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**SPOKANE VALLEY LAND & WATER CO
v. MADSEN et ux.**

(Supreme Court of Washington. July 26, 1907.)
JUDGMENT—RES JUDICATA.

The decision, in an action to restrain a water company from maintaining a dam, rendered on appeal from an order enjoining the company from using the dam and directing it to commence an action for condemnation of the littoral rights of the plaintiffs therein, that plaintiffs had rights in the waters, is conclusive, where, in a subsequent action by the company to condemn the rights of such plaintiffs, there is presented a ground for a contrary holding, which might have been, but was not, presented on the appeal in the former case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1241.]

Appeal from Superior Court, Spokane County; W. A. Huneke, Judge.

Suit by the Spokane Valley Land & Water Company against R. Madsen and wife. From a judgment for defendants, plaintiff appeals. Affirmed.

Happy & Hindman and Allen & Allen, for appellant. Gallagher & Thayer, for respondents.

ROOT, J. This case was before the court once before, and may be found reported in 40 Wash. 414, 82 Pac. 718, 6 L. R. A. (N. S.) 257. The present appeal is from a judgment of the superior court awarding respondents damages occasioned by appellant in condemning and appropriating the waters of a non-navigable arm of Liberty Lake.

The appellant contends that, inasmuch as the lands of respondents affected herein were acquired from the government subsequent to the act of Congress approved March 3, 1877, the owners of said lands have no littoral or riparian rights in the waters of the arm of the lake in question. The act of Congress provides, among other things, as follows: "And all surplus water, over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights."

Appellant sustains its contention by an elaborate and able argument, which would appeal with much force to the writer of this opinion, were the question properly before the court at this time. But, in view of the former adjudication between these same parties relative to the same subject-matter, we are constrained to hold that this question is not now before us. It could have been (but was not) presented when the case was here before. The decision announced at that time must, for the purposes of the present hearing, be deemed binding as between the parties.

The judgment from which this appeal is taken is based upon the verdict of a jury summoned to hear evidence and pass upon the question of damages. Certain errors are assigned upon the giving and refusal of instructions by the trial court. These all appear to turn upon the question just adverted to, or upon others which were, or could or should have been, submitted at the former hearing. The jury having been properly instructed in accordance with the law of the case as theretofore announced by this court, we must hold the exceptions not well taken.

The judgment is affirmed.

HADLEY, C. J., and MOUNT, CROW, and FULLERTON, JJ., concur.

STANGAIR v. ROADS.

(Supreme Court of Washington. July 23, 1907.)

1. TRIAL—INSTRUCTIONS—INVADING PROVINCE OF JURY.

In an action to recover land claimed under adverse possession, an instruction stating: "The Supreme Court has laid down the rule, which I give you as the law in this case: If one by mistake incloses the lands of another and claims it as his own, his actual possession will work a disseisure; but if, ignorant of the boundary line, he makes a mistake by laying his fence, making no claim, however, to the lands up to the fence, but only to the true line as it may be subsequently established, and it turns out that he has inclosed the land of the adjoining proprietor, his possession to the land is not adverse"—was not erroneous as an invasion of the province of the jury or a comment upon the facts of the case.

2. SAME—VERDICT—DUTY OF COURT TO RE-QUIRE SPECIAL FINDINGS—STATUTES.

In an action to recover land, it was not error for the court to give the jury two forms of verdict, and instruct them to find generally for plaintiff or defendant, instead of requesting them to render a general or special finding, as provided by 2 Ballinger's Ann. Codes & St. § 5021, where no special finding was requested.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 837.]

Appeal from Superior Court, Clarke County; W. W. McCredie, Judge.

Action by James Stangair against John Roads to recover possession of a parcel of land. From a judgment for defendant, plaintiff appeals. Affirmed.

H. C. Leiser and E. M. Green, for appellant. A. L. Miller and W. W. Sparks, for respondent.

ROOT, J. In a case between these same parties, reported in 41 Wash. 583, 84 Pac. 405, the contention of respondent as to the location of a lost corner was upheld. This action is to recover possession of a small parcel of land lying within the boundaries of respondent's land as determined by that action. Appellant herein based his right to the possession of this land upon a claim of adverse possession for more than 10 years. The case was tried to a jury, which returned a verdict in favor of respondent. Upon the verdict was entered a judgment from which this appeal is taken.

The main contention of appellant is that the evidence does not sustain the verdict. We do not think this contention can be upheld. The question turned largely as to the time when a certain fence was built. Upon this there was a conflict in the evidence. We think there was a sufficient amount of evidence which, if believed, would justify the jury in the verdict which they returned, and that the trial court did not commit error in denying the motion for a new trial on this ground.

Exceptions were taken to several instructions given by the trial judge, and the giving thereof is here assigned as error. These had to do principally with the question of what constituted adverse possession, and we think they were in accord with prior decisions of this court. One of the instructions given by the trial court, the giving of which is urged to be error, is as follows: "Our Supreme Court has laid down this rule which I give you as the law in this case: If one by mistake incloses the lands of another and claims it as his own, his actual possession will work a disseisin; but if, ignorant of the boundary line, he makes a mistake in laying his fence, making no claim, however, to the lands up to the fence, but only to the true line as it may be subsequently established, and it turns out that he has inclosed the lands of the adjoining proprietor, his possession of the land is not adverse." It is urged that this was an invasion of the province of the jury, and

a comment upon the facts of the case. We do not so understand it. The trial court laid down the rule as it had been heretofore announced by this court. *Thornely v. Andrews* (Wash.) 88 Pac. 757. Taking the instruction in connection with the others given, we think it was calculated to assist the jury in determining the issue which they were to determine, and was in no manner prejudicial to the rights of appellant.

It is also contended that the court erred in giving the jury two forms of verdict, and in instructing them to find generally for plaintiff or defendant, instead of requesting them to render a general or special finding, as provided in section 5021, 2 Ballinger's Ann. Codes & St. It does not appear that appellant requested any special finding, and we fall to find any merit in this contention.

The judgment of the superior court is affirmed.

HADLEY, C. J., and FULLERTON, MOUNT, and CROW, JJ., concur.

KANE et ux. v. JONES et ux.

(Supreme Court of Washington. July 26, 1907.)

VENDOR AND PURCHASER—CONSTRUCTION OF CONTRACT—PROVISIONS AS TO ABSTRACT AND EARNEST MONEY.

A contract for the purchase of land provided that the purchasers should have 5 days to examine the abstract, the vendors to have 30 days to correct flaws therein, the earnest money to be returned if any flaws were not corrected within 30 days after notification thereof, but to be retained as liquidated damages if the purchase was not completed upon the terms stated. The abstract was duly delivered, and no objection to it was made for over three weeks, and no request was made to perfect the title, nor was time given to cure any defects after objection was made, but the purchasers demanded a return of the earnest money. Held, that the purchaser had only 5 days after delivery of the abstract to discover objections thereto, and they were not entitled to a return of the earnest money.

Appeal from Superior Court, King County; Geo. E. Morris, Judge.

Action by M. Francis Kane and another against A. A. Jones and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

James C. Moody, for appellants. Douglas, Lane & Douglas, for respondents.

HADLEY, C. J. This action was brought to recover the sum of \$1,000, paid by the plaintiffs as a part of the purchase price of real estate. The agreement of purchase, as alleged in the amended complaint, was that the selling price was \$15,000, to be paid as follows: Cash in hand, \$250; upon the delivery to plaintiffs of an abstract of title brought down to date, \$750; 30 days thereafter, \$1,000; and within 6 months, \$3,000—the plaintiffs also to assume the payment of a mortgage of \$7,000. It is

also alleged that, in the event the abstract of title agreed to be furnished should not show good and sufficient title to the premises, then upon notification of such fact the defendants were to have 30 days within which to cure any defect that might appear, and, should they fail or refuse so to do, then the defendants should refund all sums of money paid; that, in pursuance of the agreement, which was made February 24, 1906, the plaintiffs on said day paid \$250, and thereafter, upon February 27, 1906, when the abstract of title was delivered to them, the further sum of \$750 was paid; that thereupon the abstract of title was examined, with the result that it disclosed that the defendants did not have good and sufficient title; that plaintiffs served upon defendants a notice in writing, requesting them to correct the defects in the title, which they refused to do, and that, after 30 days had elapsed, they demanded the return of the \$1,000 paid, which was also refused. The defendants deny that the title was defective. Their version of the transaction as to the details of payments is substantially the same as that of the plaintiffs, but they claim the benefit of the terms of a written contract which they delivered to plaintiffs and which was by the latter accepted. That contract provided that the plaintiffs should be allowed five days for examination of the abstract after it should be furnished by the defendants. It also embodied the terms for payments heretofore stated, and provided that the plaintiffs agreed to complete the purchase in the manner and upon the terms stated; also that, in case of their failure so to do, the money paid should, at the option of defendants, be forfeited as liquidated damages. It was also provided that the defendants should return to the plaintiffs the money paid if they should fail to deliver an abstract showing good and sufficient title within 30 days from the date of the contract, unless the defendants should correct any flaws that might be discovered affecting the title within 30 days' time after the abstract should be examined, and after they should be notified of the defects. For plaintiffs' alleged failure to comply with the terms of the contract the defendants declared a forfeiture of the \$1,000 paid as liquidated damages. The cause was tried before the court without a jury, resulting in a judgment for the defendants, from which the plaintiffs have appealed.

The assignments of error all relate to findings of the court. The court found the terms of the contract as to the payments as before stated that an abstract showing good and sufficient title to the property was to be delivered to appellants and 5 days allowed for examination thereof; that appellants agreed to complete the purchase upon the said terms, and that, in case of their failure so to do, the earnest money paid by them upon the purchase price should

be forfeited to the respondents as liquidated damages; that \$250 was paid on February 24, 1906, and on February 27th an abstract was delivered to appellants; that on the 28th day of February appellants made a further payment of \$750; that the appellants accepted the title from respondents, entered into possession of the property, and accepted the contract of purchase delivered to them by the respondents. It was further found that the respondents were the owners in fee simple of the property; that not until the 22d of March, 1906, which was just prior to the time for making a payment of \$1,000 under the terms of the contract and long after the expiration of the 5 days within which the abstract was to be examined after its delivery, did the appellants make objections to the title; that they made no objections to the title within the 5 days agreed upon by the parties; that respondents demanded payment of said \$4,000 according to the terms of the contract, and that subsequently, upon appellants' failure to make the payment, respondents notified them of their forfeiture of the payments made under the contract; that respondents tendered appellants, according to the contract, a good and sufficient marketable title, and performed the contract in all things by them to be performed, but that the appellants violated the terms of the contract by refusing to make the payments as therein provided.

There was ample evidence to sustain all the findings, and under the evidence before us we shall not disturb them. It seems very clear from the evidence that the 5-day provision for the examination of the abstract was as definite a condition as any of those relating to payments. That provision not only placed upon appellants the obligation to examine the abstract and discover their objections to the title within 5 days, but required them to promptly make known their objections, and respondents could then have 30 days from such notification to cure any actual defects in the title. Appellants not only failed to do this within the 5 days, but waited 23 days, and even made the payment of \$750 one day after they had possession of the abstract. When the objection to the title was thus tardily made, no request was made of respondents that they correct the title in the particulars wherein it was criticized, and as they had the contract right to do within 30 days from the notification, but the appellants demanded the return of the \$1,000 paid and the cancellation of the contract. Under the terms of the contract they had not the right to then make such a demand, for the reason that they were in default in making their objections, and they were also required to give respondents an opportunity to correct the title. Moreover, we think the evidence was sufficient to sustain the finding that respondents were the owners in fee simple.

The appellants made default in their payments, and respondents had the clear right under the contract to declare a forfeiture of the money theretofore paid.

The judgment is affirmed.

FULLERTON, MOUNT, and CROW, JJ.,
concur.

STATE ex rel. ROYSE v. SUPERIOR
COURT OF KITSAP COUNTY.

(Supreme Court of Washington. July 22,
1907.)

1. CERTIORARI—INADEQUACY OF OTHER REMEDY.

In an action to determine the right to an office, where an appeal could probably not be determined before the time for which the office is claimed would expire, a writ of review will be granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, § 6.]

2. OFFICERS—VACANCY—NECESSITY OF ACCEPTANCE OF RESIGNATION.

Where an officer resigns his office, no vacancy exists until the resignation is accepted formally, or by the appointment of a successor, and one who is elected to fill the vacancy before the resignation is accepted cannot claim the office.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, § 80.]

Writ of review by the state of Washington, on the relation of Arthur Royse, to the superior court of Kitsap county, to review an order sustaining a demurrer to the complaint in an action by relator against Robert Stewart. Judgment affirmed.

J. W. Bryan, for relator. Thomas Stevenson, for respondent.

HADLEY, C. J. This cause is before this court on writ of review. The relator here was the plaintiff in the court below. The cause was determined by sustaining a demurrer to the complaint and by the dismissal of the action, the plaintiff declining to plead further. The complaint in effect alleges that the city of Bremerton is a city of the third class, and that on December 5, 1905, one Gruwell was elected as councilman for the Third Ward of said city, to serve a term of two years from and after the first Monday in January, 1906; that thereafter, on November 2, 1906, said Gruwell resigned as councilman, the resignation being in writing; that the resignation was read in open council on November 5, 1906, at the first regular meeting after the date of the resignation, and that said Gruwell has never since said November 2, 1906, exercised or attempted to exercise any of the duties of said office; that at a regular annual election held in said city on December 4, 1906, the plaintiff was elected as councilman to fill the unexpired term of said Gruwell resigned; that thereafter, on March 22, 1907, the said city council, acting as a board of canvassers, under and in obedience to a writ

of mandate issued out of the superior court, canvassed the returns of said election, and issued to the plaintiff a certificate of election; that thereafter, on March 25, 1907, the plaintiff filed his oath of office with the city council, and demanded recognition in his said official capacity, whereupon he found his seat occupied by Robert Stewart, the defendant, said Stewart claiming to hold by virtue of his appointment by said city council to said office on December 10, 1906, six days after the election of the plaintiff to the office; that said Stewart is a usurper of the office; and that he wrongfully withholds the same from the plaintiff. Judgment is prayed that the defendant Stewart be ousted from the office, and that the plaintiff be put in possession of the same. The defendant's demurrer to the foregoing allegations having been sustained, and judgment of dismissal entered, the plaintiff applied to this court for a writ of review, which was granted.

The relator had the right of appeal from the judgment, but it was believed that such remedy would be inadequate, as the appeal could probably not have been determined before the time for which the relator claims the office in question expires, thus rendering the appeal fruitless. For said reason the writ of review was granted in pursuance of the rule heretofore followed in similar cases. State ex rel. Meredith v. Tallman, 24 Wash. 426, 64 Pac. 759; State ex rel. Smith v. Superior Court, 26 Wash. 278, 66 Pac. 385. The question involved in the ruling upon the demurrer to the complaint is, was there a vacancy in the office of councilman of the Third Ward of Bremerton at the time the relator claims to have been elected thereto? If Gruwell's resignation was not complete at the time of the election, there was no vacancy, and the effort to elect the relator was fruitless without a vacancy to fill. It will be observed that the complaint does not allege that the resignation had been accepted by the council prior to the election, either by the appointment of a successor or by any other action taken. The complaint merely shows that the communication tendering the resignation was read before the council. It is the contention of the relator that no acceptance of the proposed resignation was necessary, and that the office became vacant upon the mere presentation of the tendered resignation to the council. Upon the other hand, the respondent contends that an acceptance was necessary, and that in its absence there was no vacancy. The authorities cited in the respective briefs are in conflict. We have also made further investigation with the same result. The relator cites United States v. John C. Wright, 1 McLean (U. S.) 509, Fed. Cas. No. 16,775. In the opinion in that case the following expression is found: "There can be no doubt that a civil officer has a right to resign his office at pleasure, and it is not in the power of the executive to compel him to remain in office. It is only necessary that the resignation

should be received to take effect, and this does not depend upon the acceptance or rejection of the resignation by the president. * * * The above expression has been criticised in subsequent decisions, for the reason that it was not necessary to the decision, inasmuch as the letter of resignation expressed a willingness to serve until a successor could be appointed and the officer did so serve. The decision was an early one, it having been rendered by the Circuit Court of the United States in 1839, and by reason of the said quoted expression frequent reference has been made to it.

We are directed by relator to a partial quotation from section 352, McCrary on Elections, which is to the effect that, when a written resignation has been sent to the Governor, it is not necessary that the Governor shall signify his acceptance of the resignation to make it valid; the tenure of office not depending upon the will of the executive but of the incumbent. In support of the text-writer's statement *United States v. John C. Wright*, supra, is cited, together with other cases to which we shall now refer. The case of *People v. Porter*, 6 Cal. 26, is quite similar to the case at bar. The written resignation of a county judge was received by the Governor on the 24th of August, to take effect September 1st. No action was taken by the Governor until the 8th day of September following, when he appointed a successor. Meantime the fact of the tendered resignation having become known through the newspapers, the board of supervisors of the county ordered an election to fill the vacancy supposed to exist. The election was held September 5th, and the elected person then sought possession of the office from the Governor's appointee who was appointed three days after the election. The appointee resisted the claim, on the ground that there was no vacancy at the time the election occurred, and that the vacancy did not occur until September 8th, when the Governor accepted the resignation and appointed the successor. It was said in the opinion that the resignation became effective September 1st, without any action on the part of the Governor. The statement appears to have been made upon the sole authority of what was said in *United States v. John C. Wright*, supra. The case was, however, determined in favor of the appointee in possession of the office, on the ground that the election was a nullity for want of sufficient notice. Under the theory of the decision it therefore seems to have been unnecessary to say what was said about the necessity of accepting a resignation, and under all these circumstances we are not disposed to give the opinion much weight as bearing upon the subject now before us. The next case cited is *Gates v. Delaware County*, 12 Iowa. 405. The opinion in that case declares, without referring to any authority, that an officer has a right to lay down his office whether the officer to whom

the resignation must be presented consents or not; yet in the opinion it was stated that the county judge, who was such officer in that instance, had actually accepted the resignation of the county superintendent. As a decision the opinion is therefore entitled to no weight upon the subject in hand. In *State ex rel. Nourse v. Clarke*, 3 Nev. 566, it was held that one holding a civil office under the United States may resign without the consent of the appointing power, and the holding was on the authority of *United States v. John C. Wright*, supra, and *People v. Porter*, supra. A similar holding was made in *State ex rel. Williams v. Flitts*, 49 Ala. 402, and the decision was apparently made upon the authority of *State ex rel. Nourse v. Clarke*, supra, and *People v. Porter*, supra. The case of *Bunting v. Willis*, 27 Grat. (Va.) 144, 21 Am. Rep. 338, is also cited, but in that case it was said that a prospective resignation may be withdrawn at any time before it is accepted, thus recognizing that a resignation is not complete so as to create a vacancy until it has been accepted. The several decisions above noticed are all that are cited in support of the statement in McCrary on Elections, to which reference was above made. Through the relator, and also through our own investigation, the following further decisions have been called to our attention: *State ex rel. Roberts v. Mayor*, 4 Neb. 260, holds that the acceptance by the mayor of the resignation of a city engineer is not necessary to create a vacancy. The decision is on the authority of *United States v. John C. Wright*, supra, and *People v. Porter*, supra. In the case of *Olmsted v. Dennis*, 77 N. Y. 378, it was held that the resignation of a drainage commissioner was complete when it was received by the county judge, and that no formal acceptance was needed to give it effect. In the case of *Reiter v. State ex rel. Durrell*, 51 Ohio St. 74, 36 N. E. 943, 23 L. R. A. 681, the holding was similar, chiefly on the authority of the cases above cited.

The relator began his argument on the authority of *United States v. John C. Wright*, supra, and we have seen that his quotation from the text of McCrary on Elections was based upon that case and others which approved what was said in that case upon a subject which was not decisive of the case. The same section (352) of McCrary on Elections concludes as follows: "This, however, was not the rule at the common law, by which an office was regarded as a burden which the appointee was bound in the interest of good government to bear, and which he was not allowed to lay down without the consent of the appointing power. The Supreme Court of the United States has recently said that 'in this country, where offices of honor and emolument are commonly more eagerly sought after than shunned, a contrary doctrine with regard to such offices, and in some states with regard to offices in general, may have obtained; but we must assume that the com-

mon-law rule prevails unless the contrary be shown.' The quotation which the above text-writer makes from the Supreme Court of the United States was taken from the opinion in *Edwards v. United States*, 103 U. S. 471, 26 L. Ed. 314. That decision was rendered in the year 1880, after most of the decisions to which reference has hereinbefore been made were rendered. The opinion is an able and exhaustive one upon the subject now before us, in which it was held that the common-law rule which requires the acceptance of a resignation in order to create a vacancy is in force unless the rule has been discarded by statute. The reasons for the rule, as being founded in sound public policy, are well stated. Some of the decisions we have noticed above, including what seems to have been the pioneer case of *United States v. John O. Wright*, are criticised in the opinion. Among other things the court said: "As civil officers are appointed for the purpose of exercising the functions, and carrying on the operations of government, and maintaining public order, a political organization would seem to be imperfect which should allow the depositaries of its power to throw off their responsibilities at their own pleasure. This certainly was not the doctrine of the common law. In England a person elected to a municipal office was obliged to accept it and perform its duties, and he subjected himself to a penalty by refusal. An office was regarded as a burden which the appointee was bound, in the interest of the community and of good government, to bear. And from this it followed of course that, after an office was conferred and assumed, it could not be laid down without the consent of the appointing power. This was required in order that the public interests might suffer no inconvenience for the want of public servants to execute the laws. * * * This acceptance may be manifested either by a formal declaration, or by the appointment of a successor. 'To complete a resignation,' says Mr. Willcock, 'it is necessary that the corporation manifest their acceptance of the offer to resign, which may be done by an entry in the public books, or electing another person to fill the place, treating it as vacant.' * * * And, in view of the manifest spirit and intent of the laws above cited, it seems to us apparent that the common-law requirement—namely, that a resignation must be accepted before it can be regarded as complete—was not intended to be abrogated. To hold it to be abrogated would enable every officeholder to throw off his official character at will, and leave the community unprotected. We do not think that this was the intent of the law." The decision in the *Edwards Case* was cited and followed in the following cases: *People ex rel. v. Williams*, 145 Ill. 573, 33 N. E. 849, 24 L. R. A. 492, 36 Am. St. Rep. 514; *State ex rel. v. Clayton*, 27 Kan. 442;¹ *Clark v. Board of Education of Detroit*, 112 Mich.

656, 71 N. W. 177; *Coleman v. Sands*, 87 Va. 689, 13 S. E. 148. The following further authorities also support the rule that a resignation must be accepted in order to complete it and effect the vacancy: *State ex rel. Reeves v. Ferguson*, 31 N. J. Law, 107; *Hoke v. Henderson*, 4 Dev. Law (N. C.) 1, 25 Am. Dec. 677; *Steel v. Commonwealth*, 18 Pa. 451.

We believe the decided weight of authority supports the rule that an acceptance of a resignation is necessary in order to relieve an officer of responsibility and to create a vacancy. Under the decision in the *Edwards Case*, such must be the rule where the common law in that regard has not been changed by a statute. We regard that decision as an authority we should follow, unless the common-law rule has been clearly changed by statute in this state. The relator calls our attention to section 567, 1 Ballinger's Ann. Codes & St., in which the following appears: "If any justice of the peace shall die, resign, or remove out of the precinct for which he may be elected, or his term of office be in any other manner terminated, the docket, books, records, and papers appertaining to his office, or relating to any suit, matter or controversy committed to him in his official capacity, shall be delivered to the nearest justice in the precinct. * * *" It is argued that the right of a justice of the peace to resign without an acceptance of his resignation is recognized by the above statute. We are not able to so read it. It simply directs what shall be done with his books and papers after the resignation of a justice has become effective. We are also referred to section 1548, 1 Ballinger's Ann. Codes & St., which provides, among other things, as follows: "Every office shall become vacant on the happening of either of the following events before the expiration of the term of such officer: (1) The death of the incumbent; (2) his resignation; (3) his removal. * * *" We see nothing in the above which changes the common-law rule. It is true it is declared that an office shall become vacant upon the resignation of the incumbent, but nothing is said about the method of effecting a resignation. The silence of the statute in that regard should be construed to mean that the established common-law method still obtains, and that a resignation is not complete until it has been accepted by the appointing power. Our attention has not been called to any other statutes which the relator claims have effected a change in the common-law rule. In the absence of a clear statutory declaration of a purpose to change the rule, it should not be held that it has been changed. The long-standing rule is wholesome. It insures a continuous responsible incumbent in an office. One may not lightly throw aside responsibilities which he has assumed, and leave the public without an official when some possible emergency might make the existence of a qualified officer of great importance.

¹ 41 Am. Rep. 412.

We think the court did not err in sustaining the demurrer, and the judgment is affirmed.

FULLERTON, CROW, MOUNT, and ROOT, JJ., concur.

CONSTANTINE et ux. v. CASWELL et ux. (Supreme Court of Washington. July 26, 1907.)

SPECIFIC PERFORMANCE — PERFORMANCE IMPOSSIBLE — DECREETING PERFORMANCE OF MODIFIED CONTRACT.

Where, in an action for the specific performance of a contract to trade city lots for personal property, performance was impossible because of the sale of the personal property, under foreclosure proceedings the court had no power to direct the performance of the contract by one party upon the payment of a sum of money by the other in lieu of the personal property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 405.]

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by H. Constantine and wife against W. V. Caswell and wife. From a decree for plaintiffs, defendants appeal. Reversed and remanded.

Shank & Smith, for appellants. Alfred E. Parker and Chas. McCann, for respondents.

ROOT, J. During August, 1905, respondents were the owners of certain live stock and farming utensils and a leasehold interest in a farm near North Bend, King county, Wash. The lease, executed by Mary M. Miller & Sons, a corporation, provided that the lessor should have a chattel mortgage upon the live stock and farm implements for unpaid rental. At this time there was \$350 due as rent and secured by said mortgage. One O. G. Fish of Wenatchee also held a chattel mortgage upon said personal property. Appellants were the owners of two lots in Gilman addition to the city of Seattle. Against these lots there was a judgment of record in the sum of \$44, which had been paid but not satisfied of record. There was also a lien for lumber furnished in the sum of \$10.85. During said month of August these parties were negotiating for a trade, whereby respondents would exchange their leasehold interest and the live stock and farming utensils for the two city lots of appellants. There was an oral understanding between the parties, but not put in any written contract, that respondents' lessor would take a mortgage on the lots after respondents received them, and release its chattel mortgage upon the stock and farming utensils. On the 1st day of September, 1905, the negotiations resulted in a written contract that day made and signed by respondent H. Constantine and appellant W. V. Caswell, and it is conceded that their wives consented to said contract. This agreement, aside from formal parts and the de-

scription of the property, was as follows: "That H. Constantine agrees to deliver all farming implements, separators, etc., herein-after mentioned (itemized personal property) free from all debt, mortgages or incumbrances. Upon delivery of said implements, stock, etc., free from all incumbrances, W. V. Caswell agrees to deliver to H. Constantine a deed to property situated in Interbay, consisting of a house and two lots, known on the plat as lots 14 and 15, block 6, Gilman addition to the city of Seattle, this deed to be a warranty deed, the property to be free from all debt, mortgage or incumbrances and taxes to be paid, this agreement to be null and void if either party fails to live up to the foregoing agreement."

Respondents alleged, and the court found, a verbal agreement to have been made after the written contract was executed, whereby it was understood that there was a mortgage to said Fish upon respondents' stock and farming utensils, and wherein it was alleged, among other things, that respondents were to pay and have said mortgage satisfied, and that the parties were to meet at office of Mary M. Miller & Sons within a reasonable time to exchange papers, and that respondents were to have certain papers with their attorney, Chas. McCann, in Seattle. Immediately after the signing of the written contract, respondent Constantine went to Wenatchee to secure the release of the mortgage held by O. G. Fish, and the parties hereto did not see each other again until after this suit was brought. Constantine agreed to at once obtain a release of the Fish mortgage, but did not do so until about six weeks after the contract was signed as aforesaid. Appellants claim that they were not notified of the release of this mortgage until after the present suit was commenced. On October 24th Constantine came to Seattle, and Mr. Miller, secretary of Mary M. Miller & Sons, a corporation, telephoned for Caswell to come to Seattle. The latter did so the following day. Constantine says that he went to the train and did not see Caswell alight therefrom, and then went to Miller's office and informed him that Caswell had not come. The latter, however, did arrive in the forenoon of said day, and called at Miller's office, waited awhile, and returned again at 1:30 in the afternoon, and remained several hours waiting for respondent Constantine, who did not again appear at the office. That evening Constantine met Miller upon the street and was informed that Caswell was in town. He told Miller that it was not necessary for him (Constantine) to remain, and that he had left the papers with his attorney, one McCann. Constantine and Caswell left Seattle that night without seeing each other. In the meantime appellants had gone upon the farm and done considerable work, in expectation that the deal would be closed up. Near the middle of December Caswell received a letter from

Constantine, which letter is not in evidence. To it he replied by letter of December 15th, in which he tendered a return of all personal property to respondents and declared the agreement null and void, turned over the personal property to a neighbor for respondents, and removed from the farm. The \$350 rental due from respondents and secured by the mortgage to the Miller Company thereupon was not paid, and in January, 1906, the mortgage was foreclosed and the personal property sold. The present action was brought by respondents to enforce specific performance of the contract, alleging full performance upon their part and failure and refusal to fulfill on the part of appellants. The court made findings and conclusions favorable to plaintiffs, and entered a decree directing that, upon payment by plaintiffs to defendants, or into the registry of the court for them, in the sum of \$330, the defendants should make, execute, and deliver to plaintiffs a good and sufficient warranty deed for the city lots in question, and an abstract showing good title free from incumbrance, except a judgment of \$44 and a lien of \$10.85 upon the lots for claims found, and surrender immediate possession thereof; that there should be declared and reserved in favor of defendants a first and specific lien on said real estate in the sum of \$330; that upon execution and delivery to the plaintiffs of a deed for said real estate, the plaintiffs should pay to defendants \$330, less the cost of this action; that, if the defendants should fail, neglect, or refuse to execute a conveyance of said real estate as directed for a period of 10 days, a deed should be executed by the clerk of said court as commissioner. From this decree an appeal is prosecuted by defendants.

Appellants contend that the oral contract alleged in respondents' reply, and as found to have been made by paragraph 6 of the findings, is not sustained by the evidence. It will be noticed that the written agreement calls for the transfer of the personal property, free of incumbrance. As the written contract was made upon the 1st of September, and the respondent Constantine testifies that immediately thereafter he went away and did not see the appellants again until after the bringing of this action, we fail to see how, when, or where such an oral contract could have been made subsequent to the time of the making of the written contract. We are inclined to think that whatever oral agreement or understanding there was between the parties took place at or prior to the time when the written contract was executed. It was necessary for appellants to establish this oral contract in order to recover in this action. Negotiations leading up to a written contract are ordinarily presumed to culminate in said written document. It is, however, probably unnecessary for us to pass upon the question of this oral contract. Assuming it to have been

made as contended for in the reply and as stated in the findings, we are unable to see how this would justify a conclusion that respondents are entitled to the relief granted them in the decree appealed from. Instead of directing the specific performance of the contract made by the parties, this decree directs the carrying out of an arrangement which the parties themselves did not make, but which was made for them by the court. The latter was evidently acting upon the theory that this was the nearest approach possible to the contract which the parties had made. Evidently the decree was based upon the theory that the foreclosure of the chattel mortgage upon the stock and farming utensils was chargeable to appellants, in not conveying the city lots upon which respondents were to execute a mortgage to their landlord for the unpaid rent in lieu of the mortgage which they had outstanding upon said personal property as security for said rent. But we cannot see any legal justification for this theory. Mary M. Miller & Sons was not a party to the contract between these parties, and was not the agent of either party or privy in interest with them. The respondents could have prevented the sale of the personal property under the foreclosure proceedings by paying the amount due their landlord, or perhaps by adjusting the matter otherwise. The respondents having neglected for more than six weeks to pay and secure a cancellation or a release of the Fish mortgage, and having permitted the Miller mortgage to be foreclosed upon their property, thereby becoming unable to furnish the principal part of the consideration to be paid by them for appellants' city lots, and having failed to meet appellants at the time when they were both in Seattle for the purpose of completing their arrangements, we do not believe that a showing is made that will justify the decree made by the honorable superior court.

The same is therefore reversed, and the cause remanded, with instructions to dismiss the action.

HADLEY, C. J., and CROW, MOUNT, and FULLERTON, JJ., concur.

(46 Wash. 607)

GRAHAM v. BELL-IRVING.

(Supreme Court of Washington. July 17, 1907.)

1. CONTRACTS—ACTION FOR BREACH—DEFENSES.

Plaintiff, an architect, agreed with defendant to prepare plans and specifications for a structure to cost not to exceed, with all extras, \$25,000. The lowest bid for the construction of the building under the plans and specifications prepared by plaintiff was \$35,000. *Held*, that the plans and specifications furnished were not in accordance with the contract, and plaintiff could not recover for them in a suit on the contract where defendant offered to return them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1249, 1253.]

2. SAME—ACCEPTANCE.

The payment by defendant of \$300 to plaintiff as part of the contract price for certain plans and specifications furnished by plaintiff before he had an opportunity to determine whether the plans and specifications were in accordance with the contract did not bind defendant to accept them, when it was found they were not in accordance with the terms of the contract.

3. APPEAL—HARMLESS ERROR—ERRORS FAVORABLE TO PARTY COMPLAINING.

Plaintiff, in an appeal from a judgment for defendant in an action on a contract, cannot complain of the failure of the court to grant defendant relief on his counterclaim for money paid plaintiff under the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4052.]

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by John Graham against H. Bell-Irving to recover for services as an architect. From a judgment for defendant, plaintiff appeals. Affirmed.

Jerold Landon Finch, for appellant. Piles, Howe & Farrell, for respondent.

HADLEY, C. J. The plaintiff in this action brought the suit to recover for services as an architect. He alleges a contract with the defendant of the following import: That he was on July 11, 1904, employed to form, draw, and write the preliminary sketches, plans, and specifications for a certain building which the defendant proposed to erect in the city of Vancouver, British Columbia; that defendant promised to pay as compensation therefor a sum equal to 2½ per cent. of the amount of the lowest or accepted bid, as the case might be, of a contractor afterwards to bid for the contract to erect said building according to the plans and specifications so prepared; that, acting under said contract of employment, the plaintiff prepared such sketches, plans, and specifications, and delivered them to the defendant at Vancouver on the 3d day of September, 1904; that defendant accepted them and instructed plaintiff to call for and receive from contractors bids to erect said building according to the plans and specifications; that, acting in accordance with such instructions, the plaintiff called for bids and received from the contractor a bid for \$32,800, which was the lowest bid; that on the 7th day of September, 1904, defendant paid to plaintiff \$300 to apply upon the contract aforesaid; that the total amount of compensation under the contract is \$320, no part of which has been paid except said \$300. Judgment is demanded for \$520. The defendant answered with certain denials and admissions, and alleged affirmatively that he employed plaintiff to prepare plans and specifications for a building to cost \$20,000, and with all extras to cost not to exceed \$25,000; that the plaintiff accepted the employment, and assured defendant that he (plaintiff) could accurately estimate the cost of work in Vancouver, and that the building which defendant desired to

erect could be erected according to the plans and specifications which were to be prepared by plaintiff for not to exceed \$20,000, with an outside limit of \$25,000, including all extras; that defendant employed plaintiff only upon the express understanding that the building could be erected for an amount within the above sums mentioned according to the plans to be prepared; and that bids could be obtained for the erection at said figures. He further alleges that, after the delivery of certain plans and specifications and before the calling for bids, he paid plaintiff \$300, but that in response to the call for bids the lowest bid was \$35,000; that, by reason of the fact that the lowest bid was \$10,000 in excess of the highest sum which the plaintiff had assured defendant the building would cost, defendant was financially unable to erect the building, and the plans and specifications were wholly worthless to defendant, the return thereof being tendered in court; that the plans and specifications have never been used by the defendant except to call for bids as aforesaid. The answer sets up a counterclaim for the return of the \$300 paid. The reply denied much of the affirmative matter in the answer, and, upon issues as before stated, the cause was tried by the court without a jury, and resulted in a judgment that plaintiff shall take nothing by the action, and that his complaint shall be dismissed. The plaintiff has appealed.

The findings of the court are substantially in accord with the allegations of respondent's answer. Aside from certain correspondence between the parties, the only evidence before the court was the testimony of appellant and respondent. Respondent's testimony fully supported his answer, and therefore negatived the contract alleged in the complaint. The burden was upon appellant to establish the contract which he alleged. The trial court found the preponderance of the evidence to be with respondent, and we shall not undertake to say from anything appearing in the record that the court erred in that particular. With the facts established as found by the court, it would be manifestly wrong for appellant to recover. The court found that appellant was obligated by the contract between the parties to prepare plans and specifications for a structure to cost not to exceed \$20,000, and with all extras not to exceed \$25,000; that the lowest bid under the plans prepared was \$35,000, which was \$10,000 in excess of the highest sum appellant had assured respondent the building would cost. Under such facts there was a plain failure to prepare plans that would come within the limitations of the construction cost fixed by respondent, a straight breach of the contract. Appellant is therefore not entitled to recover upon the contract, and he is no more entitled to recover upon a quantum meruit. Respondent has neither accepted nor received any benefits from appellant's work, and he offered to fully return the plans. It is argued

that the respondent's payment of \$300 on account of the plans amounted to an acceptance. The payment was made before it had been demonstrated by the bids that the plans would not meet the requirements of the contract in the matter of cost of construction. It was a payment made upon account, somewhat hastily perhaps, but under the circumstances it was not an act which bound respondent to an acceptance of the plans.

Appellant argues that to support consistency in the judgment he should either have had judgment for the contract amount he claims, or that the court should have given respondent judgment for the return of the \$300 which he paid. The court refused this relief to respondent under his counterclaim. Even if it be true that respondent was entitled to recover the \$300, still he has not appealed from the judgment and is not complaining. The judgment permits appellant to keep that money, which is in his favor. It is therefore not prejudicial to him in that respect, and affords him no ground for complaint here. *Jose v. Stetson*, 20 Wash. 648, 56 Pac. 397; *Seattle Brewing, etc., Co. v. Donofrio*, 34 Wash. 18, 74 Pac. 823.

Under the record, we think the judgment must be affirmed.

FULLERTON, CROW, ROOT, and MOUNT, JJ., concur.

HAB v. CITY OF GEORGETOWN.

(Supreme Court of Washington. July 26, 1907.)

1. HIGHWAYS—LOCATION OF ROAD—POWER OF COMMISSIONERS—WIDTH OF ROAD.

Code 1881, § 2079, provides that all county roads shall be 60 feet wide, unless the county commissioners shall upon the prayer of the petitioners for the road determine upon a less number of feet in width. *Held* that, where the county board acquires jurisdiction to locate a road upon the filing of a petition, they may fix its width at 60 feet, or at any number of feet less than 60 upon the prayer of any of the petitioners at the hearing, but they are not bound by the petitioner's prayer, and may fix the road at any width that the circumstances seem to warrant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 147-150.]

2. SAME—SUFFICIENCY OF NOTICE.

Under Code 1881, § 2871, the notice of the relocation of a road need not state the width of the proposed road, but only the place of beginning, the intermediate points, if any, and the place of termination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 241.]

3. EMINENT DOMAIN — COMPENSATION TO ABUTTING OWNER—WAIVER OF RIGHT.

The fact that a person petitioned the city council to open a road 60 feet in width in front of her property did not of itself grant the city the right to take any of her property without compensation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 205-214.]

Appeal from Superior Court, King County;
H. B. Albertson, Judge.

Action by Marie Hab to enjoin the city of Georgetown from taking property for street purposes. From a decree granting an injunction, defendant appeals. Affirmed.

I. H. Randolph and Wilson & Thorgrimson, for appellant. Smith & Cole, for respondent.

MOUNT, J. This action was brought to enjoin the city of Georgetown from taking a strip of land 15 feet wide from respondent's property for street purposes. The trial court decreed 5 feet of the land in dispute to the appellant as a public highway, but enjoined the appellant from taking the remaining 10 feet. The city appeals from that part of the decree which restrains it from using the 10 feet of respondent's property for highway purposes.

The material facts, as agreed to by the parties, are, in substance, as follows: In the year 1863, a county road 60 feet wide, leading in a southerly direction from Seattle, passing respondent's property, to a point on the Duwamish river, was established, laid out, and opened by the board of county commissioners of King county. Since that time the center line of the road has been continuously used and maintained at public expense. The location of the center line of the road has not been changed in front of respondent's property. On February 4, 1879, a petition was filed with the county commissioners asking for a review and relocation of this road. The petition was granted, viewers appointed, and notice given, as required by law therefor. On May 3, 1879, the viewers' report was filed. Two days later a petition was filed by certain of the petitioners for the relocation of the road, requesting the county commissioners to fix the width of the relocated road at 30 feet along certain portions thereof. The commissioners on that day, May 5, 1879, entered an order relocating the road as petitioned for, but fixed the width thereof at 40 feet, and directed the road to be laid out and opened, which was done by the county surveyor, and the road as so laid out and opened was approved by the county commissioners on May 16, 1879. Thereafter the property owners about the point in question fenced up their property by placing their fences on the lines of their lots as platted, which left only 30 feet of the road open to the public, and this 30 feet of road has been used by the public since that time. The fences have encroached upon the road for a distance of 5 feet for about 13 years. Respondent, during that time, had occupied this portion of the street with certain sheds. On February 5, 1906, a petition was filed praying the city council of Georgetown, which was incorporated long after the road was established as aforesaid by the county of King, to open the highway to the width of 60 feet. The respondent signed said petition. Thereafter the city removed the fences and

sheds owned by respondent, and was about to occupy the premises of respondent to the extent of 30 feet from the center line of the road: whereupon this action was begun to restrain the city from taking more than 15 feet from the center line of the road.

The appellant contends that the petition requesting the county commissioners to fix the width of the road at 30 feet, and the order of the commissioners fixing the width thereof at 40 feet, were void because no notice was given. It is conceded that proper notice of the relocation of the road was given as required by law, and that the petition was silent as to the width of the road. The statute then in force provided that "all county roads shall be sixty feet in width, unless the county commissioners shall, upon the prayer of the petitioners for the same, determine on a less number of feet in width." Section 2979, Code 1881. Under this statute, where no width was fixed by order of the board of county commissioners, the statute fixed the width at 60 feet. *Town of Sumner v. Peebles*, 5 Wash. 471, 32 Pac. 221, 1000. Under the petition for relocation, the board of county commissioners had jurisdiction to fix the width at 60 feet. The board also had jurisdiction to fix the width at less than 60 feet, upon the prayer of the petitioners. While the record in this case does not show that the petitioners who asked to have the width fixed at 30 feet were all of the original petitioners, it does show that they were interested in the road, and no objections appear to have been made to the order as made by the county commissioners. Since the board of county commissioners had jurisdiction to act upon the petition and to grant the whole of the 60 feet, we are of the opinion that the board had power to fix the width of the road at any number of feet less than 60, upon the prayer or request of any of the petitioners at the hearing. The statute did not require the petition or notice to state the width of the proposed road, but to state only "the place of beginning, the intermediate points, if any, and the place of termination of said road." Section 2871, Code 1881. A new notice therefore would have afforded no more information to the public than the old notice had given. We are also of the opinion that the board of county commissioners were not bound by the prayer of the petitioners. The board, having acquired jurisdiction to establish or locate the road, might use their own judgment and fix the road at such width less than 60 feet as the circumstances and facts seemed to warrant. This being so, it follows that the road laid out in 1863 was altered by the relocation of the same road in 1879, so that thereafter the road was only 40 feet in width. The appellant was therefore not authorized to take the property of the respondent more than 20 feet from the center line of the road. The fact that the respondent signed the petition to the city council to open a road 60 feet in

width in front of her property did not of itself grant the city the right to take any part of respondent's property without compensation.

The judgment of the trial court appears to be right, and is therefore affirmed.

HADLEY, C. J., and ROOT, CROW, and FULLERTON, JJ., concur.

LECHMAN v. MILLS et al.

(Supreme Court of Washington. July 26, 1907.)

1. EASEMENTS—EASEMENT BY PRESCRIPTION—ADVERSE CHARACTER OF USE.

Where the use of an easement in land for the maintenance of a canal has continued over 25 years, it will be presumed to have been adverse, unless it is explained to have been otherwise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 89.]

2. SAME—EASEMENT PRECEDED BY VOID ORAL GRANT.

The use is not deprived of its adverse character, or rendered merely permissive for the purposes of the statute of limitations, because preceded by an oral agreement amounting to a grant but void under the statute of limitations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 23, 24.]

Appeal from Superior Court, Kittitas County; H. B. Rigg, Judge.

Action by Thomas Lechman against J. L. Mills and others to enjoin the maintaining of a canal. From a judgment for defendants, plaintiff appeals. Affirmed.

John B. Davidson, for appellant. Carroll B. Graves and J. H. McDaniels, for respondents.

HADLEY, C. J. This action was brought to enjoin the defendants from keeping and maintaining a canal on and across certain lands which the plaintiff claims to own, and also from overflowing with water any portion of said lands by means of said canal together with dams or dikes. Following largely the order of statement found in the brief of respondents, we believe the following is a fair statement of the facts in the case: In the year 1879 one Briggs was the occupant but not the owner of the land over which this controversy exists, and which land the plaintiff now claims to own. At that time it was believed the land would be included within the limits of the grant to the Northern Pacific Railroad Company when those limits should be determined by the adoption of the line of definite location of the road, such adoption not then having been made. Briggs expected to purchase the land from the railroad company as soon as the latter acquired the title and was in position to make a sale and conveyance; but the land was then a part of the public domain, and Briggs was a mere occupant. While such was the situation, Mr. Mills, one of the defendants in this action, con-

structed a water ditch and pond on part of said land to serve the purposes of power for the operation of a sawmill. The ditch led from the Yakima river down to a depression upon the land now claimed by the plaintiff, and by means of dikes and dams, together with the natural topography of the ground, the water was impounded in a lake or pond, a part of the land so flooded being a part of the land now claimed by the plaintiff. The lower end of the pond was upon land owned by Mills, and the water which flowed into the pond was released through an outlet upon the land of Mills. Mills also constructed a sawmill, and the water so impounded developed the power for the operation of the mill. Prior to the construction of the ditch, reservoir, and mill said Mills entered into an agreement with Briggs, the real nature of which is in issue.

The plaintiff contends that it was a mere permission or revocable license to Mills to construct and maintain the ditch and reservoir. The defendants contend, and the trial court found, that it was a verbal grant from Briggs to Mills of the right to construct and maintain said works upon the land. It is not disputed that Briggs at that time and as a part of the agreement undertook and promised to execute a deed as soon as he should obtain title from the railroad company. But the plaintiff claims that Briggs, in making the agreement, did not intend to give a deed without first being paid a further consideration in money, no amount being stated, but the amount to be subsequently fixed by further agreement. The defendants contend that this verbal agreement contemplated, so far as a verbal agreement could, an absolute and perpetual grant. Mills has continued to operate his sawmill by means of the water so stored from the time of said construction up to the present time. In 1882 he granted to Hutchinson and Dreisner a one-half interest in the said power for the purpose of operating a flourmill which was then by them erected. The said flourmill, together with the said conveyed interest in the water power, has by mesne conveyances passed to the defendants Kendall and Mack. The Northern Pacific Railroad Company deeded the land to Briggs in 1887, and he continued to own and occupy all of the land, except that occupied by the canal and reservoir, until October, 1898. During all of said time the defendants and their predecessors in interest continued to maintain the canal and reservoir and to impound the water therein and to utilize the power for the operation of said mill plants. In October, 1898, Briggs executed to the Sullivan Savings Institution an instrument in the form of a deed purporting to convey to said grantee the title to said land. The plaintiff derives his title through said Sullivan Savings Institution. This action was brought in January, 1906, to en-

join the defendants as aforesaid from further maintaining the ditch and reservoir. The cause was tried before the court without a jury, and judgment was rendered for the defendants to the effect that they have a perpetual easement against the plaintiff and all persons claiming or to claim through or under him. The plaintiff has appealed.

Finding No. 2, as entered by the court, is as follows: "That just prior to the construction of said works the said defendant, Mills, entered into an agreement with one Wilkin Briggs, who was then the occupant of the land hereinabove described, which land is claimed by the plaintiff, wherein and whereby the said Mills undertook and agreed to construct said canal, dams, reservoir and sawmill, and the said Wilkin Briggs, in consideration of said undertaking and agreement of said J. L. Mills, gave and granted to said J. L. Mills verbally a perpetual right of way over and upon said land for said canal, ditch, and reservoir, together with the right to construct and forever maintain said canal, ditch, reservoir, and dams upon said land and to convey said water through said ditch or canal into said reservoir and to impound said water in said reservoir and overflow the land occupied by said reservoir in order to make the required head of water for the operation of the mills that were to be run by said power. That at that time the said Wilkin Briggs had no title to the land now claimed by the plaintiff, but the same was then a part of the public domain of the United States, but it was then supposed that the same would be included within or covered by the land grant to the Northern Pacific Railroad Company as soon as the route of said company's railroad should be definitely located through said county, and the said Wilkin Briggs then expected to eventually purchase said land from said company. And at the time of said verbal agreement between the said Wilkin Briggs and the said J. L. Mills the said Briggs verbally agreed to execute and deliver to the said J. L. Mills a deed evidencing said grant of said right of way and easement upon the demand of said J. L. Mills as soon as the said Briggs himself received a deed to said land; and the said Briggs then and there waived any and all other or further compensation on account of the construction and maintenance of said works and for the overflowing of said land." It was further found that Mills thereafter constructed said works and sawmill and entered into the enjoyment of the easement and of the rights thus verbally granted to him openly, notoriously, and adversely as against Briggs and all other persons under claim of right and with the full knowledge and acquiescence of Briggs; that all of said construction was made in reliance upon, and on the faith of, the easement so granted and of the right to construct and perpetually maintain said works and conduct water through

said canal and impound the same at an expense of \$10,000, all of which was known to Briggs, who, during all the time of his occupancy, acquiesced in the claim of Mills and never disputed or denied it; that the grantees of Mills, who held the flouring mill power, in like manner relied upon the right to perpetually use said water and power and perpetually maintain the reservoir, and by reason thereof they constructed their flour-mill at an expense of \$8,000, all of which was known to Briggs during the time of his occupancy and claim of title to any of said land, and he never denied or disputed said rights, but always acquiesced therein. Errors are assigned upon the findings, but we think they are sustained by the evidence.

The findings establish that the agreement made by Briggs with Mills was not a mere revocable license or permission to occupy, but that it was intended to operate as a grant to be confirmed by deed when Briggs acquired the title so that he could convey it. We believe it is unnecessary to discuss the testimony in detail, since we are satisfied that it establishes the intention to make an absolute grant the consideration of which was the construction and operation of the mill at that place. The use of the premises was thus initiated, and it continued uninterruptedly for more than 25 years, until this suit was brought. Such use must now be presumed to have been adverse, unless it is explained to have been otherwise. "Where the use of an easement has continued for the prescriptive period unexplained, it will be presumed to have been adverse, unless it is of such a character or the circumstances attending it are such as to show that it was a mere privilege enjoyed by leave of the landowner." 23 Am. & Eng. Enc. of Law, 1202. Moreover, the use was not deprived of its adverse character or rendered merely permissive for the purposes of the statute of limitations, by a showing that it was preceded by an oral agreement amounting in terms to a grant but void under the statute of limitations. "It is generally agreed that use of an easement under claim of right by virtue of a parol grant may be adverse so as to give it title by prescription, although the parol grant itself is void under the statute of frauds." 23 Am. & Eng. Enc. of Law, 1198, and cases cited. The following from the opinion in *Coventon v. Seufert*, 23 Or. 548, 32 Pac. 508, may also be set forth as pertinent to this subject: "An easement cannot be granted by parol; yet, if Mr. Simpson purchased from Mr. Jackson the right to use the ditch, and used the same for 10 years, and such use was acquiesced in by Mr. Jackson and his grantees, it would be such an exercise of the easement, under a claim of right, as to give a prescriptive right to the same. It is no objection to granting an easement by prescription that the same was originally granted or bargained for by parol. That the use began

by permission does not affect the prescriptive right, if it has been used and exercised for the requisite period under a claim of right on the part of Mr. Simpson and his heirs and their grantees. If the use of a way is under a parol consent given by the owner of the servient tenement to use it as if it were legally conveyed, it is a use as of right. Gould, Waters, § 338; Washburn, Easem. (2d Ed.) 127. The plaintiffs have used the ditch as if it had been legally conveyed to them, that is, they have exercised such acts of ownership over it as a man would over his own property, and the court must presume, in the absence of any evidence to the contrary, that the settlement was a parol consent or transfer by Mr. Jackson to Mr. Simpson of the right to use the ditch, and hence it was a use as of right." The facts in this case clearly show a continuous adverse use by respondents and their grantors under claim of right for more than a quarter of a century. This establishes their title by prescription, and we find it unnecessary to discuss other reasons suggested in support of their title.

Appellant claims a reversal in any event on the ground that the decree is too broad inasmuch as it quiets the title to all the land covered by water from the canal, dams, and reservoir, as the same existed at the time of the decree. It is argued that there was no attempt in the pleadings or evidence to define the boundaries or to ascertain with any degree of exactness the extent of the user by respondents. We are unable to see any merit in this contention. The decree is limited to the "reservoir, dams, and dikes, as the same are at present maintained over and upon the land of the plaintiff." There is no suggestion in the record anywhere that the area involved is not the same that it has been during all the years; and, no suggestion to the contrary having been made in the court below, and the cause evidently having been tried throughout upon that theory, we find no error in the particular mentioned.

The judgment is affirmed.

CROW, MOUNT, and FULLERTON, JJ., concur.

FIREMAN'S FUND INS. CO. v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington. July 26, 1907.)

1. RAILROADS — FIRES — ACTION — EVIDENCE — SUFFICIENCY.

Evidence in an action against a railway company for loss caused by a fire escaping from the right of way held to sustain a verdict for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1730-1738.]

2. SAME—INSTRUCTION.

In an action against a railway company for loss caused by a fire escaping from its

right of way, an instruction that, if the jury should not find that the company through its officers or agents caused the fire, defendant should recover, was not objectionable as making the company liable, though it exercised reasonable care, where the other instructions, clearly made reasonable care a test of the company's liability.

3. APPEAL—REVIEW—ESTOPPEL TO ASSERT ERROR.

Where, in an action against a railway company for a loss caused by a fire escaping from its highway, the matter of negligence in the use of defective appliances was squarely within the issues made by the pleadings, and the company introduced evidence upon the subject, it could not complain that the court erred in instructing thereon, though the subject was eliminated by concession at the trial.

4. RAILROADS—FINES—COMPANY'S DUTY.

A railway company must exercise reasonable care to keep its right of way at points adjoining the private property of others free from combustible materials liable to become ignited from passing trains.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1673, 1675.]

5. SAME—DEFECTS IN ENGINE.

Where grain is burned by a fire originating on a railway right of way through sparks escaping from a passing engine and spreading to the field, it is immaterial to the company's liability whether the engine was improperly equipped.

6. SAME—MANAGEMENT OF ENGINE.

As to the liability of a railway company for loss caused by fire originating on its right of way through sparks from a passing engine spreading to an adjoining field, it was immaterial whether the employees in charge of the engine were careful or negligent in operating it.

Appeal from Superior Court, Lincoln County; W. T. Warren, Judge.

Action by the Fireman's Fund Insurance Company against the Northern Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Edward J. Cannon, for appellant. H. N. Martin and O. C. Moore, for respondent.

HADLEY, C. J. This action was brought to recover damages on account of the destruction by fire of standing wheat in an open field. One Nichols was the owner of the wheat, and the field adjoins the right of way of the Northern Pacific Railway Company. The complaint alleges that the fire was due to the negligence of the railway company. The suit was brought by the Fireman's Fund Insurance Company against the railway company, and said Nichols was also joined as a party plaintiff. The insurance company had, prior to the fire, issued a policy of insurance to Nichols to protect him against loss by fire in the wheat. After the fire the loss was adjusted, and the insurance company paid Nichols \$322.57 on account of the loss. The insurance company, claiming that it is entitled to be reimbursed by right of subrogation, then brought this suit against the railway company. At the trial any claim in favor of Nichols was dismissed. The complaint charged negligence of the defendant in permitting a large amount of dry, combus-

tible material to accumulate on its right of way at the point where the right of way adjoins the premises of Nichols, also that the locomotive appliances were defective, and that sparks were, by reason thereof, permitted to escape, causing the fire. Negligence was denied. The cause was tried before a jury, and a verdict was returned against the railway company for the exact sum which the plaintiff company paid Nichols on account of said loss. Judgment was entered in accordance with the verdict, and, the defendant's motion for new trial having been denied, it has appealed.

Appellant first assigns error in that judgment was entered against it and that its motion for a new trial was denied. It is argued that the evidence is insufficient to sustain the verdict. We think this contention is not well taken. The evidence showed that much dry grass, from four to five inches in height, was permitted to stand upon the right of way at the place where witnesses testified the fire started, and from which it immediately spread into the adjoining wheat field where the damage was done. The fire occurred in August, and the testimony showed that the grass was very dry. It was also shown that the fire sprang up very soon after one of appellant's trains had passed the spot at which, it is claimed, the fire began, the spot being on the right of way near the track. We think there was sufficient evidence to sustain the verdict.

Error is urged upon the following, which was the concluding sentence of an instruction given by the court: "If you do not find the defendant railway company, through its officers or agents, was the cause of that fire, then you should find for the defendant." It is argued that the above in effect stated to the jury that, if the railway company started the fire, it is liable, no matter what the circumstances were or what degree of care it exercised, whereas it was required by the law to exercise only reasonable care. We think no such inference could have been drawn when the instructions given the jury were considered together, as we have frequently held they must be. They were clearly instructed that the railway company was required to exercise reasonable care. That they understood such to be the standard and test of appellant's liability we think there can be no doubt. The same comment is applicable to assignment of error No. 4, which relates to another instruction. It is also argued that some of the instructions are inconsistent, but we are satisfied that, when they were read and considered as a whole, no confusion could have arisen in the minds of the jurors.

It is next contended that the court by its instructions submitted questions to the jury which were not within the issues. It is insisted that all questions of negligence touching any defective condition of the engine and

its appliances were eliminated from the case, and that the only matter of negligence left for the consideration of the jury was that relating to the accumulation of dry and combustible material upon the right of way. The matter of negligence in the use of defective appliances was squarely within the issues made by the pleadings, but appellant urges that, by concession at the trial, this subject was eliminated. The record, however, discloses that appellant was permitted to introduce much evidence upon this subject over respondent's objection; and, in view of such circumstances, evidence upon the subject having been brought before the jury by appellant itself, we think it should not now be heard to urge reversible error because the court instructed upon the subject.

The following instruction, which was given by the court, is criticised by appellant: "You are instructed that it is the duty of the railway company to exercise reasonable care to keep its right of way at all points adjoining the private property of others free from combustible materials which are liable to become ignited from passing trains. And, should you believe from the evidence that the grain in question was burned because of a fire which originated on the right of way of the company through sparks escaping from a passing engine, which thereafter spread to the grain field in question, then it is immaterial whether the engine of the railway company was improperly equipped or not. And it is likewise immaterial, should you find that the fire which caused the injury escaped from the right of way of the railway company under the circumstances just stated, whether the employees in charge of the engine were skillful or careful, or negligent and careless, in the operation of said railway engine, and your verdict should be for the plaintiff in either case, should you find that the fire escaped from the right of way of the railway company, after having been set through sparks escaping from a passing engine." We find no error in the quoted instruction. It is a clear and unobjectionable statement of the law applicable to the presence of combustible material upon the right of way negligently permitted to accumulate. It is in effect the same statement of the law as that contained in the following more elaborate statement of an eminent author: "A railroad company is bound to keep its track and contiguous land clear of materials likely to be ignited from sparks issuing from its locomotives. A neglect of these precautions will render it liable, even though its appliances were proper, and though it were guilty of no negligence in allowing the fire to escape. This is a duty which is implied in the grant of power to use locomotive engines. A franchise of this nature must be strictly construed; and it would be unreasonable to presume that, in granting the privilege to use this dangerous agent, the Leg-

islature intended to give them the privilege of running their engines on premises surrounded and covered with combustible material. The removal of such combustible substances is quite as much a means of preventing the communication of fire from their locomotives as is the use of inventions for preventing the escape of fire from the locomotives themselves. Decisions are numerous which affirm the liability of railroad companies for negligence in failing to perform this duty, where adjacent property is burned by reason of the neglect of it, notwithstanding it may have used due care in providing proper appliances to arrest the scattering of fire by its engines, and due care in the running of its engines so as to avoid setting fire to adjacent property. A round statement of this doctrine is that, where a railroad company sets fire to the dry grass and other combustible material, which it has negligently suffered to accumulate on its right of way, and, without fault of the adjacent owner, permits such fire to escape to his lands and burn and destroy his property, it will be liable to him for the damages, whether the escape of such fire was due to its negligence or not." 2 Thompson on Negligence, § 2270. Many authorities are cited by the author in support of the above, and again, in section 2280 of the same volume, reference is made to the subject as follows: "It has been well reasoned that, where the railroad company negligently permitted combustible material to accumulate on its right of way, from which a fire, communicated by one of its locomotives, spread to the property of an adjoining landowner, the question whether the fire was started through negligence in supplying the locomotive with proper appliances to prevent the spread of fire, or in keeping it in proper repair, or in operating it on the particular occasion, became immaterial. In such a case it has been held no error to exclude evidence as to what kind of a smokestack, fire box, and ash pan were in use on the defendant's locomotives."

We find no prejudicial error in the record, and the judgment is affirmed.

ROOT, MOUNT, CROW, and FULLERTON, JJ., concur.

SYLVESTER et al. v. STATE.

(Supreme Court of Washington. July 15, 1907.)

1. EVIDENCE—DOCUMENTARY EVIDENCE—RECORDS OF LAND OFFICE—PROPER CUSTODY.

In an action to recover land donated by S., who had settled thereon under the Oregon donation act, to the territory of Washington, the fact that the notification to the Surveyor General by S. of his intent to claim the land was not found in the Oregon land offices, the land being a part of Oregon Territory at the time the notification was given, but in the General Land Office at the city of Washington, did not detract from its character as evidence, and,

where a certified copy of this notification which bore on its face evidences of its genuineness showed when it was given and that the land had been surveyed prior to that time was introduced in evidence, it was proper to find that the notification was given on the date stated in the certified copy thereof.

2. TERRITORIES — CONSTRUCTION AND OPERATION OF ORGANIC ACT—PUBLIC BUILDINGS AND OTHER PROPERTY.

Act March 2, 1853, c. 90, 10 Stat. 172, creating the territory of Washington, described its boundaries, provided for a complete scheme of internal government and a legislative assembly with power to locate and establish the seat of government of the territory, and appropriated \$5,000 to be applied by the Governor to the erection of suitable buildings at the seat of government. *Held*, that the territory had the power under the act to acquire and hold land required for the erection of government buildings at the seat of government, though Congress at a subsequent session made another appropriation for the erection of a temporary capitol and for a penitentiary, inclusive of the sites of the buildings.

3. DEEDS—OPERATIVE WORDS OF CONVEYANCE —ESTATES AND INTERESTS CREATED.

A deed granting land to the territory of Washington did not require the words of succession in order to pass a fee, since the deed while in form to the territory was in fact to the government, which has had an uninterrupted existence, though its form changed in the change from a territory to a state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2032-2034.]

4. PUBLIC LANDS — TRANSFER BY HOLDER — VALIDITY OF CONTRACT—STATUTES.

Act July 17, 1854, c. 84, § 2, 10 Stat. 305, repealed the proviso of Oregon Donation Act Sept. 27, 1850, c. 76, § 4, 9 Stat. 497, providing that all contracts for the sale of lands claimed under that law before the issue of patents therefor are void, and provided that no sale of such land is valid, unless the vendor has resided four years upon the land. *Held*, that a deed to land claimed under the former statute executed after the grantor had completed a four years' residence thereon was valid.

5. DEEDS—PAROL EVIDENCE — ADMISSIBILITY —CONDITIONS.

Under the rule that a parol contemporaneous agreement cannot be shown to vary the terms of a written instrument, parol evidence was inadmissible to show that a deed of land to a territory was executed upon the condition that the territory would erect and maintain a capitol building on the land conveyed.

6. ESTOPPEL — BY DEED — GROUNDS — COVENANTS.

Where the state holding land under a valid deed from S. secured a deed to the same land from the heirs of S. which provided that, unless the land remain the site for the capitol of the state, the deed became void, it was not estopped from asserting that it holds the land under a different tenure than that expressed in the second deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 69.]

7. DEEDS — CONTENTS OF INSTRUMENT — DESCRIPTION OF PROPERTY—CERTAINTY.

The description in a deed, which, though imperfect, was sufficient to accurately locate the land conveyed, was sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 65.]

8. APPEAL—REVIEW — SCOPE AND EXTENT — THEORY AND GROUNDS—THEORY OF CASE.

Where a case was tried as if upon sufficient pleadings, it must be considered upon the same theory on appeal, since otherwise the par-

ties would be denied the benefit of the statutes relating to amendments.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1056, 1057.]

Root, J., dissenting.

Appeal from Superior Court, Thurston County; R. B. Albertson, Judge.

Action by Mrs. Clara E. Sylvester and another against the state of Washington (substituted as defendant for A. B. Allison and wife, defendants) to recover a tract of land. From a judgment for defendant, plaintiffs appeal. *Affirmed*.

Geo. Marvin Savage and May L. Sylvester, for appellants. John D. Atkinson, Atty. Gen., and A. J. Falknor, Asst. Atty. Gen., for the State.

FULLERTON, J. The appellants brought this action against the state of Washington to recover a tract of land, containing some 10 acres, held by the state as a part of its capitol grounds. The appellant Clara E. Sylvester is the wife, and the appellant May L. Sylvester is the daughter, of Edmund Sylvester, deceased, and together they constitute his sole heirs at law. The land in question is a part of a larger tract patented by the government of the United States to Edmund Sylvester. The appellants claim the land as his heirs at law, contending that the muniments of title through which the state holds the property are either void and of no effect, or are subject to conditions which have been forfeited by the state.

Edmund Sylvester acquired title to the land under the act of Congress of September 27, 1850, commonly known as the "Oregon Donation Act," 9 Stat. 496, c. 76. The record shows that he made settlement upon it in 1850, filed his notification of such settlement with the Surveyor General of Oregon in February, 1854, made final proof of his settlement and continuous residence in July, 1858, and received patent for the land in May, 1860. On March 2, 1853, Congress passed an act creating the territory of Washington. The act specifically described the boundaries of the new territory, and provided for it a complete scheme of internal government. As a part of the governing body it created a legislative assembly, and gave it power at its first session, or as soon thereafter as it should deem expedient, "to locate and establish the seat of government for said territory, at such place as [it might] deem eligible; which place, however, shall thereafter be subject to be changed by said legislative assembly"; and the sum of \$5,000 was appropriated out of the general treasury "and granted to said territory of Washington to be there applied by the Governor to the erection of suitable buildings at the seat of government." 10 Stat. 172, c. 90 et seq. The legislative assembly exercised the power thus granted at its second session. On January 9, 1855, it passed the following act (Laws 1854-55, p. 5):

"Section 1. Be it enacted by the legislative assembly of the territory of Washington, that the seat of government of this territory be, and hereby is established and located on a certain piece or parcel of land on the land claim of Edmund Sylvester, in the county of Thurston, in section twenty-three, township eighteen north, range two west, containing ten acres, and more particularly described as follows: Commencing at a point south twenty-four degrees, twenty-three minutes west, nineteen, and two one-hundredths chains from the northwest corner of Main and Union Streets, in the town of Olympia; thence south seven and fifty one-hundredths chains; thence west eight and fifty-eight hundredths chains; thence north, forty-seven degrees west, one and seventy-three hundredths chains; thence north, forty-eight degrees thirty minutes west, one and sixty hundredths chains; thence north, sixty-five degrees west, one and ninety-three hundredths chains; thence north, thirty-three degrees thirty minutes west, two and eighty hundredths chains; thence north, thirty-eight degrees west, one and seventeen hundredths chains; thence north, forty-five degrees west, one and eighty-seven hundredths chains; thence east sixteen and four hundredths chains, to place of beginning.

"Sec. 2. This act to take effect and be in force fifteen days after its passage: Provided, that within that time the present owners or claimants give a deed of release for the above described ten acres of land to the territory of Washington without expense to said territory, which shall be deemed satisfactory by a joint committee to be appointed by both branches of the legislative assembly to examine and receive the same.

"Passed January 9, 1855."

On January 18, 1855, nine days later, Edmund Sylvester and his wife, Clara E., conveyed to the territory of Washington the lands in the act described; and on January 29, 1855, the territory by a special act accepted the deed, authorized it to be deposited in the office of the Secretary of the territory, and directed that the Governor take possession of the tract described, and "hold possession thereof, for the use and behalf of the territory of Washington, in accordance with the first section of the act and to which this is a supplement." Possession of the tract was thereupon taken, which possession has been maintained by the territory and its successor, the state of Washington, from thence until the present time. The deed from Edmund Sylvester and wife to the territory was in form a deed of bargain and sale, the granting words being, "do grant, bargain, sell, convey and confirm unto the said" territory, etc. The habendum clause was as follows: "To have and to hold the same to the said party of the second part forever, free from any claim of the said party of first part, their heirs or assigns, or any or all persons claiming by, through, from, or

under them or any of them." It was executed, as will be observed from the dates given, more than four years after Sylvester had made settlement upon the land, and more than a year after he had given notice to the Surveyor General of Oregon of his intent to claim the same under the Oregon donation act, but was executed prior to the time he had made final proof of his settlement and cultivation, and prior to the time patent was issued to him therefor by the United States. After the admission of the territory of Washington into the Union as a state, the Legislature passed an act for the location of a capitol building on the land in question. At that time the then Attorney General examined into the title of the state to the land, and advised that a deed be procured from the heirs of Edmund Sylvester in order to perfect the state's legal title. Pursuant to this opinion, after request made of them, the present appellants executed to the state a quitclaim deed to the land, reciting, however, that the deed was made and accepted on the express condition that the tract should be and remain the site for the capitol of the state of Washington, and that in the event of a breach of the foregoing condition, or in the event of the location of the capitol elsewhere than upon such tract, the deed should become null and void. The state, however, did not erect a capitol building upon this site. After spending some sixty-odd thousands of dollars in the erection of a foundation for such a building, it abandoned the project, and erected a capitol building in another part of the city of Olympia, wherein all the state officers are now situate. But the state still maintains possession of the 10-acre tract, making biennial appropriations through the Legislature for its care and preservation.

The foregoing facts are in the main undisputed. The appellants, however, make some question as to the time the notification to the Surveyor General by Edmund Sylvester of his intent to claim the land was filed. They show that a survey of the land claim was made as late as April 22, 1857, and argue that, inasmuch as the notification could not have been given until after the survey, it must have been given at a date later than the date found by the court. This contention is further supported by certificates from the Surveyor General of Oregon and the register of the land office at Oregon City, Or., to the effect that neither office contains any record of the filing of such a notification. But the state produced a certified copy of the notification from the General Land Office at Washington. This paper bears on its face evidence of its genuineness, and shows conclusively that it was given at the date first above stated. It shows, moreover, that the claim had actually been surveyed prior to that time, as it contains a description of it by metes and bounds corresponding in detail to the description given of the claim in

the patent. The fact that this paper was not found in the offices where it would be expected to be found does not detract from its character as evidence. The explanation is perhaps to be found in the fact that the territory of Washington was cut off from the Oregon Territory between the time of the giving of the notification and the issuance of the patent, and the confusion arose in making the necessary transcription from the records incident to the creation of a new territory out of an old one. But be this as it may, there was no law requiring that this record be kept in the Oregon land offices, and the General Land Office at Washington, for its better preservation, might well take possession of it and maintain it as a part of its own files. We conclude therefore that the facts are correctly found. The question remaining is, did the court err in its conclusion of law to the effect that the state had title in fee to the land in suit? In discussing this question, we will notice the several contentions of the appellants in the order in which they present them.

The first is that the original deed from Edmund Sylvester and wife to the territory of Washington was void for want of a grantee empowered to take title. The argument is that the territory, not being sovereign, had no inherent power to take title to land, and that such a power was not conferred upon it by Congress in the act creating the territory. But without inquiring into the sovereign capacity of the territory to take and hold real property, and conceding that no express authority was conferred on the territory by the organic act, we still think that it had power to acquire and hold land for the purposes of a capitol site. From the quotations heretofore made from the organic act, it will be observed that the Congress especially empowered the legislative assembly of the territory to locate and establish the seat of government for the territory, and made an appropriation for the erection of suitable buildings on the site so selected. The power to locate and establish the seat of government and erect suitable buildings thereon must have necessarily included the power to acquire and hold such a quantity of land as was required for that purpose. To hold otherwise would be to deny the territory power to carry out the powers expressly conferred, as it is manifest that it could not establish a seat of government and erect suitable buildings for its purposes without acquiring a site upon which to establish the seat of government or erect the buildings. The appellants suggest that the legislative assembly might have acquired by lease sufficient land for its purposes. But this, instead of being an argument against the existence of the power to acquire title to the land, is a concession in its favor, as it would require no greater act of sovereignty for the territory to acquire property for capitol purposes by a deed in fee than it would to ac-

quire the same property by a lease for a definite or indefinite time. The fact that the Congress at a subsequent session made another appropriation for the erection of a "temporary capitol, and for a penitentiary, inclusive of the sites of the buildings," does not require the holding that no authority to acquire title to land was included in the previous grant of power. The latter act is in no way connected with the earlier one, and certainly does not preclude us from applying to the earlier one the ordinary rules of construction.

The second contention is that the deed, since it did not run to the successors or heirs of the territory, conveyed to it an estate terminable at the end of its existence, and that in consequence the property reverted to the heirs at law of Edmund Sylvester when the territory was merged into the state. But the common-law rule that the word "heirs," or its equivalent, was necessary in a deed in order to convey a fee, had no application when the grant was to the crown. While the individual representing the sovereignty might change, the sovereign itself was immortal by perpetual succession; and, on principle, a life estate to an ideal being having a perpetual and uninterrupted existence must be coextensive with a fee or perpetuity, and hence words of succession cannot extend it. For similar reasons the same result followed deeds at common law to corporations aggregate. *Jones on Real Property*, § 598; *Wilcox v. Wheeler*, 47 N. H. 488; *Asheville Division No. 15 v. Aston*, 92 N. C. 578. So on similar principles a deed to the territory did not require the words of succession in order to pass a fee. The deed while in form to the territory was in fact to the government; and, while the form of government changed in the change from a territory to statehood, there was no lapse in the government itself. The government has had an uninterrupted existence.

The third contention is that the deed is void because prohibited by the donation act itself. As originally enacted, the proviso to the fourth section of the act did provide that all contracts by any person for the sale of the land which such person might be entitled to under the act before he received patent should be void (9 Stat. 497, c. 76, § 4); but by the amendatory act of July 17, 1854 (10 Stat. 305, c. 84, § 2), it was further enacted "that the proviso to the fourth section of the act of twenty-seventh September, eighteen hundred and fifty, above mentioned, by which all contracts for the sale of lands claimed under that law, before the issue of patents therefor, are declared void, shall be, and the same is hereby, repealed: Provided, that no sale shall be deemed valid, unless the vendor shall have resided four years upon the land." This act has been held by this court, as well as by the Supreme Court of the United States, to permit a donation land claimant after four years' residence and culti-

vation to sell and convey his claim, whether he had received patent therefor or not. *Roder v. Fouts*, 5 Wash. 135, 31 Pac. 432; *Brazee v. Schofield*, 2 Wash. T. 209, 3 Pac. 265; *Brazee v. Schofield*, 124 U. S. 493, 8 Sup. Ct. 604, 31 L. Ed. 484; *Barney v. Dolph*, 97 U. S. 652, 24 L. Ed. 1063.

The deed in question here was executed after Edmund Sylvester had completed a four years' residence upon the claim. As shown by his own affidavits and the affidavits of his witness on which patent was issued, he commenced his residence on the land some time in 1850, and resided upon it continuously until he made the deed to the territory on January 18, 1855, a period of over four years. His deed, therefore, was not void for want of title in himself, nor did it violate any rule of public policy. The appellant cites *Vance v. Burbank*, 101 U. S. 514, 25 L. Ed. 929, as overruling the earlier case of *Barney v. Dolph*, *supra*, but a more careful examination of the case will show that this is not so. The earlier Oregon cases, and some cases in the inferior federal courts, had laid down the rule that the donation act was a grant in present, the donor taking a present title subject to be defeated by conditions subsequent, and *Barney v. Dolph* was thought to affirm that principle. The case cited merely holds that this was not a correct construction of the act, and that it was not intended in *Barney v. Dolph* to so hold. It held that the grant did not take effect until the settler had resided upon and cultivated the tract for four consecutive years, and otherwise conformed to the provisions of the act, but did not depart from the rule that the settler had power to convey the fee after having resided upon the land and cultivated the same for four consecutive years.

The fourth contention is that the trial court erred in excluding parol evidence tending to show that the first deed was executed upon the condition that the territory would erect and maintain a capitol building upon the land conveyed. But manifestly there was no error in this. No rule of law is more uniformly applied than is the rule that a parol contemporaneous agreement cannot be shown to vary the terms of a written instrument. This rule is applicable here, as a deed is such an agreement as falls within the rule. *Devlin on Deeds* (2d Ed.) § 850a.

The fifth contention is that the second deed, the deed made by the present appellants to the state, governs and determines the status of the parties and the tenure by which the state holds the land in question. Much of the argument under this branch of the case is based on the assumption that the first deed was invalid and insufficient to convey the title of the property to the state; but, since we hold the deed to be valid and sufficient for that purpose, we need not follow the appellants into this branch of their argument. They argue further, however, that the state, having sought for and obtained the second

deed, is now estopped from asserting that it holds the land under a different tenure than that expressed in such deed. But we cannot think the conclusion necessarily follows from the conduct of the state. Doubtless the appellants could have made it a condition on giving the second deed, if the state would have consented, that the land should revert to them in case the state should cease to use it as a capitol site, but they did not do this. The remedy reserved for a breach of the condition was that the deed itself should be void—that is to say, the state, by failing to perform the conditions, could claim nothing by virtue of the deed; but it was not provided that it must surrender all the rights it had acquired by virtue of the earlier instrument by a failure to keep these conditions, and, to be enforced, it must have been so expressly provided, as no such condition could be implied.

The sixth is that the original deed is void for want of a sufficient description of the property conveyed. The deed followed the description contained in the act locating the seat of government above quoted, with the exception that it omitted the phrase "town of Olympia" following the words "Main and Union streets." But the omission did not render the description void. Enough remained to accurately locate the land conveyed, and this is all that is necessary to constitute a sufficient description.

Lastly, the appellants object to the sufficiency of the answer filed on behalf of the state, contending that it contains an admission that the state holds the land in question subject to forfeiture in case it ceases to use it for a capitol site. We do not so read the answer, but if it required that construction it would not alter the appellants' position. The case was tried in the court below as if upon sufficient pleadings, and we must consider it upon the same theory in this court. To do otherwise would be to deny to the respondent the benefit of the statutes relating to amendments.

As we find no error in the record, the judgment will stand affirmed.

HADLEY, C. J., and MOUNT and CROW, JJ., concur.

ROOT, J. I dissent. I think Mrs. Sylvester should have been permitted to give testimony as to what the real consideration was for the grant which she and her husband made to the territory of Washington. It is almost, if not entirely, a justifiable inference from the statutes and deed that this grant was made upon the understanding that this land was to be used as the permanent site of the capitol for the territory and succeeding state. Her testimony was offered to fully establish this. I think it should have been received. The patriotism and beneficence manifested by Mr. and Mrs. Sylvester toward this commonwealth in its early infancy should

not be repaid by a rigorous application of technical rules at this time. If, as I believe, they conveyed this land for the sole purpose of its being, and with the understanding with the territorial authorities that it should be, the permanent site of the capitol of the territory and state, I think that good faith and fair dealing require that the land should now revert, inasmuch as it has ceased to be used for the purpose for which it was thus granted.

HOFFMAN v. HABIGHORST et al.

(Supreme Court of Oregon. July 23, 1907.)

PRINCIPAL AND SURETY—DISCHARGE OF SURETY—ACT OF CREDITOR.

To discharge sureties of a debt by the creditor's act, it must appear he knew of the suretyship when the act was done.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, § 21.]

On motion for rehearing. Motion disallowed.

For former opinion, see 89 Pac. 952.

SLATER, C. A very earnest motion for a rehearing has been filed by plaintiff's counsel in this case, in which connection all the issues involved have been reargued; but, after a painstaking and careful re-examination of the whole case, we are constrained to recommend an adherence to the opinion.

Plaintiff's main contention is that, in order to sustain the defendants' claim of a release by an extension agreement, it is necessary that the court must first find that the guaranty company was the principal obligor and debtor on this note, at the time of its execution, for he argues, if it was not so bound at that time, it would be a stranger to the transaction, and the makers would not be discharged as a result of an extension agreement made by the payee, with the company. In *Manley v. Boycot*, 2 El. & Bl. 46, decided by the Queen's Bench in 1853, it was held that the defense was not available, unless the holder when he took the note knew of the suretyship and agreed to treat the surety as such. But in *Pooley v. Harradine*, 7 El. & Bl. 431, decided in 1857, and in *Greenough v. McClland*, 2 El. & Bl. 424, decided in 1860 by the same court, it was held that the defense might be made when the creditor knew of the fact of suretyship, but did not agree to hold the surety as such; and it has been generally held in this country that such sureties may, both at law and in equity, show by parol that they were sureties and were known to be such by the creditor, and they will be entitled to all the rights, privileges, and immunities of sureties, and will be discharged by any act of the creditor, after he has knowledge of the fact of suretyship, which discharges any other surety. But it must appear that the creditor at the time the act complained of was done knew of the fact of suretyship. The

great weight of authority and of reason is in favor of the law as above stated. 1 Brandt, *Suretyship*, § 38. The equity of the surety to be discharged when he is prejudiced by the act of the creditor "does not depend upon any contract with the creditor, but upon its being inequitable in him knowingly to prejudice the rights of the surety against the principal." Coleridge, J., in *Pooley v. Harradine*, supra; 1 Brandt, *Suretyship* (3d Ed.) § 38. The relation of principal and surety "is a fact collateral to the contract, and no part of it." Valentine, J., in *Rose v. Williams*, 5 Kan. 483. While the company may be a stranger to the transaction, so far as disclosed by the paper evidence of it, yet it was not a stranger to the real transaction as disclosed by all the facts giving origin to the paper. It may be conceded, for the purpose of argument, that the defendants, in fact, as well as by the terms of the note, were the real borrowers from Mrs. Wertheimer of \$15,000, and were her principal debtors at the time of the signing of the note, yet, back of their contract with her, there is another contract between the defendants and the company, to the effect that if defendants would sign the note in question, and permit the company to obtain from Mrs. Wertheimer, for its own use and benefit, the proceeds thereof, it would become paymaster of the note, and upon which the later transaction was based. Mrs. Wertheimer, through her agent, Selling, had notice of this collateral contract at the time of the execution of the note, as well as at the time of the execution of the extension agreement. Doubtless she was not bound to treat the company as her debtor, nor to have any dealing with it, in respect to the note. She might do so or not, as it would appear to be to her advantage. But having knowledge of the contractual relation between the makers of the note and the company, if she ever dealt with it as her debtor in respect to the debt which was the consideration of the note, she was bound at her peril to observe the rights of the defendants against the company arising out of their collateral contract. Counsel for plaintiff relies upon 2 Dan. Neg. Instru. § 1324, who says: "The agreement for indulgence, in order to discharge the drawer or the indorser, must be made with the maker or acceptor, who is the principal debtor; and, if it be made with a third party, it will not affect the drawer's or indorser's rights or remedies, although such third party may have his appropriate remedy for breach of the contract with him." This text is apparently based upon the English case of *Frazier v. Jordan*, 8 El. & Bl. 302, cited in the footnote to said section. There Coleridge rules that the doctrine of an agreement for indulgence or extension ought not to be extended in case of a contract with a stranger; that the principal debtor, having given no consideration for the promise, has no ground to complain of

the breach. But this principal cannot apply to a case where the alleged stranger has, by previous valid contract with the original principal debtor, and based upon a valuable consideration, viz., the proceeds of the note in question, agreed to assume and pay the debt. These 15 makers were, in fact, the sureties or accommodation makers as to the guaranty company, and were entitled to the resulting legal rights and equities arising out of that relationship, and when Mrs. Wertheimer knew, or had notice, of such relationship she was bound to do nothing to endanger or destroy any of such rights, and from that time the guaranty company as to her was no longer a stranger in respect to such debt. It was legally bound by contract to the makers of the note to pay it in the first instance, and as between them and itself it was the duty of the company to either pay it, or in some manner protect the makers from legal process to collect the note. The company sought to perform this duty by contracting with Mrs. Wertheimer through Selling, and when doing so was not acting as a volunteer or a stranger to the legal relation existing between Mrs. Wertheimer and defendants.

In *Arnold v. Green*, 116 N. Y. 566, 23 N. E. 1, it is said that the terms "stranger" and "volunteer," as used with reference to the subject of "Subrogation," mean one who in no event resulting from the existing state of affairs can become liable for the debt, and whose property is not charged for the payment thereof, and cannot be sold therefor. The payment by one who is liable to be compelled to make it or lose his property will not be regarded as made by a stranger. When the person paying has an interest to protect, he is not a stranger. *Suppiger v. Garrels*, 20 Ill. App. 625; *Bennett v. Chandler*, 199 Ill. 97, 64 N. E. 1052; *Mavly v. Stover*, 68 Neb. 602, 94 N. W. 834. If, during the period of leniency granted in the extension agreement, defendants had tendered payment of the note, and it was accepted, and then they had sued the guaranty company upon its contract of indemnity with them, it, no doubt, could successfully plead in abatement its extension agreement with the payee; but, if defendants had been sued by Mrs. Wertheimer upon this note prior to the expiration of the time given in the extension agreement, they not only could have successfully pleaded the agreement as a defense, but they would have been bound to do so to preserve their right of immediate indemnity as against the guaranty company. Not to do so would be in effect confessing judgment upon a demand, the maturity of which had been extended for a valuable consideration paid by one in privity with the defendants.

No distinction whatever has been suggested by counsel for plaintiff, and we think none can be found, between the case at bar and the case of *Union Life Insurance Co. v.*

Hanford, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118, cited and quoted in the opinion, and other cases cited there in the same connection, to which may be added the following, to the same effect: *Herd v. Tuohy*, 133 Cal. 55, 65 Pac. 139; *Wyatt v. Dufrene*, 106 Ill. App. 214; *Stove Works v. Caswell*, 48 Kan. 689, 29 Pac. 1072; *Franklin Savings Bank v. Cochrane*, 182 Mass. 586, 66 N. E. 200, 61 L. R. A. 700; *Pratt v. Conway*, 148 Mo. 291, 49 S. W. 1028, 71 Am. St. Rep. 602; *Regan v. Williams*, 185 Mo. 620, 84 S. W. 959, 105 Am. St. Rep. 600; *Miller v. Kennedy*, 12 S. D. 478, 81 N. W. 906; *Iowa Loan & Trust Co. v. Schnose* (S. D. decided April 4, 1905) 103 N. W. 22; *Merrillam v. Miles*, 54 Neb. 566, 74 N. W. 861, 69 Am. St. Rep. 731; *Travers v. Dorr*, 60 Minn. 173, 62 N. W. 269; *George v. Andrews*, 60 Md. 26, 45 Am. Rep. 706.

For these reasons the motion should be disallowed.

MULTNOMAH COUNTY v. FALING.

(Supreme Court of Oregon. July 23, 1907.)

PAUPERS—LIABILITY TO SUPPORT RELATIVE.

B. & C. Comp. § 2654, provides that every poor person who shall be unable to earn a livelihood by reason of bodily infirmity shall be supported by the father, brothers, etc., and that every person failing to give such support, when directed by the county court, shall forfeit such sum monthly as the court shall find sufficient, to be recovered for the use of such poor person. *Held*, that there is no liability under the statute until an order has been made by the county court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Paupers, § 152.]

Appeal from Circuit Court, Multnomah County; Arthur L. Frazer, Judge.

Action by the county of Multnomah against X. J. Faling. From a judgment overruling a demurrer to the complaint, defendant appeals. Reversed and remanded, with directions to sustain the demurrer.

Thos. N. Strong, for appellant. Ernest Brand, Jr., for respondent.

BEAN, C. J. This is an action brought by the county court of Multnomah county against Xarifa J. Faling to compel her to pay to the county \$30 per month for the support of her brother, Cornelius W. Barrett, an alleged poor person, and comes here on appeal from a judgment rendered in favor of plaintiff, after overruling a demurrer to the complaint.

Section 2654, B. & C. Comp., provides that: "Every poor person, who shall be unable to earn a livelihood in consequence of bodily infirmity, * * * shall be supported by the father, mother, children, brothers, or sisters of such poor person, if they or either of them be of sufficient ability; and every person who shall fail or refuse to support his or her father, mother, child, sister or brother, when directed by the county court, * * * shall

forfeit and pay to the county, for the use of the poor of their county, the sum of thirty dollars per month, or such other sums as the court shall find sufficient, to be recovered in the name of the county court for the use of the poor as aforesaid before any justice of the peace or any court having jurisdiction." There is no averment in the complaint that the defendant has been directed by the county court to support her brother, and that she has failed or refused to comply therewith, and this is an essential prerequisite to the maintenance of the action. At common law there is no legal liability resting on one relative to support another, however strong the moral duty may be. The duty of providing such support is purely statutory, and the procedure provided for its enforcement is exclusive. *Belknap v. Whitmire*, 43 Or. 75, 72 Pac. 589. Under this statute the county court has no cause of action against a delinquent relative except upon his failure to perform the duty imposed upon him by statute "when directed by the county court." The provision is that every person who shall refuse to support his or her parents, children, brother, or sister, "when directed by the county court," shall forfeit and pay to the county for the use of the poor the sum of \$30 per month, or such other sum as the court shall find sufficient, "to be recovered in the name of the county court" before a court having jurisdiction. To fix a liability in favor of the county court and against the delinquent relative, it is necessary therefore that an order be made by the court directing him to discharge the duty imposed upon him, and that such direction has been ignored. *Faling v. Multnomah Co.*, 46 Or. 460, 80 Pac. 1009. This is the plain reading of the statute, and the necessary and orderly procedure to fix liability upon a delinquent relative and a complaint by a county court, which fails to allege a compliance with the statute, necessarily does not state a cause of action.

For these reasons the judgment of the court below must be reversed, and the case remanded, with directions to sustain the demurrer to the complaint, and for such further proceedings as may be proper not inconsistent with this opinion.

RIDINGS v. MARION COUNTY.

(Supreme Court of Oregon. July 23, 1907.)

1. PLEADING—AMENDMENT OF COMPLAINT—NEW CAUSE OF ACTION.

Under B. & C. Comp. § 102, providing that the court may, in furtherance of justice and upon proper terms, at any time before the cause is submitted, allow any pleading to be amended by correcting a mistake in any respect, or, when the amendment does not substantially change the cause of action or defense, by conforming the pleading to the facts proved, where the complaint in an action for injuries sustained because of a defective bridge alleged that plaintiff had not been informed of its defective condition, but did not allege that plaintiff was without knowledge of the defect or danger, as

required by Laws 1903, p. 280, § 59, it was proper to allow an amendment during the trial making that allegation, since the amendment did not change the cause of action, and it did not appear that defendant had been misled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 676-683.]

2. SAME—EFFECT OF OBJECTION TO TESTIMONY UNDER ORIGINAL COMPLAINT.

The fact that under the original complaint objection was made to the admission of testimony as to plaintiff's lack of knowledge of the defect in the bridge did not deprive the court of power to allow the amendment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 653-675.]

3. APPEAL—REVIEW—DISCRETION OF LOWER COURT—AMENDMENT OF PLEADINGS.

The ruling of the trial court on a motion to amend the complaint will not be disturbed on appeal, except for manifest abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3825-3833.]

4. HIGHWAYS—ESTABLISHMENT BY USER—PUBLIC IMPROVEMENT.

If a highway has been traveled, used, improved, and worked by the public as a county road for a period of 10 years or more, it is a legal county road.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 1-10.]

5. BRIDGES—ACTIONS FOR INJURIES—ADMISSIBILITY OF EVIDENCE—AUTHORITY TO CONSTRUCT AND REPAIR.

In an action for personal injuries sustained because of a defective bridge, testimony to show that the road and bridge had been kept in repair by the road supervisor, under the direction of the county court is admissible without showing an order of the court authorizing or directing him to keep them in repair, or that no record of such authority had been made, since, under Laws 1903, p. 282, § 68, the road supervisor is an officer of the county appointed by the court, and it is his duty under Laws 1903, p. 271, § 28, to keep the public roads in repair.

6. BRIDGES—USE FOR TRAVEL—CONTRIBUTORY NEGLIGENCE.

Where a county constructs or maintains a bridge for use by the public, a traveler may assume, in the absence of information to the contrary, that he may safely travel over any portion of the bridge and in doing so he is not guilty of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bridges, §§ 91, 94.]

7. TRIAL—INSTRUCTIONS—SUFFICIENCY AS A WHOLE.

Where an instruction as a whole clearly states the law as to the measure of damages for personal injury, and the jury could not be misled thereby, it will not be held insufficient on account of the wording of a portion thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-717.]

Appeal from Circuit Court, Marion County; Thomas A. McBride, Judge.

Action by H. P. Ridings against Marion county. From a judgment for plaintiff, defendant appeals. Affirmed.

C. L. McNary, for appellant. C. D. Latourrette and Geo. G. Bingham, for respondent.

BEAN, C. J. This is an action to recover damages for an injury received by plaintiff, while traveling on a county road leading

from Woodburn to Monitor in defendant county, in consequence of a defect in a bridge over Pudding river on such road. After alleging that the road upon which he was traveling at the time of his injury was a legal county road, and that the bridge thereon was and had been, for a long time prior to the accident, out of repair and in a dangerous and defective condition, and known to the county authorities to be so, plaintiff avers that, "while he was lawfully traveling upon said highway and not having been warned of the defects in said legal county road, or in said bridge, or of the dangerous condition of the same, the horse upon which plaintiff was riding stepped through a hole in said bridge, and plaintiff by reason thereof was thrown violently to the flooring of said bridge" and severely and permanently injured in his right arm. The answer denies all the material allegations of the complaint. Upon the issues thus joined, the cause was tried before the court and a jury, resulting in a verdict in favor of plaintiff. From the judgment entered therein defendant appeals, assigning error in the admission of testimony and in the giving of instructions. The several assignments of error will be considered in the order in which they were presented.

1. Plaintiff, as a witness, testified that after dark on the evening of October 30, 1904, as he was traveling over the bridge in question going towards Woodburn, he met a buggy and team, and in turning out to allow them to pass his horse stepped in a hole in the bridge, and he was thrown violently to the floor thereof and severely injured. He was thereupon asked by his counsel whether he had any previous knowledge of the existence of the hole in the bridge. To this question an objection was interposed and sustained, because a want of such knowledge was not alleged in the complaint, but simply that plaintiff had not been warned of the defect. Plaintiff then moved for permission to amend his complaint by inserting the words "and without knowledge." The motion was allowed, and this ruling is assigned as error. The omission of an averment in the complaint that plaintiff was without knowledge of the defect in the highway was no doubt due to the fact that the pleader had forgotten that section 4781, B. & C. Comp., giving a right of action to one injured while lawfully traveling on a county road, had been amended or changed by the act of 1903 (Laws 1903, p. 280, § 59). But as the amendment did not change the cause of action, and it does not appear that the defendant was in any way misled to its prejudice thereby, it was properly allowed. The statute authorizes the court to allow a pleading to be amended at any time before the cause is submitted by correcting a mistake therein, or when the amendment does not substantially change the cause of action or defense by conforming the plead-

ing to the facts proved. Section 102, B. & C. Comp. The power thus conferred upon trial courts has always been and should be liberally exercised in furtherance of justice, for as said by Mr. Chief Justice Strahan, in *Baldock v. Atwood*, 21 Or. 73, 26 Pac. 1058: "Nothing is ever gained by turning a party out of court or compelling him to take a nonsuit on account of some defect in his pleading not discovered perhaps until the progress of the case, when an amendment could supply the defect and the action or suit be brought to an early determination." The allowance of such an amendment rests in the discretion of the trial court, and its ruling will not be disturbed on appeal except in case of manifest abuse of such discretion. This rule has been so often announced and applied by this court that it is unnecessary to cite authorities in its support. The fact that objection was made to the admission of the testimony did not deprive the court of the power to allow the amendment. *Wild v. O. S. L. Ry. Co.*, 21 Or. 159, 27 Pac. 954; *Koshland v. Fire Association*, 31 Or. 362, 49 Pac. 865; *Farmers' Bank v. Saling*, 33 Or. 394, 54 Pac. 190; *York v. Nash*, 42 Or. 321, 71 Pac. 59. The case of *Mendenhall v. Harrisburg Water Co.*, 27 Or. 38, 39 Pac. 399, when rightfully understood, is not to the contrary. It was so explained in *Farmers' Bank v. Saling*, supra.

2. No evidence was admitted on the trial to show that the highway in question had been regularly laid out and established by the public authorities, but plaintiff was permitted to give evidence tending to show that it had been used and traveled by the public as a highway for more than 10 years prior to the time of plaintiff's injury, and that it had been recognized as such by the county authorities. The court instructed the jury that if the road had been traveled, used, improved, and worked by the public as a county road for a period of 10 years and more prior to the accident, it was, for the purpose of this action, a legal county road. There was no error in the admission of this testimony, or in so instructing the jury. In this state a highway may be established by adverse user, and, "where the length of time of such use by the public has been greater than the period prescribed by the statute of limitations for the recovery of real property, that will be regarded as sufficient evidence of the existence of a highway independently of any supposed dedication." *Douglas County Road Co. v. Abraham*, 5 Or. 318. To the same effect, *Bayard v. Standard Oil Co.*, 38 Or. 438, 63 Pac. 614.

3. Objection was made to the admission of testimony that the road and bridge in question for more than 10 years had been kept in repair by the road supervisor under the direction of the county court without showing an order of the court authorizing or directing him to do so or that no record of such authority had been made. But we

think the evidence was competent. The road supervisor is an officer of the county appointed by the court (Laws 1903, p. 282, § 68), and it is his duty to open or cause to be opened all county roads in his district and keep the same in good repair. For that purpose he is authorized to purchase, with any available funds on his hands, timber, plank, or other necessary material. Laws 1903, p. 271, § 28. In so acting he is the agent or representative of the county (*McCalla v. Multnomah Co.*, 3 Or. 424), and it is not necessary to show a formal order of the court authorizing or instructing him as to when or how he shall perform his duty, or that no such order was entered of record. If a highway is opened and kept in repair by the proper county authorities, it is evidence tending to show that it is a county road, and it is not incumbent on one who is injured by the negligence of such authorities to show that the work was authorized by some formal order of the county authorities that it was done by or under their direction.

4. It appears that the bridge in question, which was about 16 feet wide, had been replanked or "half-soled" for about 10 feet in the center thereof a short time before the accident to plaintiff. The defendant requested the court to instruct the jury that, as plaintiff failed to show that the parties in charge of the buggy which he met on the bridge refused to give him half the road, it must be presumed that they did so, and as a consequence that he was guilty of contributory negligence in guiding his horse off of the replanking and into the hole in the bridge. But plaintiff had a right to assume, in the absence of knowledge to the contrary, that the bridge was safe for travel its full width, and could not be charged with contributory negligence in going off of the half-soled portion thereof, whether he was compelled to do so or not. Where a county constructs or maintains a bridge for use by the public, a traveler has a right to assume, in absence of information to the contrary, that he may safely travel over any portion of such bridge and he is not guilty of contributory negligence in doing so.

5. The defense excepted to the following language in the court's charge to the jury: "In this case you cannot find for over \$2,000 in damages, and the compensation you are to give is for whatever bodily injury you say he has suffered, you find that he has suffered, if he has suffered any, or is unable to perform any work as a mail contractor or any work whatever, whatever lessened capacity for work he has, if any. Your verdict should be for such sum as in your judgment would compensate him for the injury and suffering he has sustained, if you find he is entitled to compensation at all. If you find he is entitled to compensation at all for his reduced capacity for work and his disablement, if you find he is disabled, or incapacitated for labor in any degree whatever you find he is

incapacitated, you will fix that in the measure of damages." The objection is that the language excepted to is unintelligible, and it cannot be determined therefrom whether the court intended to confine the recovery of damages to the physical suffering of the plaintiff, or whether it intended to allow the jury to include damages for his mental suffering. But it is only a part of the instructions on the measure of damages. The remainder of the charge on that subject is as follows: "There is no exact measure for bodily pain and suffering in these matters. You cannot say so much pain is worth so many dollars, and such another amount of pain is worth so much more. You cannot estimate it with the accuracy that you could sum up an account. But it is left, to a very great extent, to the sound discretion of the jury, under the law. There is nothing to be given here on account of sympathy you may feel for this man. Whenever you begin to consider a verdict on the ground of sympathy, it is your duty to put your hands in your own pockets and contribute whatever amount you feel sympathy ought, and not to take it from the pockets of the citizens of Marion county. But whatever is fair compensation, if you think he has shown the right to recover at all, whatever is fair and just compensation inside of \$2,000, you should give him; on one hand not wanting to give him any less than fair compensation, and on the other hand without any desire to shovel money out on the ground of sympathy, but just what justice and fairness would compensate him for whatever injury he has sustained at this place, if he has sustained any." When taken as a whole, the instruction, we think, clearly stated the law, and the jury could not have been misled thereby. It confined the recovery to compensation for the physical injury plaintiff sustained.

Judgment affirmed.

STATE ex rel. PORTER v. RITCHIE, Judge.
(Supreme Court of Utah. June 25, 1907. On Rehearing, July 12, 1907.)

1. JUSTICES OF THE PEACE—PROCEDURE—NEW TRIAL.

Where the right to grant new trials is conferred upon justices of the peace, the same principles govern the extent and exercise of the jurisdiction as govern courts of record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 369-371.]

2. SAME—APPEAL—TIME FOR TAKING—EFFECT OF MOTION FOR NEW TRIAL.

Rev. St. 1898, § 3744, provides that an appeal may be taken from the judgment of a justice of the peace at any time within 30 days after the rendition of judgment. Section 3742 provides that a new trial may be granted by the justice on motion made within 10 days after the entry of judgment. Const. art. 8, § 1 grants appeals only from final judgments of the justice of the peace. *Held*, that the filing of a motion for a new trial suspends the judgment, and an appeal cannot be taken until the overruling of the motion.¹

¹ *Watson v. Mayberry*, 49 Pac. 479, 15 Utah, 265.

3. SAME—NEW TRIAL—TIME FOR DECISION ON MOTION.

Under Rev. St. 1898, § 3742, providing that a new trial may be granted by a justice of the peace on motion made within 10 days after the entry of judgment, no time is fixed within which the motion must be decided.

4. STATUTES—REVISION—SETTING FORTH PROVISIONS AS ALTERED—CONSTRUCTION.

Where, in a revision of the statutes, the phraseology of a section is changed, the obvious effect of which is to give it a different meaning, the courts cannot give the old meaning to the new section.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 216, 312.]

On Application for Rehearing.

5. COSTS—ON APPEAL—DISCRETION OF COURT—MANDAMUS.

The awarding of costs in certiorari and mandamus proceedings rests in the discretion of the court.²

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, §§ 20-25.]

6. SAME.

Where the question presented in a mandamus proceeding in the appellate court, to compel the district court to reinstate an appeal from a justice's court, dismissed as not taken in time, was the jurisdiction of the district court to hear the appeal on the merits, costs should not be awarded against the real party in interest, who had moved in the district court to dismiss the appeal only as a suggestion that the court did not have jurisdiction, and who did not appear in the mandamus proceedings against the judge of the district court, who opposed merely to settle the law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, §§ 20-25.]

Mandamus by the state, on the relation of Don Porter, against Morris L. Ritchie, as judge of the district court, and another. Writ granted.

C. S. Price, for petitioner. McGurrian & Gustin, for defendant.

FRICK, J. This is an original application to this court for a writ of mandate against one of the judges of the district court of Salt Lake county. The application is based upon substantially the following proceedings: On December 7, 1905, one Mae Houghton, as plaintiff, filed her complaint in the justice court in and for Salt Lake county against Don Porter, praying judgment for \$41.86. Porter appeared and filed a general denial as a defense to the action. On January 8, 1906, the justice entered judgment, after a trial, against Porter, for the amount prayed for, with costs. On January 17, 1906, and within the time allowed by section 3742, Rev. St. 1898, and upon the grounds therein provided, Porter served the plaintiff, and filed with the justice, a motion for a new trial, supported by affidavit, as required by section 3743. This motion remained pending until September 27, 1906, when the plaintiff in said action caused a notice to be served on said Porter notifying him that said motion for a new trial would be heard by the justice on the 1st day of October following. On

that day the motion was heard by the justice and overruled. On the 10th day of October, 1906, Porter served the plaintiff in that action and filed with the justice a notice of appeal, and thereafter, on the 12th day of October, 1906, duly filed the necessary undertaking on appeal, as required by law, and appealed said cause to the district court of Salt Lake county. The justice thereafter in due time transmitted the papers in said case to the clerk of said district court, and the cause was duly docketed in said court and the fees therefor paid as required by law. In other words, the appeal was regular in all respects, if taken in time. On January 31, 1907, the plaintiff in said action served and filed a motion to dismiss said appeal upon the sole ground that it had not been taken within the time required by the laws of this state relating to appeals from justices' courts. Upon the hearing of said motion the respondent in this proceeding, as judge of said district court, sustained the same and dismissed said appeal, and, upon application to reinstate the same and to proceed to a hearing upon the merits, refused, and this application is made to require him to do so. The questions presented for decision are: (1) Was said appeal taken within the time required by the laws of this state governing appeals from justice courts to the district courts? And (2) was the motion for a new trial passed on within the time the law authorized the justice to do so?

The time within which an appeal must be taken from judgments of justices of the peace is stated in section 3744 to be "at any time within 30 days after the rendition of judgment." If this section stood alone, or if the part above quoted is controlling in all cases, regardless of any other provision in other sections relating to the trial of and proceedings before justices of the peace, then it necessarily follows that the appeal in this case, not having been taken within the time fixed by said section, was not taken in time, and therefore cannot be sustained. In view, however, of other sections relating to the subject-matter, this conclusion does not necessarily follow. Section 3742 reads as follows: "A new trial may be granted by the justice on motion made within ten days after the entry of judgment, for the following causes." Then follow the causes for which a new trial may be granted by the justice. This section, in another form, is first found in the Compiled Laws of 1876 as section 1802. The wording and punctuation, as there enacted, are as follows: "A new trial may be granted by the justice, on motion, within ten days after the entry of judgment, for any of the following causes." This wording and punctuation were carried into the Compiled Laws of 1888, and constituted section 3655 of that compilation. In 1898, however, when the Revised Statutes were adopted, the wording and punctuation were changed as they are now in section 3742, above quoted. During all of

² O. S. L. Ry. Co. v. District Court, 85 Pac. 360, 30 Utah, 571; Hoffman v. Lewis (Utah) 87 Pac. 167; State v. Morse (Utah) 87 Pac. 706.

the time, however, since 1876, the language respecting the time within which an appeal must be taken is the same as quoted above. The language respecting the time within which appeals must be taken was thus adopted without modification into the revision of 1898, but not so with respect to the granting of new trials by justices of the peace, as clearly appears from the foregoing quotations. In this connection it should not be overlooked that justice courts of this state are constitutional courts, and the right to an appeal from final judgments of such courts is expressly provided by the Constitution (article 8, § 9), "with such limitations and restrictions as shall be provided by law." The right to an appeal, however, is a constitutional right. In the same article and section of the Constitution the right to an appeal from all final judgments of the district courts to this court is also given, and the time within which such appeals must be taken is fixed by section 3301 in the following language: "An appeal may be taken within six months from the entry of judgment or order appealed from." The time limit in which an appeal must thus be taken from the judgment of the district court is six months from the entry of judgment, and from a justice's judgment 30 days after the rendition of the judgment. Since we have no such thing as a judgment without a record in this state, all judgments, to be of any effect whatever, must be in writing, and hence there can be no essential difference between the "entry" and "rendition" of a judgment. Moreover, by section 3726, it is provided that, when the case is tried by a justice, he must enter judgment at the conclusion of the trial or within two days thereafter. In section 3757 the justice is required to enter all motions and judgments in his docket, and by section 3758 he is required to enter all matters that are required to be entered as of the time when they occur.

The foregoing matters have thus been specifically set forth for the reason that the relator contends that the time within which an appeal is required to be taken from a justice's judgment is within 30 days after the motion for a new trial has been overruled by him, for the reason, as we understand the relator, that the Constitution grants appeals only from final judgments, and that a judgment which is subject to a motion for a new trial is suspended, and hence not a final judgment subject to appeal, and becomes final only upon the overruling of the motion for a new trial. In support of his contention he cites numerous authorities to the effect that a motion for a new trial, when the right to make one is given, suspends the judgment, and the time within which an appeal must be taken begins to run from the time the motion is overruled. This, it must be conceded, is the general rule, and is the one adopted by this court with regard to the time within which appeals must be taken from judgments of the district courts, notwithstanding the language

contained in section 3301, which requires it to be done within six months from the entry of judgment. The reasons for the rule are discussed in the case of *Watson v. Mayberry*, 15 Utah, 265, 49 Pac. 479, and they are well supported by the following authorities: *Smelting Company v. Billings*, 150 U. S. 31, 14 Sup. Ct. 4, 37 L. Ed. 986; *Voorhees v. Mfg. Co.*, 151 U. S. 135, 14 Sup. Ct. 205, 38 L. Ed. 101; *Railroad Co. v. Holmes*, 155 U. S. 137, 15 Sup. Ct. 28, 39 L. Ed. 99; *Kingman v. Western Mfg. Co.*, 170 U. S. 675, 18 Sup. Ct. 786, 42 L. Ed. 1192; 2 *Thompson, Trials*, § 2730; *Hilliard on New Trials*, 59; *State v. Chapman*, 76 Pac. 525, 35 Wash. 64; *Louisville, etc., v. Commonwealth*, 71 Ky. 179; *Reynolds v. Horine*, 13 B. Mon. (Ky.) 234. In 1 *Spelling on New Trials*, § 28, in speaking of new trials in justice courts, the author says: "In several states are found statutes providing for a new trial in justices' courts. These present nothing peculiar or exceptional. The same principles govern the extent and exercise of the jurisdiction as govern courts of record."

The right to grant new trials being expressly conferred upon justices of the peace by section 3742, the legal effect of a motion for a new trial, if filed within the time allowed by the statute giving the right to file it, must, in the absence of any express provision to the contrary, be held to be the same in justices' courts as in the district courts. This, we think, is likewise the evident purpose and meaning of section 3771, Rev. St. 1898, where the provisions of the Code in their nature applicable are made applicable to the proceedings in justices' courts. The power to vacate judgments and to grant a new trial is certainly conferred on justices of the peace, and in the exercise of that power, to the extent it is given, it cannot, in legal contemplation, be different from the exercise of a similar power by the district courts. If, then, the filing of a motion for a new trial in the district court has the legal effect of suspending its judgment, and thus preventing it from being a final judgment, under the Constitution, for the purposes of an appeal, as held in *Watson v. Mayberry*, supra, why is not the legal effect precisely the same with regard to judgments of justices' courts? Certainly the reasons are the same, which are that, the court having power under the motion to set aside the judgment and to grant a new trial, therefore the judgment cannot be final until the overruling of the motion, which settles the contentions of the parties and makes the judgment final; and, as the Constitution limits the right to an appeal from final judgments only, the right cannot exist, and therefore cannot be exercised, until the judgment is, in contemplation of law, a final judgment.

The respondent, however, contends that the justice was required to pass on the motion for a new trial, and to grant or refuse it, within 10 days after the entry of the judg-

ment in this case. By reference to the dates set forth in the statement of facts it will be seen that this was not done. The second question, therefore, arises, which is: Is the time within which the justice must pass upon the motion limited by section 3742? It must be granted that, as the section was originally worded and punctuated, expressly in view of the existing time limit within which to appeal, the contention has great force. The original phraseology of the section has, however, been changed, and with it the original punctuation, to make it conform to the changed phraseology. This change, however, cannot be held to be one where a section is rewritten by revisers for the sake of brevity or condensation, with the view of retaining and making the original meaning clearer; but the change was manifestly made for the purpose of preventing a misconstruction of the meaning of the statute, and to so frame it that only one meaning was possible in view of the language used. This purpose is made clear, we think, from a comparison and analysis of the original and present wording and punctuation of the two sections. As it originally stood it read and was punctuated as follows: "A new trial may be granted by the justice, on motion, within ten days after the entry of judgment." What could the justice do, under the wording and punctuation of this section? He could grant a new trial. How? On motion. When? Within ten days after the entry of the judgment. In this section the phrase "within ten days," etc., clearly relates back to and modifies the phrase "a new trial may be granted"; that is, the time limit can only refer to the granting of a new trial. It cannot reasonably be made to refer to anything else. It cannot refer to the phrase "on motion," because this phrase does no more than point out the means by which the power to grant is set in motion. The phrase "on motion" might just as well be placed in parenthesis in the original section, for that is its grammatical effect, in view that it is set off by commas. It was a reasonable contention, therefore, under the old wording and punctuation, that the motion for a new trial would have to be made and passed on within 10 days from the entry of judgment. Of course, this construction would lead to some incongruity, in that no time limit is given in which a motion was to be made, except the implied one that it must be made at least before it had to be passed on. The succeeding section, however, provides for counter affidavits, if filed one day previous to the hearing on the motion. Taking all these provisions together, it left the whole matter in a somewhat confused state. This evidently was intended to be corrected when the section was amended and adopted in 1898 as section 3742. That section now reads and is punctuated as follows: "A new trial may be granted by the justice on motion made within ten days after the entry of judgment." It will be observed that the two

commas which separated the phrase "on motion" are omitted, while after said phrase the word "made" is inserted. The word "made" here clearly refers, and can only refer, to the phrase "on motion"; that is, on motion being made, etc. The word "being," or its equivalent, "which is," is implied before the word "made." Under the present wording of the statute, the phrase "within ten days" no longer can be carried back to the phrase "a new trial may be granted," but it now qualifies the phrase "on motion made"; that is, if a motion be made within 10 days after entry of judgment, the justice may grant a new trial. It certainly will not do to say that the phrase "within ten days," etc., as written in the present section, refers, or under any rule of grammatical construction can reasonably be made to refer, back to "a new trial may be granted," so as to make it mean that a new trial may be granted within 10 days after the entry of judgment on motion made for that purpose. To so construe the language of the section would distort the regular and ordinary meaning of the words, in view of their position, and would change the manifest intention of the author who placed them as they stand.

We are not unmindful of the salutary rule that it is our duty to harmonize conflicting provisions or sections, if possible, and, to that end, to expand or restrict the natural or ordinary meaning of words to make them speak the evident intention of the author or authors. This rule, however, does not permit us to go to the extent of changing the entire meaning of a section or provision to bring about harmony. The first duty of the court is to give all words and phrases their natural, obvious, and ordinary meaning, and the right to expand or restrict them is permissible only when, in giving the ordinary and natural meaning, the result would lead to absurdity, or to a partial or total repeal of a provision or section. If the natural and obvious meaning can be retained, and all conflicting provisions can be harmonized and made effective, by other reasonable rules and principles of construction, then the latter method will be adopted, as it should be. There are such other reasonable means open in this case. The right to an appeal in this state from final judgments of justices' courts is a constitutional right. The means and the limits of its exercise only are left to legislative power. The right to make a motion for a new trial is conferred upon a litigant, and the justice is given the power to grant it. As we read the statute, no limit is fixed within which the motion must be decided, although one is fixed within which it must be made. Under the rules of procedure either party may bring the motion on for hearing at any time, and the justice certainly could, after a reasonable time, be compelled to act upon it. The only provision, therefore, that stands in the way of harmonizing all of the provisions pertaining to new trials

and appeals from justices' courts, is the one that an appeal must be taken within 30 days after the rendition of the judgment.

We have already pointed out that this court has held, as other courts have, that the making of a motion for a new trial within the proper time suspends the judgment, and prevents its finality for the purpose of an appeal. If this be so, then the judgment in this case was not a final judgment, within the constitutional meaning, while the motion for a new trial was pending, and hence not appealable. The right to an appeal, then, did not exist, and could not be exercised, until the judgment was made final by the overruling of the motion for a new trial, the pendency of which prevented it from being so. It is no answer to say that a party may appeal, notwithstanding the motion remains undisposed of. The right to make the motion is given. The purpose thereof must be to give the justice an opportunity to review his findings respecting the sufficiency of the evidence, or, in case of accident or surprise or newly discovered evidence, to grant a new trial upon those grounds. The motion was not intended as a mere idle ceremony, which it would be if an appeal must be taken while it is pending or before a ruling thereon. Jurisdiction, being once conferred, is not to be destroyed, unless by some positive provision or by some unavoidable implication of law. If it be held, therefore, that the time for an appeal dates from the time the judgment in fact became final by the overruling of the motion for a new trial, which is in accordance with the general rule, then all the seeming conflicting provisions of the different sections are harmonized, and no violence is committed by the construction above adopted to any of them. If, however, we hold that the time for an appeal from judgments of the district courts does not run from the entry of judgment, when such is the language of the statute, but that it does so from justices' judgments, under precisely the same conditions and language, so far as its effect is concerned, then we must ignore either one or the other provision applicable to the same subject-matter, viz., the constitutional provision of appeals from final judgments. It is manifest that a judgment cannot be final so long as it is within the power of the court to set it aside upon a pending motion. It is equally obvious that the mere grade of a court cannot affect this principle. Of course, all this depends on whether the motion for a new trial must be made and passed upon within 10 days from the entry of the judgment. Upon this point we have already pointed out the distinction between section 3742 as changed in 1898 and as it was before that time.

In 1898 section 3657, Comp. Laws 1883, was also substituted by section 3744, which gives an enlarged right to an appeal in a certain class of cases. It might just as well

be contended that the meaning of section 3744 is the same as the meaning of section 3657, as to say that section 3742 means the same as did the old section 3655. The phraseology of section 3742 being changed, it must be assumed that the meaning was intended to be changed. The change is too radical, according to the rules applied to ascertain the ordinary meaning of words, to admit of serious doubt. Where such is the case, the courts have no right to force into the new phraseology the old meaning. 2 Lewis' *Suth. Stat. Con.* § 401; *Collins v. Millen*, 57 Ohio St. 289-296, 48 N. E. 1097. When the change was made in 1898, the Constitution had changed the right to appeal to this court with regard to the great majority of the cases tried in justices' courts. Nearly all the cases became final on appeal to the district courts after the adoption of the Constitution in 1896; but the old provision still stood—that a justice must decide a case and render judgment within two days after trial. It is only fair to assume that the Legislature thought that, while that short space of time might be sufficient in most cases, there might be some which required more time for consideration; hence it made the time within which a new trial might be granted without express limitation, leaving it to the parties to call it up for hearing, and give the justice a reasonable time, at least, in which to decide, the same as in the district courts. If this was not the intention, then it would have been an easy matter for the Legislature to so frame the section as to limit both the time of filing the motion and the time in which it should be passed on. The first was provided for. The latter was omitted, and we are not authorized to make it by a forced construction, for the sole reason that a time limit is fixed in another section with regard to some other matter connected with the first, but which has been held does not under similar conditions apply to judgments of other courts.

We are cited to cases from other courts which it is asserted are decisive of the question. We will now briefly review these cases. *Scott v. Meyer*, 3 S. W. 833, 49 Ark. 17, is a case from the state of Arkansas, where it was held that the time limit for an appeal in that state is absolute, and that the pendency of a motion for a new trial does not extend the time in which to appeal. The decision is very brief, and gives no reasons for the conclusion reached. It is contrary, however, to nearly all, if not all, the authorities, in holding that the pendency of a motion for a new trial, if filed under a statutory right and within time, does not suspend a judgment for the purposes of an appeal. See authorities first above cited. The *Montana* case (*State v. Votaw*, 16 Mont. 308, 40 Pac. 597), does not reach the question involved in this case. That case decides that the notice of intention to move is not a motion for a new trial, and that a new trial granted by a jus-

tice of the peace upon a motion filed after the time in which the statute required it to be done was of no force or effect, and that the original judgment was not vacated thereby. Were such a case presented here, we should not hesitate to follow that decision. *Kerner v. Petigo*, 25 Kan. 632, is a case where it is held that the justice exceeded his power in granting a new trial in a case tried before him, for the reason that the statutes of Kansas permitted him to grant new trials only in cases tried to a jury. Moreover, the time within which a new trial could be granted, in any event, was absolutely limited by the Kansas statute, and the justice granted a new trial after the limit had passed. The case of *Vogel v. Lawrenceburgh Tob. Co.*, 49 Ind. 218, is like the Kansas case, in that the justice acted after the time limit imposed by the Indiana statute had expired. This was also the precise point decided in the case of *Derby v. Heath*, 59 Ohio St. 54, 51 N. E. 547, and *Burroughs v. Taylor*, 90 Va. 55, 17 S. E. 745. The citation found in 24 Cyc. 586, cited by counsel, contains nothing to the contrary.

The foregoing are all the cases cited, and we have found no others. In all those cases, therefore, we have an express statutory limitation within which the justice must act, and if he fails to do so within that limit the power to act is wanting. If this had been made so by express statute in this state, there would be no difficulty; but we are asked to so hold by implication merely. We should have less hesitancy in so holding, were it not for the fact that this court has held—and which holding is clearly right, both upon principle and authority—that the time limit for appeals made in almost the precise language, certainly in the same sense, did not apply, where a motion for a new trial was pending, when applied to the district courts. This has become the settled practice in this state. *Stoll v. Daly Mining Company*, 19 Utah, 280, 57 Pac. 295. If this is good law when applied to appeals from district courts, it should be the same when applied to justices' courts.

We might add, in conclusion, that the question here decided has no longer any practical value or effect, apart from its effect in this case, for the reason that the Legislature at its last session fixed the time absolute in which appeals must be taken from justices' courts. This, however, is no reason why we should not declare the law as in our judgment it should be declared.

A peremptory writ of mandate is granted, requiring the respondent to vacate the judgment dismissing the appeal and to reinstate the case, and to proceed therewith in accordance with law.

McCARTY, C. J., and STRAUP, J., concur.

On Rehearing.

FRICK, J. An application for a rehearing is made in this case, asking this court to

modify the judgment heretofore rendered, so as to include costs in favor of the petitioner and against the respondent, Mae Houghton. While in some cases the courts have awarded costs in certiorari and mandamus proceedings to the prevailing party, the same as in all other cases, we think the better rule, in the absence of a special statute, is to award or withhold costs as best comports with a sound judicial discretion. *Merrill on Mandamus*, § 310; *High on Extra. Rem.* (3d Ed.) § 518. This has also been the prevailing rule in this court. *O. S. L. Ry. Co. v. District Court*, 85 Pac. 360, 30 Utah, 371; *Hoffman v. Lewis* (Utah) 87 Pac. 167; *State v. Morse* (Utah) 87 Pac. 705.

The petitioner, however, insists that in this case the costs should be taxed against the real party in interest, and asserts that the real party in interest was made a party to this proceeding, and hence the costs should be taxed against her. This sometimes is done, and properly so, as appears from the case of *Whitmore v. Harris*, 10 Utah 259, 37 Pac. 464. In that case, however, the real party in interest resisted the application, while in the case at bar no one appeared but the judge. Costs are sometimes taxed against the real party in interest, although not a nominal party to the proceedings. *People v. Bacon*, 18 Mich. 247. More frequently, however, costs are not allowed to either party. *State v. Judge*, 12 Iowa, 237, *Tennant v. Crocker*, 85 Mich. 328-340, 48 N. W. 577, and the cases first above cited from this court. Applying the general rule to this case, we do not think it is a proper case in which to tax costs against the real party in interest, for the following reasons:

The question presented to the district court was one of jurisdiction—power to hear the appeal on the merits. If the appeal was not taken in time, the district court was without power to hear and determine the questions involved. The district court, therefore, might have raised the question on its own motion, and the fact that the respondent, Mae Houghton, made the motion to dismiss the appeal, was no more than a suggestion that the court was without jurisdiction to proceed to the merits of the case. The court concurred in this view and entered judgment accordingly. Unfortunately the law did not permit the petitioner to appeal from that judgment, and hence, in order to settle the legal questions involved, he was compelled to resort to a direct proceeding in this court against the judge. To have commenced the proceeding against the respondent, Houghton, would have been useless; nor was she a necessary party to the proceeding in this court. True, she might have filed an answer and have resisted the application, and possibly have put the petitioner to some additional trouble and expense. This she did not do, however; but the judge appeared alone, and he did so for the sole purpose of settling the law. If the

respondent, Houghton, had come into this court and confessed the application of the petitioner, the result would have been the same. Her admission could not have conferred jurisdiction on the district court, nor could it have relieved this court from determining that question. Jurisdiction of the subject-matter cannot be conferred in that way. The dilemma, therefore, applied to the petitioner alone. It was his misfortune to be placed in the legal attitude of either having to pay a judgment rendered against him by a competent court in the original action, or come to this court in a direct proceeding to determine the question whether or not he should be given another trial on the merits. While he is innocent, the respondent, Houghton, is equally without fault; and the only obstacle in his way, as the district judge viewed it, was the want of jurisdiction on his part to hear the appeal on the merits.

We do not think, therefore, that this is a proper case in which to impose the costs of this proceeding upon the respondent, Houghton. The application, therefore, ought to be, and accordingly is, denied.

MCCARTY, C. J., and STRAUP, J., concur.

NELSON v. KEITH-O'BRIEN CO. et al.

(Supreme Court of Utah. June 26, 1907.)

1. CORPORATIONS—RIGHT TO ASSESS STOCK.

The power of a corporation to levy an assessment on full-paid capital stock must be derived from the statute, the articles of incorporation, or some other express promise to pay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 654.]

2. SAME—ASSESSMENT OF PAID-UP STOCK.

The original articles of incorporation of a company granted the directors power for the purposes of paying expenses, conducting the business, or paying the debts of the corporation to levy assessments upon the outstanding capital stock as provided by law, and declared the capital stock for that purpose assessable. It was also provided that the articles might be amended in any respect at any stockholders' meeting called for that purpose after due notice; a majority of the outstanding stock represented at the meeting voting for the amendment. Rev. St. 1898, § 331, allows the assessment of full-paid capital stock to the extent and in the manner expressly provided in the articles of incorporation. *Held*, that a majority of the outstanding stock had power to amend the articles, so as to authorize an assessment on the full-paid capital stock when the corporate indebtedness exceeded 10 per cent. of the outstanding stock, notwithstanding Rev. St. 1898, § 338, providing that articles of incorporation might be amended by two-thirds of the outstanding capital stock, but declaring that the liability of the holders of full-paid capital stock for assessments, etc., should not be changed without the consent of "all" the stockholders.

3. SAME—TREASURY STOCK.

The articles of incorporation of a company provided that 500 shares of its capital stock should remain in the treasury, and should be disposed of at such time and for such price as

the directors should determine. The financial condition of the company was such that, if the stock were sold, no substantial sum would be realized for it. *Held*, that the directors were not required to sell the treasury stock before levying an assessment on the outstanding stock to pay the corporate debts.¹

Appeal from District Court, Third District; M. L. Ritchie, Judge.

Action by H. A. Nelson against the Keith-O'Brien Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

M. P. Braffett and King, Burton & King, for appellant. Dickson, Ellis, Ellis & Schouder and Howat & Macmillan, for respondents.

STRAUP, J. This action was brought by plaintiff against the Keith-O'Brien Company, a corporation engaged in general mercantile business and organized under the laws of the state of Utah, and against its directors and its secretary, for an alleged conversion of certain shares of the capital stock of the corporation owned by the plaintiff and his assignors. Judgment was in favor of the defendants, and plaintiff appeals.

The full-paid capital stock of the plaintiff and his assignors was sold by the defendants for nonpayment of assessments levied against it. The only question presented is whether the board of directors had authority to assess the stock. Section 331, Rev. St. 1898, provides: "The property of the corporation and the unpaid stock shall be liable for the debts of the corporation; but the individual property of any holder of full-paid capital stock of any corporation organized since March eighth, eighteen hundred and ninety-four, or that hereafter may be organized, under the laws of this state, except as otherwise expressly provided in this title, shall not be liable for the corporate obligations, nor shall assessments be levied on such stock for any purpose whatever, except to such extent and in such manner as may be expressly provided in the articles of incorporation." Section 338 provides: "The articles of incorporation of any corporation now existing, or that may hereafter be organized under the laws of this state, may be amended in any respect conformable to the provisions of this chapter by a vote representing at least two-thirds of the outstanding capital stock thereof at a stockholders' meeting called for that purpose, as hereinafter prescribed; provided, that the original purpose of the corporation shall not be altered, nor shall the capital stock be diminished to an amount less than fifty per cent. in excess of the indebtedness of the corporation; and provided further, that the liability of the holder of full-paid capital stock for assessments or for the indebtedness of the corporation shall not be changed without the consent of all the stockholders." Section 354 provides: "The full-paid capital stock of any corporation organized since March

¹ Gary v. Mining Co., 9 Utah, 464, 35 Pac. 494.

eighth, eighteen hundred and ninety-four, or that may hereafter be organized under the laws of this state, shall not be assessable for any purpose whatever, except to such extent and in such manner as may be expressly provided in the articles of incorporation; provided, that if such stock is made assessable and the manner of levying the assessment is not provided for, it shall be levied in the manner and form hereinafter prescribed."

The defendant company was organized December 2, 1902. So far as material, the articles of incorporation provided: That the capital stock should be \$250,000, divided into 2,500 shares, of the par value of \$100 per share, and stated the names of the incorporators and the amount of stock subscribed by each, aggregating 2,000 shares, of which the plaintiff and his assignors subscribed 222½ shares. They further provided that: "The remainder of said shares of said capital stock, to wit: 500 shares thereof, shall be and remain in the treasury of said corporation, unissued, and shall be disposed of at such time and for such price as the board of directors of said corporation may determine, for the purpose of carrying on the business of said corporation, or in the payment of debts, obligations or the purchase of property necessary or proper for the uses and purposes of said corporation, provided, however, the stockholders of record of said corporation shall have the first right to purchase said stock pro rata." Article 16 provides: "That the board of directors of said corporation shall have the power and authority, for the purposes of paying expenses, conducting the business, or paying the debts of said corporation, to levy and collect assessments upon the outstanding capital stock of said corporation in the manner and form and to the extent as is provided by law. For that purpose and to that end the capital stock of this corporation is hereby declared assessable." Article 19 provides: "That these articles of incorporation may be amended in any respect at any stockholders' meeting called for that purpose, specifying in the notice of such stockholders' meeting the nature of the amendments; a majority of the outstanding capital stock of said corporation represented at such meeting either personally or by proxy voting for such amendments."

In 1903 (Sess. Laws, p. 78, c. 94) the Legislature, among other sections, amended section 338, Rev. St. 1898, to read: "The articles of incorporation of any corporation now existing or that may hereafter be organized under the laws of this state may be amended in any respect conformable to the laws of this state by a vote representing at least two-thirds of the outstanding capital stock thereof at a stockholders' meeting called for that purpose as hereinafter prescribed. Provided, that the original purpose of the corporation shall not be altered, nor shall the capital stock be diminished to an amount less than fifty per cent. in excess of the indebted-

ness of the corporation; and provided further, that the personal or individual liability of the holder of full-paid capital stock for assessments or for the indebtedness or obligations of the corporation shall not be changed without the consent of all the stockholders." Section 1, art. 12, of the Constitution of Utah, is: "Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended or repealed by the Legislature, and all corporations doing business in this state, may, as to such business, be regulated, limited or restrained by law."

On the 15th day of February, 1904, in pursuance of previous notice of a special meeting for that purpose, the stockholders of the defendant company representing 1,655 shares of the capital stock amended article 16 of the articles of incorporation to read: "That, whenever the said corporation is indebted to an amount exceeding 10 per cent. of the amount of the outstanding capital stock of said corporation, the board of directors shall have the power and authority, for the purpose of paying said indebtedness, to levy and collect an assessment upon the outstanding capital stock of said corporation in an amount sufficient to pay said indebtedness, but not to exceed 50 per cent. of the outstanding capital stock, and shall have the power and authority to levy and collect such other assessments upon the capital stock of said corporation as are authorized by statute; but only one assessment exceeding the amount authorized by statute shall be levied by the directors of said corporation. To the extent herein mentioned the capital stock of this corporation is hereby declared to be assessable." The amendment was adopted by 1,605 shares of the capital stock voting for it. Fifty shares voted against it. On March 8, 1904, the directors adopted the following resolution: "Resolved, that an assessment of 50 per cent., to wit, \$50 per share, be, and the same is hereby, levied upon all of the outstanding capital stock of the said Keith-O'Brien company, which shall be payable to E. G. Kidder, secretary of said company, at Room 100, David Keith Building, Salt Lake City, Utah, on or before the 2d day of May, 1904; and any shares of stock upon which said assessment shall not be paid on or before the 2d day of May, 1904, shall be delinquent, and shall be sold according to law on the 6th day of June, 1904, to pay the amount of said assessment and the costs of advertising and expenses of sale." Notices of the amending of the articles and of the levying of the assessment were properly given. The plaintiff and his assignors failed to pay the assessment, whereupon their stock was sold.

The appellant contends: (1) That the original articles of incorporation did not authorize the board to levy an assessment upon the outstanding capital stock fully paid, nor were any number of stockholders less than

the whole authorized to amend the articles with respect to levying and collecting assessments on such stock; (2) that the Legislature, under the reserved power of the Constitution, could not lawfully confer authority upon two-thirds of the stockholders, or any other number of stockholders less than the whole, to make amendments to the articles, so as to levy assessments on such capital stock, without the consent of the minority; and (3) that in all events such assessments could not lawfully be made until the treasury stock was first exhausted.

It undoubtedly is the law that the power of a corporation to levy an assessment on full-paid capital stock must be derived from the statute, or the articles of incorporation, or some other express promise to pay it. It may be assumed that, were it not for the provisions contained in articles 16 and 19 of the articles of incorporation, the original articles could not have been amended, under section 338, Rev. St. 1898, so as to authorize the levy of an assessment on full-paid capital stock without the consent of all the stockholders. But section 331, Rev. St., provides that assessments are not to be levied on full-paid stock for any purpose whatever, except to such extent and in such manner as may be expressly provided in the articles of incorporation. And it is the general rule that "a majority of the stockholders of a corporation clearly have the power to make any alterations or changes in the constitution of the corporation which are authorized by its charter, for this power is within the contract between the corporation and its stockholders." 3 Clark & Marshall's Private Corporations, § 630. "It is a principle of law," says Mr. Cook, in his work on Corporations (volume 1 [5th Ed.] § 241), "coeval with the existence of corporations having capital stock, that, unless the corporation charter or constitutional statute provides otherwise, a stockholder, the full par value of whose stock has been paid in, is not liable for and cannot be made to pay any amounts in addition thereto." The plaintiff and his assignors subscribed the articles of incorporation. The articles are their contract. What powers have they conferred upon the board of directors, or a majority of the stockholders, by the terms of their contract? Fairly construed, article 16 of their contract means that, for the purpose of paying expenses, conducting the business, and for paying the debts of the corporation, the board of directors are authorized to levy and collect assessments on the outstanding capital stock, and for that purpose and to that end such stock was made assessable. The extent of the assessment, and the manner and form of levying and collecting it, was stipulated to be as by law provided. Such stipulation undoubtedly was made with reference to the proviso of section 354, Rev. St. 1898, that if such stock (full-paid capital stock) is made assessable, and the manner of levying the as-

essment is not provided for (by the articles), "it shall be levied in the manner and form hereinafter provided." It will therefore be observed that the capital stock of the corporation was, for certain purposes and to some extent, made assessable. Such was the contract of agreement of the incorporators, and to which each subscriber agreed. Now, they further contracted and agreed among themselves that the articles might be amended in any respect, at any stockholders' meeting called for that purpose, by a majority of the outstanding capital stock voting for such amendments. By this stipulation the incorporators expressly authorized a majority of the stockholders to amend the articles. They had the undoubted right to make such an agreement. While this did not give the majority the right to alter or change the fundamental purpose or character of the corporation, or to substitute entirely different articles for the original, it nevertheless gave them the authority to make any reasonable and proper amendments germane to the things and subjects expressed in the articles, or in furtherance of carrying out the general plan and purpose of the corporation, and to promote the due administration of its affairs. As before observed, it may be conceded that, had the incorporators in their original articles declared that the full-paid capital stock should not be assessable for any purpose, the articles, by reason of section 338, Rev. St., could not thereafter have been amended, so as to make such stock assessable, without the consent of all the stockholders. Nevertheless, when the incorporators, by their articles of agreement, declared such stock assessable to some extent and for certain purposes, and then expressly conferred upon a majority of the stockholders the authority to amend the articles in any respect, they by their agreement consented to any reasonable and proper amendment which a majority may thereafter make with respect to levying an assessment on such stock. The amendment, made by more than two-thirds of the outstanding capital stock, was germane to the subject specified and expressed in article 16 of the original articles; and by virtue of the power conferred by the articles we are of the opinion, and so hold, that the majority of the outstanding capital stock had the right to make such amendment to the articles as was here made.

Having reached this conclusion, it is unnecessary to pass upon the questions whether the Legislature, by the amendment of 1903, conferred the power upon two-thirds of the stockholders to amend the articles so as to authorize the board of directors to levy the assessment in question against a dissenting minority, and whether the Legislature, under the reserved power of the Constitution, was authorized to make such an amendment, so far as affecting corporations existing at the time of the passage of the amendment.

The only other question remaining is: Was the assessment properly levied while the 500 shares of treasury stock remained in the treasury and unsold? Again looking at the contract of the incorporators, we find that these 500 shares should remain in the treasury, and should be disposed of at such time and for such price as the board of directors should determine. The articles nowhere provide that the treasury stock should first be exhausted before the levying of an assessment. On the contrary, the articles of incorporation expressly left the disposition of the treasury stock to the discretion of the board of directors. Furthermore, it is made to appear that nothing substantial could have been realized on a sale of the treasury stock at the time of the levying of the assessment. The corporation then owed an indebtedness of over \$153,000. The excess of assets, as stated by some of the witnesses, was about \$141,000, but estimated on invoices at cost price of goods and fixtures. Some of the witnesses valued the capital stock at \$20 to \$70 per share. However, there is ample testimony in the record showing that at the time of the levying of the assessment, owing to the weak and unfavorable financial condition of the corporation, its capital stock had no real market value, and that the treasury stock could not have been sold for any substantial price, and that if it had been sold nothing substantial would have been realized for it. Some of the witnesses even say that it "was impossible" to sell it; that the only possible way to continue the business of the corporation was to borrow money by the issuance of bonds or preferred stock, or to levy an assessment. By reason of the power conferred upon the board of directors to dispose of the treasury stock at their discretion, and by reason of the showing to warrant a finding that nothing substantial could have been realized on a sale of the treasury stock, it was not improper to levy an assessment before first exhausting the treasury stock. *Gary v. Mining Co.*, 9 Utah, 464, 85 Pac. 494.

We are of the opinion that the judgment of the court below should be affirmed; and it therefore is affirmed, with costs.

MCCARTY, C. J., and FRICK, J., concur.

PEOPLE ex rel. DICKSON, Atty. Gen., v.
RICE et al.

(Supreme Court of Colorado. July 1, 1907.)

1. TAXATION—INHERITANCE TAX—TRANSFER
SUBJECT TO TAX.

Under the revenue act (Laws 1902, p. 49, c. 3), imposing a tax on property passing by will or by the intestate laws of the state, where the sole heir of a testator contested the will because testator made him a less liberal allowance than the statute, and the executor paid him a sum in addition to his legacy in consideration of his withdrawing the contest, the sum paid the son was subject to the tax.

91 P.—3

2. SAME—INTEREST.

Laws 1902, p. 49, c. 3, imposing an inheritance tax, provides that the taxes shall be due at the death of decedent and payable with interest at the rate of 6 per cent. on the taxes until such time as they are paid; provided that, if the tax is paid within six months from the accruing thereof interest shall not be charged, and a discount allowed. *Held*, that, though a contest over a will was not determined until more than six months after testator's death, and though suits were brought against corporations in which testator was a stockholder, which suits, had they been successful, would have rendered the estate insolvent, so that during such litigation the taxes could not be determined, they were nevertheless payable on the estate passing under the will with 6 per cent. interest from testator's death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1724.]

En Banc. Error to El Paso County Court; Robert Kerr, Judge.

Proceedings by the people, on the relation of William H. Dickson, as Attorney General, for the collection of a transfer tax on the estate of Winfield S. Stratton, deceased. From the judgment fixing the tax, relator brings error. Reversed in part, and judgment directed.

William H. Dickson, Atty. Gen., and Horace Phelps, for plaintiff in error. David P. Strickler, J. G. McMurray, and Dines, Whitte & Dines, for defendant in error.

STEELE, J. Winfield S. Stratton departed this life at Colorado Springs on the 14th day of September, 1902. By his will he devised and bequeathed his entire estate to his executors in trust. The will was contested by I. Harry Stratton, son of the deceased. In consideration of his withdrawing the contest and consenting to the probate of the will, the executors paid to him, in addition to a legacy of \$50,000 the sum of \$300,000. On July 27, 1906, the county court of El Paso county found that the gross value of the estate of the deceased at the time of his death was \$6,307,166.86. Deductions amounting to the sum of \$981,890.69, on account of costs and expenses and claims paid by the executors, including the sum of \$350,000 paid I. Harry Stratton, were allowed. Tentative deductions amounting to the sum of \$375,275.67 were also allowed, and the court adjudged that the sum of \$4,980,000 was subject to the payment of inheritance tax. This item was ascertained by deducting from the amount of the gross value the sums mentioned and the further sum of \$20,000, made up of two items of \$10,000 each, allowed by law as exemption to each of two legatees. The court fixed the amount of the inheritance tax at the sum of \$284,062.33, together with interest thereon at the rate of 6 per cent. per annum from September 14, 1902, the date of the testator's death. Many errors and cross-errors were assigned, but all have been waived by stipulation of the parties except the error assigned by the state which relates to the deduction allowed by the court from the amount

fixed as the gross value of the estate of the sum of \$300,000, as part of the costs and expenses of administration, paid by the executors to I. Harry Stratton, and the cross-errors of the executors which relate to the allowance of interest on the amount of the inheritance tax from the date of the death of the testator. Neither the Attorney General nor counsel for the executors has discussed the assignment of error relating to the deduction on account of costs and expenses of the amount in excess of his legacy paid to I. Harry Stratton. Nevertheless, as the interests of the state are involved, we shall decide the question.

By section 21 of the revenue act (laws 1902, p. 49, c. 3) it is provided that: "All property * * * which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same * * * shall be and is subject to a tax at the rate hereinafter specified. * * * When the beneficial interests to any property or income therefrom shall pass to or for the use of any * * * child, * * * the rate of tax shall be two dollars on every hundred dollars of the clear market value of such property received by each person, and at and after the same rate for every less amount. Provided, that the sum of ten thousand dollars of any such estate shall not be subject to any such duty or taxes, and that only the amount in excess of ten thousand dollars shall be subject to the above duty or tax." The proviso has been construed by this court in the case *People v. Koenig* (Colo.) 85 Pac. 1129, and it is there held that the exemption of the statute refers to the separate estate received by each person, and not to the body of the estate of the decedent. I. Harry Stratton, as an heir, in fact the sole heir of W. S. Stratton, contested his father's will. If he succeeded in defeating the will, the entire estate of his father would descend to him. To settle the contest he was paid the sum of \$350,000, and the court allowed of this amount \$300,000 as costs and expenses of administration. The rule stated generally, is that only those substantially interested will be heard to contest the probate of a will. And it is usually because the will does not make as liberal provision for the heir as the statute does that contests are begun. So here the heir at law of Stratton contested the will because his father made a less liberal provision for him than the statute, and he, in effect, accepted the sum of \$350,000 in settlement of his claim as son and heir. The money was paid to him because he was the son of Stratton, and it makes no difference that he accepted less than the statute would give him. He took all he did take in excess of his legacy by virtue of his heirship, and whatever he took, whether under the will or otherwise, is subject to an inheritance tax.

By section 23 of the act referred to it is provided that: "All taxes imposed by this act, unless otherwise herein provided for,

shall be due and payable at the death of the decedent, and interest at the rate of 6 per cent. per annum shall be charged and collected thereon for such time as said taxes are not paid: Provided, that if said tax is paid within six months from the accruing thereof, interest shall not be charged or collected thereon, but a discount of 5 per cent. shall be allowed and deducted from said tax, and in all cases where the executors, administrators or trustees do not pay such tax within one year from the death of the decedent, they shall be required to give a bond in the form and to the effect prescribed in section twenty-two of this act for the payment of said tax, together with interest." The contest over the probate of the will was not determined until six months and more after the testator's death. During this period the rate of taxation could not be determined, because a different rate is fixed in cases where property is devised to trustees than in cases where the property is taken under the statutes of descents and distributions. Very many claims were filed against the estate proper, involving several hundreds of thousands of dollars, and suits were brought against companies in which the deceased was a large stockholder, involving the value of the stock of those companies; and it is stated in the brief, and not disputed, that, if the suits filed were successfully maintained, the estate would be hopelessly insolvent. Because of these conditions the executors insist that the interest fixed by the statute is not chargeable nor collectible, and they cite many authorities which sustain the position that where a penalty is imposed by law for failing to pay a tax, that if the tax is not ascertainable, or the person by whom the tax is to be paid is not certain, the penalty cannot be collected. Counsel for the defendants in error claim that the statute must be strictly construed in favor of the person taxed. This proposition has been sustained by this court, and it is held in *People v. Koenig*, supra, that the statute imposes a special tax and is to be construed strictly against the government and in favor of the taxpayer.

Counsel also contend that the interest imposed is a penalty, and the statute must therefore be strictly construed in favor of the party sought to be penalized. Also that the penalty cannot be enforced, because there was never an opportunity to pay the tax and thus avoid the penalty. Whether we construe the statute strictly or liberally, we reach the same result. The act, in plain and unambiguous terms, says the tax "shall be due and payable at the death of the decedent, and interest at the rate of 6 per cent. per annum for such time as said taxes are not paid shall be charged and collected." The Legislature knew that under our laws no estate where an inheritance tax is chargeable could be settled within one year from the death of the intestate or testator; and, if the courts are to be in any wise controlled by the intention of the

Legislature as expressed by the laws of the state considered together, they are bound to say that the Legislature intended to not exempt beneficiaries from the operation of this law because of pending litigation. It is not claimed that the language of this act is ambiguous or uncertain, but it is claimed that the charge of interest therein is a penalty imposed, and that under the circumstances disclosed by the record it is inequitable, unjust, and unlawful for the state to collect the interest.

Such matters are considered by the statutes of New York and Pennsylvania as entitling the beneficiaries of an estate to be relieved from paying interest. Section 4, c. 713, p. 922, of the laws of New York (session of 1887), provides: "All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and if the same are paid within eighteen months, no interest shall be charged and collected thereon, but if not so paid, interest at the rate of 10 per cent. per annum shall be charged and collected from the time said tax accrued." Section 5 of the same chapter of the New York laws provides that the penalty of 10 per cent. shall not be charged where, in cases of necessary litigation or other unavoidable cause of delay, the estate cannot be settled at the end of eighteen months from the date of the decedent's death, and in such cases only 6 per cent. shall be charged upon said tax, from the expiration of eighteen months until the cause of such delay is removed. In the case *In re Moore*, 90 Hun, 169, 35 N. Y. Supp. 783, these statutes are construed, and the court there held that, as it appeared that there had been unavoidable delay in the settlement of the estate, no penalty should be imposed for the delay, but that interest at the rate of 6 per cent. from the expiration of 18 months should be paid. The estate mentioned in the case cited in 90 Hun was involved in litigation for many years, yet the court required interest to be paid as part of the tax, as required by statute. A very similar case arose in Pennsylvania, where the statutes are substantially the same as those of New York. The statute was construed in the case *Miller Estate*, 182 Pa. 157, 37 Atl. 1000. The court held that, as there was unavoidable delay in the settlement of the estate, the penalty should not be imposed, but required interest from the expiration of one year from the death of the decedent at the rate fixed by statute, and this notwithstanding the fact that a very large portion of the estate did not come into the executor's hands until several months after the expiration of one year from the testator's death.

In New York and Pennsylvania a time is fixed within which the taxes may be paid without the addition of interest. They provide that after the time fixed a certain rate of interest shall be paid. They also provide that, if unavoidable delay is occasioned in the

settlement of the estate of a decedent, a lower rate of interest shall be charged. In both provisions are made for a discount if payment is made before the time fixed for the settlement of the estate. In New York the rate is 10 per cent. after 18 months, in Pennsylvania, 12 per cent. after 1 year, in both states the rate is reduced to 6 per cent. where there is unavoidable delay in the settlement of estates. Our statute provides that the tax shall be due and payable at the death of the decedent. It does not fix a time when the tax shall be paid and after which a penalty shall be paid as interest for failure to pay, but it requires that interest at the rate of 6 per cent. per annum shall be charged and collected for such time as the taxes are not paid. It imposes a penalty, probably, for failure to pay the tax within a year, but the penalty is not an additional charge in the way of interest, but a requirement that a bond shall be given to secure the payment of tax and interest. In New York and Pennsylvania the statute requires a higher rate of interest to be paid after default, and this interest at the higher rate is properly termed a penalty; and, although interest must be paid in these states whether there is or is not litigation, no suggestion is made in the decisions that we have cited that the interest that must in any event be paid is a penalty. The usual method of imposing a penalty in the revenue statutes is to fix a time at which the taxes become delinquent, after which a higher rate of interest is charged or a penalty by name imposed. Our statutes, in fact other sections of the revenue act, recognize the difference between a penalty as such and interest, and in several decisions of this court a distinction has been made between the interest and penalty mentioned in the revenue laws. *Charlton v. Kelly*, 24 Colo. 273, 50 Pac. 1042; *Pueblo Realty Co. v. Tate*, 32 Colo. 67, 75 Pac. 402. Even if we disregard the legislative use of the terms "interest" and "penalty," the interest fixed by the section under consideration cannot be regarded as a penalty, because it is no higher than the legal rate. *Sparks v. Lowndes County*, 93 Ga. 284, 25 S. E. 426.

Attention is directed to the proviso of the section, which declares that if the tax is paid within six months no interest shall be charged and that a discount of 5 per cent. shall be allowed. This, in our opinion, does not have the effect of rendering the interest charged a penalty. It is but the usual inducement held out to those interested in estates to make prompt payment of their taxes, and cannot be construed as fixing a time when the tax becomes delinquent, after which a penalty is imposed for nonpayment. The executors say that this statute imposes a hardship upon them and the trustees of the estate, because they could not pay the tax without becoming personally liable in the event of adverse decisions exhausting the funds in their hands, and that they could not determine until after the contest what rate should be paid. These

are matters which should have appealed to the Legislature; but the Legislature, having before them the laws of other states containing more liberal provisions with respect to such matters, did not make provisions for a rebate of interest under such conditions, and this department, therefore, cannot grant relief.

Under the authority of the New York and Pennsylvania cases we have cited holding that interest is properly chargeable and collectible, we hold that the county court properly charged interest upon the taxes from the date of the death of the testator, and that portion of the judgment is affirmed. The judgment is reversed as to that portion thereof which credits, on account of costs and expenses, the sum paid I. Harry Stratton, and the court is directed to render judgment in accordance with the views herein expressed.

GODDARD, J., not participating.

PEOPLE ex rel. COLORADO BAR ASS'N v. THOMAS.

(Supreme Court of Colorado. March 5, 1906.)

ATTORNEY AND CLIENT—DISBARMENT—FORMER ACQUITTAL ON CRIMINAL CHARGE.

An acquittal of an attorney on a criminal charge is not a bar to a proceeding for disbarment based on the same facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 71.]

En Banc. Original proceeding in disbarment by the people, on the relation of the Colorado Bar Association, against William J. Thomas. Relator demurs to the answer. Demurrer sustained.

L. F. Twitchell, for petitioner. Thomas Ward, Jr., A. M. Stevenson, and Milton Smith, for respondent.

GUNTER, J. The information herein charges respondent with the crime of embracery. The answer denies the allegations of the information, and sets up two affirmative defenses, each entitled "Further and Separate Answer." The one of these affirmative defenses alleges that respondent was proceeded against in a criminal action for the same crime as that charged in the information, embracery, and acquitted thereof. The other sets up a proceeding for contempt, and an acquittal thereof. A general demurrer presents the question of the sufficiency of these two defenses.

It is contended by counsel that the same principle obtains as to both defenses; that is, if the acquittal in the criminal proceeding is not a complete defense to this action for disbarment, then the acquittal in the action for contempt is likewise not a defense. That the acquittal upon the criminal charge is not a defense to a proceeding for disbarment, based upon the same facts, is stare decisis in this jurisdiction. *People v. Mead*, 29 Colo.

343, 68 Pac. 241; *People v. Weeber*, 26 Colo. 229, 57 Pac. 1079. Other authorities to the same effect are *In the Matter of an Attorney*, 86 N. Y. 563; *In re Wellcome*, 23 Mont. 213, 53 Pac. 47.

Demurrer sustained.

BOARD OF COM'RS OF LAS ANIMAS COUNTY v. PEOPLE ex rel. McPHERSON.

(Supreme Court of Colorado. Jan. 8, 1906.)

WRIT OF ERROR—DISMISSAL—ACADEMIC QUESTIONS.

The writ of error to a judgment granting mandamus commanding county commissioners to establish an election precinct at a certain place will be dismissed, such precinct having been established, of which the court will take judicial notice, so that there is no live question to be decided.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 8122.]

Department 3. Error to District Court, Las Animas County; Jesse M. Northcutt, Judge.

Mandamus by the people, on the relation of Frank McPherson, against the board of county commissioners of Las Animas county. Writ granted, and defendant brings error. Dismissed.

Everett Bell and A. P. Anderson, for plaintiff in error. Robert Bonyngue, for defendant in error.

PER CURIAM. A complaint was filed in the district court of Las Animas county, reciting that a petition was filed with the board of county commissioners of said county praying for the establishment of an election precinct at Primero in said county, but that the county commissioners had refused to act, and praying for a writ of mandamus commanding the commissioners to establish an election precinct at said Primero. A demurrer to the complaint was filed and was overruled, and judgment entered granting the writ. The board of commissioners took the case to the Court of Appeals by writ of error.

We shall take judicial notice of the fact that there has been a precinct established at Primero in said county. It is not material whether the precinct was established upon proper petition or by virtue of authority so to do under the statute. There being no live question for us to determine, the cause should be dismissed.

Dismissed.

GYRA v. WINDLER.

(Supreme Court of Colorado. July 1, 1907.)

EASEMENTS—PRESCRIPTION—RIGHT OF WAY.

Plaintiff refused to purchase a tract of land from defendant's brother-in-law unless defendant would give a right of way across his land for ingress and egress, which was given

by defendant by parol, and thereafter plaintiff used the way for over 20 years and made improvements in reliance on the permission. *Held*, that plaintiff was entitled to an injunction restraining defendant from obstructing the way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 24, 27, 28.]

Appeal from District Court, City and County of Denver; F. T. Johnson, Judge.

Suit by Henry Windler against Rudolph Gyra. From a decree in favor of plaintiff, defendant appeals. Reversed and remanded.

Theodore H. Thomas, for appellant. Whitford & May, for appellee.

BAILEY, J. In the year 1875, Detlef Moller made a homestead filing on the northeast quarter of section 24, township 3 south, of range 66 west. He built a house near the west line of the quarter section and about a quarter of a mile north of the south line of the quarter section. He also had a half section of railroad land and a timber claim. Mr. Thompson, the brother-in-law of Moller, settled upon the northwest quarter of section 24 in the spring of 1875. There was a county road running north and south along the west line of section 24. In order to reach this county road, Moller went in a westerly direction across Thompson's land; Thompson consenting to this arrangement for a while, when he objected. Moller then told him that, unless he could continue to use this way across Thompson's land, it would be necessary for him to condemn a right of way across the north line of section 24. Thompson did not want this to be done, because he owned the land north of section 24, and it would be more injurious to his property to have a road laid out along the north line than to permit Moller to use the road across his place. So Moller was permitted to continue to use it. In the spring of 1883, Moller sold his property to appellee, Windler. Windler declined to purchase the land unless some way was provided for him to reach the public highway at the west of Thompson's place. He wanted a road laid out along the north line of the section. Thompson objected to this because it would be more injurious to his property than to have Windler continue to use the road which had theretofore been used by Moller. So Thompson gave Windler the right to use the road across his place as the same had been theretofore used. This gift was by parol. No writing of any kind was made. It seems to have been given by Thompson because Windler declined to buy the property from Thompson's brother-in-law unless he could have a road connecting him with the public highway. Some time later Thompson sold his property to Tilden, and Tilden sold to appellant in 1890. In 1894, appellee constructed a new eight-room brick dwelling upon his land at the terminus of the road across appellant's land. From the time appellee purchased the land from Moller and was given the right to trav-

el over Thompson's land, there was no objection raised to his using the road until September, 1903, something more than 20 years, at which time appellant sent appellee a written notice that he intended to close the gate at the fence on the northwest quarter of section 24 opposite appellee's house, and gave appellee 60 days' time to quit going through appellant's property. Upon this state of facts, appellee brought an action for injunction, alleging the ownership of his land; that the defendant owned the northwest quarter of section 24 and other lands, and "the plaintiff is the owner of an easement in and a right of way through, over and across the northwest quarter of said section 24," describing the line thereof with reasonable certainty; that appellant threatened to close the road; and that appellee had no other way to reach the public road. Defendant answered the complaint, and the matter went to trial to the court without a jury. The court found that appellee was the owner of the right of way, and made a decree restraining defendant from interfering with the use of it, and also providing that the right of way was 35 feet wide. The action is brought here upon appeal.

The principal contention of appellant is that whatever grant was made by Thompson was a mere license or permission which could be revoked at the pleasure of the licensor. The finding of the trial court is against the contention of appellant as to this proposition. The court distinctly found that Thompson, "knowing that the plaintiff would not make such purchase without such easement and right of way aforesaid, then and there gave and granted to the plaintiff the easement and right of way aforesaid for the purpose aforesaid for a valuable and meritorious consideration; that said easement and right of way was to be permanent, and not terminable at the will of said Thompson." This finding is supported by the testimony and will not be disturbed. Where the donee of a right of way across the property of another, which has been granted, not by deed, but by parol, has uninterruptedly used the same for more than 20 years, with the knowledge, consent, and acquiescence of the donor and his grantees, where he has made improvements and expended money because of the grant, and where he would not have purchased the property to which the right of way is pertinent except for the granting of the same, his right to the use thereof may not be terminated by the donor or his grantees. The following appears to be the rule in such cases: "But though a right of way cannot be gained by the parol agreement of him who creates it, yet where, under such agreement, the owner of the dominant estate used the way thus created for 20 years, and the same was acquiesced in by the owner of the servient estate, it was held to be such an exercise of the way, under a claim of right, as to gain thereby a prescriptive right to the

same. And it is no objection to gaining an easement by prescription that the same was originally granted or bargained for by parol. That the use began by permission does not affect the prescriptive right, if it has been used and exercised for the requisite period, under a claim of right on the part of the owner of the dominant tenement." *Washburn's Easements & Servitudes* (4th Ed.) *53. To the same effect, see *Huff v. McCauley*, 53 Pa. 206, 91 Am. Dec. 203; *Ashley v. Ashley*, 4 Gray (Mass.) 197; *Jewett v. Hussey*, 70 Me. 433; *Stearns v. Janes*, 12 Allen (Mass.) 582; *Lane v. Miller*, 27 Ind. 534; *Clark v. Glidden*, 15 Atl. 358, 60 Vt. 702; *Town of Spencer v. Andrew*, 47 N. W. 1007, 82 Iowa, 14, 12 L. R. A. 115; *Messick v. Midland Ry. Co.*, 27 N. E. 419, 128 Ind. 81; *Campbell v. Ind. & V. R. Co.*, 11 N. E. 482, 110 Ind. 490. Even though the contract between Thompson and appellee should be construed as a mere license, yet the rule is that an executed parol license cannot be revoked: "A parol license to erect a dam upon another's land, or to convey water from a stream running through the land of another for the purpose of erecting and conducting a flouring mill, is in our opinion irrevocable after the party to whom the license was given has executed it by erecting the mill or otherwise expended his money upon the faith of the license." *Lee v. McLeod*, 12 Nev. 284. "The principle that expending money or labor in consequence of a license to divert a water course or use a water right in a particular way has the effect of turning such a license into an agreement that will be enforced in equity has been frequently announced by the courts. In all such cases, the execution of the parol license supplies the place of a writing and takes the case out of the statute of frauds." *Id.* "While a parol license to enter upon real estate is generally revocable at the pleasure of the licensor, it is settled that such license cannot be revoked when the licensee, on the faith of the license, with the knowledge of the licensor, has expended his money and labor in carrying out the object of the license. This is on the principle of estoppel." *School District v. Lindsay*, 47 Mo. App. 136. To the same effect, see *Schilling v. Rominger*, 4 Colo. 105; *Tynon v. Despain*, 22 Colo. 240, 43 Pac. 1039; *De Graffenried v. Savage*, 9 Colo. App. 135, 47 Pac. 902; *Reick v. Kern*, 14 Serg. & R. 271, 16 Am. Dec. 497; *Sumner v. Stevens*, 6 Metc. (Mass.) 338; *Arbuckle v. Ward*, 29 Vt. 52; *Snowden v. Wilas*, 19 Ind. 14, 81 Am. Dec. 370; *Talbott v. Thorn*, 91 Ky. 417, 16 S. W. 88.

In rendering its decree, the court said: "It is further ordered, adjudged, and decreed that the width of said right of way is 17½ feet on each side of the center of the present traveled way over and along the entire course of said private roadway." There is no allegation in the complaint as to the width of the right of way; neither is there

any testimony as to its width. The contention of appellee was that he was entitled to an easement for a roadway, and under the findings of the court and the testimony he is entitled to such easement to the width and extent as heretofore used. In the absence of any proof defining the same, the court may not specify its width.

Appellant contends that the court erred in the admission of testimony as to the price which appellee paid for the land he bought from Moller, and as to his construction of his residence at the end of the road. This testimony was pertinent as tending to show that appellee had placed himself in a position and had expended money which he would not have done but for the making of the grant and the acquiescence therein by appellant.

We have carefully examined the record and the testimony in this case, and have concluded that the findings and decree are abundantly supported by the same, except as to the width of the roadway. The judgment will therefore be affirmed in all matters except that portion of the decree which provides that the right of way should be 35 feet wide. As to that, it will be reversed and remanded, with instructions to modify the decree in accordance with this opinion.

Reversed and remanded.

STEELE, C. J., and GODDARD, J., concur.

PECK v. ALEXANDER.

(Supreme Court of Colorado. July 1, 1907.)

1. PARTNERSHIP—RIGHTS OF PARTNERS—COMPENSATION.

One partner cannot charge his copartners with any sum for compensation on account of his services in conducting the partnership business, in the absence of an agreement to that effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 131.]

2. REFERENCE—FINDINGS—EFFECT.

Under the express provisions of *Mills' Ann. Code*, § 212, the findings of a referee on the whole issue stands as the finding of the court, and on filing the same with the clerk judgment is to be entered thereon in the same manner as if the action had been tried by the court, unless objected to by either party by filing a motion for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reference, §§ 148-156.]

3. APPEAL AND ERROR—PRESUMPTIONS—NEW TRIAL.

On appeal it will be presumed, in the absence of a showing to the contrary, that on a motion for a new trial the court examined the testimony and did every other act imposed upon it by law and practice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3783-3787.]

Appeal from District Court, City and County of Denver; F. T. Johnson, Judge.

Action by Ira F. Peck against J. W. Alexander. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. T. Rogers and F. W. Barry, for appellant. John H. Chiles, for appellee.

CASWELL, J. Appellant, as plaintiff below, brought suit against appellee in the district court for the city and county of Denver. Complaint alleges in substance that parties were partners for the purpose of developing a certain mine, and that the plaintiff had advanced large sums of money to the enterprise, being not less than \$600, and that the defendant was indebted to him in such amount and asked for an accounting. The answer is a general denial. The case was referred to George W. Allen, Esq., as referee, to make a full and complete finding on the law and the facts in the case and report thereon. It appeared at the trial that the indebtedness arose, if at all, by virtue of certain charges on the part of plaintiff for salary while engaged in the management and superintendence of the enterprise. The referee held as matter of law that one partner cannot recover from another for services in partnership affairs without express contract to that effect between them. At page 774, vol. 2, Lindley on Partnership, it is stated that "under ordinary circumstances the contract of partnership excludes any implied contract for payment for services rendered for the firm by any of its members. Consequently, under ordinary circumstances, and in the absence of an agreement to that effect, one partner cannot charge his copartners with any sum for compensation, whether in the shape of salary, commission, or otherwise, on account of his own trouble in conducting the partnership business, and in this respect is in no different position from any other partner." See, also, *Nevills v. Moore Mining Co.*, 135 Cal. 561, 67 Pac. 1054, and cases cited. In the latter case, in addition to the rule laid down above, it is further stated: "The question is one of evidence, and it was for the trial court to determine whether, from the facts and circumstances, a contract was proven."

In the case at bar the testimony concerning the contract was conflicting. The referee found as a fact that there was no such contract between the parties hereto, that the plaintiff was not entitled in its absence to charge a salary, and that the defendant had paid slightly more than his proportion of the amount agreed to be paid as his share for the development of the mine. There is sufficient evidence to support this finding. Under our Code, "the findings of the referee upon the whole issue shall stand as the finding of the court and upon filing the same with the clerk, judgment shall be entered thereon in the same manner as if the action had been tried by the court unless objected to by either party by filing a motion for new trial as herein-after provided." *Mills' Ann. Code*, § 212. Under the circumstances of this case, the findings are entitled to the same consideration as the verdict of a jury, or the findings of the court based upon like evidence produced in

open court. There having been sufficient evidence to support the findings and judgment, this court is bound by the findings and judgment in the court below. There was a motion for a new trial, which was overruled, and appellant alleges that the court below erred in overruling the exceptions and ordering judgment without an examination of the testimony—citing *Jones v. Van Horn*, 28 Colo. 126-128, 63 Pac. 307. Our attention is not called to any portion of the record showing that the court below did not examine the testimony in the exceptions filed. The presumption is that the court did examine same, and did every other act imposed upon it by law and practice, unless the contrary affirmatively appears by the record. The burden is upon appellant to bring to this court by the record and point out specifically the errors relied upon. In the absence of such showing, the presumption is that the court did its full duty.

The judgment is affirmed.

STEELE, C. J., and MAXWELL, J., concur.

(36 Colo. 395)

O'DONNELL v. CHAMBERLIN et al.

(Supreme Court of Colorado. March 5, 1906.

Rehearing Denied May 7, 1906.)

1. SALE—OPTION CONTRACT—PAYMENT—TENDER.

A tender to the bank, though coupled with a demand for delivery of the notes and assignment of the decree, operates as a payment, for the purpose of saving the rights of plaintiff under the contract of defendant's testate, giving F., plaintiff's assignor, an option to purchase notes and a decree within a certain time, and providing: "On payment of said sum * * * within the time aforesaid, * * * I hereby agree * * * to deliver said two notes * * * and assign * * * the said decree, * * * and payment of said sum * * * may at the option of said F. * * * be made by depositing said sum to my credit" in a certain bank.

2. SPECIFIC PERFORMANCE—REMEDY AT LAW.

Specific performance of a contract to sell to plaintiff notes secured by mortgage on a hotel, and the decree, based thereon, declaring them a first lien on the hotel, and ordering sale of the hotel to satisfy the indebtedness, will be granted; plaintiff having made the contract in furtherance of his desire to become owner of the hotel, and the remedy at law not being adequate.

Gobbert, C. J., and Bailey, J., dissenting.

En Banc. Appeal from District Court, City and County of Denver; S. L. Carpenter, Judge.

Action by T. J. O'Donnell against Carl Chamberlin and another, executors of Winfield Scott Stratton, deceased, and another. From a judgment sustaining a general demurrer to the complaint, plaintiff appeals. Reversed.

Sterling B. Toney, John W. Graham, Jr., T. J. O'Donnell, and John M. Waldron, for appellant. E. E. Whitted, O. L. Dines, and P. H. Holme, for appellees.

GUNTER, J. This was an action for specific performance against the United States Mortgage & Trust Company and the executors of the last will of Winfield Scott Stratton, deceased. A general demurrer to the complaint was sustained, and, as the appellant (plaintiff) stood upon her complaint the action was dismissed, the question therefore before us is: Does the complaint state facts sufficient to constitute a cause of action? The facts so presented, so far as pertinent to the first ground urged why the judgment below, holding that the complaint does not state a cause of action, should stand, are: July 26, 1902, Stratton made the following contract: "I, Winfield S. Stratton * * * in consideration of one dollar to me in hand paid by and for other valuable consideration moving to me from Michael Finnerty, * * * do hereby give and grant unto said Finnerty, his executors, administrators and assigns, the right and option to purchase * * * the rights, benefits and sums of money decreed to the plaintiff * * * in that certain cause * * * The United States Mortgage and Trust Company, Plaintiff, vs. Henry C. Brown et. al., Defendants, * * * and the two certain notes made by the said Henry C. Brown to said plaintiff, one for \$100,000, another for \$500,000, secured by the mortgage to said plaintiff described in said decree * * * for the sum of six hundred and fifty thousand dollars (\$650,000), to be paid on or before sixty days from this date, and on payment of said sum promptly within the time aforesaid, time being of the essence thereof, I hereby agree for myself, my executors and administrators, to deliver said two notes with the same amount due thereon as found by said decree * * * and assign or procure to be assigned the said decree * * * as the said Finnerty, his executors, administrators or assigns, may direct, * * * and payment of said sum of six hundred and fifty thousand dollars may at the option of said Finnerty, his executors, administrators or assigns, be made by depositing said sum to my credit in the Denver National Bank of Denver, Colorado." Within the 60 days named in the contract, Stratton died, leaving a will, whereby he named as his executors appellees, Dines, Chamberlin, and Rice. These executors, on account of litigation over the will, did not qualify until after the lapse of the 60 days mentioned in the contract, but did so qualify before the bringing of this action. September 24, 1902, after the death of Stratton, appellant, theretofore the assignee of Finnerty, as a compliance with the contract, tendered at and to said bank "for the use and credit of said Stratton, or his estate, or the executors thereof, or other persons entitled thereto," \$654,155.55, and "then and there demanded a delivery of said notes and an assignment of said decree as provided in said contract." But said tender and delivery were refused by said bank for the stated reason that it had not in its possession said

notes, or an assignment of said decree, and could not accept said tender or comply with said demand for that reason." On the same date, September 24th, appellant made known to said executors his desire to comply with the terms of said agreement and secure the assignment and transfer of said decree and notes, and demanded that said executors should make such transfer, and said executors refused to make the transfer, and have since so refused.

1. Appellees contend that the tender of September 24th was not an acceptance of the offer extended by the contract, and therefore a contract to deliver the notes and assign the decree did not arise. The contract provides: "On payment of said sum promptly within the time aforesaid * * * I hereby agree * * * to deliver said two notes * * * and assign * * * the said decree * * * as said Finnerty * * * may direct, and payment of said sum * * * may at the option of said Finnerty * * * be made by depositing said sum to my credit. * * *" This, in terms, was a promise to deliver and assign when payment should be made, and a stipulation that payment might be made at the option of Finnerty, or his assignees, by making the deposit in the manner recited in the contract. The offer to make the deposit appellees say did not amount to a tender, and was not equivalent to a payment for the purpose of saving rights under the contract, because there was coupled with it a demand for contemporaneous delivery of the notes and an assignment of the decree. If the offer made to the bank September 24th operated as a payment for the purpose of avoiding the loss of rights under the contract, then appellant accepted the offer made by the contract within the time limited thereby; that is, he satisfied the condition upon the performance of which Stratton had promised to deliver and assign. The contract was to deliver the notes and assign the decree upon payment. When payment was tendered, mutual dependent covenants arose, on the one part to deliver and assign, on the other to pay. "The general rule is to consider all covenants dependent, in the absence of a contrary intention, for this is the way most men make their bargains, neither party intending to perform unless the other at the same time performs on his part, and the same is held when no time is fixed for the performance by either." 9 Am. & Eng. Ency. of Law, 630. "A covenant or obligation to pay and therewith pass title is mutual and dependent; the one cannot be required before the other is ready to be performed." Barrett v. McAllister, 33 W. Va. 738, 11 S. E. 220; 2 Minor's Inst. 779. "In case of dependent covenants to be performed contemporaneously, neither party is required to perform until the other does. An offer to perform upon condition of performance by the other party is sufficient." 6 Am. & Eng. Ency. of Law (2d Ed.) 33. "Tender is not invalid because

it is coupled with a demand for the performance of reciprocal duty enjoined by law upon the person to whom the tender is made." 28 Am. & Eng. Ency. of Law (2d Ed.) 88. "For the purpose of avoiding * * * the loss of any rights or privileges, the tender is the exact equivalent of payment, and it does not have to be repeated. * * * Tender when rejected operates as payment." Words and Phrases, vol. 8, pp. 69, 110.

We are justified in concluding that, if tender had been made to Stratton living, within the life of the contract, its effect as such would not have been impaired by a demand for a delivery of the notes and an assignment of the decree. The tender, although accompanied with such demand, would for the purpose of saving rights have been the equivalent of payment. That such would have been the effect of the tender, if made to Stratton living, we do not understand to be denied; but it is said that the demand, coupled with the offer to the bank, defeated its operation as a tender. The contract gave to Finnerty, or his assignee, the option of making payment to and at the bank, and in terms provided that, upon payment being so made, the notes would be delivered and the decree be assigned. The obligation of Stratton, according to the terms of the contract, was to be the same whether payment was made to him in person or to and at the bank. The rights of Finnerty were to be the same whether he paid Stratton in person or made payment to and at the bank. The rights of Finnerty, or his assignee, were dependent upon his making payment in one of the modes prescribed by the contract, and his rights were to be the same whichever mode of payment he saw fit to adopt. This being true, if tender of payment to Stratton would entitle Finnerty to demand contemporaneously therewith a delivery of the notes and an assignment of the decree, and if such tender, coupled with such demand, would operate as a payment for the purpose of an acceptance of the option and an avoidance of the loss of any rights thereunder, such tender made to the bank, coupled with such demand, had a like effect as if made to Stratton. *Mueller v. Nortmann*, 116 Wis. 469, 93 N. W. 538, is in point. Klein, for a valuable consideration, gave plaintiff this option: "In case said J. F. Mueller elects to purchase said land under this option, he is to pay at the office of Theo. Mueller, in Milwaukee, Wis., within four weeks from date thereof, \$4,975, when a warranty deed of said land shall be delivered. * * * Within the time limited, plaintiff tendered at the office of said Theo. Mueller the sum mentioned in the option, but the said Mueller refused to accept the same, assigning as his reason therefor the death of Klein. An action was brought to enforce specific performance. The court held that the action would lie, saying: "Within that period [the period named in the contract] the plaintiff did everything that the written op-

tion required him to do. He went to the office designated, and tendered the sum specified as his election to complete his option. That tender was to the very person designated in the option, at whose office the money was to be paid. The payment of the money at the place stated was the only condition imposed upon the purchaser. * * * The tender at the place designated, was all that the option required." We think that the tender at the bank was an acceptance of the offer, that it satisfied the condition necessary to entitle the appellant to a delivery and assignment of the securities contracted for, and that a mutual contract then arose by appellees to deliver and assign, and by appellant to pay.

2. It is next contended that the judgment below dismissing the complaint should stand, because the complaint, even though it stated facts showing a valid contract to assign the securities, did not state such facts as entitled appellant to specific performance, because it is said appellant had an adequate remedy by an action at law for damages. The following are the facts pertinent to this question, as such facts appear from the complaint: July, 1902, a decree was entered in said suit of the United States Mortgage & Trust Company against H. C. Brown, finding the amount due June 20, 1902, on the unpaid notes secured by said mortgage to be \$623,332.32, the mortgage to be a first lien on the real estate covered thereby, and ordering a sale of said real estate to satisfy said indebtedness and the expenses of foreclosure. The aggregate indebtedness to satisfy which the sale was to be made was \$662,000. July 16, 1902, Stratton made the contract herein-after set out to sell said securities for \$650,000, to be paid on or before 60 days. Stratton died before the expiration of the life of the option. After his death, and before the expiration of the 60 days, the tender, hereinbefore set out, was made, and this suit was brought December 5, 1903. Appellant desired to become a purchaser of the Brown Hotel property. At the sale ordered to be made under the decree it would require about \$700,000 to make the bid. By becoming the owner of the notes, mortgage, and decree, appellant would have legitimate advantages in bidding at the sale that others would not have. By owning the securities the enormous sum, which he would probably have to bid at the sale, would draw interest from the date of his purchasing the securities to the date of sale, regardless of any postponement thereof. The officer making the sale might be slow in fixing a date of sale. The sale when noticed might be postponed. The sale when made might be set aside by the court. In the event appellant became the purchaser at the sale, he might acquire the property, or there might be a redemption from the sale within any time before the expiration of nine months from the date of sale. How long his money would remain so invested is uncertain.

How long it would require to reinvest so large a sum is uncertain. It is contended upon the part of appellee that specific performance will not lie for the reason, above stated, that appellant had an adequate remedy at law in damages. Appellant contracted for the specific performance covered by the contract. He had legitimate reasons for purchasing these securities, which reasons were, presumably, known to Stratton. An action at law for damages would not give to appellant that which Stratton contracted to sell him by the contract. Appellant could not go upon the open market and with the damages procured at law purchase other securities which would answer the same purpose for which he legitimately desired to purchase these specific securities. If he had brought an action at law for damages immediately upon a breach of the contract to sell him the securities, the amount of his damages would have been a matter of conjecture. It would have been impossible to say how long his funds would have been invested in these particular securities; perhaps some one else would have bid in the property at the date of the sale. If appellant had purchased, it would be uncertain as to whether or not there would be a redemption therefrom, and, if so, when.

When an action at law for damages will not answer the justice of the case, and an action for specific performance will do so, the action for specific performance will lie. The general principle has thus been announced in the courts of this state: "That courts of equity have jurisdiction to decree the specific performance of agreements, whether relating to personal or real property, is well settled. * * * The ground of the jurisdiction, when assumed, is that the party seeking equitable relief cannot be fully compensated by an award of damages at law." *Frue et al. v. Houghton et al.*, 6 Colo. 318, 319. "The old rule, that the remedy must pertain to an interest in realty, has been relaxed, and modern decisions decree the performance where the subject-matter is purely personal." *Colo., L. & W. Co. v. Adams*, 5 Colo. App. 193, 37 Pac. 89. The following cases furnish illustrations of the application of the doctrine that specific performance will lie upon contracts pertaining to personalty when there is an adequate remedy at law in damages: *Buxton v. Lister*, 3 Atkins, 382, was specific performance by the vendor upon an agreement by defendants to purchase several timber trees marked and growing at the time. While the court dismissed the bill on an affirmative defense, it was held that specific performance would not lie upon such a contract. *Wright v. Bell*, 5 Price (Exchequer Reports) 325, was a bill against the purchaser to compel the specific performance of a contract for the purchase of a debt. Held, the action would lie. *Adlerly v. Dixon*, 1 & 2 Sim. & Stu. 607, was specific performance at the suit of the ven-

dor upon a contract for the sale of debts proved under a commission of bankruptcy. It was held the action would lie. In the course of the opinion the court said: "Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not in the particular case afford a complete remedy. Thus, a court of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of the land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a court of equity will not generally decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for, inasmuch as with the damages he may purchase the same quality of the like stock or goods." *Furman v. Clark*, 11 N. J. Eq. 306, was an action of specific performance upon a contract by which the defendant agreed to furnish the complainant with clay on board his boats at a certain price; the clay to be delivered from time to time while navigation was open, and the delivery to run through a period of seven years. Defendant delivered the clay according to contract during the first year, during the second year he failed to make delivery according to the contract, and declined to make further deliveries. While the bill was dismissed for lack of proof of the facts, it was held that specific performance would not lie upon such a contract because the damages sustained could not be measured in an action at law. In *Cutting v. Dana*, 25 N. J. Eq. 265, specific performance was sustained upon an agreement made by the defendant with the complainant by which the former agreed to assign to the latter a certain debt. In *Brown v. Runals*, 14 Wis. 693, an action of specific performance was sustained to compel the defendant to deliver to the plaintiff certain notes and a mortgage securing the same, which defendant had agreed to restore plaintiff upon the payment of a debt, to secure which the notes and mortgage had been hypothecated to the defendant by plaintiff. The debt had been paid. The court upheld specific performance, and, while the special ground of the decision is the trust relation created by the contract, yet the court considered that the facts, aside from the trust feature, justified specific performance. In *Shockley v. Davis*, 17 Ga. 177, 63 Am. Dec. 233, the court upheld an action for specific performance upon an agreement of Shockley to turn over to the plaintiffs certain evidences of debt to secure them from loss by reason of their suretyship for the defendant. *Gottschalk v. Stein*, 69 Md. 51, 13 Atl. 625, was an action of specific performance upon a contract of the defendant,

Gottschalk, to transfer to the plaintiff certain promissory notes. The action was upheld. The court, *inter alia*, said: "Now, in this case the appellant agreed to sell to the appellee three promissory notes of Weller & Son, and appellee agreed to buy these notes for a specific purpose, which was known to the appellant. An action at law for a breach of the contract would not, it is clear, give to the appellee the subject-matter of the contract; and, besides, the damages to be recovered must necessarily be uncertain."

The principle of law announced by the foregoing authorities, and by others not cited, is that if, under the facts of the particular case before the court, there is not an adequate remedy in an action at law, specific performance will lie; whether the action can be maintained depends upon the facts of each particular case. In the case before us, an action at law will not satisfy the justice of the case, because it will not give to appellant the specific securities which he for good reasons contracted to purchase of Stratton, and because the damages by appellant otherwise sustained by a breach of the contract cannot be estimated in an action at law.

The former opinion herein will be withdrawn, and a judgment of reversal entered.

Judgment reversed.

GODDARD, J., not participating. The CHIEF JUSTICE and BAILEY, J., dissenting.

WRIGHT et al. v. ULRICH.

(Supreme Court of Colorado. July 1, 1907.)

1. NUISANCE—PRIVATE NUISANCE—INJUNCTION.

The occupant of a dwelling is entitled to an injunction to restrain the operation of a slaughter house adjacent thereto, where such operation causes the dwelling to be filled with noxious smells.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 64.]

2. LIMITATION OF ACTIONS—CONTINUING NUISANCE.

The nuisance was a continuing one against which limitations did not commence to run at the inception thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 303, 304.]

Appeal from District Court, Fremont County; M. S. Bailey, Judge.

Suit by Lucinda Ulrich against Samuel A. Wright and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Maupin, McLain & Wilkes, for appellants. Taylor & Sayre, for appellee.

CASWELL, J. This suit was instituted in the district court of Fremont county by the appellee, plaintiff below, to restrain the appellants from rebuilding and operating a slaughter house adjacent to plaintiff's premises and dwelling house which she and her

family had occupied for about 20 years. It seems that the first slaughter house, which had been erected some 8 or 10 years prior to the commencement of this suit, was destroyed by fire, and that plaintiff had objected to the rebuilding of the house, and had objected to and complained of the injury and inconvenience to her on account of the odors from the slaughter house and its use and the noise resulting from the keeping of cattle in pens adjacent to the slaughter house. The answer in effect is a denial of the allegations of the complaint, and defendants also plead the statute of limitations.

The main contention of appellants as set forth in their brief is that there is not sufficient evidence to support the allegations of the complaint, that there is not sufficient evidence to support the judgment, and that the judgment is based upon "a remote sentiment of future possible annoyance, not warranted by the facts." The record does not support this contention. It is clearly shown by the abstract, and the additional abstract filed by appellee, that the plaintiff had suffered much annoyance and inconvenience because of the odors and stench which had emanated from the use of the slaughter house. This is shown, not only by the evidence of her own family, but strangers to the suit testified positively as to the sickening odors which had reached them from the slaughter house at a point about the same distance therefrom as plaintiff's dwelling house. Indeed, there was not very much conflicting testimony. However, this matter was submitted to a judicial determination, and the court found as a fact that the maintenance and operation of the slaughter house and its adjuncts by defendants "constituted and constitutes a continuing nuisance, resulting in rendering plaintiff's occupancy of her dwelling house and premises described in the complaint in this cause disagreeable and uncomfortable by reason of the noxious vapors and noisome smells and stench emitted therefrom, which are a constant menace to the health of plaintiff and her family, materially impair the usefulness of said property, and greatly decrease its value; that the damage to plaintiff therefrom are of such a nature and character, of such proportions and so peculiar to herself, as to entitle her to equitable relief herein."

We think the findings of the court are amply sustained by the evidence. We do not find any error in the law as applied by the trial court to this case. Without entering into an extended discussion of the law concerning nuisances both public and private, the City of Denver v. Mullen et al., 7 Colo. 345, 3 Pac. 693, furnishes ample authority for the plaintiff to maintain this action. The suit is manifestly to abate the nuisance, regardless of damages, and any private nuisance may be abated by the party aggrieved. In Wood's Law of Nuisances, § 22, it is said: "As to what constitutes a nuisance is a question for the court and not for the jury to determine.

Whether the results of a given business are so common as to amount to a public nuisance is a question for the jury." In the case at bar a jury was waived and trial was had to the court, and the court passed upon both these questions adversely to the appellant. At page 692, Am. & Eng. Enc. of Law, it is said: "It may be laid down broadly as a general rule that any act, omission, or use of property which results in polluting the atmosphere with noxious or offensive effluvia, gases, stenches, or vapors, thereby producing material physical discomfort and annoyance to those residing in the vicinity or injury to their health or property, is a nuisance"—and many cases are cited in support of this doctrine. We know of no decisions to the contrary, and none are pointed out to us. At page 697 of the same volume it is stated: "When the noises made by animals kept in a residence neighborhood is of a distressing or annoying character, it is a nuisance."

The case was not barred by the statute of limitations. It is held in the case of *Home Supply Ditch Co. v. Hamlin*, 8 Colo. App. 341, 40 Pac. 582, that "the continuing of a trespass or nuisance from day to day is considered in law a several trespass on each day"; and it was further held in that case that "the nuisance or trespass was continuous, and the subsequent damage continually being incurred, that the ditch company was liable until the nuisance was abated and the cause of damage removed, and that the law of continuing nuisances and continuing trespasses is, admittedly, the same." It follows that the plaintiff could have sought a decree abating the nuisance at any time during its existence, unless she had estopped herself, by some act or agreement, to complain of the nuisance. No estoppel was pleaded, proven, or claimed in the case at bar.

Perceiving no error in the record, the judgment is affirmed.

STEELE, C. J., and MAXWELL, J., concur.

BIG THOMPSON & PLATTE RIVER DITCH CO. v. MAYNE.

(Supreme Court of Colorado, April 2, 1906. Rehearing Denied May 7, 1906.)

EVIDENCE—MEMORANDA—PUBLIC RECORD.

Where the water commissioner has deputies who report to him the amount of water in a river and from these reports he makes a record in a book, he cannot, in an action by a share owner in an irrigation ditch company against it for failure to divert water from a river and deliver it, testify to the contents of the book to show the amount of water in the river, on the theory of the memoranda being a public record; the statutes not requiring him to keep such a book, though they do require him to report to the state engineer the amount of water coming into the district and the ditches inadequately supplied, the object being to enable the state engineer to do his duty, and the water commissioner having no personal knowledge of the matters recorded by him.

Appeal from District Court, Weld County; Christian A. Bennett, Judge.

Action by Minnie B. Mayne against the Big Thompson & Platte River Ditch Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Garrigues & Smith, for appellant. H. N. Haynes, for appellee.

BAILEY, J. Appellant, who was defendant below, is a mutual ditch company, delivering water for irrigation pro rata upon its shares. Appellee, who was plaintiff below, owns one-fifteenth of the shares of the company. Plaintiff brought this action to recover for losses she claimed to have sustained because of the alleged failure of defendant to deliver the water to which she averred she was entitled.

Among other things she alleges in her complaint that defendant failed and neglected to divert any water from the Big Thompson river into its ditch during the irrigation season of 1899 until May 23th, and thereafter failed to deliver to her her pro rata share of the water in the ditch. The testimony as to there being water in the river available for defendant at certain times and the amount thereof at certain other times was conflicting, and plaintiff in making her case in chief called the water commissioner as a witness, and the court, over the objection of defendant, permitted him to testify as to the contents of a book kept by him in which he made a record of the amount of water said to be flowing in the river, and the amount which defendant consequently was entitled to divert. While the memorandum made in the book was written by the witness, he had no personal knowledge of the truth of the statements. He had two deputies, and one of these reported to him the amount of water in the river above the ditches taking water, and the other reported to him the amount of water in the river at defendant's headgate, and from these reports he made his record. The admission of this testimony was error, and as the matter testified to was vitally material to the making of plaintiff's case the error was prejudicial.

Plaintiff contends that the testimony was admissible, because "the memorandum book kept by the water commissioner was a public record kept by an officer in the proper discharge of his official duty." The statutes do not require the keeping of such a book. They do require that the commissioner report to the state engineer, among other things, the amount of water coming into the district and the ditches which are inadequately supplied. The object of these reports is to enable the state engineer to perform his duty and are for his guidance, and not for the purpose of creating or perpetuating testimony. It is made the duty of the district court to appoint a committee to examine the books of the county treasurer and make and file a written report, yet this re-

port is not admissible as evidence, although the matters stated therein may be material. *McClure v. La Plata County*, 19 Colo. 122, 34 Pac. 763. While some of the authorities hold that a record may be introduced in evidence, even though the keeping of it may not be required by law, if it is essential to the conduct of the office, yet the matters recorded must be within the knowledge of the officer at the time he records them. 1 *Greenleaf on Evidence*, § 493.

The memorandum book kept by the water commissioner was not admissible to prove any of the issues in this cause. We do not deem it necessary to consider the other errors assigned, and the judgment will be reversed and remanded.

Reversed.

GABBERT, C. J., and GODDARD, J., concur.

(76 Kan. 124)

KREMER v. KREMER.

(Supreme Court of Kansas. July 5, 1907.)

Modification of judgment. Case remanded to lower court, with instructions.

For former opinion, see 90 Pac. 998.

PER CURIAM. Since the order awarding the land to the defendant was reversed in this case, the parties have agreed that, as the record discloses all the facts in the case, this court may accept them as agreed to and direct the judgment to be rendered. The case is therefore remanded, with instructions to award the land in question to the plaintiff as her separate property, and to set aside the judgment in favor of the plaintiff against the defendant for \$1,250, which was made a lien on the land, and that in all other respects the judgment be the same as before.

(76 Kan. 311)

ROUSE v. ROUSE et al.

(Supreme Court of Kansas. July 5, 1907.)

DESCENT AND DISTRIBUTION—RIGHTS OF SURVIVING WIFE—ANTENUPTIAL AGREEMENT—CONSTRUCTION.

An antenuptial agreement provided that the property owned by either party should, after the marriage, remain the separate and distinct property of such owner, and neither should have or exercise any right, title, or estate in the property of the other, and each might at his or her option dispose of such property by will or otherwise except that the husband should not, during the lifetime of the wife, so dispose of his property as to jeopardize or render nugatory a subsequent provision for her benefit, by which he agreed to furnish her proper and comfortable support so long as they lived together as husband and wife, or, in case she survived him, so long as she remained his widow. After living together 30 years the husband died intestate. *Held*, that the agreement did not exclude the widow from her right of inheritance in the husband's property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Descent and Distribution, § 150.]

(Syllabus by the Court.)

Error from District Court, Miami County; W. H. Sheldon, Judge.

Action by Jane Rouse against J. W. Rouse and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Alpheus Lane, Benson & Harriss, and W. J. Costigan, for plaintiff in error. Frank M. Sheridan, for defendants in error.

PORTER, J. This suit was for partition of lands, and the construction of an antenuptial contract is the only question involved. George W. Rouse died intestate in Miami county August 9, 1903, at the age of 82 years. He owned about 200 acres of land at his death, and left surviving him, in addition to several children of a former marriage, his widow, Jane Rouse, and one child by her. The controversy is between the children of the first marriage and Jane Rouse, the widow. He married Jane Rouse in 1874. Immediately before the marriage they entered into the following contract:

"Know all men that we, G. W. Rouse, of Miami county, state of Kansas, and Jane Sewel, of the same place, in consideration of mutual promises of marriage between made, have this day agreed and we do by these presents agree, that in case said marriage takes place, that the property real and personal now owned by either, or which may hereafter be acquired by either, shall after the solemnization of said marriage, be and remain the separate and distinct property of such owner, and neither shall have or exercise any rights, title or estate in the property of the other, and each may at his or her option, dispose of by will or otherwise, all or any part of his or her property in such manner as may to him or her seem fit, excepting, however, that said G. W. Rouse shall not during the lifetime of said Jane Sewel so dispose of his property as to jeopardize or render nugatory the provisions hereinafter mentioned, viz.: It is agreed and provided that said G. W. Rouse shall and will furnish to said Jane Sewel a good, proper and comfortable support out of his said estate, so long as they shall live together as man and wife, and also, that in case said Jane Sewel shall survive said G. W. Rouse then and in that case said Jane Sewel shall have a proper and sufficient support according to her station in life out of the estate of the said G. W. Rouse during the term of her natural life, or so long as she remains the widow of said G. W. Rouse.

"Witness our hands and seals this 23d day of June, A. D. 1874.

"G. W. Rouse. [Seal.]

"Jane Sewel. [Seal.]"

The district court held that by the terms of the agreement Jane Rouse took no interest in any of the real estate. Of this holding Mrs. Rouse complains.

It seems manifest that the first provision in the agreement would not be sufficient of itself to exclude the wife as an heir. A similar provision in *Kistler v. Ernst*, 60 Kan. 243, 56 Pac. 18, was held not to exclude the husband from his rights of inheritance. In that case the language of the antenuptial agreement provided that the wife "shall have, hold, keep and retain all of the property which she now has or may hereafter acquire, whether real, personal, or mixed, and wheresoever situate, as her sole, exclusive and absolute property, for her separate use and benefit, free from all claims, rights and interest of her said intended husband, John Ernst, with the right on the part of the said Henrietta to, by gift, sale, devise, or will, dispose of the same to such persons as she may desire, the said John Ernst hereby consenting to such disposition of all such property in all respects as if the same should be by will devised by said Henrietta after such marriage and the consent of said John Ernst indorsed in writing thereon." In the present case the agreement, looking alone at the first provision, is that the property of each shall, after the marriage, be and remain the separate and distinct property of such owner, who is to have the right, at his or her option, to dispose of the same by will or otherwise; and neither shall have nor exercise any right, title, or interest in the property of the other. So far, the agreements are substantially alike. It is contended, however, that a construction must be given which would in some way alter the rights of the parties as they existed; that otherwise the agreement is rendered inoperative. The same contention was urged in *Kistler v. Ernst*, supra, where it was said in the opinion: "The contract seems to have followed the law and conferred no greater rights on either party than were vouchsafed by the statute, with these limitations: Any conveyance, gift, or sale of the property of one during coverture could not be challenged as being in fraud of the rights of the other. The antenuptial agreement worked an estoppel on both parties and silenced all complaint of one against alienation by the other, fraudulent or otherwise. It also gave to each the right to convey his or her real estate by separate deed and pass a merchantable title. It gave the power to bequeath and devise all the property of each by separate will. Thus the contract performed some service in respect to the property of both parties during coverture, and its terms, to the extent stated, modified and changed rights secured by the statute."

In *Busenbark v. Busenbark*, 33 Kan. 572, 576, 7 Pac. 245, 248, speaking of the interest which the wife has in the husband's real estate, it was said: "It is true that this interest in the real estate of the husband is inchoate and uncertain, yet, according to the authorities, it possesses the element of property. It is an interest and right of which she can be divested only by her consent, or

crime, or her dying before her husband. It is an interest which may be, in connection with the husband, the subject of contract and bargain, and is by many of the authorities denominated a contingent but valuable interest. It has been decided by this court that the wife has an interest in the homestead occupied by herself and husband, although the title to the same be in the husband, and that it is such a present and existing estate that it will be protected by the courts. *Helm v. Helm*, 11 Kan. 19; *Jenness v. Cutler*, 12 Kan. 500."

The main question, however, is if the subsequent clause of the contract guarantying to the wife a sufficient support from the husband's property after his death, in the event she survived him, distinguishes this from *Kistler v. Ernst*, supra, and compels a different construction to be placed upon the agreement. Plaintiff in error contends that this clause is simply a further provision for the benefit of Mrs. Rouse, by which the husband agrees that, although he has the right without her consent to dispose by deed or will of all his property during her lifetime, he will not so far dispose of it as to prejudice her rights to have out of his estate a sufficient support for the remainder of her life in case she survives him. It is argued that without this provision he might have conveyed by deed or devise every dollar he possessed, and, dying before her, leave her without any means of support, and the contention is that this safeguard of the wife's right in any event to sufficient support has been employed by the trial court as a means to destroy her inheritance; that by a fair construction of both provisions there is no implication even that she is to be deprived of her right to inherit from the husband. Manifestly, the court construed this clause, taken with the first, to constitute a substantive provision for the wife which excluded her from any other interest in his property after his death.

In *Hart, etc., v. Soward*, 14 B. Mon. (Ky.) 301, the contract provided that the wife "shall hold and possess, for her own separate and exclusive use and benefit, all the estate, real, personal, and mixed now owned and possessed by her, and the future rents, issues, and profits thereof, free from the control or disposition of the said Alfred Soward; it being intended that the said Margaretta Gorsuch shall hold the said property as her separate estate, and in the same manner as if she were sole and unmarried, she hereby retaining authority and power to dispose of the same, in such manner as she may choose in her lifetime, by sale and conveyance, or by last will and testament." She died intestate, and the husband was given a husband's interest in all her property notwithstanding the agreement. It was said: "If this agreement contained any provisions on the subject of the right of succession to the property, after the death of the wife, this question

could not arise; but as it only secured to the wife the right to control and dispose of the property during the coverture as if she were unmarried, and as she made no disposition of it to take effect after her death, the agreement, having accomplished the object of its existence, and the purpose contemplated by the parties in its execution, became, by her death, inoperative, according to its own nature, and left her estate to the disposition of the law." It will be noticed that by the agreement in that case, the wife retained the power to dispose of her property "as she may choose in her lifetime." The words "in her lifetime" are not used in the agreement we are considering, nor was the same or similar language used in the agreement in *Kistler v. Ernst*, supra. Their absence is not important, for if either husband or wife desired to dispose of property by deed, gift, or devise it would necessarily be done during the lifetime of the grantor, though effect might not be given until after death.

As said by Justice Smith in *Kistler v. Ernst*: "There is no express agreement in the contract which excludes the husband from a right of inheritance on the death of the wife. She had the right to devise her property to whom she pleased, and the consent of her husband was given in advance. Under the position taken by plaintiff in error, a devise by will to the husband was necessary on the part of the wife should she have desired that he take her property at her death. The law obviated all necessity for a will in such a case, as we construe the contract. There is nothing in the contract that convinces us that *Ernst*, by the agreement, surrendered or released his right of inheritance as the survivor of his wife. * * * The counsel for plaintiff in error, by a refinement of reasoning, seeks to read into the agreement provisions founded on implications and probabilities as to the intention of the parties which cannot be justified under the language of the instrument. The wife had the right of disposition, which she did not see fit to exercise. This failure to make disposition might have been induced by the affection she bore for her husband, knowing that upon her death the law would place her property in his hands as effectually as if a formal will had been made."

This contract is not free from doubt, but it is open to the construction contended for by plaintiff in error, and could well mean that by this subsequent provision nothing more was contemplated than to guaranty to the wife that, in case the husband saw fit to exercise the right to dispose of his entire estate, he would not do so without making ample provision for her support during the time she should survive him and remain his widow. It is by no means clear to us that the intention was that she should not inherit a wife's interest in all property of his which he did not see fit to dispose of separately by deed or will during his life.

We have frequently held that agreements of this character should be liberally construed to carry into effect the intention and purpose of the parties; nevertheless, their terms are not to be extended by mere implication to exclude the right of the survivor to take by inheritance. The reasons are manifest. If such be the intent of the parties, it can be readily expressed in appropriate language or in words from which the intention is necessarily implied. Nor are we impressed with the claim that the circumstances surrounding the parties to this agreement, at the time it was entered into, and the relations which existed between them, are of a nature from which a different purpose may be implied, or are such as to invoke a strained construction in favor of the heirs. It is true that at the time the agreement was made the husband possessed most of the land, and the wife brought but little in the way of property or means to the marriage, and was at the time past middle life. However, they lived together for more than 30 years, during which she doubtless contributed her share to his further accumulation of property. Moreover, he had three minor children at the time of this marriage, and the evidence warrants the inference that Jane Rouse became a mother to them. The circumstances, it will be observed, are not similar to a case where an old man, in his declining years, having property of his own, enters the marriage relation with a woman younger than himself, neither expecting that the relation will extend beyond a few years at most, and a contract is made which the circumstances assist in construing as intended to provide that the wife at his death shall take a certain compensation in lieu of any interest the law might give her in his estate.

The agreement might have provided that in case the wife survived the husband she should take no share in his estate by inheritance, but the provision that the husband should have the option to dispose of his property by will or otherwise cannot by implication be said to mean that, in the event he failed to exercise such option, the laws of inheritance should be set aside and the wife be left in the same situation as though he had exercised the option. Notwithstanding the contract, he could have devised all of his property to his wife. There was no will, no disposition by him in his lifetime, although she had agreed that he might make a will or other disposition. This is a contest between his heirs and the wife. The heirs are not mentioned in the agreement, and must take under the laws of descent, the same laws which gave her one-half of the husband's property where he dies intestate. The limitation of the husband's power of disposition in the subsequent clause cannot be extended by implication beyond the plain import of its terms.

While we are not prepared to say that an express provision must always appear in or-

der to deprive the survivor of the rights of inheritance, there are authorities which go to that extent. See *Stewart v. Stewart*, 7 Johns. Ch. (N. Y.) 229, cited and relied upon in *Kistler v. Ernst*, supra. In that case Chancellor Kent said: "The court cannot take away the right of the husband to the personal estate of his wife, when it is not taken away by the settlement or by the exercise of the power of appointment under it. When the settlement makes no disposition of the property in the event of the wife's death, and provides only for her dominion over it during coverture, the right of the husband, as survivor, is a fixed and stable right, over which the court has no control, and of which he cannot be divested. The settlement cannot be extended by construction beyond the just and fair import of its provisions; and, clearly, the court cannot create a settlement, or a disposition of property, in violation of the *ius mariti*, when none has been made by the party." See, also, *Jones & White v. Brown*, 1 Md. Ch. 191; *Talbot v. Calvert*, 24 Pa. 327; *Brown's Adm'r v. Brown*, 25 Tenn. 127; *Sutherland et al. v. Sutherland et al.*, 69 Ill. 491; *Christy v. Marmon*, 163 Ill. 225, 45 N. E. 150. In commenting upon an antenuptial agreement the Supreme Court of Iowa in *Re Estate of Peet*, 79 Iowa, 185, 188, 44 N. W. 354, 355, said: "It must be understood that contracts designed to divest the wife of the benefits of the statutes in her favor after the death of her husband * * * must not be of doubtful interpretation, but specific and certain as to such intent."

It follows from what has been said that the judgment must be reversed, and remanded for further proceedings in accordance with these views. All the Justices concurring.

(77 Kan. 803)

MISSOURI PAC. RY. CO. v. TRAHERN.

(Supreme Court of Kansas. July 5, 1907.)

RAILROADS--ACCIDENTS AT CROSSINGS--CONTRIBUTORY NEGLIGENCE.

Plaintiff, struck and injured at railroad crossing, held guilty of contributory negligence, barring recovery, though no signal was given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1080-1083.]

Error from District Court, Miami County; W. H. Sheldon, Judge.

Action by Matilda Trahern against the Missouri Pacific Railway Company for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed, with directions to enter judgment for defendant.

Waggener, Orr & Challis and A. Lane, for plaintiff in error. Frank M. Sheridan, for defendant in error.

PER CURIAM. Matilda Trahern was injured while attempting to cross the track of the plaintiff in error in front of a passenger train while it was running on a street through

the city of Le Roy. She settled with the company and released it from further liability, but afterwards commenced this suit in the district court of Miami county, where she recovered a judgment for \$1,937.27. The company has brought the case here and asks that the judgment be reversed on account of the contributory negligence of the plaintiff, as shown by the special findings of fact found by the jury, and that a judgment be directed in its favor for costs.

The special findings, so far as they relate to the question of contributory negligence, read:

"Q. 41. What time of day was it when plaintiff was injured? A. About 4 o'clock, p. m.

"Q. 42. Was it daylight when said accident occurred? A. Yes.

"Q. 43. From which direction did plaintiff approach defendant's track? A. From the west, and a little north.

"Q. 44. From the point where plaintiff was injured for what distance north was defendant's track straight? A. About 3,000 feet."

"Q. 46. From which direction was defendant's train approaching? A. From north.

"Q. 47. How far south of Fourth street crossing did the accident occur? A. About 60 feet.

"Q. 48. Just before attempting to cross said track, and when plaintiff was in a position of safety, did she look along said track, and in the direction from which said train was coming? A. Yes.

"Q. 49. Did she then discover said approaching train? A. Yes."

"Q. 52. At a distance of from 5 to 10 feet west of said railroad track, how far north along said track could plaintiff see, if she had looked? A. About 3,000 feet.

"Q. 53. When did plaintiff first discover the approach of said train? A. When she came out on walk.

"Q. 54. When plaintiff first discovered the approach of said train what did she do? A. Looked at the approaching train, and, thinking that she had ample time to cross the track without danger, started to cross."

"Q. 60. Just before plaintiff started over said track, did she know that said train was approaching from the north? A. Yes.

"Q. 61. For what length of time next preceding the date of the injury to the plaintiff had she resided near to said railroad track? A. About two or three years."

"Q. 64. Do you find from the evidence that previous to the date of said accident plaintiff had knowledge that freight and passenger trains passed to and fro over said track daily, and many times each day? A. Yes."

"Q. 66. Do you find from the evidence that plaintiff, at the time of said accident and just before she attempted to cross said track, was in possession of all her faculties of sight and hearing, and that they were in their normal condition? A. Yes.

"Q. 67. What was the distance between the west rail of said track and the west line of said street in front of plaintiff's house? A. About 28 feet."

"Q. 69. At any point between the west line of said street and the west rail of said track, if the plaintiff had looked, could she have seen said approaching train from the north? A. Yes."

"Q. 72. Just before plaintiff reached the west rail of said track, if she had listened, could she have heard said approaching train? A. Yes."

"Q. 74. How many feet did plaintiff walk on said street after she left her own premises until she reached the west rail of said track? A. About 30 or 40 feet."

"Q. 76. Do you find from the evidence that plaintiff saw said approaching train, and, thinking that she had ample time to cross over the track before it reached her, made an effort to do so? A. Yes."

"Q. 77. Just before plaintiff reached the west rail of said track, and when in a place of safety, how far was said approaching train from the point where she crossed the track? A. At or north of Fourth street."

"Q. 86. Do you find from the evidence that just before plaintiff was struck by the engine she turned her back to said approaching train? A. Partly. Evidence shows she was going in a southeasterly direction."

"Q. 90. How far would plaintiff have been required to step to have been out of danger? A. Two or three feet."

"Q. 94. When plaintiff stepped from a place of safety, and onto said track, how far was said engine from her? A. About 60 feet."

These findings are made almost wholly from the testimony of the plaintiff. They show that she was grossly negligent. She was familiar with the operation of trains at that place, knew that their speed was not uniform, she saw the train coming, realized that it was dangerously near, and hurried to get across safely. She knowingly and unnecessarily took the chance and lost. The negligence on the part of the company was not the cause of her injury. The failure to sound bell or whistle did not deceive or mislead her. The object of these alarms is to notify people of an approaching train. She already possessed all the information which they could have given. It is claimed that the train moved at a speed greater than allowed by the city ordinance, but it does not appear that the plaintiff knew of such regulation or that she relied upon the prescribed speed. On the contrary, it appears that she knew the speed of trains was not uniform. They sometimes moved slowly, and at times rapidly. She acted with a full understanding of the situation. People who thus defy danger must accept the consequences.

The judgment is reversed, with direction that judgment be entered for the plaintiff in error for costs.

BOMAN v. BANKERS' UNION OF THE WORLD.

(Supreme Court of Kansas. July 5, 1907.)

INSURANCE — MUTUAL LIFE INSURANCE — CHANGE OF BY-LAWS—EFFECT ON BENEFICIARY.

The defendant in error was incorporated as a mutual life insurance association and issued a joint certificate to Boman and wife, by the terms of which, and the by-laws which were made a part of the contract, the association agreed to pay the survivor, upon proof of the death of the other, an indemnity of \$1,000, subject to certain deductions provided for by a by-law then in force. Subsequently, the association passed a new by-law, which, if applicable to said certificate, would greatly reduce the indemnity. Neither Boman nor his wife had any notice or knowledge of the new by-law during her life, but they continued for many months after the new by-law was passed to pay the monthly assessments at the rate required at the time their certificate was issued, and the association received such payments without objection to their sufficiency. The wife died, and Boman made proof of the death and demanded the indemnity, and the association offered him the amount he would be entitled to under the new by-law, but less than one-third the amount to which he would be entitled under the former by-law.

Held, although Boman and wife may have agreed in the acceptance of the certificate to be bound by subsequently enacted by-laws, the association waived the enforcement of the new by-law, and is estopped from asserting it against Boman.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1855.]

(Syllabus by the Court.)

Error from District Court, Allen County; Oscar Foust, Judge.

Action by Alvin Boman against the Bankers' Union of the World. Judgment for defendant. Plaintiff brings error. Remanded, with instructions to modify judgment.

Ewing, Gard & Gard, for plaintiff in error. Austin & Hingate, for defendant in error.

SMITH, J. This action was commenced in the district court of Allen county by Boman to recover, as the surviving beneficiary, his wife having died, the indemnity on a joint policy of life insurance issued to them during her lifetime. The policy on its face purported to afford indemnity to the survivor in the sum of \$1,000, payable 90 days after the receipt of proof of the death of the other spouse. It is specified in the policy that payment of all benefits under the policy should be governed by the provisions of the by-laws, but there is no agreement authorizing any change in the by-laws or any agreement to abide by any subsequent change therein which would affect the amount of the indemnity.

The policy reads: "This certifies that Alvin Boman and Helena Boman having each complied with all of the requirements of the order, and in consideration of the payments of premiums and fees necessary to be paid in advance herein, are members of Jeddo Lodge No. 1073 of the Bankers' Union of the World

located at Humboldt in the state of Kansas and they are each entitled to all the rights, privileges and benefits of membership therein. That upon receipt by the supreme lodge at its office in the city of Omaha, Nebraska, of satisfactory proofs of the death of either of said members while in good standing in this order, and within ninety days after the receipt of such proofs, there will be paid to the surviving member, upon surrender and cancellation of this policy, the sum of one thousand dollars. The payment of all benefits under this policy shall be governed by the provisions of the laws pertaining to this class of policies, which provisions, together with the statements made by the insured in their application for membership and the statements certified by the insured to the medical examiner, are hereby made a part of this contract. This policy is issued to and accepted by both of said members upon the terms and subject to the conditions set forth in the constitution and by-laws of this union, and subject to the conditions and stipulations on the reverse side hereof, all of which are hereby made a part of this contract as fully as if they were recited at length over the signatures hereto affixed."

The only conditions or stipulations on the reverse side of the policy which can affect the questions here involved are: "Death Benefit. Within ninety days after receipt and approval of satisfactory proofs of the death of either of the said members, there shall be paid to the surviving member, if living, otherwise to the legal heirs of such surviving member, upon the surrender and cancellation of this policy, such balance, if any, of the amount payable under this policy, if such remains unpaid to the said member; payable at the supreme office at Omaha, Nebraska, upon the surrender and cancellation of this policy. Should either of said members die before having lived out their expectancy of life, based upon age at time of entry, according to the American Experience Tables of Mortality, there shall be deducted from the death benefit payable hereunder a sum equal to the amount of one payment (at the rate of the member whose death shall first occur, from which the joint rate was fixed) for each month of the unexpired period of such life expectancy with 4 per cent. on the unpaid balance of such sum. Accident and disability payments hereunder shall be subject to proportionate deductions. All deduction, as provided above, shall remain in the benefit fund until transferred to the reserve fund, in accordance with the constitution and by-laws of the order."

From which it will be seen that there is here no provision for a subsequent fixing of the amount of the deduction in case of the death of either of the assured before the expiration of his or her life expectancy; but the reduction is to be determined from the amount of one payment at the rate of the

member whose death shall first occur, from which the joint rate was fixed.

It is contended that the following stipulation in the application for membership binds the members not only to comply with any by-laws which may be enacted, but also authorizes the corporation to change or reduce the benefit: "I agree that the maintenance of my membership in the Lodge of the Bankers' Union of the World and the compliance on my part with the constitution, by-laws, regulations and requirements which are now in force or may hereafter be enacted by the said Bankers' Union of the World, is the express condition upon which I am entitled to enjoy the rights, benefits and privileges of membership in the beneficiary department of this order." Certain it is that the by-laws were explicit on this subject. Division 9, section F, thereof reads: "Every certificate of insurance heretofore issued, or that may be hereafter issued shall be subject to, governed by and construed in accordance with the constitution and by-laws of this order or any amendments thereto that may be hereafter adopted, and all claims shall be settled in accordance with the various provisions thereof as the same may be in force at the time such claim arose." Also division 12, section B: "The Constitution may be altered or amended by the Supreme Lodge at any regular or special meeting." The case was tried to the court upon an agreed statement of facts. The policy and all the pertinent portions of the by-laws necessary to an understanding of such agreed statement are above set forth.

The agreed statement of facts is as follows: "Agreed Statement of Facts. In addition to the facts admitted in the pleadings, and without waiving any such admissions, now, to wit: It is hereby stipulated and agreed that the following facts be and hereby are admitted herein: (1) That the defendant is now, and was at all times mentioned in plaintiff's petition, a fraternal beneficiary association organized and incorporated under the laws of the state of Nebraska, and authorized to, and doing business as such fraternal beneficiary association in the state of Kansas. (2) That on or about the 31st day of December, 1901, said defendant duly executed and delivered to said plaintiff and one Helena Boman, now deceased, who was at said time and thereafter the wife of plaintiff, a certain joint policy of insurance, as provided by the constitution and by-laws of the defendant in force at that time, granting therein benefits or indemnity in case of death of one of said parties to the surviving one the sum of \$1,000.00; a copy of which policy is attached to plaintiff's petition, marked 'Exhibit A,' and which is referred to and made a part of this agreed statement of facts. (3) That prior to the execution and delivery of said policy, said plaintiff and said Helena Boman each separately made application for

the same; copies of which applications are attached to the answer of defendant herein, marked 'Exhibit A' thereof, and are here referred to as a part of this agreed statement of facts. (4) That at the time of the issuance of the said policy of insurance, and prior thereto and thereafter, said plaintiff and his said wife complied with the constitution and by-laws of said defendant in force at the time of the execution of the said policy, and with the terms of said policy. A copy of which constitution and by-laws is attached to defendant's answer herein and marked 'Exhibit B,' and which is here referred to and made a part of this agreed statement of facts. (5) That on or about the 13th day of January, 1904, said Helena Boman died intestate, leaving surviving her this plaintiff, who was and is the sole surviving beneficiary under the said policy of insurance. (6) That thereafter on or about the 15th day of March, 1904, said plaintiff submitted to said defendant due and proper proof of the death of the said Helena Boman under said policy; and thereafter, on the 16th day of August, 1904, the same were approved by the board of directors of the defendant and the said policy ordered paid within 90 days thereafter, and that the sum payable under the terms of said policy became due and payable to the said Alvin Boman at the expiration of the said 90 days from said date. (7) The total amount paid in to the mortuary fund of the defendant by said plaintiff and Helena Boman, during their membership, under said policy was the sum of \$25.58. (8) That subsequently an amended and substituted constitution and by-laws of the defendant was adopted by the supreme lodge of said defendant association, and duly filed with the auditor of public accounts of the state of Nebraska December 19, 1902; a copy of which is attached to defendant's answer, marked 'Exhibit C,' and is here referred to as a part of this agreed statement of facts. (9) That by the laws of the state of Nebraska, under and by virtue of which the defendant association was organized and incorporated, it is provided that amendments to the constitution and by-laws of the defendant should take effect and be in force after the same have been filed with the auditor of public accounts of the state of Nebraska, who is the officer intrusted with the supervision of such association. (10) That said Helena Boman was 27 years of age and said plaintiff was 33 years of age at the date of the issuance of the said policy of insurance; and that the expectancy of life of said Helena Boman at her age, at the date of her entry into said order, to wit, date of issuance of said policy, according to the American Experience Tables of Mortality, was 37.4 years. (11) That said Helena Boman, while living, and said plaintiff at no time until after the death of his said wife, Helena Boman, had any notice or knowledge of the said amended and substituted constitution

and by-laws of 1902, referred to in paragraph 8 of this agreed statement of facts. (12) That the premium rates therein provided for were never enforced or attempted to be enforced as against him or his said deceased wife; and that all payments of premiums made by the plaintiff or said Helena Boman were at the rates, and all transactions had with reference to said beneficiary certificate, were in accordance with the constitution and by-laws of the defendant of 1901, referred to in paragraph 4 of this agreed statement of facts, and never at any time was any reference made to the amended and substituted constitution and by-laws of 1902; and that all payments of premiums made by said plaintiff and said Helena Boman were accepted by said defendant without objection or question, concerning their sufficiency. (3) That computing the amount due under said policy according to the constitution and by-laws of 1901 or the terms of said policy, the amount would be \$739.65, with interest at 6 per cent. per annum from November 16, 1904. (14) That computing the amount due under said policy according to the constitution and by-laws of 1902, the amount due would be the sum of \$224.25, with interest at 6 per cent. per annum since November 16, 1904."

The writer is inclined, under the terms of the policy and the constitution and by-laws of the association, to deny the right of the corporation to diminish the indemnity by the enactment of a by-law subsequent to the issuance of the policy and without the consent of the assured. This association is an insurance corporation under the decision in *National Council v. Shawnee Co.*, 63 Kan. 806, 66 Pac. 1011, 1014. It has been here held (*Miller v. National Council*, 69 Kan. 234, 76 Pac. 830), that, where a member in such an association "agreed to be bound by subsequently enacted by-laws, he is bound by a new law which changes and increases his rate of monthly assessment, if reasonable and necessary to the accomplishment of the purposes of the association"; still, it would seem repugnant to every idea of right that one party to a contract could by a by-law which increases the benefit thereof to itself entirely wipe out, or in the least diminish, the benefits to the other party thereto. If this association could, as it claims, by increasing the monthly assessments, increase the deductions from the face of the policy, and thus decrease the indemnity by over two-thirds the value thereof, it could by only a slight additional increase wipe out the entire indemnity. By the same act it would convey more money to its coffers than the assured contracted to pay for carrying the risk. As the assured grew older, by enacting new by-laws, the corporation could increase its demands and keep the indemnity at nil. Without deciding as to whether the corporation has this power, we are agreed that it is not entitled to enforce the new by-law against Boman. It appears by the agreed statement

of facts that neither Boman or his wife, prior to her death, had any notice or knowledge of the new by-law; that they paid all the assessments according to the rate prescribed by the by-laws in force at the time of issuance of their policy; and that the association neither enforced, or attempted to enforce, the new rate as to them, but received all their payments without objection or question as to the sufficiency thereof. If the association had demanded payment of assessments under the new rate, it would have been notice to the assured of the change in the by-laws, and they could at least have exercised their discretion to continue to pay at the new rate or to drop out by nonpayment. If there be ambiguity under the contract, consisting of the certificate, the constitution, and the by-laws, as to whether the new by-law applied to the Bomans, the action of the parties would amount to a mutual construction thereof adversely to the claims of the association, and the court would adopt such construction, or at least give it great weight. If there be no such ambiguity or uncertainty, still it must be held that the association, by keeping the assured in ignorance of the existence of the new by-law, and by accepting payments without objection at the old rate, waived the new law as to them, and is now estopped from asserting it against the beneficiary. *Assurance Co. v. Bradford*, 60 Kan. 82, 55 Pac. 835; *Wyatt v. Larimer & Weld I. Co.*, 38 Pac. 144, 18 Colo. 298, 36 Am. St. Rep. 280; *Williamson v. Eastern Bldg. Ass'n*, 32 S. E. 765, 54 S. C. 582, 71 Am. St. Rep. 822; *Modern Woodmen of America v. Breckenridge* (Kan.) 89 Pac. 661.

The case is remanded, with instructions to modify the judgment by increasing the same in favor of the plaintiff below to the aggregate amount of \$739.65, with interest at 6 per cent. thereon from November 16, 1904, and costs. The costs of this court will be taxed to the defendant in error.

GREENE, GRAVES, MASON, and PORTER, JJ., concur.

JOHNSTON, C. J. I concur in holding that there was a waiver of the right to enforce the by-law and in the theory of estoppel, but not in all that is said in the opinion.

BURCH, J. I concur in the result.

(76 Kan. 238)

PHARES v. KRHUT et al.

(Supreme Court of Kansas. July 5, 1907.)

1. NEW TRIAL—MISCONDUCT OF PARTIES.

"Misconduct of the prevailing party" as ground for a new trial is not confined to something occurring at the trial. It may include acts amounting to misconduct, which, though occurring before, operate at the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 42.]

2. SAME.

Where, after a trial, evidence is produced which arouses well-grounded suspicion that the prevailing party may have exercised an unlawful and corrupt interference with the selection and drawing of the jury, it is the duty of the court promptly to set aside the verdict and order a new trial, without proof that the rights of the other party have been materially affected by such misconduct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 47.]

3. SAME—EVIDENCE.

The evidence in support of the motion for a new trial in this case, upon the ground of misconduct of the prevailing party, examined, and held sufficient to require the court to set the verdict aside and order another trial.

(Syllabus by the Court.)

Error from District Court, Trego County; J. H. Reeder, Judge.

Action by Ciryll M. Krhut and others against John W. Phares. Judgment for defendant. From an order granting a new trial, he brings error. Affirmed.

Defendants in error brought this action against John W. Phares to recover \$2,000 damages for fraud and misrepresentation, claiming that he had acted as their agent in the sale of a section of land and fraudulently misrepresented to them that he had sold it for the sum of \$8,000, when in fact he received the sum of \$9,600, and had retained the difference as well as an agent's commission. Upon issues joined, the case was tried to a jury, and judgment rendered in favor of defendant. The trial court sustained a motion for a new trial and set aside the verdict, and it is to reverse that ruling of the court that plaintiff in error brings this proceeding.

At the time the case was tried, John W. Phares was the county clerk of Trego county, and had filled that position for a number of years. The motion for a new trial included all the statutory grounds, but the ground relied upon was "misconduct of the prevailing party." Defendants in error charged that plaintiff in error, while county clerk, corruptly placed, or caused to be placed, in the jury box, six names not selected by the township trustees for jury service, and corruptly altered the jury lists in his official custody in order to conceal the unauthorized placing of the names in the jury box, and corruptly withdrew from the jury box prior to the drawing of the jury in February, 1906, 19 names; that all of these acts were for the purpose of securing the drawing of a jury favorable to himself in this and other jury cases pending in the court in which he was a party. In support of the motion, the testimony of a number of township trustees, and also other oral testimony and affidavits, was introduced from which it appears that, after the trustee of Collyer township had returned the 1905 jury list from that township to plaintiff in error, who was then county clerk, the list was changed by some person without authority by the addition of eight

names. It also appears from the same kind of testimony that the names of seven persons were added to the list of those eligible as jurors from Ogallah township after the trustee had made his return. Among these added names was that of J. L. Arnold, who had not been selected for jury service by the trustee. The assessment roll of Riverside township showed the same kind of manipulation; 11 names having been added to the five names returned by the trustee. The October term of the district court was the first term after the names were returned by the trustees. All the names were placed in the jury box in September, 1905, in the presence of two justices and the sheriff, and 24 names were drawn from the jury box for service as jurors for the October term. The next term of court was the March, 1906, term, when the cause was tried. On February 3, 1906, in the presence of the same justices and sheriff, 24 names were drawn from the jury box for service at the March term. Among the names drawn at this time were J. L. Arnold, Otto Colberg, J. Walberg, E. Pugh, T. W. Johnson, and S. Erickson, persons whose names were among those added to the list without the authority of the trustees. After this drawing, according to the testimony of the justices and sheriff, the jury box was found to be empty, although, by adding the total number of names drawn out for the two terms of court, there were 19 names unaccounted for, and which should have been left in the box when the drawing closed. The officers who were present also testified that the slips containing the names drawn at this time were not the same slips which were placed in the box in their presence in September, 1905, but were made upon a different kind of paper. Among those who served as jurors on the trial, there were three from Riverside township, who were not selected by the trustee of that township, and whose names were added to the jury list without his authority or knowledge.

F. F. Ziehlman, who was the trustee of Collyer township, testified that he returned in his own handwriting the names of 16 persons as jurors, and that there had been eight names added which were not in his handwriting, and that he had not authorized any one to add any names to the roll. He further testified that, while the motion for the new trial was pending, plaintiff in error sent for him to come to the county clerk's office and showed him the assessment roll with the additional names and said that he wanted him to "recognize this list." The witness informed him that he could not do that. "He [plaintiff in error] said if I could not recognize this as my list, he would make out a new book, if I would recognize it." J. C. Buchanan, trustee of Ogallah township, testified that seven names had been added to the list after he had returned the names to the county clerk; that he had a conversation with plaintiff in error while the motion

for a new trial was pending, in which plaintiff in error asked him if he had had any talk with the attorney for defendants in error, and, when informed by the witness to the contrary, said to him: "If he comes to you for anything, don't tell him anything until you come on the stand. I say 'what do you want?' And he says: 'I don't know. It is something about the jury.'" He also testified that he had a conversation with plaintiff in error when the motion for a new trial was pending, as follows: "He asked me if I had made an affidavit, and I told him I had not; and he asked me if I would make an affidavit to the effect that I did not know how many jurors I reported, and I told him I would not—I could not." E. B. Hobbick, township assessor of Wakeeney township in 1905, also testified that he returned to the county clerk the names of six persons eligible as jurors from the city of Wakeeney, and that the assessment roll of the township showed nine names added without his authority. Defendants in error were residents of Collyer township, which was one of the most populous townships in the county, and its trustee selected 16 persons for jury service. It appears that no person from this township happened to be drawn or summoned on the jury for the March term. J. L. Arnold, whose name was added to the jury list from Ogallah township without the authority of the trustee, was a tenant on the farm of plaintiff in error. Charles Ridgway, who was drawn as a juror, and whose name was one of those added to the list, but who did not serve, testified that before the trial took place he had a conversation with plaintiff in error, in which the latter said: "I think my land case will be tried, and if it is, and you sit on the jury, I wish you would do me all the good you can, because I am right."

The motion for a new trial was also supported by affidavits of defendants in error and their attorneys showing that they had no knowledge or notice of the irregularities and misconduct with reference to the drawing of the jury at the time the case was tried, nor until about the time the motion for a new trial was filed. There was further testimony showing that plaintiff in error was a party in two other causes pending at the same term of court, liable to be tried by juries, and in which considerable amounts were involved. There was no evidence offered by plaintiff in error in rebuttal.

W. E. Saum and Jno. E. Hessin, for plaintiff in error. Herman Long, for defendants in error.

PORTER, J. (after stating the facts). It is claimed that the court erred in refusing to strike from the files the affidavits, and in admitting oral evidence in support of the motion. This claim of error is based upon the contention that the "misconduct of the prevailing party," which is one of the statutory

grounds for a new trial, has no application to any acts of a party except such as occur at the trial, and especially that it has no reference to something that may have occurred long prior to the trial. To this we cannot agree. The language of the statute contains no such restrictions. Nor is there any substantial reason why the acts of a party which were designed to and did operate at the trial to secure to him an undue advantage, by means which the law regards as reprehensible, should not furnish grounds for setting aside the verdict merely because they were set in motion before the trial. In *May v. Ham*, 10 Kan. 598, the syllabus reads: "Where it is shown, on a motion for a new trial, that the prevailing party in the cause, prior to the commencement of the trial, attempted to pack the jury, the verdict should be set aside for such misconduct, unless it should also appear clearly and beyond all reasonable doubt that the other party was not prejudiced by such conduct. And where such misconduct was discovered by the other party during the trial, it is sufficient for such party to raise any question connected therewith, after verdict, on a motion for a new trial." The statute makes misconduct of the prevailing party a ground for a new trial, provided the substantial rights of the complaining party have been materially affected. This does not require an affirmative showing that but for the misconduct the verdict would have been different, for it is obvious that such a showing would be ordinarily impossible. Both parties have equally the right to a fair and impartial trial, which includes the right to have the jury drawn without one party having exercised a choice or selection of the men who shall serve thereon, except as provided by law, when the jurors are examined upon their voir dire. Where one of the parties unlawfully secures the selection of certain men for the regular panel, and prevents certain others from being drawn who were regularly chosen for jury service, it can hardly be seriously contended that the rights of the other party have not been materially affected thereby. In *May v. Ham*, *supra*, it is said, in the opinion: "It may also be that the seeming misconduct of the plaintiffs did not affect the verdict of the jury; but it may be that it did, and we cannot say that we feel clear that it did not, and this is all that is necessary to require a reversal of the judgment. When a party has committed a flagitious act in order to obtain some undue advantage over his adversary, as it would seem one of the plaintiffs in this case did, such party should not ask that the other parties should show that they were in fact prejudiced by his acts. On the contrary, he should be compelled to show clearly and beyond all reasonable doubt, if not beyond all doubt, that such parties were not prejudiced by his unwarranted and reprehensible misconduct."

It is seriously urged that the objections to

the manner in which the jury was drawn amounts to a challenge to the array, and comes too late. It is doubtless true that the irregularities could have been shown in support of such a challenge, and the proof would have warranted the court in quashing the panel; but that fact does not in any sense give character to a showing made, not for the purpose of quashing the panel, but for the purpose of setting aside a verdict and obtaining a new trial. If the charges set forth in the motion were true, plaintiff in error might have been prosecuted criminally; but it would hardly be said that for that reason the truth of the charges could not be shown for any other purpose, or could not be used to support a motion for a new trial.

Another contention is that what plaintiff in error chooses to call "irregularities" and "informalities" were waived because the objections were not taken sooner; that by ordinary diligence the objections to the manner in which the jury was drawn could have been made before the trial. It is a sufficient answer that defendants in error, according to the evidence, had no notice or knowledge of the facts relied upon until after the trial. Besides, they were certainly not bound to assume that a county officer, who happened to be a party to the action, might falsify the records and tamper with the jury box. And it is a misuse of the English language to characterize the acts charged against plaintiff in error as mere "irregularities" and "informalities."

It is true, as contended, that there was no direct evidence that plaintiff in error was responsible for the alterations in the lists of jurors or had tampered with the jury box; but we do not agree with the claim that there was no evidence which tended to show a motive on his part to secure an unfair and unlawful advantage. On the contrary, there was direct evidence showing a disposition to obtain an unfair advantage with the jury, and showing an attempt to influence jurors who might be called to serve on the case, and direct evidence of an attempt to conceal and distort the facts with respect to the jury lists after an investigation had begun. The jury box and the jury lists were in his official custody and were undoubtedly altered and tampered with, and, while no witness testified to seeing him in the act of making the alterations or changes, the circumstances in evidence were very suspicious, and beyond any question in our opinion sufficient to require the court to set aside the verdict and order a new trial. This is especially true in view of the failure of plaintiff in error to contradict the direct testimony of the four trustees, the justices, or the sheriff as to what transpired at the time the returns were made and the drawings took place, or to contradict the testimony of the trustees that he attempted to induce them to suppress the facts; and in view also of his willingness to rely upon technical objections to the consideration of

the evidence, rather than to attempt to explain the suspicious circumstances.

It is finally insisted that the reason assigned by the trial court for sustaining the motion amounts to a finding that the charges of misconduct were not established by the evidence, and that a new trial was in fact granted upon grounds not included either in the motion or provided for in the statute. The remarks of the court were as follows: "I have no criticism to make upon any one connected with this case, nor am I going into the question of the manner in which certain names got into the jury box; but I want to say this: That there is a suspicion caused, by the manner of drawing that jury, which should not exist in any court on earth. * * * It is possible that the instructions of the court were not clear enough. It is barely possible that the jury did not weigh and consider the evidence, as they should have done; but I have no criticism to make upon the jury. They did as they thought was right, but, on account of the suspicion that is raised that the plaintiffs did not have a fair and impartial trial, and the jury was not fairly drawn, I am of the opinion that a new trial should be had, and that the judgment should be set aside, and a new trial is ordered." In the light of the uncontradicted evidence, we cannot regard the language of the court as a finding that the charges were not established, but are rather inclined to view the language used as showing a disposition on the part of the trial judge to avoid unnecessary harshness in characterizing what appeared to be reprehensible conduct in one of the parties. Courts are created to secure the administration of justice between contending parties; and where, after a trial, evidence is produced which arouses well-grounded suspicion that the prevailing party may have exercised an unlawful and corrupt interference with the selection and drawing of the jury, it is the duty of the court promptly to set aside the verdict and order a new trial, without proof that the rights of the other party have been materially affected by such misconduct. Upon the showing made upon the motion in this case, we think it would have been error not to have ordered another trial.

The judgment will be affirmed. All the Justices concurring.

(76 Kan. 228)

SILVER v. BOARD OF COM'RS OF CLAY COUNTY.

(Supreme Court of Kansas. July 5, 1907.)

1. COUNTIES — LIABILITIES — NEGLIGENCE OF OFFICERS.

Counties are involuntary quasi corporations and are mere auxiliaries to the state government and partake of the state's immunity from liability. They are in no sense business corporations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 212.]

2. SAME.

A county is not liable in damages for the negligent or wrongful acts of its board of county commissioners, unless such liability is expressly imposed by statute or necessarily implied therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 212.]

(Syllabus by the Court.)

Error to District Court, Clay County; Sam Kimble, Judge.

Action by William Silver against the board of county commissioners of Clay county. Judgment for defendants, and plaintiff brings error. Affirmed.

The plaintiff filed his petition against the defendant board, in which he alleges, in substance, that he is the owner of a large tract of land in Clay county on the western side and within a horseshoe bend of the Republican river. That for many years a regularly laid out public road has extended east and west along his premises and across the river. That many years ago a bridge was built on said public road across the river, at the toe of the horseshoe bend, and had been maintained and used as a part of the highway until a short time prior to the filing of the petition. That in 1904, at a time of high water, the river cut a new channel across the heel of the horseshoe bend and across said public road, and the main stream has since continued to flow therein, leaving the old channel, a lagoon, filled with water and impassable except over said bridge; the highway across the new channel being also impassable. That the defendant board instead of restoring said highway, by building a bridge thereon across the new channel, abandoned the same and ordered and caused to be removed therefrom the bridge across the old channel, thus leaving plaintiff's premises upon an island and inaccessible from either direction. That by reason of the facts stated the plaintiff has been damaged in the sum of \$5,000, for the recovery of which amount he prays. A general demurrer was filed to this petition, and was sustained by the court. To reverse this order the plaintiff comes here.

Hy W. Stackpole and Coleman & Williams, for plaintiff in error. W. P. Anthony, for defendant in error.

SMITH, J. (after stating the facts). According to the allegations of the petition, the removal of the bridge by the county commissioners was illegal and imposed great hardship upon the plaintiff, and he would, perhaps, under the authority of *Greeley Township v. Board of County Commissioners*, 26 Kan. 514, have been entitled to enjoin the act, or may even yet not be without a remedy. However, before the decision of the court sustaining the demurrer can be reversed, we must be able to say that the county is responsible in damages for the wrong alleged. It is well-established law that a county is an involuntary

corporation for governmental purposes, and is in no sense a business corporation; that the powers and obligations of the county are such only as the law prescribes or as arise by necessary implication therefrom. *Elkenberry v. Township*, *infra*; *Marion Co. v. Riggs*, *infra*; 11 Cyc. 497; 7 Am. & Eng. Encyc. Law, 947. Cities, however, in this state, are municipal corporations, and neither their powers nor obligations are so restricted, and decisions as to their liability for negligence have no application here.

We have not been cited to any statute, and believe none exists, which imposes any obligation upon a county to respond in damages for the negligence or even wrongful act of its officers in relation to the maintenance of public roads or bridges, except section 579, Gen. St. 1901, which reads: "Any person who shall without contributing negligence on his part sustain damage by reason of any defective bridge, culvert, or highway, may recover such damage from the county or township wherein such defective bridge, culvert or highway is located, as hereinafter provided; that is to say, such recovery may be from the county when such damage was caused by a defective bridge constructed wholly or partially by such county, and when the chairman of the board of county commissioners of such county shall have had notice of such defects for at least five days prior to the time when such damage was sustained; and in other cases such recovery may be from the township where the trustee of such township shall have had like notice of such defect." Since first the state was organized, it has been the duty of counties and the townships thereof to maintain public roads and bridges, but not until the passage of the above statute, in 1887, was either the county or township liable in damages resulting from the failure so to do. *Elkenberry v. Township of Bazaar*, 22 Kan. 556, 31 Am. Rep. 198; *Com'rs of Marion County v. Riggs*, 24 Kan. 255. The language of section 579, *supra*, at first blush, seems quite inclusive in its terms; possibly broad enough to include damages claimed in the petition herein. A consideration, however, of the former law upon the subject, and of the radical change therein by the provisions of this enactment, even when strictly construed, and especially of the qualifying words "without contributing negligence on his part," compels the conclusion that the enactment is intended only to authorize the recovery of damages suffered in the use of a highway or bridge, for the purposes for which they are maintained, which, after the requisite notice, is negligently allowed to remain defective. The petition charges, as the basis of the claim for damages, an illegal and wrongful act to which there can be no "contributing negligence." If the plaintiff had even assisted in the removal of the bridge, he would not thereby have been guilty of contributory negligence, although by so doing he evidenced his consent to the illegal

act. Clearly, the statute was not intended to apply to damages of the nature complained of.

We conclude, with some reluctance, that the judgment of the court must be sustained, and it is so ordered. All the Justices concurring.

(77 Kan. 809)

FOSKUHLE et al. v. HERZER.

(Supreme Court of Kansas. July 5, 1907.)

BOUNDARIES — ASCERTAINMENT — RECOGNITION OF ACQUESCENCE.

In ejectment, the boundaries of certain government townships were in dispute. It appeared that over 20 years previously a survey had been made to establish the boundaries, and roads were laid out in conformity thereto on petitions signed by plaintiff's immediate grantors, fire guards were made, fences built, trees planted, and other permanent improvements made with reference to that survey. About two years later another survey was made by an experienced surveyor, who claimed to have located some of the government corners, but in making it he relied on information given him by another surveyor as to the location of a certain corner, and the evidence as to the location of that corner was in dispute. The court decided that the first of the two surveys should govern. *Held*, that the finding should not be disturbed.

Error from District Court, Ford County; E. H. Madison, Judge.

Separate actions, consolidated and tried as one, by Charles Herzer against A. J. Foskuhl, J. J. Morrison, and Mattie E. Nevins. Judgment for plaintiff, and defendants bring error. Affirmed.

F. Dumont Smith, for plaintiffs in error. Sutton & Scates, for defendant in error.

PER CURIAM. In the early settlement of Ford county it appears that considerable confusion resulted in land surveys in some localities for the reason that no government corner stones could be found. This was especially true in townships 27, 28, and 29, range 22. In 1885 the county surveyor, one Mather, undertook to survey and subdivide these three townships. He started at the sixth standard parallel in Clark county and ran north on the range line between ranges 21 and 22. From the southeast corner of township 29, range 22, he ran north a distance of 18 miles before finding any government corners or pits or mounds called for in the field notes. Twelve miles north of the south line of Ford county he reached the Arkansas river, which he declined to consider a witness mark on account of the shifting, sandy condition of the banks. In township 27, north of the river, he reached the Santa Fé trail, mentioned in the field notes of the government surveys, and at the northeast corner of township 27, range 22, he found a government stone. In the distance of 18 miles he found, however, an excess of about 36 chains, amounting to almost a half mile, and he apportioned this excess from the south line of the county to the trail between

these points. The range line between 22 and 23 was run in the same manner with the same results, except that a point 11 miles north of the south line of the county he came to Mulberry creek. The government field notes called for a corner stone just south of this creek as the southwest corner of section 6, township 28, range 22. No apparent change had taken place since the original government survey in 1868, and he therefore took this as a true witness mark, and proceeded to apportion the excess found by actual measurement from that point south over the 11 miles, and to apportion the remaining excess from that point north to the trail. He then surveyed and subdivided townships 28 and 29 in range 22, except a small portion of the north part of township 28, and set up corner stones. He was called away about this time, and never returned to complete the survey and subdivision of the north tier of sections of township 28. The Mather survey appears to have been generally acquiesced in by the public. Roads were laid out upon petition in townships 28 and 29, fences built, hedge rows plowed, trees set out, according to this survey. The immediate grantors of plaintiffs in error petitioned for public roads in accordance with this survey. This controversy arises over the fact that plaintiffs in error have taken possession of portions of tracts of land claimed by defendant in error who brought separate actions in ejectment. These were consolidated and tried as one. The court found generally for plaintiff, and defendants seek by this proceeding to reverse the judgment.

About 1887 Gen. Fonda, an experienced surveyor, was ordered by the county commissioners of Ford county to make a survey of these three townships. He had previously made partial surveys with Eckert, another surveyor, and claimed to have located the northwest and northeast corners of township 28, range 22, as government corners. He relied, however, to some extent upon information given him by Eckert as to the location of what is referred to in the evidence as the "Van Trump" corner at the northwest corner of township 28. The corners in dispute are the exterior corners of township 28, range 22. Black, Ford, Eckert, Lewis, and other surveyors testified, and a number of plats and surveys were introduced in evidence. Plaintiffs in error concede that the general finding of the court in favor of defendant in error concludes them, unless the court erred in a matter of law, and their contention is that the record shows conclusively that township 27 was surveyed and the government corners found and proven, and that what is known as the "Fonda" corner is a government corner, and the court erred in refusing so to regard it. The claim is made that the court disregarded the rules in reference to surveys established by the cases of *Everett v. Lusk*, 19 Kan. 195, *McAlpine v. Reicheneker*, 27 Kan. 257, and Tar-

penning v. Cannon, 28 Kan. 665, to the effect that, where known government corners are shown, or, in cases where they have disappeared, if their location can be ascertained, the monuments must govern, and the field notes of the government survey must be disregarded. The rules laid down in those cases are well-settled rules in cases of disputed surveys, but it by no means follows that the trial court erred. It is not conceded by defendant in error that there was conclusive evidence of the actual location of any government corners in township 27, or that the "Van Trump" corner testified to by Gen. Fonda was proven to have been a government corner. On the contrary, it was contended by plaintiff below that no government corners were ever found or ascertained in the three tiers of townships which included township 27, and several surveyors so testified. The controversy in the evidence was waged over these disputed facts, and there was, we think, sufficient evidence to warrant the finding of the court. On the other hand, the testimony of Gen. Fonda and Surveyor Black was, we think, sufficient to have sustained a finding to the contrary if the court had taken that view.

Another rule laid down in *Tarpenning v. Cannon*, *supra*, has, we think, a forceful application to the facts and circumstances of this case. The rule is stated to be: "A boundary line long recognized and acquiesced in is generally better evidence of where the real line should be than any survey made after the original monuments have disappeared." As observed, the Mather line was generally acquiesced in by the public since 1835, roads were laid out in conformity thereto on petition signed by the immediate grantors of plaintiffs in error, fire guards were made, fences built, trees planted, and other permanent improvements made with reference to it; and courts should hesitate to change the boundaries of lands in cases where it is conceded that the lines were never surveyed by the government except theoretically, and overturn the boundaries which have been so long recognized, unless upon the clearest kind of proof.

The judgment will therefore be affirmed.

(76 Kan. 224)

BALIN et al. v. OSOBA et al.

(Supreme Court of Kansas. July 5, 1907.)

DEED—DELIVERY—EVIDENCE.

Where a contract is made for the sale of land, the consideration being the assumption of an existing mortgage and the payment of a sum of money at a future date (no note for the deferred payment being contemplated), and the vendor files for record a deed from himself to the vendee, who thereupon goes into possession of the land and thereafter pays the taxes thereon and the interest on the mortgage as they accrue, this situation continuing for two years without objection by the grantor, these facts warrant an inference that he intended that the title should pass and a finding that there was a

constructive delivery of the deed, notwithstanding it was never manually delivered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 136.]

(Syllabus by the Court.)

Error from District Court, Greenwood County; G. P. Aikman, Judge.

Action by Hynek Balin and others against Joseph Osoba and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Jackson & Darby, for plaintiffs in error.
Lew E. Clogston, for defendants in error.

MASON, J. John Balin died intestate owning a farm, the title to which passed to his widow, Margretha Balin, their sons Hynek and Joseph Balin, and their daughters Christina Osoba and Johanna Ullman. In 1888 a conveyance was made to Margretha Balin by all the other heirs excepting Mrs. Osoba. In 1901 Margretha Balin made a warranty deed to Hynek Balin, which was duly filed for record, he at the same time executing an instrument which was never recorded by which he gave her a lease to the property for her life and agreed at her death to pay \$100 to each of his sisters. Thereafter he and his mother lived upon the place, he managing it and giving her as rent one-third of the crops. In 1903 Hynek Balin entered into negotiations with Christina Osoba and her husband, who were then living in Pennsylvania, for the conveyance of the land to them, in consideration of their assuming an existing mortgage and paying \$100 to Johanna Ullman upon the death of Margretha Balin. Afterwards a dispute arose, Hynek asserting that it had been understood that the conveyance was to be subject to the mother's life lease, and Christina and her husband denying this, and disavowing any knowledge of such lease or of any claim on the part of Margretha to an interest in the property. Whatever the fact may have been in this respect, on November 28, 1903, Hynek signed, acknowledged, and placed on record a warranty deed to Christina and her husband, purporting to transfer a complete title except for the mortgage, which it recited was to be paid by the grantees. According to the claim of Christina and Joseph Osoba, which has some support in the evidence, Hynek then moved to another farm which he had bought with the proceeds of the mortgage, and their son assumed possession and control of the place in their behalf, and thereafter they paid the interest on the mortgage and the taxes on the land as they accrued. In July, 1905, they came west and began living upon the farm themselves with the others. A few weeks later they expelled Margretha from the property, and she and Hynek then began an action against them to recover possession and declare the deed a nullity. The court gave judgment for the defendants, and the plaintiffs prosecute error.

Although the negotiations for the sale of

the land were carried on entirely by correspondence, most of the letters had been lost, and each party relied upon oral testimony to establish their contents. This testimony being conflicting, the judgment must be interpreted as establishing that the defendants contracted for immediate possession and had no actual notice of the life interest of Margretha Balin in the land. They had no constructive notice of it, for the instrument creating it was not recorded, and the possession of Margretha Balin gave no warning of a claim on her part, for persons dealing with her grantee were justified in regarding her execution of a warranty deed as a renunciation of any such claim. "Possession of real estate by the grantor in a warranty deed does not impart notice to a purchaser from the grantee of secret equities existing in favor of the person occupying the land. The possession in such case by one who has conveyed the land indicates that he is holding the premises for a temporary purpose only, as a tenant at sufferance of his grantee." *Hockman v. Thuma*, 68 Kan. 519, 75 Pac. 486.

These considerations limit the present inquiry to one question: Was the court warranted in finding that there was a valid delivery of the deed executed by Hynek Balin to Christina and Joseph Osoba? It was admitted there was no actual, physical delivery of the document itself to either of the grantees. After it had been recorded it was returned to the grantor, who has ever since retained it. Nevertheless, if the filing of the deed for record was intended by the grantor and accepted by the grantees as a constructive delivery, the law will give it that effect. It is well settled that delivery is largely a matter of intention, that a manual delivery is not necessary, that although registration may not itself constitute delivery it is a circumstance from which delivery may be inferred and will be inferred in the absence of some sufficient reason to the contrary. These propositions are elementary, and are supported by the texts and citations to be found in 13 Cyc. 561, 562, 569, and 567, and in 9 A. & E. Encycl. of L. 153, 154, and 159. In the present case it must be borne in mind that the grantees had done everything required of them by the contract as they stated it. No cash payment was to be made, and no note was to be given. The deed upon its face showed their assumption of the mortgage debt. They had paid the installments of interest, and the remainder of the purchase price was not due until the death of Margretha Balin. Their going into possession and paying taxes and interest sufficiently established their acceptance of the deed, with its obligations as well as its benefits. The silence of Hynek Balin for a considerable period, perhaps about two years, not being otherwise explained by any testimony which the court was bound to believe, warranted the inference that he regarded the transaction as completed. True, he afterwards demanded that Christina and

Joseph Osoba should execute an acknowledgment of Margretha's life interest as a condition for the final delivery to them of the deed, but in view of all the evidence this may have been an afterthought. As was said of a similar situation in *Kelsa v. Graves*, 64 Kan. 777, 68 Pac. 607: "The fact that the plaintiff executed the deed and at the same time recorded it is entitled to consideration, and while the recording of the deed is not conclusive, and may be rebutted by circumstances or proof of a contrary purpose, still there were acts and words of the parties showing an intention to treat the instrument as a conveyance, and both parties, according to the proof offered in behalf of the defendants, acted as if the property had actually passed by the transfer. There was sufficient proof of the conveyance, constructive delivery, and an acceptance by the grantee; and, although there was contradictory evidence given in behalf of plaintiff, the general finding of the court settles all such disputes in favor of the defendants."

The judgment rendered not only denied the plaintiffs' petition, but also quieted the defendants' title against them. Complaint is made that the latter part of the judgment was outside of the issues made by the pleadings, inasmuch as no affirmative relief was asked in the answer. A decision for the defendants on the merits, however, necessarily had the effect to bar any future claim of either of the plaintiffs to the property, and no prejudice could result from this fact being given positive expression.

The judgment is affirmed. All the Justices concurring.



(76 Kan. 251)

TRIPLE TIE BENEFIT ASS'N v. WHEATLEY.

(Supreme Court of Kansas. July 5, 1907.)

INSURANCE—BENEFIT ASSOCIATIONS—PROOF OF DEATH—STATEMENTS OF ATTENDING PHYSICIAN.

The by-laws of a fraternal beneficiary association required satisfactory proof of death before payment of a beneficiary certificate. It furnished blanks upon which such proof should be made. The following printed note preceded the blank to be filled by the attending physician: "Note to Attending Physician: The purpose of the following statement is twofold: First, to establish proof of death and the cause. Second, to give such information concerning the personal and family history of deceased, together with predisposing causes leading to last illness, as well as the various matters of importance necessary in tabulating vital statistics. Attending physicians are urged to give under general remarks any information, which, in their judgment, tended to shorten the natural duration of life. You are assured that this statement will be used only for the purpose of gathering correct and accurate information, and will in no case be used as a basis for litigation." A beneficiary submitted proof of death upon one of these blanks in which the attending physician made statements beyond those necessary to establish death, and which gave information obtained in a professional way concerning the

state of the deceased's health several months prior to his death. *Held*, that such statements cannot be regarded as admissions of the beneficiary made in connection with his proof of death.

(Syllabus by the Court.)

Error from District Court, Neosho County; L. Stillwell, Judge.

Action by George W. Wheatley against the Triple Tie Benefit Association. Judgment for plaintiff, and defendant brings error. Affirmed.

Coleman & Williams and Dawes & Rutherford, for plaintiff in error. Brown & Grigsby and E. L. Burton, for defendant in error.

BURCH, J. The defendant is a fraternal benefit association. It issued a certificate to Alpheus Wheatley, one of its members, entitling him to participate in the beneficiary fund of the association in a stated amount which at his death should be paid to George W. Wheatley. Subsequently the membership of Alpheus Wheatley was suspended for non-payment of dues, and he was reinstated upon an application supported by a certificate in which he made certain declarations regarding the state of his health. Afterwards he died. The association furnished a blank form satisfactory to itself upon which proof of death should be made, which included a certificate under seal by the president and secretary of the local lodge, a statement by the attending physician, and an undertaker's certificate. A form duly filled out reached the association. There is some dispute in the evidence whether the beneficiary, George W. Wheatley, procured the document to be prepared and forwarded, but this question may be passed by, and it may be assumed that he furnished the proof of death. In an action based upon the beneficiary certificate brought by the beneficiary against the defendant, the answer charged that the health certificate upon which the member was reinstated was false, in that at the time it was made he was under medical treatment for the disease from which he died. The physician's statement forming part of the proof of death contained facts not essential to proof of death which became known to him in a professional way only and which supported the allegations of the answer. The defendant offered it in evidence, but it was excluded, and judgment having gone for the plaintiff, the defendant assigns error.

The defendant argues that, notwithstanding the manner in which the physician's information was required, his statement should have been received in evidence as an admission of the plaintiff made in connection with his proof of death. Upon this question the authorities are divided, but it may be left wholly at one side. The blank furnished by the defendant and actually used by the attending physician contained the following matter immediately preceding the statement itself:

"Medical Proof and Cause of Death.

"Note to Attending Physician: The purpose of the following statement is twofold: First, to establish proof of death and the cause. Second, to give such information concerning the personal and family history of deceased, together with predisposing causes leading to last illness, as well as the various matters of importance necessary in tabulating vital statistics. Attending physicians are urged to give under general remarks any information, which, in their judgment, tended to shorten the natural duration of life. You are assured that this statement will be used only for the purpose of gathering correct and accurate information, and will in no case be used as a basis for litigation.

"Statement of the Attending Physician."

The by-laws of the association simply required satisfactory proof of death. The printed note recognizes the fact that the plaintiff was under no obligation to do more than to show that the certificate which he held had matured by the death of the member, and that the attending physician, as the witness or agent of the plaintiff, was not required to break the seal of professional confidence and disclose his professional knowledge of his patient's physical condition months before the latter's death. By sending out the blank, by making the express appeal which the blank contains, and by warranting the use to be made of the information imparted, if response should be made to the appeal, it is clear that the matter became one entirely between the association and the physician. The defendant directly intervened and procured the physician's statement in its own way for its own purposes, and the facts related were not supplied by the beneficiary in connection with any effort or purpose of his own. It may be assumed that the physician would not have violated the confidence of the deceased, except under the assurance of the defendant that any revelations made would be used for none but scientific purposes. The plaintiff had no occasion to intercept the communication of the physician to the defendant so long as it was made under a promise that it would not be used to his prejudice. The guaranty of the printed note ran to the plaintiff as much as to the physician, since the document must pass through the plaintiff's hands, and even the bluntest conception of good faith would prevent the defendant from asserting that the plaintiff voluntarily propounded the disclosures to it as admissions of his own.

It is not entirely clear from the record how far the district court acted upon these considerations. In ruling out the evidence the trial judge said: "I am of the opinion that, in view of all the circumstances surrounding this piece of evidence, it is my duty to sustain the objection. The article of the constitution and by-laws of the defendant that provides about this matter of the proof of death simply calls for satisfactory proof

of the member's death, and that is all, in cases where it is a death claim. Now this proof is made by Mr. Baird, a medical gentleman who was on the stand this morning and who testified far enough to show the manner in which he acquired his knowledge with reference to the alleged cause of the death. * * * As I stated, this was made by a medical gentleman, who, so far as the case now stands, acquired his knowledge professionally; and, without enlarging the matter further, I think it is my duty to sustain the objection." Since, however, the ruling was correct, it is immaterial if an insufficient reason were given for it.

The judgment of the district court is affirmed. All the Justices concurring.

(76 Kan. 235)

CITY OF CHERRYVALE v. STUDYVIN.

(Supreme Court of Kansas. July 5, 1907.)

1. MUNICIPAL CORPORATIONS—NEGLIGENCE—LIABILITY.

The fact that a work of municipal improvement is being carried on by the municipality is of public benefit, or even a public necessity, does not exempt the municipality from liability for damages caused by negligence in the prosecution thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1547.]

2. SAME—CONTROL OF ALLEYS.

A city of the second class has control of the alleys therein and has the right to extend sewers under such alleys.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 725.]

3. SAME—INJURY FROM BLASTING—EVIDENCE.

Where the owner of a building abutting upon an alley through which the city is causing a ditch to be blasted for a sewer claims damages to his building by reason thereof, it is incumbent upon him to allege and prove that his building was damaged by exploding unnecessarily powerful blasts; that his injury is the result of negligence and not incidental to a careful prosecution of the work done with due regard to the place and surroundings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1547-1549.] (Syllabus by the Court.)

Error from District Court, Montgomery County; Thos. J. Flannelly, Judge.

Action by J. F. Studyvin against the city of Cherryvale. Judgment for plaintiff. Defendant brings error. Affirmed.

J. B. Bellamy and Travis Morse, for plaintiff in error. Holdren & Brooks, for defendant in error.

SMITH, J. Studyvin sued the city for damages alleged to have been caused to his building by the negligence of the city in blasting a ditch for a sewer in an alley at the side of the building. He recovered judgment for \$554, and the city claims that he was entitled to recover only the value of two panes of glass, broken by a rock thrown in the blasting.

Whether the city was negligent in doing the blasting is practically the only issue under

the pleadings, unless it be said that the allegation of the answer that if any injury occurred to Studyvin's building it resulted from the faulty and unworkmanlike manner in which it was constructed, and the denial thereof constitutes an issue. The ownership of the building by Studyvin and the making of the sewer by the city are admitted. A number of trial errors are assigned, but are grouped by counsel for the city as follows: "Studyvin cannot recover in this case, except as to the two glass broken by projected stones, because the work then being done was a work of public necessity, and was being done in the usual, customary way employed for doing such work under like circumstances, and the damage was caused by the jarring of the ground, which is a necessary consequence of the use of such means and methods in such work, and the damage resulted from inherent defects in the building itself, there being a failure to prove negligence on the part of the city." The contention of the city that the injury to the building occurred by the fault of Studyvin, and not through the negligence of the city, is based upon the following statement in the petition, viz.: "That at the time of the damage herein the walls of said building were not well settled, that they were green, and the mortar used in laying the brick had not become well seasoned." This allegation was made in the petition in connection with a statement that the employees of the city had notice of the condition of the building, and were therefore under obligations to exercise care commensurate with the evident danger. If the condition of the building was as alleged, and the employees had notice thereof, these facts were pertinent in determining the degree of care required to be observed in the blasting. It is a novel proposition, certainly, that the fact of owning a new building is, per se, contributory negligence.

The proposition that the work being done was of public necessity and was being done in the usual, customary way of doing such work, and that the damages, other than the breaking of the window panes, resulted from the jarring of the ground and the concussion of the air, and that the individual suffering damage thereby cannot recover from the government or municipality therefor, is not without the support of some authority. See *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156, 31 N. E. 328, 17 L. R. A. 220, 30 Am. St. Rep. 649; *Cogswell v. Railroad Co.*, 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701. However, later New York cases, while perhaps attaching greater importance to the fact that work of this character is prosecuted by the public and is of public utility than we might be inclined to give it, lay down the rule that negligence will not be presumed from the jarring of the earth or the concussion of the air, but the burden is upon the claimant, to "make it appear that the explosion was unnecessarily violent and carelessly prepared for,

having regard to the place and surroundings."

Holland House Co. v. Baird, 169 N. Y. 136, 62 N. E. 149. See, also, *Booth v. Rome, W. & O. T. R. Co.*, 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. Rep. 552. This rule we accept as a correct statement of the law. It is, of course, a general proposition that, wherever an individual, a corporation, or a municipality has the right to do and does a work of this character, and injury results therefrom to the property of another, without trespass thereon, it is incumbent upon the party injured, before he can recover for the injury, to allege and prove that such injury resulted from negligence in the doing of the work; in other words, that with proper care and with regard to the place and surroundings the work could have been accomplished without injury, but, in fact, the work was done without such care and by reason thereof the injury resulted.

In this case the negligence of the city and its employees, after being warned of the greenness of the building and after being requested to put in lighter charges, was fully pleaded and was sustained by competent evidence, although some of the evidence was conflicting. The man in charge of the blasting testified, in part, that, when blasting in the alley by the side of the building in question, he generally exploded, at one time, what he called a round consisting of 5 holes, 16 inches to 2 feet deep, in each of which was a stick and a quarter of dynamite, a stick being 8 inches long. He also testified, in substance, that the rock at that place could have been blasted out by the use of one stick of dynamite at one blast, "for a little ways." We understand his answer to indicate that by the use of one stick at a time the work would be slower. He also said that one stick would not cause as great concussion as two, and probably this is common knowledge, as well as that six sticks would cause a much greater concussion, which the jury had a right to take into consideration. In connection with the proven effects of the explosions on the building, this evidence was sufficient of itself to justify the jury in finding him guilty of negligence.

We have considered all the trial errors urged, and find nothing therein to justify a reversal. The verdict is sustained by the evidence, was approved by the court, and the judgment rendered thereon is affirmed. All the Justices concurring.

(76 Kan. 304)

CARTER v. HYATT.

(Supreme Court of Kansas. July 5, 1907.)

1. MORTGAGES—FORECLOSURE—SALE—CONFIRMATION.

Whether or not an order of sale issued by the clerk of a district court to the sheriff, directing him to sell the land, in a foreclosure action, in accordance with a former decree of the court, is authenticated by the seal of the court, is a fact necessarily involved in the subsequent

adjudication of the confirmation or refusal to confirm the sale.

2. SAME—PRESUMPTIONS.

In such case, if the court having jurisdiction of the subject-matter and the parties, confirms the sale, it will be presumed it found that the order of sale was so authenticated; and, if such finding be erroneous, the adjudication is not by reason thereof void, but is only voidable, and is vulnerable to attack only in a direct, and not in a collateral, proceeding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1534.]

(Syllabus by the Court.)

Error from District Court, Pratt County; P. B. Gillett, Judge.

Action by John D. Carter against Emma Hyatt. Judgment sustaining demurrer to the petition, and plaintiff brings error. Affirmed.

Carter brought this suit in the district court of Pratt county to recover a certain tract of land, admitting that he should first pay the amount which should be found to be due from him after an accounting for which he prayed. In his petition he alleged, in substance, that in August, 1886, he mortgaged the same to secure the payment of a note and interest coupons; that he defaulted in payment; that an action was brought against him by the holder of the mortgage for the foreclosure thereof; that judgment was therein rendered against him for the debt, and a decree was made for the foreclosure of the mortgage and for the sale of the land; that an order of sale, unauthenticated by the seal of the court, was issued in due time, and the sheriff sold the land in accordance with the mandate thereof, and made a proper return to the court of his proceedings thereunder; that thereafter such sale was confirmed by the court, and the sheriff was ordered to make a deed of the land to the purchaser, which was done; that the order of sale, and all the proceedings of the sheriff thereunder, and all the subsequent proceedings of the court in the matter, were void by reason of the omission of the clerk to authenticate the order of sale by attaching thereto his official seal; and that the defendant was in possession of the land under a conveyance from the purchaser at the sheriff's sale. A copy of the order of sale was attached, which shows the decree of foreclosure was rendered in October, 1889, and the order of sale, without the seal, was issued in April, 1890. The return thereon indicates that the sale was conducted according to law. No allegation of fraud in the sale, nor of anything whatever which would affect the rights of the plaintiff, is made. The only infirmity in the proceeding complained of is the absence of the clerk's seal from the order of sale. A general demurrer was filed to this petition, and was sustained by the court. To reverse this ruling, Carter brings the case here.

Geo. E. McMahon, for plaintiff in error. R. F. Crick, F. G. Turner, and Wm. Barrett, for defendant in error.

SMITH, J. (after stating the facts). The only question necessary to be considered in the case is whether the omission of the clerk to affix his seal to the order of sale renders all the subsequent proceedings void, and subjects them to collateral attack, or whether the subsequent proceedings were only voidable, and were so far, at least, validated by the order of the court confirming the sale as to render them invulnerable to a collateral attack. We hold the latter view. That the sale was at least voidable at the time, and before the confirmation thereof, must be fully admitted. The court which made the order of foreclosure and sale, in the absence of any allegation in the petition to the contrary, must be assumed to have personal jurisdiction of Carter, as well as jurisdiction of the subject-matter. In other words, Carter was in court, or, which is the same in effect, had the opportunity to be in court, not only when the order of sale was made, but when the motion to confirm the sale was presented. Upon the hearing of the application to confirm the sale, the question before the court was: Are the proceedings regular and in conformity with law and equity? Gen. St. 1901, § 4952.

The order confirming the sale and directing the sheriff to make a deed is an adjudication of all the facts involved in the inquiry, one of which was the issuance of a legal order of sale. In case of a decision adverse to his interest, all legal methods of correcting the error were open to him. Should he, then, be allowed to ignore the proceedings of the court, and years afterwards, in a collateral attack, to assert that a fact upon which the order of confirmation was based is false? If the order of confirmation was an adjudication that all the proceedings, including the issuance of the order of sale, were regular and in conformity with law, he cannot in this action be heard to dispute it. In the opinion in an analogous case (*Cross v. Knox*, 32 Kan. 734, 735, 5 Pac. 38) it is said: "The act of the clerk in issuing the order, and the acts of the sheriff under it, were ministerial, and might have been reached by motion to vacate or set aside; but the order of the court confirming the sale was a judicial act, and is such a final order as can only be reached, and, if erroneous, corrected, by proceedings in error. * * * We incline to the opinion (but do not decide the question) that a confirmation of the proceedings of a sheriff under an order of sale is a judicial determination that establishes the legality of the order of sale, as well as the legality of the sale made under it." That the order of sale is a process of the court, and should have been authenticated by the seal thereof, is unquestionable; but in this case, while called the order of sale, it was not the real order of sale. It in effect only communicated to the sheriff the order theretofore made by the court, which order of the court was the primary authority of the sheriff to sell the land.

This was not an execution sale, in the proper sense of the term, but was a judicial sale. The distinction is illuminated at length in *Norton v. Reardon*, 67 Kan. 302, 72 Pac. 861, 100 Am. St. Rep. 459. An excerpt from a quotation therein made, with approval, from *Freeman on Void Judicial Sales*, § 1, epitomizes the distinction: "The chief differences between execution and judicial sales are these: The former are based on a general judgment for so much money; the latter, on an order to sell specific property. The former are conducted by an officer of the law in pursuance of the directions of a statute; the latter are made by the agent of a court in pursuance of the directions of the court. In the former the sheriff is the vendor; in the latter, the court. In the former the sale is usually complete when the property is struck off to the highest bidder; in the latter it must be reported to and approved by the court." At common law, if, in an execution sale, the sheriff, or officer authorized to make the sale, conformed to the established regulations, the sale was final and valid as soon as made, and confirmation was only required in chancery cases, which are, of course, judicial sales. *Rorer on Judicial Sales* (2d Ed.) §§ 9, 16; also, note 4, p. 6. Under our own statutes, however, all sales of real estate, either on execution or on order of sale, must be confirmed by the court before a deed is issued. Section 4952, *supra*.

If the writ in question had been one to bring the parties defendant into court, or one upon which the jurisdiction of the court in any way depended, the omission of the seal would have been fatal, and the jurisdiction of the court would not have attached. If the sale had been attacked on the motion to confirm, as in *Gordon v. Bodwell*, 59 Kan. 51, 51 Pac. 906, 68 Am. St. Rep. 341, it should, according to the decision in that case, although there is much authority to the contrary, have been set aside. That was a direct attack. In this case the attack is collateral, and herein lies the distinction. Expressions are used in the opinion in *Stoutfer v. Harlan*, 68 Kan. 137, 74 Pac. 610, 64 L. R. A. 320, 104 Am. St. Rep. 396, in which case the order of sale was not authenticated by the seal of the court, to the effect that the order of sale, and all the proceedings under it, were thereby rendered null and void. The case, however, did not depend upon this question, but upon the rights of the mortgagee in possession. The remarks were, therefore, *obiter dictum*.

The law favors the stability of judgments, and to maintain the judgment of a court having jurisdiction of the subject-matter involved and of the parties to an action, it is to be presumed, from a general finding or judgment in favor of one party, that every fact involved in the action and which is necessary to support the judgment is found in favor of the prevailing party. *Bixby v.*

Bailey, 11 Kan. 359; *Knaggs v. Mastin*, 9 Kan. 532; *Winstead v. Standeford*, 21 Kan. 270.

Where a court has jurisdiction over the subject-matter of an action and over the parties in the case, no error in its exercise can render the judgment void. *Burke v. Wheat*, 22 Kan. 722; *Meixell v. Kirkpatrick*, 28 Kan. 315; *Sweett v. Ward*, 43 Kan. 695, 23 Pac. 941; *Bank v. Bank*, 51 Kan. 50, 32 Pac. 627. In such case, even if a court decides a fact upon which its jurisdiction depends contrary to the real truth, its judgment based on such jurisdiction is not void, but is only erroneous. In *re Wallace* (Kan.) 89 Pac. 687 (April, 1907); *Ayers v. Deering Co.* (Kan.) 90 Pac. 794 (June, 1907). Under these authorities the allegation of the petition that the court confirmed the sale in question really admits that the court found that the order of sale was authenticated by the seal of the clerk, as this is a fact necessarily embraced in the general finding, required by section 4952, *supra*, that "the proceedings [are] regular and in conformity with law and equity," without which finding the court had no authority to confirm the sale. True, the petition says this is not the real fact. Assuming, as we must, the truth of all the allegations of the petition, it follows that the adjudication confirming the sale was erroneous; but it was not void, even though the order of sale was void.

Bearing in mind the distinction in *Norton v. Reardon*, *supra*, between ministerial and judicial sales, in the former of which the sale is consummated by the sheriff by authority of the law, and in the latter the sale is by the court through the agency of the sheriff, it would not be without the support of authority, probably the greater weight of authority, to say that, even though the court examined the order of sale, as perhaps it should be presumed to have done, and hence knew that it was unauthenticated by the seal, the court, by confirming the sale, cured the defect. The most that is claimed in the petition is that the sheriff, in making the sale, acted without legal authority. It is not claimed that the court was without jurisdiction or authority. Now, if the sale was really made by the court through its agent, the sheriff, and upon the application to confirm the sale the court found there was no fraud or collusion in the sale itself, and that all the proceedings were regular and in conformity with law and equity, except that technically the sheriff had no authority to proceed to execute the mandate, could not the court, and did it not by confirming the sale, ratify the unauthorized act of its agent and thus give it validity? The authorities on this question, pro and con, are collated in a note covering several pages at the foot of *Watson v. Tromble* (Neb.) 29 Am. St. Rep. 495. See, also, 17 Am. & Eng. Encyc. of Law, 993; *Robertson v. Smith*, 94 Va.

250, 26 S. E. 579, 64 Am. St. Rep. 723, and note 726; also 24 Cyc. 36.

The weight of authority seems to be that, in the absence of fraud or circumstances that might affect substantial rights, the court may cure by confirmation any infirmity in the proceedings which it could correct by immediately ordering a new sale. This seems to accord with reason. The plaintiff had here opportunity to know, at the time of the confirmation, the fact upon which he claims to have the whole proceedings adjudged void. He may not then have desired to take advantage of it. The lapse of about 15 years may have augmented the value of the property, and have effected a change in his mind. If this be the situation, he is entitled to little equitable consideration; but he should prevail, if at all, because the law entitles him to what he asks. It seems well established that whether a sale be confirmed or set aside is largely a matter of judicial discretion; that the determination thereof is a judicial decision, final unless corrected by appeal, or unless wholly void; that the fact upon which the alleged infirmity is based was determined by the court in confirming the sale, and, even if the fact were erroneously determined, the final order of confirmation is not therefore void.

It follows that the demurrer to the petition was properly sustained, and the judgment is affirmed. All the Justices concurring.

(75 Kan. 209)

SCHOCKMAN et al. v. WILLIAMS.

(Supreme Court of Kansas. July 5, 1907.)

1. COURTS—MUNICIPAL COURTS—PROCEDURE.

The statute creating the court of Coffeyville does not contemplate action by the court in a civil case on the day fixed by the summons for answer. The judge need not be present in court on that day, and no adjournment need be taken on that day to preserve jurisdiction.

2. SAME—PLEADINGS.

Personal appearance by the defendant at the place of holding court on answer day is not a legal step in a civil action in the Court of Coffeyville. To protect his rights he should file some written pleading recognized by the Code of Civil Procedure.

3. SAME—DEFAULT JUDGMENT.

The court of Coffeyville may render judgment by default whenever it desires to do so after the time allotted to the defendant in which to plead has expired.

(Syllabus by the Court.)

Error from District Court, Montgomery County; Thos. J. Flannelly, Judge.

Action by Kate Williams against Bertha Schockman and Wilhelm Schockman. Judgment for plaintiff, and defendants bring error. Affirmed.

Ayers & Welch, for plaintiffs in error. A. B. Clark, for defendant in error.

BURCH, J. The defendants were sued by the plaintiff in the court of Coffeyville and served with a summons which required them

to answer on July 3, 1901. On that day they made default. They did, however, go to the city court and remain there a considerable portion of the day, when they ascertained the judge was absent, and went home. They gave no further attention to the case, and upon January 10, 1902, without further notice to them, judgment was rendered in favor of the plaintiff by default. The judge of the city court was not present in court at any time on July 3, 1901, and the clerk made no adjournment of the cause. In an action in the district court between the same parties, based upon the city court judgment, the plaintiff recovered, and the defendants assign error.

The principal question relates to the authority of the city court to proceed, under the circumstances, after July 3, 1901. Chapter 126, p. 241, Sess. Laws 1899, creates the court of Coffeyville, defines its jurisdiction, and regulates its procedure. In civil actions the Code of Civil Procedure and the practice in district courts govern, except in certain specified matters not material here. Following that procedure and practice the city court acquires jurisdiction of a defendant by the service of summons. The answer day stated in the summons is the day for the defendant to file a written pleading or become in default. He is not required or expected to be personally present in court on that day, and, if he does go to the place for holding the court and wait out the day, he accomplishes nothing in fortification of his rights. Such conduct is not recognized as a legal step in a civil proceeding. The court is not expected or obliged to do anything in the case on answer day. The defendant has all of it in which to plead. If he fails to plead, there is nothing before the court to continue, and nothing upon which it could act before the next day. In the district court, when once a defendant is in default the cause may be disposed of, irrespective of the time for the beginning of terms and without notice to the defendant at any time it may be reached in the orderly course of the court's business or may be brought to the attention of the court by the plaintiff. The absence from the statute of a provision for terms of the court of Coffeyville is therefore of no importance in this controversy. In theory the court is in continuous session. Only those hearings, the time of which has been in some manner lawfully fixed, need be continued by the clerk in the absence of the judge, to preserve jurisdiction over the parties; and defaults may be disposed of at pleasure.

The defendants admitted the commencement of the action in the court of Coffeyville against them, the service of summons upon them, and the pendency of proceedings there. All that remained for the plaintiff to prove was the rendition of judgment, and this was properly done by a transcript of the judgment alone. A transcript of the entire record would have been superfluous. No objection,

to the authentication of the transcript was made in the district court, and none will be considered now.

The defendants complain because the court withdrew the cause from the jury, but they point out nothing but an issue of law which was finally in controversy in the district court, and which is in controversy now.

Other errors assigned are without merit, and the judgment of the district court is affirmed. All the Justices concurring.

(76 Kan. 319)

MEISTRELL v. BOARD OF COMRS OF ELLIS COUNTY.

(Supreme Court of Kansas. July 5, 1907.)

1. COUNTIES—ACTIONS BY TAXPAYERS.

Taxpayers who bring an action under chapter 834, p. 550, of the Laws of 1905, to enjoin a board of county commissioners from carrying out a contract for the building of a bridge and appropriating money to pay for the same, do not sue in behalf of the public, or in any representative capacity, but only for the protection of their own interests.

2. EQUITY—INEQUITABLE CONDUCT—ACTION BY TAXPAYERS.

The rule that equity will not aid those who have been guilty of inequitable conduct in the matter presented as a basis for equitable relief applies to such taxpayers the same as to ordinary suitors.

3. COUNTIES—ACTIONS BY TAXPAYERS—ESTOPPEL.

It would be inequitable to allow such taxpayers, who had a knowledge of the letting of the contract, and who stood silently by for months until the greater part of the work was done and the contractor had incurred great expense, to enjoin the board of county commissioners from paying for the bridge, when complete, because of irregularities in the letting of the contract and a defective exercise of authority, conferred by law upon such board.

(Syllabus by the Court.)

Error from District Court, Ellis County; J. H. Reeder, Judge.

Suit by Theodore Meistrell against the board of county commissioners of Ellis county. Judgment for defendants, and plaintiff brings error. Affirmed.

A. D. Glikeson and W. E. Saum, for plaintiff in error. D. R. Hite, Mulvane & Gault, and J. P. Shutts, for defendants in error.

JOHNSTON, C. J. This was an action to enjoin the commissioners of Ellis county from carrying out a contract for the building of a bridge or the appropriation of public money to pay for the bridge.

On November 4, 1905, the commissioners determined to build a bridge over the Saline river and advertised for bids for its construction, specifying that it should be "a stone or cement bridge with a span of forty-eight feet, to be fourteen feet above low-water level, with a sixteen-foot roadway. Iron guard rails, with one seventy-foot wing and one fifty-foot wing. Said bridge to be built across the Saline river about fourteen miles north of the city of Hays, Kansas." In re-

sponse to this notice the Topeka Bridge & Iron Manufacturing Company and others made bids for the construction of the bridge. It proposed to build a cement, concrete bridge, reinforced with iron and steel, at a specified price. The proposal was accepted by the board, and on December 19, 1905, it entered into a contract with the bridge company by which the latter was to construct the bridge for \$1,995. The bridge company began at once to make the iron and steel portions of the bridge and had completed and shipped the same to Ellis county in June, 1906. About the same time it shipped the cement and other necessary materials and began the construction of the abutments and piers of the bridge. On February 5, 1906, an order was made providing for a notice, and public notice was given of the purpose of the board to appropriate \$1,995 for the building of the bridge in question. On June 23, 1906, when the manufacture and construction of the bridge was well advanced, Theodore Meistrell and seven other taxpayers of the county instituted this action, alleging noncompliance with the statute in the preliminary steps taken by the board towards the building of the bridge and in the awarding of the contract for that purpose, and obtained a restraining order. On July 18, 1906, upon a trial had the temporary injunction asked for was denied. While the court held that the board had not appointed a commissioner to determine the cost of the bridge in advance, and also that no plans or specifications for the bridge were on file in the office of the county clerk 30 days prior to the awarding of the contract, as the statute required, and while the bridge contracted for was not strictly of the kind described in the notice inviting bids, the laches of the plaintiffs in sitting still for so long a time and allowing large expenditures of money to be made in carrying out the contract disentitled them to the equitable relief which they asked.

The ruling of the court will not be disturbed. The ground of the relief asked by plaintiff is based, not so much upon a want of power to build a bridge as upon informality and irregularity in the exercise of the power. The bridge was necessary, and there was the acknowledged power in the board to build it. The board did not appoint a commissioner to estimate the cost and contract for the building of the bridge; but it will be observed that such an appointment is not required, except when the board is not satisfied as to the expense of building the proposed bridge. Gen. St. 1905, § 565. The board had inspected other bridges and had learned about the cost of such structures, but had no definite information as to what the contemplated bridge would cost, and hence the commissioner might well have been appointed. They had, however, estimated the expense, in a way, to be about \$2,500, and that estimate appears to have been about as close to the contract price as were the

estimates of bidders who were interested in making a careful calculation as to cost.

It is also said that no specifications for the bridge were filed with the county clerk prior to the letting of the contract; but it appears that the notice for bids, given by the board, and which was on file with the county clerk, gave specifications of the proposed bridge with considerable fullness and detail. Another objection was that the advertisement for proposals to build the bridge called for the construction of a stone or cement bridge, while the one contracted for, as we have seen, was cement reinforced with iron and steel. This was a departure, but not a wide one, for ordinarily steel and iron are used to a considerable extent in cement structures. This bridge is spoken of by witnesses as a cement bridge. The testimony is that it has cement concrete piers and cement concrete abutments reinforced by iron and steel structures. The floor of the bridge is of cement concrete constructed on steel beams, and the only exposed steel portions of the bridge are the side trusses above the floor. Officers are, of course, required to comply with mandatory provisions of the statute, but it is plausibly argued by the defendant that there has been substantial compliance with the mandatory provisions, and that mere irregularities and informalities in the methods employed should not defeat the completion of a public improvement. Under the circumstances of this case, the plaintiffs were hardly in a position to invoke the equitable jurisdiction of the court and enjoin a public improvement so nearly completed. They appear in court in the capacity of private suitors for the protection of their personal interests. They bring the action under chapter 334 of the Laws of 1905. Until that act was passed private parties could not interpose an action of injunction against a proposed improvement until a tax or charge had been placed against them or their property and was about to be enforced. The act named expanded the remedy of injunction, and gives the taxpayer a right of action against a public officer or board to enjoin them from entering into any contract or doing any unauthorized act that might result ultimately in the creation of a burden or the levying of a tax against his property. He does not, however, sue in behalf of the state, or in any representative capacity. As was said in *Water, Light & Gas Co. v. Railway Co.*, 74 Kan. 661, 87 Pac. 883: "This statute gives the right of action at the inception of any attempt to create such an illegal burden. The plaintiff is not suing in behalf of the public, or in the public's interest, but in its own name for the protection of its own property. A judgment in its favor may result in relieving all the property in the city from paying taxes to liquidate the indebtedness which the city is trying to create; but that would be only an incident in the protection of its own property, and not a reason why it should not be permitted to

maintain an action at this time." As the plaintiffs were suing for themselves only, and for the protection of their own interests, they are to be governed, and their rights measured by the ordinary rules applicable to private suitors.

The plaintiffs come into a court of equity asking a permanent injunction against the payment of the contractor for work which was in progress for months, upon which a large amount of money had been expended, and when the contractor is not even a party to the action. Assuming that originally they had a right to interpose and enjoin, it has been forfeited by their silence and delay. The contract was let and the work was in progress for about six months before they made any complaint, or took any steps to assert their rights. With a knowledge that the contract had been made, and that the bridge was being built, they stood silently by and suffered the contractor to make a special bridge to fit that crossing and to incur expenses and liabilities of a burdensome character. To allow them to enjoin a public improvement which would so seriously affect others after such inaction and delay would be grossly inequitable. As was said in *Commissioners of Morris County v. Hinchman*, 31 Kan. 738, 3 Pac. 509, "It is a well-established rule in equity that if a party is guilty of laches or unreasonable delay in the enforcement of his rights he thereby forfeits his claim to equitable relief." *Brown v. Merrick County*, 18 Neb. 355, 25 N. W. 356, is a case where certain taxpayers sought to enjoin the county commissioners from paying for the construction of a public bridge. It was contended that the board had failed to comply with the law in several particulars; but there was no charge of bad faith against the board or of fraud in contracting for the building of the bridge, and it was said that so long as the board acted within its authority no injunction would lie to restrain it, and that "a taxpayer who seeks to enjoin the payment of money for the erection of a public bridge, which he claims is being constructed in violation of law, must act with reasonable promptness. If he is guilty of gross laches, and knowingly permits the contractor to incur liabilities in good faith in the construction of the greater portion of the work, an injunction will be denied." See, also, *Sleeper v. Bullen*, 6 Kan. 300; *H. & S. Railroad Co. v. Com'rs of Kingman County*, 48 Kan. 70, 28 Pac. 1078, 15 L. R. A. 401, 30 Am. St. Rep. 273; *Tash v. Adams*, 10 Cush. (Mass.) 252; *Kellogg v. Ely*, 15 Ohio St. 64; *Lamb v. Railroad Co.*, 39 Iowa, 333.

The bridge was necessary for the convenience of the people. No fraud is charged against the board in the letting of the contract. The board had power to build the kind of a bridge that was contracted for, and there is no claim that it is not worth the contract price. The case is unlike those cited by plaintiffs where the commissioners were

wholly without authority to act. Here there was power, but it was defectively exercised. The delay of the plaintiffs in challenging the proceedings was unreasonable, and the court rightly held that they were not entitled to the equitable relief sought.

Judgment affirmed. All the Justices concurring.

(77 Kan. 815)

CRANE v. CHENEY.

(Supreme Court of Kansas. July 5, 1907.)

1. QUIETING TITLE—EVIDENCE—SUFFICIENCY.

In an action to quiet title, evidence held sufficient to sustain a judgment for plaintiff on the theory that a deed to defendant was subsequent to an oral agreement of the grantors to convey the property to plaintiff in pursuance of an arrangement by which he was already in possession and had made improvements thereon, of which defendant had notice.

2. SAME—PARTIES.

In an action to quiet title to certain land which defendant's grantors had orally agreed to convey to plaintiff prior to their execution of the deed to defendant, whether plaintiff had a partner was immaterial as the agreement was made with plaintiff alone.

3. FRAUDS, STATUTE OF—CONTRACT TO CONVEY LAND—IMPROVEMENTS BY VENDEE.

Where a purchaser has made improvements and invested money on the strength of an oral agreement to convey land, the statute of frauds does not apply.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 301-324.]

Error from District Court, Pawnee County; Chas. E. Lobdell, Judge.

Action by I. W. Cheney against Val. Crane. Judgment for plaintiff, and defendant brings error. Affirmed.

G. W. Finney and W. H. Vernon, Sr., for plaintiff in error. G. Polk Cline, for defendant in error.

PER CURIAM. The defendant in error commenced this action in the district court of Pawnee county to quiet his title against the claims of the plaintiff in error. The court found and filed findings of fact and conclusions of law which read:

Findings of Fact. "That on August 9, 1901, J. H. Hazen and Lena Hazen were husband and wife, and were jointly occupying as their home the quarter section of land of which the tract in controversy is a part. That on that date defendant J. H. Hazen entered into a parol contract to sell the tract in controversy to S. A. Miller for the sum of \$125.00. That the defendant Lena Hazen had no knowledge of such agreement, and was in no way a party thereto at the time. The court finds that Miller forthwith entered upon the land and made lasting and valuable improvements thereon. The court finds that on the 4th of March, 1904, Miller made verbal assignment of his interest under such agreement to plaintiff. That on the 7th of March, 1904, plaintiff took possession of the land in controversy. That at the time of taking possession he did so with the knowledge and con-

sent of defendants J. H. Hazen and Lena Hazen, and with their knowledge and without objection from them at once made lasting and valuable improvements thereon, and that on said date or on a later date between that time and March 19, 1904, the defendants J. H. Hazen and Lena Hazen, being together, verbally jointly agreed with the plaintiff to execute to him a deed to said property, pursuant to the arrangement with Miller and plaintiff's rights thereunder. That from the 7th of March, 1904, to this date the plaintiff has been in open and notorious possession of the property in controversy. That on the 29th of March, 1904, the defendants J. H. Hazen and Lena Hazen, by deed of general warranty, conveyed the quarter section of land of which the tract in controversy is a part, without reservation to the defendant Valentine Crane. That Crane at that date, and at all times after March 7, 1904, had actual knowledge of the occupancy, possession, and improvements of the plaintiff."

Conclusions of Law. "The court concludes as a matter of law that the quarter section of land of which the tract in controversy is a part was on August 9, 1901, the homestead of J. H. Hazen and Lena Hazen. That the attempted agreement of J. H. Hazen to transfer a portion thereof without the consent of his wife was void. The court concludes as a matter of law that the defendants J. H. Hazen and Lena Hazen by this verbal agreement with the plaintiff to adopt the contract with Miller and convey the land to plaintiff was joint consent, verbally given, and that plaintiff's immediate possession was in law sufficient to take such agreement out of the statute of frauds and make it binding. The court concludes as a matter of law that the occupancy of the premises by the plaintiff at the time defendant Crane acquired his title thereto was notice of any and all interest that plaintiff might have therein. It is therefore by the court considered, ordered, and adjudged and held that the plaintiff is the owner in fee simple of the land in controversy. The court finds that the land in controversy was, on the 29th of August, 1904, of the value of \$150; that his title thereto be quieted against defendant and all persons."

The finding of fact to the effect that the Hazens jointly agreed to convey to Cheney is assailed on the ground that it has no support in the evidence, and also for the reason that at the time this agreement is found to have been made the Hazens had already sold the property to Crane and received \$800 as part payment therefor.

As to the first objection, the evidence upon this subject is conflicting, and therefore we feel bound by the finding of the court thereon. The second proposition does not seem to be supported by the evidence. The court ignored this subject in its findings, which indicates that the evidence on that point was not deemed sufficient to challenge consideration. It seems quite clear that Hazen could not

convey or make a binding contract concerning Crane's land. If the land at the time this contract was made had been sold by the Hazens, that fact was important and would undoubtedly have been shown. The date of the deed by the Hazens, and when the money was paid by Crane, were facts apparently material and easily shown, but Crane rested upon his unaided memory of these facts and placed the date in March. When pressed for a more specific answer, he fixed the time "along about the first part or within the first half of March." This was indefinite and unsatisfactory. The agreement with the Hazens took place March 14th, while Cheney's improvements were in course of erection. The evidence, therefore, indicated that the trade with Crane might have been after the contract with Cheney. There is not a word of evidence that any negotiation had been made with Mrs. Hazen by Crane, or that she had any knowledge thereof before she executed the deed, March 29th, and whatever negotiations may have been had with Hazen alone were void. In any event there is nothing in the evidence to indicate that Hazen had a contract concerning the land which he was in a position to enforce before he received the deed. The court was therefore justified in eliminating this whole question from its consideration.

Considerable has been said about the partnership existing between Cheney and Manderschied, and it is claimed that because of such partnership Cheney could not maintain this action alone. We do not think this question important. The plaintiff's right to recover here rests entirely upon the agreement of the Hazens to convey to him in ratification and confirmation of his contract with Miller. The promise was made personally to Cheney. The partnership was not considered. Cheney alone, therefore, was the proper party to enforce the contract. The rights of the partnership must be adjusted between the parties interested.

As found by the court, Crane bought of Hazens with full knowledge of the rights of Cheney and subject thereto. The erection of improvements and investment of money by Cheney upon the strength of the promise of Hazens eliminates the statute of frauds. The findings of fact made by the court are sustained by the evidence, and they justify its conclusions of law and decree.

The judgment is affirmed.

(76 Kan. 255)

UNION PAC. R. CO. v. HARRIS et al.

(Supreme Court of Kansas. July 5, 1907.)

PUBLIC LANDS — RAILROAD GRANTS — RIGHT OF WAY.

A tract of land owned by the United States, but lawfully occupied by a settler who had filed a declaratory statement claiming a right to it under the pre-emption law, was not "public land," within the meaning of section 2 of the act of Congress of July 1, 1862 (12 Stat. 489,

c. 120), giving to certain railroad companies a right of way through the public lands, and no right with respect to such tract was thereby granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 244.]

(Syllabus by the Court.)

Error from District Court, Saline County; R. R. Rees, Judge.

Action by Morris Harris and others against the Union Pacific Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

N. H. Loomis, R. W. Blair, and H. A. Scandrett, for plaintiff in error. Z. C. Millikin, for defendant in error.

MASON, J. April 22, 1861, Bernhard Blou settled upon a quarter section of "unoffered" government land, and May 13th in the same year he filed a declaratory statement claiming a right thereto under the pre-emption law. He remained continuously in possession, but September 5, 1865, he entered the land as a homestead. He proved it up as such December 8, 1870, receiving a patent March 15, 1872. July 1, 1862, Congress passed an act (12 Stat. 489, c. 120) incorporating the Union Pacific Railroad Company, and giving to it and to the Leavenworth, Pawnee & Western Railroad Company, a Kansas corporation, a right of way 400 feet wide over "the public lands" for the construction of a railroad within certain limits, and upon certain conditions. In conformity with this act and the amendments thereto a road was built by the Kansas company across the land above described prior to May 4, 1867. January 20, 1873, Blou made the company a deed for a right of way lying 50 feet on each side of its track. Thereafter Blou's title to the land south of the track passed to Morris Harris and others, and the Union Pacific Railroad Company succeeded to all the rights of the Kansas corporation. In August, 1902, the company placed a fence on the land 200 feet south of the track and parallel to it, and began the construction of side tracks and yards on the strip so enclosed. Harris and his associates brought ejectment for all of the strip, except the 50 feet next to the track, and recovered judgment, from which the defendant prosecutes error.

The railroad company has no title, unless it obtained one by the following grant made to the Union Pacific Company by section 2 of the act referred to and extended to the Leavenworth Company by section 9: "That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof. Said right of way is granted to said

railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, slide tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made."

A claimant under the pre-emption law acquired no vested right in the land he occupied until he had fully complied with the law, paid the purchase money, and become entitled to a patent. 26 A. & E. Encycl. of L. 232. Therefore Congress had the unquestioned power in 1862 to grant a right of way across the quarter section upon which Blou had settled, notwithstanding that his occupancy was lawful and in connection with his filing insured him a preference when the land should be offered for sale. The question is whether the statute quoted is to be interpreted as evidencing an intention to do so. And this depends upon whether the phrase "public lands" was therein employed in such a sense as to make it inclusive of tracts in the situation of that occupied by Blou. In construing railroad land grants the words "public lands" are treated, not as designating all lands which are public in the sense that the government owns them and, technically speaking, may dispose of them as it sees fit, but as excluding at least every tract to which an individual has acquired under the settlement laws a valid claim that may ultimately ripen into a title, although no vested right has accrued to him at the time. This rule of construction has been definitely adopted by the federal Supreme Court. Thus, in *Bardon v. N. P. Ry. Co.*, 145 U. S. 535, 12 Sup. Ct. 856, 38 L. Ed. 806, it is said: "It is thus seen that, when the grant to the Northern Pacific Railroad Company was made on the 2d of July, 1864, the premises in controversy had been taken up on the pre-emption claim of Robinson, and that the pre-emption entry made was uncanceled; that by such pre-emption entry the land was not at the time a part of the public lands; and that no interest therein passed to that company. The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws. All land to which any claims or rights of others have attached does not fall within the designation of public land." And in *N. P. Ry. Co. v. De Lacey*, 174 U. S. 622, 19 Sup. 791, 43 L. Ed. 1111: "If there had been a pre-emption claim at the time of the passage of the act of 1864, the land would not have passed under that grant." Of this expression it is said in *United States v. Oregon & C. R. Co.*, 143 Fed. 765, 75 C. C. A. 66: "We think the clause last quoted is in precise accord with the numerous decisions

of the same court to the effect that no land is 'public land,' within the meaning of such grants, to which there is at the time of the making thereof a live claim on the part of an individual under the homestead or pre-emption law, which has been recognized by the officers of the government, and has not ceased to be an existing claim." See, also, 6 Words & Phrases Judicially Defined, 5793, *Railway Co. v. Johnson*, 38 Kan. 142, 150, 16 Pac. 125, *Hastings v. Whitney*, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363, *United States v. U. P. Ry. Co. (C. C.)* 61 Fed. 149, *United States v. Turner (C. C.)* 54 Fed. 228, *Whitney v. Taylor*, 158 U. S. 85, 15 Sup. Ct. 796, 39 L. Ed. 906, and *Northern Lumber Co. v. O'Brien*, 204 U. S. 190, 27 Sup. Ct. 249, 51 L. Ed. 438, affirming the same case in 139 Fed. 614, 71 C. C. A. 598, where it is said: "The words 'public land' have long had a settled meaning in the legislation of Congress, and, when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made."

But it is insisted that a different rule should obtain here, because the statute quoted grants a mere right of way. Such a grant, however, differs only in degree—not in kind—from a grant of land. Even although it may not in strictness carry the fee to the strip designated, its practical operation is the same as though it did. The right it confers is much greater than an ordinary easement. 26 A. & E. Encycl. of L. 336, par. 9. It is true that land is ordinarily made more valuable by proximity to a railroad, and in a particular case the owner or prospective owner of a tract may be benefited rather than injured by the building of a road directly across it. But it cannot be said that a right of occupancy is not to some extent invaded by such an act, if done without compensation, or that the practical injurious effect of such invasion is necessarily slight and unsubstantial. It is noticeable that Congress has often explicitly recognized the moral right of the settler to be protected in this respect and so far as our observation goes has never explicitly ignored it. Nevertheless there is so great a difference between the entire loss of all claim to a tract, and the yielding up to a railroad of a right of way across it, that it might not be unreasonable to suppose that Congress, having the power to impose either hardship upon the settler, was willing to compel him to bear the less and not the greater. If the *Bardon* Case had been decided merely upon a presumption that Congress did not intend that settlers should lose their lands, the argument might well be made that the rule it announced does not apply where only a right of way is involved. But that case was not controlled solely by that consideration. If it had been, the grant

would have been held to relate to and to be inclusive of the lands already settled upon, but to be made in subjection to the prior rights of the settlers. And in any given instance, where a filing had been in force at the time the act was passed, but had been canceled before the road was definitely located, the right of the settler being thus disposed of, a complete title would have been held to have vested in the company when the conditions of the grant were met. But in the *Bardon Case* it was decided that the grant did not pass title to a tract which was burdened with a pre-emption filing at the date of the enactment, notwithstanding its subsequent cancellation. This result was reached by so defining "public land" as to exclude all lands to which individual interests had attached. In the opinion it was further said: "As the land pre-empted then stood on the records of the land department, it was severed from the mass of the public lands, and the subsequent cancellation of the pre-emption entry did not restore it to the public domain so as to bring it under the operation of previous legislation, which applied at the time to land then public. The cancellation only brought it within the category of public land in reference to future legislation. This, as we think, has long been the settled doctrine of this court. * * * Three justices, of whom the writer of this opinion was one, dissented from the majority of the court in the *Leavenworth Case*; but the decision has been uniformly adhered to since its announcement, and this writer, after a much larger experience in the consideration of public land grants since that time, now readily concedes that the rule of construction adopted that, in the absence of any express provision indicating otherwise, a grant of public lands only applies to lands which are at the time free from existing claims, is better and safer, both to the government and to private parties, than the rule which would pass the property subject to the liens and claims of others."

While the phrase "public land" is capable of a variety of meanings, and may be variously employed in different statutes, the presumption is reasonable that, where used in a similar connection in contiguous sections of the same act, it is intended to have the same force. Section 3 of the act of 1862 reads: "And be it further enacted, that there be, and is hereby granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead

claim may not have attached, at the time the line of said road is definitely fixed: Provided that all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company." This language is not essentially different, so far as concerns the question under consideration, from that interpreted in the *Bardon Case*, which is as follows: "That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile, on each side of said railroad line as said company may adopt through the territories of the United States, and 10 alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office."

Manifestly, therefore, in the act of 1862 the section following that by which the right of way is granted uses the term "public land" as excluding tracts occupied by settlers. It refers to lands to which pre-emption or homestead claims have attached, not as forming a separate class of public lands, but as lands which have been withdrawn from that category—have ceased to be public lands—by the fact of such claims having attached. Two conditions were necessary in order that land should pass by the grant there contained: It must have been free from pre-emption or other filing when the act was passed, or the act would not have applied to it, because it would not have been public land at that time; and it must have remained in that condition until the line of the railroad was definitely fixed, because a filing prior to that time would have taken it out of the operation of the act by bringing it within the exception there stated. This is necessarily the interpretation that results from the decisions cited. By attributing the same meaning to the expression "public lands" as used in section 2, a harmonious and consistent construction is reached. The right of way was granted upon

but one condition—that the land should be public at the time the act was passed. The grant took effect at once upon all lands that were then public, that is, unoccupied. Any that were then occupied were not public and were not affected. Any that were then vacant but were filed upon later were taken in subjection to the right of way. Thus, in *Railroad Co. v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578, it was said: "The act * * * makes two distinct grants—one of lands, * * * the other of a right of way. * * * The lands consisted of alternate sections, designated by odd numbers, on each side of the line of the proposed road. The grant of them was subject to the condition that if, at the time the line of road was definitely fixed, the United States had sold any section or a part thereof, or the right of pre-emption or homestead settlement had attached to it, or the same had been otherwise reserved by the United States for any purpose, the Secretary of the Interior should select an equal quantity of other lands nearest the sections designated, in lieu of those appropriated. * * * But the grant of the right of way * * * contains no reservations or exceptions. It is a present, absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designated." It seems clear that this is the construction placed upon the act of 1862 by the ensuing Congress. The original act made no provision for condemnation proceedings. But in 1864 it was amended (13 Stat. 356, 357, c. 120) by adding a provision for the exercise of the right of eminent domain, and for the compensation not only of "owners," but also of "claimants," of land taken. The word "claimants" had obvious reference to occupants under the homestead or pre-emption laws (*Western Pac. R. Co. v. Tevis*, 41 Cal. 489, 494; *Northern Pac. R. Co. v. McCormick*, 94 Fed. 934, 36 C. C. A. 560; *Nelson v. Railway Co.*, 188 U. S. 108, 23 Sup. Ct. 307, 47 L. Ed. 406), and must have been intended to apply to occupants of lands filed upon before the first enactment; for, as already pointed out, those filed upon afterwards were taken subject to the right of way thereby granted.

It follows from this view that the judgment of the trial court must be affirmed on the theory that section 2 of the act of 1862 granted no right of way over the Blou tract, because it was not at the time public land within the meaning of the term as there used. We think this conclusion is not inconsistent with any controlling decision. Expressions are used in a number of cases to the effect that a difference is to be recognized between the grant of land and the grant of a right of way, but for the most part they relate to differences made by the statutes in express terms, or by necessary implication, and have no direct bearing upon the question here involved. In two in-

stances this very act explicitly makes such a distinction. It makes two exceptions with respect to the grant of aid lands which do not apply to the grant of the right of way—one in favor of claims to be acquired before the definite location of the line of railroad, and the other in favor of reservations already made to the United States for any purpose, such as for the use of an Indian tribe under a treaty. *Leavenworth, Lawrence & Galveston R. R. Co. v. United States*, 92 U. S. 733, 746, 23 L. Ed. 634. That the framers of the statute deemed it necessary to mention these differences in set terms militates against the suggestion that by mere implication growing out of the nature of the privilege given the words "public lands," when used in connection with the grant of a strip of ground for the use of a railroad, are to be given a different meaning from that attached to them when applied to the grant of land to aid in its construction. In the opinion in *Union Pac. Ry. Co. v. Douglas Co. (C. C.)* 31 Fed. 540, it was said that Congress intended by the act of 1862 that a right of way should be given through all lands over which it had control, but the statement was broader than the occasion required. There the question presented was the right of the railroad company to occupy a right of way across school sections, and was determined upon a variety of considerations, not all of which are here applicable. *Northern Pac. R. R. Co. v. Smith*, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. Ed. 157, the authority of which the plaintiff in error invokes, turned upon exceptional circumstances. A 400-foot right of way over public lands was granted to the railroad company in 1864. It adopted a definite route which was accepted by the government in 1873. But in 1872 it actually constructed its road along a somewhat different route, which also was afterwards approved or at least acquiesced in by the federal authorities. The road as so constructed crossed a town site which had already been occupied but no plat of which had then been filed in the register's office. Such occupancy did not date back to 1864. In 1879 a patent of the town site was made to the town company, and thereafter Smith received a conveyance from the town company for lots lying within 200 feet of the track. He brought ejectment against the railroad company, whose title was ultimately sustained. It is evidence that unless the railroad company lost some rights under the statute by its change of route, its title antedated Smith's. The land was unquestionably public land when the act was passed. If, however, it did lose priority thereby, the entire situation was changed, and the determination of the rights of the parties under such circumstances would not necessarily affect the present case. Indeed, the decision involved so many different considerations that it is difficult to evolve from it a principle of general application.

In *Jamestown & Northern R. R. Co. v. Jones*, 177 U. S. 125, 20 Sup. Ct. 568, 44 L.

Ed. 698, a different statute is considered—the general act (Act March 3, 1875, c. 152, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568]), granting a right of way over public lands to any corporation upon certain conditions. In the federal court the only question discussed related to the time the grant took effect—whether upon the construction of the road or the filing of a map. In the state court, however (Jamestown & N. R. Co. v. Jones, 7 N. D. 619, 76 N. W. 227), it was held that, although a grant was prevented from taking effect at once as to a particular tract by the existence of a pre-emption filing thereon, it would become operative upon the cancellation of that filing. This holding is supported by reasoning not applicable to the statute here involved. The act of 1875 is prospective. It makes no present grant. It rather affords a means by which a right of way may be acquired than grants one. It expressly recognizes and protects the interest of the settler who has acquired no vested right. Moreover, by the use of the phrase “possessory claims on the public lands of the United States” in section 3, there is a recognition that the term “public lands” is there employed in its broader sense. The Supreme Court of Utah has recently decided against the contention of the railroad company a question entirely similar to that here presented. *Oregon Short Line Ry. Co. v. Fisher*, 26 Utah, 179, 72 Pac. 931.

The judgment is affirmed. All the Justices concurring.

(76 Kan. 325)

BILLINGS v. ATCHISON, T. & S. F. RY. CO.

(Supreme Court of Kansas. July 5, 1907.)

TRIAL—VERDICT—SPECIAL FINDINGS—INCONSISTENCY.

Where, in an action based upon a tort, the jury return a general verdict for nominal damages only, but in answer to a special question find that a substantial injury was sustained, for which they assess a stated compensation, a judgment rendered by the trial court for the sum of the two amounts so named will not be set aside on review at the instance of the plaintiff by reason of the apparent inconsistency between such verdict and finding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 857-864.]

(Syllabus by the Court.)

Error from District Court, Montgomery County; Thos. J. Flannelly, Judge.

Action by Lewis Billings against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff for less than amount claimed, and he brings error. Affirmed.

A. L. Billings and O. P. Ergenbright, for plaintiff in error. Wm. R. Smith, O. J. Wood, and A. A. Scott, for defendant in error.

MASON, J. Lewis Billings brought an action against the Atchison, Topeka & Santa Fé Railway Company for malicious prose-

cution. A jury trial resulted in a general verdict for the plaintiff for \$1. In answer to a special question a finding was made that he had been put to an expense of \$180 in his defense against the prosecution of which he complained. The court rendered judgment for \$181, from which the plaintiff prosecutes error.

It is argued that, according to the uncontradicted and unimpeached evidence adduced by the plaintiff, he had suffered substantial injury outside of the specific item for which \$180 was assessed as compensation, and that justice requires that a new trial be granted on that account. In the brief of the plaintiff it is said: “Neither jury, nor the judge sitting as a juror, in the hearing of the motion for a new trial, allowed plaintiff anything for the ‘extreme humiliation and disgrace’ that his undisputed testimony shows he suffered; and yet, this was, without doubt, the actual damage from which plaintiff suffered most.” The former provision of the statute (Gen. St. 1901, § 4755) that “a new trial shall not be granted on account of the smallness of the damages, in an action for an injury to the person or reputation, nor in any other action where the damages shall equal the actual pecuniary injury sustained,” has been repealed. Laws 1905, p. 549, c. 332. Therefore the trial court doubtless had the power, if convinced that there was just occasion for such action, to set aside the verdict on the theory that its amount was inadequate, and that it was on that account contrary to the evidence. But there is nothing for this court to act upon in that connection. We cannot say that because there was no direct contradiction of certain testimony offered in behalf of the plaintiff the jury were bound to give it full credit, nor is their determination in that regard subject to review here. This is the general rule (*Taylor v. Modern Woodmen*, 72 Kan. 443, 83 Pac. 1090, 5 L. R. A. [N. S.] 283), and it applies with especial force to the plaintiff’s personal statement of the extent of his mental suffering.

There is an obvious inconsistency between the general verdict and the special finding referred to. It is not clear why the jury, having decided in favor of the plaintiff and estimated his actual loss through the defendant’s wrongful act at \$180, returned a general verdict for only \$1, but it does not follow that they were actuated by any unworthy motive. They may have been under a misapprehension as to the relation between the verdict and the finding. They may have supposed that the amount stated in the one need not be included in the other. Unless the trial court was convinced that the jury were guilty of some intentional misconduct in the matter, or acted under the influence of passion or prejudice, there was no occasion for granting a new trial; and, unless a new trial were granted, nothing

remained to be done but to render the very judgment that was entered. The verdict and special findings alike established that the plaintiff was entitled to a judgment to the extent of the damages he had suffered. The finding with regard to the expenses of his defense established that he was entitled to \$180 on that account, and the general verdict established that he had sustained no substantial injury in any other respect. The requirements of all parts of the jury's return were met by a judgment for \$181.

The judgment is affirmed. All the Justices concurring.

(75 Kan. 820)

GRUBEL v. BUSCHE.

(Supreme Court of Kansas. July 5, 1907.)

1. REPLEVIN—DEFENSES—FAILURE TO ASSERT TITLE.

Where it was agreed between plaintiff and D., his agent, that a horse in the hands of D. belonging to plaintiff should be placed in the possession of defendant who was to use it and who might buy it, the fact that plaintiff frequently saw defendant in the possession of the horse without questioning his possession did not estop him to claim title to the horse as against defendant.

2. SAME—ASSENT TO ACTS OF OTHERS.

Where plaintiff agreed with his agent who had possession of his horse that the agent allow defendant to use the horse, with the prospect that he would buy it and plaintiff did not learn that the agent had sold the horse until months after the sale, his acts then could not estop him to deny title to the horse as against defendant.

3. PRINCIPAL AND AGENT—POWERS OF AGENT—SALES AND CONVEYANCES.

Where an agent, authorized to sell a horse in his possession belonging to his principal, transferred the horse to B. upon the consideration of B.'s surrender of a note against the agent, the sale passed no title as against the principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 574-577.]

4. TRIAL — INSTRUCTIONS — CONFORMITY TO EVIDENCE.

Where it appeared in an action for the recovery of a horse sold by plaintiff's agent to defendant that plaintiff authorized the agent to allow defendant to use the horse, with the prospect that he would purchase it, that plaintiff did not learn that the agent had sold the horse until long after the sale, and that defendant as consideration for the transfer of the horse only surrendered a note he held against the agent, it was error to instruct that, if plaintiff by his acts, statements, or silence permitted the agent to appear as the owner of the horse with authority to dispose of it, and defendant induced thereby bought the horse in good faith, plaintiff was estopped.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 596.]

Error from District Court, Wyandotte County; J. McCabe Moore, Judge.

Replevin by E. J. Grubel against Henry Busche to recover possession of a horse. From a judgment of the district court, affirming a judgment of the justice's court for defendant, plaintiff brings error. Reversed and remanded.

Nathan Cree, for plaintiff in error. Getty & Hutchings, for defendant in error.

PER CURIAM. Action of replevin to recover possession of a horse. Defendant had judgment below, and plaintiff brings error. Busche made the defense that he purchased the horse in good faith from one Dysert, who represented himself to be the owner and had possession. Plaintiff furnished the money with which Dysert bought the horse in the first place, and had a written contract with Dysert by which they were to carry on the business of buying and selling horses. He testified that Dysert had possession as his agent, and with his consent delivered the horse to defendant under an arrangement by which defendant, as plaintiff believed, was to board the horse for its use. On the trial defendant contended that plaintiff had held Dysert out to the world as the owner of the horse by giving him the possession, control, and apparent right of disposal; that he had bought it from Dysert and paid for it, believing that Dysert was the owner, and relying upon plaintiff's conduct; that plaintiff was estopped by his acts and conduct to claim the horse afterwards.

The principal contention here is that the court erred in instructing the jury to the effect that, though plaintiff owned the horse, if, by his acts, statements, or silence he permitted Dysert to appear as the owner with authority to dispose of it, and defendant, induced by the statements, acts, or silence of the plaintiff so to believe, relied thereon, and bought the horse in good faith, plaintiff was estopped. It is argued that there was no evidence upon which to base this and another similar instruction in which the words "allowed or permitted" were used to characterize the conduct of plaintiff. Without going into a review of the evidence, it is enough to say that we think there was some evidence upon which to base these and the other instructions complained of. It appears that Busche, the defendant, and Grubel, the plaintiff, have been intimate friends for years; that Busche drove the horse for two months after the time he claims to have bought it, and plaintiff saw him frequently with it and made no objection or claim of ownership. Both parties testified, and each flatly contradicted the other about conversations concerning the horse and Dysert's relations with plaintiff and their knowledge of what he had done and had authority to do. The merits of the case rest almost wholly upon the weight and credibility of the evidence, much of which is circumstantial. Two juries, one before a justice of the peace, and the other in the district court, have found the facts in favor of defendant.

The judgment is affirmed.

On Rehearing.

On rehearing our attention has been specially called to the absence of any testimony showing that at and prior to the sale of the horse Grubel by his acts estopped himself

from asserting ownership. It appears from the evidence to be undisputed that Grubel was the owner and Dysert his agent to sell the horse. It was agreed between Grubel and Dysert that the horse should be placed in the possession of Busche who was to use it, and who might buy it. Therefore the fact that Grubel frequently saw Busche in the possession of the horse could not of itself estop Grubel; and if, as it appears, he never learned of the sale until months after it was consummated his acts then could not estop him, because Busche did not purchase on the strength of what Grubel said or did after the sale, and was not prejudiced thereby. Moreover, an agent with authority to sell has only the implied power to sell for cash, and it is undisputed that Busche paid no cash but merely surrendered to the agent Dysert a note which he held against Dysert. It is well settled that a sale under such circumstances passes no title as against the owner. "Where an agent, as such, having a general authority to sell, transfers his principal's goods to a third party in payment of his (the agent's) debt, the principal may, as a general rule, recover from the third party the goods so transferred, or the value thereof." 1 A. & E. Enc. of Law, 1174. See, also, Mechem on Sales, § 1435.

It is said in *Barnard et al. v. Campbell et al.*, 55 N. Y. 456, 14 Am. Rep. 289: "Two things must concur to create an estoppel by which an owner is prevented from asserting title to and is deprived of his property by the act of a third person without his assent: (1) The owner must have clothed the person, assuming to dispose of the property, with the apparent title to or authority to dispose of it. (2) The person alleging the estoppel must have acted and parted with value, upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real."

The instructions complained of were not based upon the evidence and, besides, ignored the principle of law applying to a case where the purchaser in dealing with an agent parts with nothing of value, but merely exchanges for the property of the principal the agent's own debt.

The cause will be reversed and remanded for another trial.

of its failure to comply with the corporation laws of the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2920.]

Porter, J., dissenting.

(Syllabus by the Court.)

Error from District Court, Shawnee County; A. W. Dana, Judge.

Action by the International Text-Book Company against A. T. Pigg. Judgment for defendant, and plaintiff brings error. Affirmed.

W. H. Cowels (David C. Harrington, of counsel), for plaintiff in error. T. D. Humphreys, for defendant in error.

SMITH, J. The plaintiff in error brought this action in the court of Topeka on a written contract of date October 12, 1905, and set forth as follows:

"Said defendant subscribes for a scholarship in the commercial law course in the International Correspondence Schools, an educational establishment conducted by the plaintiff at Scranton, Pa.; instruction papers and questions to be furnished by plaintiff as studies proceed; scholarship, when paid for, to be nonforfeitable and transferable on payment of stipulated transfer fees; defendant to pay for said scholarship the sum of \$84.60, payable \$5 at the signing of the contract, and \$5 a month thereafter till fully paid, but in case of default in the payment of any installment all to become due at the option of this plaintiff; and with a further option to said defendant to pay out in full within sixty days at an aggregate of \$72."

The defendant answered, in abatement, that plaintiff was a foreign corporation, for profit, that it was transacting business in this state out of which business the contract arose, and that it had not complied with the corporation laws of Kansas and was not entitled to maintain the action. The reply denied that the plaintiff was doing business in the state of Kansas, and admitted all other facts alleged in the bill of particulars.

At the trial the case was submitted upon the following agreed statement, without other evidence, to wit:

"The parties hereto submit this action to the court for decision upon an agreed statement of facts, as follows:

"(1) The plaintiff is a corporation organized and existing under the laws of the state of Pennsylvania, and is the proprietor of the International Correspondence Schools, located at Scranton, Pa.

"(2) That on Oct. 10, 1905, the defendant executed in Topeka, Kan., an agreement in writing, a copy of which is hereto attached, marked 'Exhibit A,' and made a part hereof. That on or about the 16th day of October, 1905, said agreement was received by the plaintiff in Scranton, Pa., and was by it there approved and accepted. That the plaintiff thereupon delivered to the defendant the scholarship in the International Correspondence Schools referred to in said agreement,

(76 Kan. 328)

INTERNATIONAL TEXT-BOOK CO. v.
PIGG.

(Supreme Court of Kansas. July 5, 1907.)

CORPORATIONS—FOREIGN CORPORATIONS—AC-
TIONS.

Under the agreed facts in this case, the plaintiff in error was a foreign corporation, and was, at the time of the rendition of the judgment in the court below, "doing business in the state of Kansas," and was not entitled to maintain any action in the courts thereof by reason

and has duly performed all conditions thus far to be performed under the terms of said agreement and scholarship. A blank form of the certificate of scholarship is hereto attached, marked 'Exhibit B.'

"(3) That unless the plaintiff is debarred from maintaining this action by reason of its failure to comply with the statutes of Kansas, as hereafter appears from this statement of facts, the plaintiff is entitled to judgment as prayed for in the bill of particulars.

"(4) The plaintiff is a corporation having a capital stock, and the profits, if any, from the operation of the corporation, belong to the corporation to be distributed in dividends or otherwise applied as it may elect.

"(5) All the executive officers of the plaintiff corporation reside, and exercise their functions as such executive officers, at Scranton, Pa., and not in Kansas.

"(6) The business of the plaintiff is preparing and publishing instruction papers, textbooks, and illustrative apparatus for the same, for courses of study suited for teaching by correspondence through the mails, and forwarding such publications and apparatus to students and instructing them through the mail, from Scranton, Pa., in the manner set forth in Exhibit A.

"(7) All the teachers and instructors of the plaintiff corporation reside and perform their duties at Scranton, Pa., and none of them reside in the state of Kansas.

"(8) The plaintiff in carrying out these operations employs local or traveling agents, whose title is solicitor collector, and whose duties are to procure and forward to the plaintiff at Scranton, Pa., from persons in a specified territory, on blanks furnished by the plaintiff, similar in substance to the printed portion of Exhibit A hereto attached, applications for scholarships in the International Correspondence Schools, and to collect and forward deferred payments on scholarships issued by the plaintiff. That the solicitor collector is kept informed by the plaintiff of the various fees to be collected for the various scholarships offered and the contract charges to be made for cash or deferred payments, and the terms of payment acceptable to the plaintiff, in order that applicants may, so far as practicable, adapt their applications to their needs.

The scholarship, instruction papers, textbooks, and illustrative apparatus called for under each application accepted are sent by the plaintiff from Scranton, Pa., directly to the applicant; and instruction is imparted by means of correspondence by mail between the applicant, from his residence, and the plaintiff at Scranton, Pa. Moneys paid by the applicants on account of scholarships are received in the first instance by the solicitor collector of the district, where the applicant resides, and by him forwarded to the plaintiff. That the receipt given for such money, with stub, and voucher to be sent the plain-

tiff, is on a form furnished by the plaintiff, a copy of which is hereto attached, marked 'Exhibit C,' and made a part hereof.

"(9) One J. B. Hughes is solicitor collector for plaintiff for a territory including Topeka, Kan., and is soliciting students to take correspondence courses in plaintiff's schools. He has his office in Room 1, Real Estate Building, on Jackson street, in the city of Topeka, and has in the window of said office a sign, supplied by plaintiff, which reads, 'Local Agency International Correspondence Schools, Scranton, Pa.' In his office are bound volumes, samples of some of the volumes that are sent out by plaintiff as pertaining to particular courses. Said office is paid for by said Hughes, and is maintained by him for the purpose of furthering the procuring of applications for scholarships for plaintiff and the collection of fees therefor, as above set forth; and the plaintiff has no office in the state of Kansas for the purpose of doing any business other than that herein stated. That said Hughes is paid a fixed salary by the plaintiff, and also a commission on the number of applications obtained and the volume of collections made. Numerous persons in the city of Topeka are now, and were at the time this suit was filed, and at the time the contract herein sued on was accepted, taking from plaintiff courses of instruction by correspondence. Contracts for said courses were procured, and payments thereof were and are being collected and remitted by plaintiff's solicitor collector in the manner above set forth. Said Hughes makes to the plaintiff a 'daily report' for his territory on blanks furnished by the plaintiff; and such reports show for the month of March, 1906, aggregate collections on scholarships and deferred payments on scholarships approaching \$500.

"(10) The plaintiff has never filed with the Secretary of State of the state of Kansas its consent to be sued by the service of summons upon said Secretary, or any application for authority to do business in the state of Kansas, or any annual reports; and it has no certificate from the secretary of the charter board or from the Secretary of State as to such matters."

Thereupon the court of Topeka rendered judgment in favor of the plaintiff for the amount claimed, and the defendant appealed therefrom to the district court of Shawnee county. In the latter court the case was submitted upon the same pleadings and the same evidence, and judgment was therein rendered in favor of the defendant. The plaintiff brings the case here.

As disclosed by the agreed statement of facts, a principal part of the business of the plaintiff was selling scholarships in many branches of learning and collecting the pay therefor. For this purpose it maintained an agency in Kansas and had, before the commencement of this action, done quite an extensive business with numerous customers and was evidently seeking and intending to

pursue and extend this business. The scholarships entitled the owner thereof to certain books and instruction, and when paid for were transferable. It is true that the books and instruction papers were prepared and forwarded to the owner of the scholarship from another state, but the securing of the order therefor and a part payment in advance were done through an agent in this state. This agent was doing business in Kansas, not his own business as principal, but the company's business as its agent. Hence the company was doing business in Kansas.

We are unable to distinguish this case in principle from *Deere v. Wyland*, 69 Kan. 255, 76 Pac. 863, and on the authority of that case and the authorities there cited the judgment is affirmed.

JOHNSTON, C. J., and GREENE, BURCH, MASON, and GRAVES, JJ., concur.

PORTER, J. (dissenting). The business of plaintiff was not the disposal of scholarships, but the teaching by correspondence of various branches of learning. The sale of the certificate entitled the purchaser thereof to receive instruction, and was a mere incident of the business. When preliminary examinations of applicants for admission to an eastern university are conducted in Kansas, and certificates issued, the university is not transacting its principal business here, nor would the fact that it received from its agent here the matriculation fee and delivered its certificate here make the transaction a doing of business in the state within the statute requiring foreign corporations seeking to do business in the state to make application for permission to do so. The repetition of the transaction does not make it, in my opinion, any the less a mere incident of the principal business of the corporation.

(77 Kan. 819)

ARNOLD v. HOPPER.

(Supreme Court of Kansas. July 5, 1907.)

1. APPEAL—REVIEW—FINDINGS UPON CONFLICTING EVIDENCE.

The findings of fact by the trial court upon conflicting evidence will not be disturbed on appeal.

2. FRAUDS, STATUTE OF—DECLARATION BY WIFE OF HUSBAND'S AGENCY.

A statement made to plaintiff by defendant, a married woman, that he might treat as signed by her any notes to which her name was signed by her husband is binding upon her though not in writing, since, as it is not a promise on her part to perform anything the statute of frauds does not apply.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 16-21.

Error from District Court, Ness County, Chas. E. Lobdell, Judge.

Action by J. C. Hopper against Clara B. Arnold and J. G. Arnold. Judgment for plaintiff against Clara B. Arnold, and she brings error. Affirmed.

J. F. Wood, for plaintiff in error. Foulks & Wilson, for defendant in error.

PER CURIAM. J. C. Hopper commenced this action in the district court of Ness county to recover upon a promissory note made by J. G. Arnold and Clara B. Arnold, who were husband and wife. The husband signed the wife's name to the note. Afterwards he abandoned her and left the state. She alone was served with summons in the suit. She denied the execution of the note under oath. To avoid this answer, the plaintiff filed a reply which reads: "Second. Specially replying to the second count of said answer, he avers that prior to the time of the execution and delivery of the note sued on herein, to wit, about the month of November, 1900, the defendant Clara B. Arnold, for the purpose of inducing the plaintiff thereafter to accept notes with her name signed thereto by her husband, J. G. Arnold, and for the purpose of giving the plaintiff to know and understand that her husband had authority to sign her name to promissory notes, stated and declared to plaintiff that her said husband had authority to sign her name to said notes, and that thereafter any notes with her name so signed and delivered to plaintiff she would honor and treat as her note as fully as if she had signed the same in person, and plaintiff avers that thereafter J. G. Arnold, husband of the defendant Clara B. Arnold did execute and deliver to plaintiff a promissory note so signed with his own name and the name of his wife, and his wife recognized and honored the same as her note and obligation without objections, thereby as well as by her statements and declarations aforesaid causing plaintiff to believe that her husband had authority to sign her name to promissory notes given to plaintiff, and plaintiff says that at no time subsequent to the making of said statement of defendant Clara B. Arnold, and prior to the execution and delivery of the note in suit, did plaintiff have any knowledge or information of any kind that the said defendant Clara B. Arnold would not honor notes given to plaintiff so signed, nor did he have any knowledge or information that the defendant J. G. Arnold had no authority to sign his wife's name to notes given to plaintiff, and plaintiff avers that by reason of said statement of Clara B. Arnold and of her subsequently honoring a promissory note so signed and delivered to plaintiff he believed that her husband was by her authorized to sign such notes and so believing he accepted the note in suit so signed." The court on the trial made findings of fact which read: "I find the facts to be that the name of Clara B. Arnold was signed to the note in controversy by J. G. Arnold; that before the execution of said note the defendant Clara B. Arnold had said to J. C. Hopper in substance that he might treat as signed by her any notes to which her name was signed

by J. G. Arnold, which authority had never been revoked. I conclude that such statement by defendant was sufficient in law to render her liable upon the note sued on"—and thereupon entered judgment against Clara B. Arnold for the face of the note, with interest.

These findings are challenged on the ground that they are not sustained by the evidence. There was a sharp and decided conflict between the witnesses, and we see no reason to depart from the rule that this court will be bound by findings of fact found under such circumstances. It was suggested in argument that the statement made by the plaintiff in error to the defendant in error not being in writing was in violation of the statute of frauds and void. An examination of it, however, will show that it does not amount to a contract or promise on her part to do or perform anything, but is merely a declaration that J. G. Arnold, her husband, was authorized to execute promissory notes in her name. This is the real purport of the statement made by her, and the defendant in error relied thereon when he accepted the notes so executed. The statute of frauds does not, therefore, apply.

Judgment is affirmed.

(76 Kan. 333)

REEVES & CO. v. BASCUE.

(Supreme Court of Kansas. July 5, 1907.)

1. EXEMPTIONS—TOOLS AND IMPLEMENTS.

A traction engine and the saws, belt, carrier, and other appliances commonly used in connection with such an engine for sawing logs and making lumber are tools and implements within the meaning of subdivision 8, § 3018, Gen. St. 1901, and are exempt to an owner who is a resident of the state and the head of a family, where they are necessary to and are personally used by him in carrying on the business of sawing logs and converting them into lumber.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Exemptions, § 56.]

2. CHATTEL MORTGAGE—EXEMPT PROPERTY—SIGNATURE OF WIFE.

A mortgage, given upon such appliances by the owner, without the consent or signature of his wife, is invalid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Exemptions, § 110.]

(Syllabus by the Court.)

Error from District Court, Crawford County; Arthur Fuller, Judge.

Action by Reeves & Co. against D. Bascue. Judgment for defendant, and plaintiff brings error. Affirmed.

Ryan & Phillips, for plaintiff. T. J. Karr, for defendant.

JOHNSTON, C. J. This was an action brought by Reeves & Co. to recover possession of a traction engine and sawmill used in connection with it for the sawing of lumber. Bascue purchased a part of a threshing outfit from plaintiff, and to secure payment of a portion of the purchase price made

a chattel mortgage on the machinery in controversy. He failed to make one of the payments when it became due, and the plaintiff thereupon secured possession of the property under a writ of replevin. The principal defense made by Bascue was that the chattel mortgage under which the plaintiff claimed the right of possession was void. The basis of this claim was that he was a married man, the head of a family, that the property was exempt, and that, as his wife did not join him in the execution of the chattel mortgage, it was void. The trial resulted in a judgment in favor of the defendant for the possession of the property, or its value placed at \$650, and also for \$357.50 as damages for the wrongful detention of the property.

The plaintiff complains and contends that the engine and other appliances for sawing lumber is a manufacturing plant, and cannot be classed as the necessary tools and implements of the defendant's business. His principal business, it appears, is sawing timber into lumber of various dimensions and forms. He did use the traction engine in threshing for a brief time during the threshing season, but the sawing of lumber appears to have been his principal occupation. Aside from the traction engine, which is portable, the saws, carrier, belts, etc., are said to be such as can be moved in a farmer's wagon. Were they exempt? The statute provides that there shall be exempt to a resident of the state who is the head of a family "the necessary tools and implements of any mechanic, miner, or other person, used and kept in stock for the purpose of carrying on his trade or business and in addition thereto stock in trade not exceeding \$400.00 in value." Gen. St. 1901, § 3018, subd. 8. It will be observed that the fact that the tools and implements are large and heavy does not take them out of the operation of the statute. Neither is there any limit placed on the number, character, or value of the tools and implements protected by the exemption. It is enough that they belong to the mechanic, miner, or other person, that they are necessary and are personally used for the purpose of carrying on his trade or business. If he uses the tools and implements in person, and performs a considerable portion of the work himself, it would seem to be immaterial whether he is called a manufacturer or a mechanic.

A liberal interpretation is given to statutes of exemption, and following the one already placed upon this provision in *Jackman v. Lambertson*, 71 Kan. 138, 80 Pac. 55, the appliances in controversy must be held to be exempt. In that case a traction engine, with a separator, belts, and other parts of a threshing outfit, were held to be implements within the meaning of the exemption statute, and further that a chattel mortgage given by the owner of an outfit in which his

wife did not join was invalid. In another case it was held that a printing plant used by the head of a family for printing a newspaper, a business to which he devoted the greater part of his time, some of the work being done by himself, but the larger part by his employes, constituted tools and implements within the meaning of the statute and was exempt. *Bliss v. Vedder*, 34 Kan. 57, 7 Pac. 599, 55 Am. Rep. 237. The engine and sawmill being exempt, the mortgage given thereon, without the consent or signature of Bascue's wife, is without validity, and gave Reeves & Co. no right of possession. *Gen. St. 1901, § 4255; Skinner v. Bank*, 63 Kan. 842, 66 Pac. 997; *Alexander v. Logan*, 65 Kan. 505, 70 Pac. 339; *Jackman v. Lamberton*, *supra*.

The objection to striking out a portion of the plaintiff's reply is without merit, and we find nothing substantial in the objections made to the rulings on the admission of testimony. The defendant asked for damages resulting from the wrongful taking and detention of the property, and was entitled to show and recover the usable value of the property from the time of the taking up to the date of judgment. *Yandle v. Kingsbury*, 17 Kan. 195, 22 Am. Rep. 282; *Werner v. Graley*, 54 Kan. 383, 38 Pac. 432; *Bank v. Showers*, 65 Kan. 431, 70 Pac. 332. He was also entitled to recover for the injury to the property while it was unlawfully detained.

There was sufficient proof to sustain the findings of the court, and its judgment will be affirmed. All the Justices concurring.

(76 Kan. 343)

JONES v. ADAIR.

(Supreme Court of Kansas. July 5, 1907.)

1. PRINCIPAL AND AGENT—TRANSACTIONS BETWEEN.

An agent of a proprietor of a hotel who constructs a drain or sewer to be used in connection with the hotel for and at the expense of the proprietor does not become the owner of the appurtenance merely because the contracts for the privilege of laying the sewer in the streets of the city and over the land of another were made in the name of the agent instead of his principal.

2. TRIAL—DEMURRER TO EVIDENCE.

On a demurrer to plaintiff's evidence, the court may not weigh conflicting testimony, or disbelieve and disregard that offered in his behalf which tends to sustain his cause of action.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 46, *Trial*, §§ 354, 356.]

(Syllabus by the Court.)

Error from District Court, Chase County; J. Harvey Frith, Judge pro tem.

Action by Pate S. Jones against Wilt Adair. Judgment for defendant, and plaintiff brings error. Reversed.

Madden & Doolittle and G. M. Dameron, for plaintiff in error. Gisham & Swan, for defendant in error.

JOHNSTON, C. J. This was an action by Pate S. Jones to enjoin Wilt Adair from interfering with the use and enjoyment of a sewer connecting with his hotel, and which he claims to own. He alleged and offered proof to show that in 1890 Stephen F. Jones, who was an owner of a hotel in Strong City, desired to construct a sewer from the hotel to the Cottonwood river. To do so it was necessary to pass through the streets of Strong City and across the right of way of the A., T. & S. F. Railway Company. Wilt Adair, who was then an employe and agent of Stephen F. Jones, procured the consent of the city to lay a sewer along the streets, and entered into a contract with the railway company to lay it under the tracks of the railroad. Although these things were done for Stephen F. Jones, and in order that he might build his sewer, the privileges were taken and the contracts made in the name of Adair, instead of that of his employer. Stephen F. Jones furnished the money and built the sewer, and it was thereafter used in connection with the hotel. In 1903 Stephen F. Jones conveyed the hotel and its appurtenances to the plaintiff, Pate S. Jones, and some time later Adair, claiming to own the sewer, threatened to disconnect it from the hotel, and hence the present action was brought. When plaintiff's evidence was introduced, the trial court sustained a demurrer to his evidence, dissolved the temporary restraining order, and denied the permanent injunction sought by plaintiff.

The testimony fairly tended to sustain the plaintiff's claim of ownership in the sewer and a right to its use, and hence the ruling of the court cannot be upheld. It was shown, without contradiction, that the sewer, which was an appurtenance of the hotel, was built for the owner, and that the cost of construction was paid by him. It was done, it is true, under the direction of Adair, but the evidence is that in doing so he was acting as the agent of the hotel proprietor. He could not, while acting for his principal, and investing his principal's money in an improvement of the hotel, very well acquire ownership in it. The mere fact that the contract made and the privilege obtained in behalf of his principal were in his own name did not divest the principal of his property, nor give the agent an ownership which he could assert against the principal or one holding under him. *Butler v. Kaulback*, 8 Kan. 668.

So far as the agent is concerned, the contracts, although made in his own name, are in law the contracts of his principal, and it does not appear that the railway company or the city with whom the contracts were made are disputing the rights of the plaintiff under them. The agent may have been entitled to be reimbursed for expenses incurred in the transactions, but not to the ownership of the property acquired for his principal and paid for by his principal's money. The trial court may have discredited the testimony of the

plaintiff, but the testimony offered in his behalf could not be disbelieved and disregarded on a demurrer to evidence. On that test every part of the testimony favorable to the plaintiff is deemed to be true, and every conclusion which it tends to prove is deemed to be admitted. *Christie v. Barnes*, 33 Kan. 317, 6 Pac. 590; *Buoy v. Milling Co.*, 68 Kan. 436, 75 Pac. 406.

The judgment will be reversed, and the cause remanded for further proceeding. All the Justices concurring.

(76 Kan. 365)

STATE v. THOMPSON.

(Supreme Court of Kansas. July 5, 1907.)

1. CRIMINAL LAW—INFORMATION—INDORSEMENT OF WITNESSES.

Where a defendant is prosecuted for a violation of the prohibitory law upon an information verified positively by an Assistant Attorney General, he cannot complain that such officer is permitted to testify without his name having been indorsed thereon as a witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1409, 1430.]

2. INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE.

The evidence examined, and held not to support a conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 300, 322.]

(Syllabus by the Court.)

Appeal from District Court, Allen County; Oscar Foust, Judge.

Felix Thompson was convicted of maintaining a nuisance, and appeals. Reversed.

Oyler & Barnes, for appellant. F. S. Jackson, Atty. Gen., John S. Dawson, Asst. Atty. Gen., and C. L. Evans, Co. Atty., for the State.

MASON, J. Felix Thompson appeals from a conviction upon a charge of maintaining a statutory nuisance by keeping a place where intoxicating liquors were unlawfully sold.

Complaint is made of the admission of the testimony of a witness whose name was not indorsed on the information. The witness in question was the Assistant Attorney General, who had verified the information by his positive affidavit. He was the complainant, and it was not necessary that his name should be so indorsed in order to warn the defendant to be ready to meet such testimony as he might be able to give. The case is within the reason of the rule applied in *State v. Bundy*, 71 Kan. 779, 81 Pac. 459, where, in a prosecution under the prohibitory law based upon testimony taken before the county attorney, it was held to be unnecessary to indorse upon the information the names of witnesses whose sworn statements so obtained were attached thereto.

The further contention is made that the evidence did not support the verdict. It was sufficiently shown that a nuisance had

been maintained for some time at the place described in the information. The only evidence, however, connecting the defendant with it, was the testimony of one witness that "they said" it was his, and that he had seen him there "standing around," "not doing anything in particular," and of another that four days after the information was filed the defendant was found there acting as proprietor. The defendant, of course, could not be convicted upon rumor. The mere fact of his presence in a place where the law was being violated had no tendency to connect him with its management, and no presumption that he was its keeper before the prosecution was begun arose from a showing that such relation existed four days later. *Topeka v. Chesney*, 66 Kan. 480, 71 Pac. 843; *State v. Durem*, 70 Kan. 1, 7, 78 Pac. 152.

The judgment is therefore reversed. All the Justices concurring.

(76 Kan. 266)

NICHOLS v. BOARD OF COM'RS OF SHAWNEE COUNTY.

(Supreme Court of Kansas. July 5, 1907.)

DISTRICT AND PROSECUTING ATTORNEYS—COMPENSATION.

A county attorney who is directed by the board of county commissioners to defend or represent his county in litigation pending in the United States court may recover for such services, notwithstanding at the time the services are performed such court may be held in the same county.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, District and Prosecuting Attorneys, § 22.]

(Syllabus by the Court.)

Error from District Court, Shawnee County; A. W. Dana, Judge.

Action by Galen Nichols against the board of county commissioners of Shawnee county. Judgment for defendant on demurrer, and plaintiff brings error. Reversed and remanded.

Galen Nichols, in pro. per. J. J. Scheneck, for defendant in error.

PORTER, J. May a county attorney who has been employed by the board of county commissioners to represent the county in litigation in the federal courts in which the county is a party recover fees for his services performed under such contract where the federal court was held in his county? This is the sole question for determination.

Galen Nichols, while county attorney of Shawnee county, was employed by the board of county commissioners to represent the board in the Circuit Court of the United States in a suit brought against the county by William H. Keepers to recover \$9,346 on account of extra material and labor alleged to have been furnished in the construction of the Melan bridge over the Kansas river.

The suit was pending in the federal court for eight months, and after Mr. Nichols had appeared therein a number of times, and performed services as attorney for the county, the board compromised the case and refused to allow him for his services. Hence this action. It appeared from the petition that part of the services were performed while the federal court was sitting in Leavenworth county, and part while it was sitting in Shawnee county. The trial court sustained a demurrer to that part of the petition in which it was sought to recover for services performed while the federal court was in session in Shawnee county, and plaintiff, electing to stand upon the averments of his petition in that respect, brings error.

The question has been settled in the affirmative, and the county held liable, in a case where the county attorney was obliged to attend the sessions of the federal court in another county. David J. Brewer, while county attorney of Leavenworth county, was directed by the county commissioners to perform certain services for his county in the federal court. He performed the services, and the county then refused to pay him for them. He brought suit, and this court held that he was entitled to recover. *County of Leavenworth v. Brewer*, 9 Kan. 307. In that case the services were performed outside of the county, the federal court sitting at the time in Shawnee county. In *Gillett v. Com'rs of Lyon Co.*, 18 Kan. 410, the county was held liable for services of the county attorney rendered outside his county in two suits, one pending in the Supreme Court, and one in Harvey county. To the same effect, see *Huffman v. County of Greenwood*, 25 Kan. 64.

The Brewer Case was decided in 1872, and defendant in error contends that, while it was good law then, it is no longer the law, for the reason that the Legislature of 1897 repealed the act fixing the salaries of county attorneys and enacted a new provision by which the salaries allowed should be in full compensation for all services performed. Gen. St. 1868, c. 25, § 139, reads: "The county attorneys of the several counties of this state shall be allowed by the board of county commissioners, as compensation for their services, a salary as follows." The language of Acts 1897, p. 276, c. 131, § 7, is: "The county attorneys of the several counties of the state shall be allowed, by the board of county commissioners of their respective counties, the following salaries per annum, as full compensation for all services performed." From the employment of the words "full compensation for all services performed" it is seriously argued that the Legislature had in mind the foregoing decisions, and intended thereby to establish a different rule, so that thereafter a county attorney should not be permitted to recover for services performed outside his county. If such was the legislative intent, it was certainly not expressed in apt and appropriate language. Two years lat-

er the Legislature of 1899 in re-enacting the same law dropped the word "full" before "compensation" and might have omitted the word "all" before "services" without the slightest change in sense or meaning. We cannot believe that the language used in the act of 1868 meant anything less than full compensation for all services performed, or that the use of the explicit terms "full" and "all" in the act of 1897 added anything of substance to the old law or changed its sense or meaning.

This case is ruled by the *David J. Brewer Case*, unless the fact that the federal court happened to sit in the county where Galen Nichols was county attorney, thus rendering it unnecessary for him to go outside his county while representing the board in the federal court, is a circumstance which calls for a different rule. Section 136, c. 25, of the General Statutes of 1868, which prescribes the duties of county attorneys, is still the law, and reads as it read when the Brewer Case was decided. It still in general terms defines the duties of county attorneys as follows: "It shall be the duty of the county attorney to appear in the several courts of their respective counties, and prosecute or defend on behalf of the people all suits, applications, or motions, civil or criminal, arising under the laws of this state, in which the state or their county is a party or interested." The "courts of their respective counties" was held in the Brewer Case not to have reference to the courts of the United States. And we are of the opinion that, without extending the doctrine of that case beyond its logical conclusions, a county attorney who is directed by the county board to defend or represent his county in litigation pending in the United States court may recover for such services, notwithstanding at the time the services are performed such court may be held in the same county. No matter where a court of the United States may sit, it is no sense one of the courts of the county where it sits. The services performed by the county attorney in the courts of the United States are not those which his duties or the law require him to perform. If the board employ or direct him to act for the county in such courts, the county is liable to him for the services he performs under such employment or direction, except the giving to the board of advice in respect to the litigation.

The sittings of the courts of the United States for the district of Kansas are frequently changed from one county to another as the centers of population and business change. The construction which defendant in error contends for would not give the statutes fixing the duties and compensation of county attorneys uniform operation. The county of Wyandotte, for instance, where the courts of the United States are frequently held, might become involved in a vast amount of litigation in those courts, and the county attorney

might, in the opinion of the board, be better qualified than any one else to represent the county's interests therein. He would have onerous duties imposed upon him for which he could recover no compensation, while the same officer of an adjoining county could recover for similar services performed for his county in the same court. The Supreme Court sits only in Shawnee county. The county attorney of that county without direction or employment of the board would be required to attend this court in all cases where the county might be interested, for which he would receive no pay beyond his regular salary, while the county attorney of any other county in the state, whose duties are fixed by the same statute, could recover compensation for similar services in the Supreme Court, if directed or employed by his county. The law prescribing the duties and fixing the compensation of county attorneys was never intended to produce such absurd consequences.

The decisions which settle the liability of a county in cases of this character were not placed solely on the ground that the services performed obliged the attorney to go beyond the county, although in all the cases heretofore decided such was the fact, and it was given most prominence. The reasoning of the cases rests, after all, upon the proposition that the services performed are not within the duties imposed by law upon the county attorney. The county attorney, in theory at least, goes beyond the realm of his official duties when he steps into one of the courts of the United States, although it may be sitting in a building across the street from where his office is located. Nor do we feel disposed in a case of this character to split hairs over the fact that necessarily the county attorney, while preparing the pleadings and fitting himself to represent his client properly, may have performed some of his labors while in the county. He is entitled to recover a reasonable attorney's fee for his services in court, which includes compensation for the labor of preparation, and this without reference to where it is performed. The United States court might appoint a referee to take testimony who would hold the hearing in the office of the county clerk, or, for that matter, in the office of the county attorney, and still we think the county attorney could recover for his services in appearing before the referee. For any advice given to the board of county commissioners in reference to such litigation he cannot recover, for the reason that to give the board advice on all legal matters is one of the duties of his office. *Huffman v. County of Greenwood*, supra.

We conclude that the demurrer should have been overruled, and the cause will therefore be reversed and remanded for further proceedings. All the Justices concurring.

Ex parte ELLIS.

(Supreme Court of Kansas. July 5, 1907.)

1. STATUTES—TITLE OF ACT.

The title to chapter 165, p. 242, Laws 1887, is broad enough to include the provision of section 5 thereof (section 2476, Gen. St. 1901), which authorizes the taxing of attorney's fees as costs in prosecutions brought by the Attorney General or his assistant under the prohibitory liquor law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 158-160.]

2. HABEAS CORPUS—GROUNDS OF DISCHARGE.

The fact that a county jail is in bad condition and is an unfit place in which to keep prisoners confined will not authorize this court to order a prisoner confined therein released on habeas corpus.

3. SAME—CRUEL OR UNUSUAL PUNISHMENT.

The board of county commissioners alone have authority to order the release of a person committed to the county jail for failure to pay a fine and costs. The refusal of the board to discharge a convicted person who has been found to their satisfaction to be unable to pay the fine or costs will not make his imprisonment cruel or unusual punishment, nor furnish ground for his release by habeas corpus.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3308.]

(Syllabus by the Court.)

Application of George Ellis for writ of habeas corpus. Writ denied.

There is an agreed statement of facts, from which it appears that George Ellis, the petitioner, on the 27th day of September, 1905, was convicted in the district court of Wilson county of violating the prohibitory liquor law, upon an information containing 52 counts, and was sentenced by the court on each count to imprisonment in the county jail of Wilson county for the term of 30 days and to pay a fine of \$100, and committed to the county jail until the fine and costs were paid. The term of his imprisonment amounted to 52 months, the fine to \$5,200, and there was taxed up as costs in the case the sum of \$1,300, being \$25 on each count as attorney's fee for E. D. Mikesell, who prosecuted the action as Assistant Attorney General. The petitioner was committed to the jail on the 3d day of October, 1905. His sentence was commuted by Gov. E. W. Hoch to expire on the 20th day of June, 1906, and he has since been confined in the jail because of the non-payment of the costs. At the next regular meeting of the county commissioners of Wilson county, following the commutation of his sentence, the petitioner made application to be released for the reason that he was unable to pay the costs. It is a part of the agreed statement of facts that the board of county commissioners were and are satisfied of his inability to pay the costs and only refuse to release him for the reason that Wilson county would become liable to the Assistant Attorney General for the sum of \$1,300 fees. The county board had paid the other costs, and declare their purpose to keep the petitioner in the county jail for his natural life

rather than the county should pay this sum to Mr. Mikesell. The petitioner is a poor man, and has no means of paying the costs nor procuring them from others. He is in poor health, and his condition is such that he requires medical attention continuously. In addition to the agreed facts, it appears from the evidence that for the past year the board of county commissioners and Mr. Mikesell have been sparring over an attempt to have these fees reduced; that the board made him an offer of \$750 if he would release further claims against the county, which offer he refused. Submitted with the evidence there is a copy of a written report made to the board of county commissioners, dated January 12, 1907, signed by Hon. L. Stilwell, judge of the district court, B. F. Carter, County Attorney, and J. W. Timmons, sheriff, in regard to the condition of the Wilson county jail, from which it appears that the jail is entirely inadequate to accommodate the number of prisoners, that it is poorly ventilated, and there is no space in which the prisoners can take exercise. The final recommendation to the board, signed by these gentlemen, is as follows: "And, that, finally, the jail of Wilson county be made a fit place for human beings, though criminals, to be confined in, instead of a dark, filthy, disease-breeding dungeon for its inmates, and a disgrace upon a prosperous and enlightened community."

Osborn & Osborn, for plaintiff. Frank Woodward, Co. Atty., F. S. Jackson, Atty. Gen., J. S. Dawson, Asst. Atty. Gen., and E. D. Mikesell, for the State.

PORTER, J. (after stating the facts). Briefs have been filed and oral arguments made on behalf of the petitioner, and by the Attorney General and Mr. Mikesell representing the state, and also by the county attorney of Wilson county on behalf of the board of county commissioners. The situation presented is anomalous, for the court has practically been importuned by those representing both sides of the controversy to find some way to order the petitioner's discharge. The board of county commissioners apparently desire to be relieved of the responsibility of the situation, and to obtain a decision which will in some manner have the effect to release the county from liability to Mr. Mikesell.

It is contended by the petitioner that section 2476, Gen. St. 1901, is unconstitutional. This act authorizes the taxing of \$25 as attorney's fees for each count upon which a conviction is had in this class of cases, and declares that the county shall be liable therefor to the Attorney General or his assistant where the same is not paid by the convicted person within one month after his release from jail. In this contention he is heartily joined by the attorney for the board of county commissioners. The petitioner is held for the payment of these costs, and manifestly can in this proceeding raise the question of

whether they can be lawfully taxed against him; but whether the county can be compelled to pay them to Mr. Mikesell after the petitioner's release, if he should be released, is not involved here, and is no concern of the petitioner. The board of county commissioners is not a party to this proceeding, nor is Mr. Mikesell.

The objection to the validity of the section is that the title of the act is too narrow to include the taxing of such costs. The section is an amendment to the prohibitory liquor law of 1885, and is section 5, c. 165, p. 242, Laws 1887. The title to this act was assailed upon practically the same grounds in *State v. Brooks* (Kan.) 85 Pac. 1013, and upheld. In that case it was said: "A provision intended to insure the prosecution of offenses against an act is as plainly adapted to the enforcement of its purpose as is one prescribing a penalty." We must, therefore, hold against the petitioner's claim that these costs are not lawfully taxed against him.

The principal contention of the petitioner is that the refusal of the board to order his release, unless he shall pay the costs, when his inability ever to pay has been established and conceded by the board, is in violation of section 9 of the Bill of Rights of the Constitution, which provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." It was decided in *Re Boyd*, 34 Kan. 570, 9 Pac. 240, that imprisonment for the nonpayment of costs is no part of the punishment, and in the same case it was held that imprisonment under such circumstances is not imprisonment for debt. It is urged that the present case differs from that, because the board has found that the petitioner is unable to pay the costs, and has announced the intention of continuing the refusal to release him, although it will have the effect to keep him confined for the remainder of his life; and the case of *Ex parte Tuichner*, 69 Iowa, 393, 28 N. W. 655, is relied upon. In that case the Supreme Court of Iowa said: "It is true that the imprisonment is but a mode of enforcing the payment of the fine and costs; but, if the convicted person is unable to pay, then the imprisonment becomes punishment, and possibly within the prohibition of section 17 of article 1 of the Constitution, which provides that cruel and unusual punishment shall not be inflicted."

Reliance is also placed upon some expressions in the opinion in the case of *State v. Looker*, 54 Kan. 227, 38 Pac. 288, where the same question was raised in respect, however, of the validity of the judgment and sentence. It was argued that the sentence was indefinite; that, if a person convicted is unable to pay the fine and costs, he might be imprisoned during his natural life, and, if there is no authority for his discharge, there is no limitation of the duration of his imprisonment. It is insisted that if an indefinite sentence may not be imposed, nor

excessive nor unusual punishment inflicted, a law which has the effect to impose such penalty should be held to be void. The court in the opinion declared that chapter 199, p. 293, Laws 1889, was void, because in attempting to amend chapter 117 p. 279, Laws 1871, providing for the discharge of prisoners unable to pay the costs, the Legislature, in the title to the act, provided for amending chapter 147, in place of 117. In the opinion it was said by Justice Johnston: "A plausible argument to sustain this view was made in behalf of the defendant, and there would be great force in his contention if chapter 199, p. 293, Laws 1889, could be treated as a valid law." As the case was decided expressly upon the proposition that the law was void, the expressions which are relied upon are obiter. In *State v. White*, 44 Kan. 514, 25 Pac. 33, this section of the Bill of Rights was under consideration, and it was said by Justice Valentine that the provision "probably, however, relates to the kind of punishment to be inflicted, and not its duration."

But it is unnecessary to decide whether imprisonment for the nonpayment of costs, where the prisoner is unable to pay them, might not, under some circumstances, amount to cruel and unusual punishment; for, notwithstanding the threats of the board, if threats they can be termed, to keep the petitioner confined for the remainder of his life, we would have no right to assume that the present or some future board will not deal justly in the matter and order him released when satisfied of his inability to pay the costs. Some criticism of the present board has been indulged in by counsel for the state, and the members have been charged with a disregard of the claims of humanity and justice in their persistence in refusing to order the petitioner released. The matter has been before the board a number of times, and numerous and various resolutions have been adopted to bring about an adjustment of the costs, so that the same will not fall upon the county; but the members have placed themselves on record several times as recognizing that justice and humanity require his release. The difficulty appears to be that the board has never been able to see over and beyond the \$1,300. Doubtless they would not hesitate to order the expenditure of as large an amount to build a bridge over a creek and save a few taxpayers some slight inconvenience in travel, but the expenditure of \$1,300 of the county's money to uphold and enforce the criminal laws of the county seems to them to be money thrown away. In this era of law enforcement most people would regard the sum as insignificant when added to the taxes of a large and populous county and compared to the advantage which must accrue to the community in vindicating law and order and suppressing lawlessness.

The certificate of the honorable judge who

has so long presided over the district court is a severe condemnation of the jail and its conditions and surroundings. Jails are never desirable places in which to remain; but the dictates of humanity demand that some consideration should be given to the comfort, and especially to the health, of those compelled to occupy them. As communities become more enlightened and prosperous, the tendency is in favor of bettering the condition of all classes of unfortunate persons who are committed to the care of the public. It must be obvious, however, that we cannot order the petitioner released on account of the condition of the jail. To do so would require us on similar applications to order the release of all prisoners confined there.

The authority of the board to discharge the petitioner is conferred by section 5698, Gen. St. 1901, which reads as follows: "Any person imprisoned for failure to pay any fine or costs may be discharged from imprisonment by the board of commissioners of the county where conviction took place, on satisfactory proof to them that said person is unable to pay the same." The act gives the board power in their discretion to discharge him; but it is not mandatory. An action of mandamus would not lie to compel the board to act.

Having decided that the costs taxed against the petitioner are authorized by law, and that under the circumstances it cannot be said that his imprisonment for failure to pay them amounts to a violation of the Bill of Rights, and is not cruel or unusual punishment, and that the condition of the county jail is not ground upon which we may order his release, our responsibility ends. The board of county commissioners alone have authority to discharge the petitioner. The law and their oaths of office impose duties and responsibilities upon them which can neither be avoided at will nor shared with others.

It follows that the writ will be denied. All the Justices concurring.

(76 Kan. 353)

COSTIGAN v. STEWART et al.

(Supreme Court of Kansas. July 5, 1907.)

ATTORNEY AND CLIENT—ATTORNEY'S LIEN.

An attorney, who is employed by the mother of an illegitimate child to assist in the prosecution of bastardy proceedings, under a contract by which he is to be paid an attorney's fee out of the fund recovered, is entitled to lien upon such fund for his fees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 378-383.]

(Syllabus by the Court.)

Error from District Court, Franklin County; C. A. Smart, Judge.

Action by W. J. Costigan against Anna B. Stewart and W. B. Klier. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Benson & Harris and Ferry & Doran, for plaintiff in error. J. W. Deford, for defendants in error.

PORTER, J. The only question here is whether an attorney, employed by the mother to assist in the prosecution of bastardy proceedings, is entitled to a lien for his fees upon the money judgment recovered in the proceeding against the father. Emmanuel B. Stewart was convicted in the district court of Franklin county of being the father of a bastard child born to Anna B. Stewart. Defendant was required to pay the sum of \$1,200 for the support and maintenance of the child. On the order of the court W. B. Klier was appointed trustee of the fund, which defendant at once paid into court. W. J. Costigan was employed by the prosecuting witness to assist the county attorney in the prosecution, and appeared in the proceedings before the justice and in the district court. She agreed to pay him as an attorney's fee one-third of the amount recovered. It appears that an offer of \$500 made by defendant while the case was pending would have been accepted by the prosecuting witness in full settlement of the matter, except for the advice of Mr. Costigan, and there is no question that he performed the services for which he was retained. When the order was made appointing a trustee for the fund, Mr. Costigan informed the court of his contract, and asked to have his fee paid out of the fund. The court stated that the fund was still in the hands of the court, and required Mr. Costigan to make a formal application with proof. This was done, and a hearing was had upon affidavits; the trustee resisting any allowance of fees, while the mother of the child filed her affidavit stating that she had employed Mr. Costigan with the understanding that he was to receive one-third of the amount recovered, and that she desired the fee paid to him. The court refused to make the allowance, and held that the attorney was not entitled to any lien upon the fund for his fees. Mr. Costigan has brought the case to this court on error.

Courts have never doubted their authority to allow nor hesitated to give to an attorney a lien for his fees upon a fund which his labors have created or assisted to bring into existence, unless some considerations of public policy or other special reason stood in the way of such an equitable allowance. There is nothing analogous in the doctrine of the cases which refuse an attorney a lien upon money paid for alimony as his fees for procuring the allowance. We have no quarrel with the principles announced in the case of *Jordon v. Westerman*, 62 Mich. 170, 28 N. W. 826, 4 Am. St. Rep. 836, or *Lynde v. Lynde*, 64 N. J. Eq. 736, 52 Atl. 694, 53 L. R. A. 471, 97 Am. St. Rep. 692, which are cited by defendant in error. There are valid reasons which control cases of that character which have no application to the present case. In

the former case *Westerman*, the attorney, collected \$4,500 alimony, allowed to the wife by the court, and retained one-half. In the *Lynde* Case the amount was \$41,000 and, the attorneys claimed and retained one-half. In each case the court compelled the attorney to relinquish his claim upon the fund and pay the whole sum to his client, because public policy will not uphold a contract which tends towards the separation of husband and wife and which seeks to prevent the adjustment of marital difficulties. Besides, the court always has power to award fees to the attorney for the wife; and, in each of the above cases, it was held that a fraud had been practiced in withholding from the court the object and purpose for which the allowance was to be used.

While the proceedings are carried on in the name of the state, and the statute provides for the arrest and imprisonment under certain circumstances of the person charged with being the father of an illegitimate child, the rules of evidence and the procedure are governed by the law regulating civil actions. The proceeding is therefore more in the nature of a civil action. The right to prosecute has been held optional with the mother. *State ex rel. v. Young*, 32 Kan. 292, 4 Pac. 309. Not only this, but she controls the prosecution, and may without let or hindrance accept satisfaction and dismiss the proceedings. *Moore v. State ex rel.*, 47 Kan. 772, 28 Pac. 1072, 17 L. R. A. 714; *Poole v. French*, 71 Kan. 391, 80 Pac. 997. In the opinion in the latter case it is said: "The prosecution is under the direction of the relatrix. She may accept satisfaction and dismiss the action. *Gleason, Sheriff, v. Com'rs of McPherson Co.*, 30 Kan. 492, 2 Pac. 644, 1 Pac. 384; *State v. Baker*, 65 Kan. 117, 69 Pac. 170. The money judgment is collectible by her, and her only if she be alive. Whether it be called an action or a special proceeding matters little. It is being prosecuted by a party who has a right under the statute so to prosecute against another party, who is called a defendant, for the enforcement of a right given to her by the statute."

Defendant in error also cites the note to the case of *Crafts v. Carr*, 24 R. I. 397, 53 Atl. 275, 60 L. R. A. 128, 96 Am. St. Rep. 721, 731, as to the liability of an infant for attorney fees as necessities furnished in actions brought in his behalf. None of the cases in the note are in point, for the reason that the service for which the allowance in this case is asked was not performed for or on behalf of the infant, but on behalf of the mother who entered into the contract of employment. It is beside the whole question to contend that, because the judgment is in theory to be used for the support and maintenance of the child, the mother cannot out of the amount recovered pay to an attorney his fee for prosecuting the action. The statute makes no provision with respect to the manner in which the mother shall

expend the money. When it is paid to her she may, so far as the statute is concerned, use it for any purpose of her own—may buy jewelry with it—withstanding the fact that her statutory right to maintain the action is based upon the theory that she is entitled to receive assistance from the father for the support and maintenance of the child. She has the statutory right to prosecute the action and recover, although she may have independent means of her own, or even though the child has already been amply provided for. The fund recovered is hers for any and all purposes, and the child has no legal claim upon it or direct interest in it.

It is argued, however, that the mother has no pecuniary interest in the judgment, and it is said her only interest in the proceeding is to establish the parentage of the child. Such is not the law under our statute as declared by this court. In former numerous decisions the pecuniary interest of the mother in the fund has been recognized. In *State ex rel. v. Reed*, 46 Kan. 501, the trial court gave an instruction that the mother was a mere witness and in effect not pecuniarily interested. This court said: "This instruction is faulty in several respects. It states that the mother has no pecuniary interest in the support of her child. This statement could only have been made by the trial court upon the assumption that the mother of a bastard child is in no way responsible, under the law, for the support of such child. This is not the law. Under the law, the mother of an illegitimate child is all the while known, and is at all times, at least during its infancy, liable for its support, while the father of such child is unknown until ascertained by judicial proceedings, unless he acknowledge its paternity, and therefore he is liable only when the paternity of the child is acknowledged by him, or it is established by judicial inquiry. And when the paternity of the child is established by the judgment of the court, the law does not relieve the mother from liability for the support of her child, but compels the father, thus ascertained, to contribute his share to the support of such child. The mother must still do her part towards caring for and supporting her child. And again, so far as the judicial inquiry is concerned, the mother, who under the law must alone support her illegitimate child, unless its paternity is ascertained by such inquiry, has an interest in the result of the proceeding to the full extent of the contribution the court requires the accused, if found to be the father of her child, to make towards its support; and that is the measure also of the pecuniary interest the accused has in the inquiry."

In *Moore v. State ex rel.*, *supra*, it was held that the mother might maintain the action, although she, as well as the child, was a resident of Illinois. In the opinion it

was said: "The enforcement of the statute by the mother both protects the municipality from the burden and makes the putative father contribute material aid to the mother in the maintenance and education of their illicit offspring. Our legislation has partaken very largely of this tendency. It seems that such proceedings can be instituted alone on the complaint of the mother. The money is to be paid to her, unless it appears that she is an improper person. She can at any time dismiss the suit, if she enters of record an admission that provision has been made for the maintenance of the child to her satisfaction. Such an entry is a bar to all other prosecutions for the same cause and purpose. Sections 19 and 21 of the act seem to be conclusive against the view that the sole purpose of the proceeding is to protect the public, for it provides that, 'in case of the death of the putative father of such child, the right of action shall survive against his personal representatives, and the death of the bastard child shall not cause the abatement of the proceedings.' If the sole or principal object of the statute is to protect the public from the maintenance of the child, the proceedings would abate with the death, for with the death the necessity for the statute would cease to exist." In *Kolbe v. People*, 85 Ill. 336, it was held that the mother is chiefly interested. The Illinois statute is substantially the same as ours.

In Minnesota, notwithstanding the mother is not given the sole right to institute the proceedings, hers is recognized as the chief interest and as pecuniary. *State v. Zeitler*, 35 Minn. 238, 28 N. W. 501. Again, the same court in another case, after referring to the duties and obligations of the mother to rear and maintain the child, and the statutory duty of the putative father to aid her in this respect, said: "Now, with these rights, duties, and obligations pertaining to the mother and father of a bastard child, how can it be reasonably said that the complaining mother has no pecuniary interest in the result of the suit? One of the objects of the statute is to compel him to pay to her such sum of money or other property as she may agree to receive in full satisfaction. Such is the language of the statute." *State v. Nestaval*, 72 Minn. 415, 75 N. W. 725.

The pecuniary interest of the mother, her right to begin, direct, control, settle, or dismiss the proceedings, are those which no other person shares with her; and it would seem to follow necessarily that she may contract for the employment of an attorney to assist the county attorney in prosecuting the action and provide for his payment out of the fund. No valid reason can, we think, be suggested against her right to do this. It is incidental to the right to institute and control the action.

The argument advanced so strenuously that no person can bind the estate of an

unborn child, and therefore the mother is powerless by contract to create a lien upon the fund, falls, when it is seen that the judgment is not a part of the child's estate. The mother is not the trustee of the fund for the child and has, not only the optional right to institute the suit and control it after it is instituted, but she receives the judgment with the sole right of disposition. The argument would apply with equal force to the claim that the mother could not compromise or accept satisfaction and dismiss the proceedings. If the child has the vested interest, and the mother is only the trustee acting for it, she could not, by accepting a grossly inadequate sum, prejudice the child's interest. But, as we have seen, her right to institute, control, or compromise the prosecution is without reference to any supposed right of the child in the fund.

It is said in argument that if the child should die defendant would have a right to an order of the court refunding to him any unexpended balance that the court might deem proper in consequence of such death, and it argued that therefore the mother never got title to the fund. Gen. St. 1901, § 3337, provides for such a case where the judgment is to be paid in installments and the child dies before the last payment. It is sufficient to suggest that after the attorney fee is paid it has been expended and, of course, would not be a part of an unexpended balance.

It is our opinion that it was error to refuse the allowance of the fees of the attorney, and that they were properly a charge upon the fund. The cause will therefore be reversed and remanded with directions to order payment of the fee to plaintiff in error. All the Justices concurring.

(76 Kan. 347)

JENSON v. JENSON.

(Supreme Court of Kansas. July 5, 1907.)

1. APPEAL—REVIEW—OPINION OF REFEREE.

Where a referee's report contains all the evidence, a judgment contrary to his findings cannot be upheld on review upon the theory that the trial court had any means of information as to the facts not open to him, or any better opportunity than this court to determine the force and effect of the testimony.

2. TRUSTS — CONSTRUCTIVE TRUSTS — EVIDENCE.

The evidence examined, and held to support the findings of the referee.

(Syllabus by the Court.)

Error from District Court, Morris County; O. L. Moore, Judge.

Action by Tom Jenson against Thomas Jenson. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

Humphrey & Humphrey and John Maloy, for plaintiff in error. Roark & Roark and N. B. Nieholson, for defendant in error.

MASON, J. A life interest in real estate in England vested in Margaret Jenson by the terms of a will, which also provided that upon her death the property should go to her husband, Thomas Jenson, for his life (he to educate and maintain her children out of it), and that upon his death the executors should sell it and divide the proceeds among her children or their heirs. She died in 1882, the only beneficiaries under the will surviving her being her husband and their son, Tom, who was born in 1875. In 1899, by what was understood to be their joint consent, the property was sold, the executors and the father and son uniting in the deed. The consideration was £3,000, which was paid to the father who came to this country, accompanied by his son, and invested it largely in the purchase and improvement of lands for a cattle ranch, taking the title in his own name. In 1903 the son began an action against his father, alleging in substance that he had never known until a short time before that the will referred to gave him any interest in the English property; that his father had fraudulently concealed the fact from him and had induced him to sign the conveyance by leading him to believe that it was purely a formal matter, and had procured the co-operation of the executors by representing to them that the purpose of the sale was to procure funds to be invested in land in America for the benefit of Tom, and by promising that such plan should be carried out. The plaintiff therefore asked to be declared the absolute owner of all property into which such proceeds could be traced. The defendant answered, denying the allegations of fraudulent concealment and misrepresentation, and taking the position that he held a life interest in such property, his son being the remainderman. The case was tried before a referee, who made detailed findings of fact and conclusions of law, in effect sustaining the defendant's contention as to the principal matter in controversy. The court, however, took a different view of the evidence; and, setting aside so much of the referee's report as was inconsistent therewith, gave judgment for the plaintiff. The defendant prosecutes error.

The evidence was partly oral and partly in the form of depositions. Circumstances were narrated from which different inferences might be drawn, and there was some direct conflict of testimony. The brief of the defendant in error contains a suggestion that in the course of other litigation the trial court had acquired information material to the resolution of these contradictions, not available to the referee or to this court, and that its conclusions regarding them should therefore control. This is not a consideration that can be given weight here. Inasmuch as the referee's report set out the evidence in full, "the testimony is presented to this court in the same form as it was to the district court, and hence we have the

same opportunity which that court had to determine its force and effect." *Fountain v. Kenney*, 68 Kan. 797, 72 Pac. 392.

In behalf of Tom Jenson a theory is presented, which was outlined in his petition, that he is entitled to recover because of representations made by his father to the executors to induce them to execute the deed to the English property. We cannot perceive that properly there is such an issue in the case. The executors had no power of alienation except as they derived it from the joint consent of the father and son. Their act was merely formal. Practically, Tom Jenson, being entitled to the proceeds of a sale of the property at his father's death, was the owner, subject to his father's life interest. Any disposition of the property, or its proceeds to which he and his father might agree, was a matter of no concern to any one else. He was of full age and not under guardianship. The sale was effective only because of his participation in it.

The real questions in dispute are: (1) Was his consent to the transaction fairly given with a full understanding of his rights, or was it obtained by a fraudulent concealment of the terms of the will, by which he was deceived into a belief that he had no substantial interest in the matter; and (2) if no fraud was employed, what was the agreement between himself and his father as to the disposition of the proceeds of the sale, was it that the new property purchased was to be absolutely his own, or that the American real estate should be held as that in England had been—the life estate in the father, the remainder in the son?

Upon the question of fraud there was a direct conflict of oral testimony between the parties. That of Thomas Jenson was explicitly corroborated by the deposition of the lawyer who arranged the details of the sale, to the effect that he fully explained to the plaintiff his rights at the time of its completion. The other evidence affecting the matter was largely negative or circumstantial. The referee by necessary implication, although not in express language, found against the defendant on this issue, and we see no sufficient reason for disturbing the finding.

To establish his claim to the absolute ownership of the American property, the plaintiff relied upon evidence that his father at various times had stated that his purpose was to use the proceeds of the English property to buy a cattle ranch for Tom—to start Tom in business; that he himself should remain in this country but a short time; that he had other means sufficient for his support. These expressions, however, and others of the same general import shown by the record, are consistent with the idea that, while the lands were to be bought with special reference to Tom's interests, were to afford him a present occupation and ultimately to become his, his father was to en-

joy a life estate in them. No witness professed to have heard the defendant declare unequivocally that he was to renounce such interest on his part. Tom's own version of his father's promise was thus expressed: "He said he would come to America, and we would invest the money in a ranch, and I should share it with him." Upon the issue so presented the referee made the following finding, the portion thereof inclosed in brackets being afterwards stricken out by the court as not supported by the evidence: "At the time of the sale of said property known as the 'Hare and Hounds,' it was the intention of both plaintiff and defendant that the proceeds derived from said sale should be brought to the United States and invested in a cattle ranch for the purpose of establishing the plaintiff in business [but it was not the intention at that time, of either the plaintiff or the defendant, that the defendant should part with or forfeit his life interest in the proceeds derived from the sale of said Hare and Hounds property]."

It is unquestionably true that there was much in the relations and conduct of the parties to afford just ground for doubting the good faith of the father, and that a plausible argument can be made in favor of the son's contentions. But the case is peculiarly one in which the appearance and bearing of the parties upon the witness stand may have been of great value in deciding between them—may have been a determining factor. We deem it unnecessary to review the evidence more in detail, or to recite the considerations which might be thought to support one view or the other. The finding quoted is substantially to the effect that the father and son agreed that the interest of each in the property sold should attach to the proceeds and follow them into whatever form they might assume. We cannot say that such finding was without support, nor that it was against the weight of the evidence.

An incidental finding upon which the court differed with the referee had relation to a lease of the ranch from the father to the son, signed by both parties. The plaintiff claims that this lease was a sham; that it was executed to deceive a third person. The referee found otherwise. The matter seems a fair one for his determination. But in any event the matter is not very material. The lease is important chiefly as an acknowledgment by the son of his father's title. If his story is true, such acknowledgment was made in ignorance of his rights and did not bind him; if it is untrue, the acknowledgment was superfluous. Moreover, the lease was pleaded in the answer, and the reply tendered no issue regarding it, except by alleging that the plaintiff entered into it not knowing that he was the owner of the land.

The referee also made findings, which are not challenged, settling various minor disputes, and establishing that the defendant

still has on hand a part of the proceeds of the sale of the English property, amounting to \$679.32. His conclusions were that the plaintiff was the owner of this and of the lands referred to, subject to a life interest of the defendant, and that the costs of the action should be divided.

It results from what already has been said that the judgment must be reversed and the cause remanded, with directions to enter a decree in accordance with the facts as found by the referee. The matter of costs, however, rests in the discretion of the district court, and there are obviously good grounds for permitting their recovery by the plaintiff. The defendant asserted in his answer that he was ready, and had been at all times, to assure to the plaintiff, by any proper instrument, his interest in the lands in controversy—that is to say, the title to them subject to his father's life estate. The evidence showed that a few weeks before the suit was begun Tom was advised by a letter from his father that his rights as remainderman were recognized, but it does not appear that any offer was ever made, excepting that contained in the answer, to give legal effect to such recognition, or to make it a matter of record. The plaintiff therefore was entitled to relief in this respect, as well as to an accounting.

So far as the real estate is concerned, he can be protected by a judgment declaring his interest. As to the money, in the absence of an agreement between the parties, an order will have to be framed to meet the occasion. All the Justices concurring.

(76 Kan. 361)

ROWLES v. BOARD OF EDUCATION OF CITY OF WICHITA et al.

(Supreme Court of Kansas. July 5, 1907.)

1. SCHOOLS AND SCHOOL DISTRICTS—PUBLIC SCHOOLS—SEPARATE SCHOOLS.

Chapter 227, p. 320, Laws 1889, is a special act, which by its terms makes full provisions for the government of the public schools of the city of Wichita, a city of the first class. It renders all other provisions of the statute relating to public schools inapplicable to the public schools of Wichita, and it has not been amended or repealed and does not authorize the maintenance of separate schools for the education of white and colored children.

2. SAME—EXCLUSION OF COLORED CHILDREN.

In the absence of statutory authority, the board of education of the city of Wichita has no right to exclude a child, by reason only of its color, from any public school of the city.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Schools and School Districts, §§ 15-322.]

(Syllabus by the Court.)

Error from District Court, Sedgwick County; Thos. C. Wilson, Judge.

Action by Sallie Rowles for writ of mandamus against the board of education of the city of Wichita and others. Writ denied, and plaintiff brings error. Reversed and remanded.

John W. Adams and O. H. Bentley, for plaintiff in error. Stanley, Vermillion & Evans and H. C. Sluss, for defendant in error.

SMITH, J. The following portion of the agreed statement of facts upon which the case was tried is sufficient to determine the decision of this case, to wit: "It is further admitted that the seventh grade of the course of study of the schools of the city of Wichita is taught in the Emerson School, that white children, living in the same block in which the said Fannie S. Rowles resides, were, at the time the said Fannie S. Rowles presented herself for admission and now, attending the said Emerson School and the seventh grade thereof; and it is further admitted that the said Fannie S. Rowles presented herself to the said Emerson School as set forth in the writ of mandamus herein, and that she was excluded and prohibited from attending said Emerson School for the sole reason that she was of African descent and colored and a separate school had been provided in the Park School for her education in the seventh grade as a colored child; and it is further admitted that the plaintiff is a widow and the mother of the said Fannie S. Rowles, and as such she has the charge and sole responsibility of educating the said Fannie S. Rowles, and that the father of the said Fannie S. Rowles is deceased; and that said Fannie S. Rowles resides within 400 feet of the Emerson School, and that the said Fannie S. Rowles is not attending the Park or Emerson School at this time because she claims the right to attend the Emerson School." The action was brought by Mrs. Rowles for a writ of mandamus to compel the school board of the city of Wichita to admit her daughter Fannie to the Emerson School, which writ was refused by the court, and she brings the case here.

Section 75, c. 18, Gen. St. 1868, which chapter relates to cities of the first class, authorized all cities of this class to maintain separate schools for the education of white and colored children, and authorized the establishment of high schools. In 1879 (chapter 81, § 1, p. 163, Laws 1879) said section 75, c. 18, Laws 1868, was repealed and amended. By the amendatory act cities of the first class were authorized to maintain separate schools for the education of white and colored children, "except in the high school where no discrimination shall be made on account of color." In 1905 this act was again amended (chapter 414, § 1, p. 676, Laws 1905), and cities of the first class were authorized "to organize and maintain separate schools for the education of white and colored children, including high schools in Kansas City, Kansas. No discrimination on account of color shall be made in high schools, except as provided herein."

The city of Wichita, from the time it became a city of the first class until 1889, was,

as to its public schools, within the provisions of the general statutes theretofore enacted and above cited. In that year, however, the Legislature, probably at the instigation of representatives of the city, passed a special act in which full provision is made for the schools of that city. The act applies only to the city of Wichita, and, in effect, repeals all former general acts to the extent of their application to the schools of Wichita. Section 1 of the special act reads: "The public schools of the city of Wichita shall be governed by the provisions of the following act." Section 4 thereof reads: "The board of education shall be a body corporate under the name of 'The Board of Education of the City of Wichita,' and as such shall have the power to sue and be sued; to elect its own officers, and make all necessary rules for the government and regulation of the schools of said city under its charge and control, subject to the provisions of this act; to exercise the sole control over the public schools and school property of said city; and shall have the power to establish and maintain a high school: Provided, no discrimination shall be made on account of race or color; Provided further, that no tuition fee shall be collected from any pupil who is an actual resident of said city. The board of education shall have power, where the school accommodations are deemed insufficient, to exclude, for the time being, children between the ages of five and seven years." This act has never been amended or repealed. The act of 1905 was expressly amendatory of the act of 1879, and was a general act with a special exception in relation to Kansas City, Kan. As the schools of Wichita had for years been under the special act of 1889, it cannot be inferred that the Legislature intended the act of 1905 to have any application whatever thereto.

It is contended on the one hand that section 4 of the special act supra prohibits discrimination on account of color in any and all of the public schools of Wichita, and on the other hand that the prohibition relates only to the high schools. However this may be, it is certain that the city is not by any provision thereof authorized to maintain any grade of its public schools for the separate education of white and colored children. The history of the legislation on this subject from 1868 to 1905 amounts almost to a legislative declaration that, in the absence of an express grant thereof, no city or school district has any authority to discriminate against any child, or to deny it admission to any public school thereof, on account of its color. Such, also, has been the uniform tenor of the decisions of this court. See *Board of Education v. Tinnon*, 28 Kan. 1; *Knox v. Board of Education*, 45 Kan. 152, 25 Pac. 616, 11 L. R. A. 830; *Cartwright v. Board of Education* (Kan.) 84 Pac. 382; *Board of Education v. Dick*, 70 Kan. 434, 78 Pac. 812; *Richardson v. Board of Educa-*

tion, 72 Kan. 629, 84 Pac. 538. It follows that the plaintiff was entitled to the relief prayed for.

The judgment of the district court is reversed, and the case is remanded, with instructions to enter judgment for the plaintiff in accordance with the views herein expressed. All the Justices concurring.

(76 Kan. 280)

SPARKS v. BOARD OF COM'RS OF CHEROKEE COUNTY.

(Supreme Court of Kansas. July 5, 1907.)

1. COUNTIES—COUNTY OFFICERS—OFFICIAL BONDS.

Where by a statute changing the date of an election, enacted after a county officer has given his official bond, his term of office is extended for a year, the sureties on such bond cannot be held liable by reason of any misconduct on his part occurring after the expiration of the time for which he was elected, notwithstanding the bond is conditioned for his good behavior during his continuance in the office "by virtue of said election," and the Constitution provides that "county officers shall hold their offices for a term of two years, and until their successors shall be qualified."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 145.]

2. SAME—ACTION AGAINST PRINCIPAL.

An action upon the bond for such misconduct may be maintained against the principal.

(Syllabus by the Court.)

Error from District Court, Cherokee County; W. B. Glasse, Judge.

Action by the board of county commissioners of Cherokee county against O. W. Sparks. Judgment for plaintiff. Defendant brings error. Affirmed.

E. E. Sapp and J. N. Dunnbar, for plaintiff in error. Tracewell & Moore, for defendant in error.

MASON, J. In November, 1899, O. W. Sparks was elected sheriff of Cherokee county for the regular term, which under the law as it then stood was fixed at two years, beginning with the ensuing January. As required by the statute (Gen. St. 1901, §§ 1740, 1741), he gave a bond, signed by himself and several sureties, for the faithful discharge of his duties. In 1901 the Legislature did away with elections in the odd-numbered years. Laws 1901, p. 309, c. 176. The result of this action was to extend Sparks' term until January, 1903 (*Pruitt v. Squires*, 64 Kan. 855, 68 Pac. 643), and he continued to hold the office until that time. During the year 1902 he collected and retained various fees which it may for present purposes be assumed he should have paid over to the county. An action was brought by the county commissioners upon the sheriff's bond to recover the amount so withheld. The matter was sent to a referee, who reported that neither the sheriff nor his sureties were liable in said action. The court approved the report as to the sureties, but held that the county was entitled to recover against the principal.

This proceeding is brought to review such rulings; the commissioners claiming that their demand against the sureties should have been sustained, the sheriff that he also should have been exonerated. The only questions involved are whether the bond is to be so construed as to make the sureties answerable for any misconduct of the sheriff occurring during the year which the Legislature added to his term after his service had begun, and whether a recovery can be had against the officer himself for such misconduct in an action upon the bond.

It is true that the Constitution provides (formerly by section 3 of article 9, now by section 2 of article 4) that "all county * * * officers shall hold their offices for a term of two years, and until their successors shall be qualified." And it was decided in *Pruitt v. Squires*, supra, that in such a case as the present the sheriff continued to hold office from January, 1902, to January, 1903, in virtue of that provision; that his service for that period was under his original election; that the effect of the statute was to extend the old term, not to create a new one. The bond in question, following the language of the statute, purported to guaranty the good behavior of the sheriff "during his continuance in office, in virtue of said election." Literally construed, therefore, the terms of the bond were broad enough to cover the misfeasance here complained of. But it is urged with much force that the sureties, being favorites of the law, are entitled to any reasonable construction that will relieve them from liability. There is a sharp conflict of authority upon the question whether, notwithstanding a statutory provision that an officer's term shall continue until his successor has qualified, a bondsman's liability does not cease as soon as a reasonable time has elapsed to permit such qualification, even although it does not take place. The authorities on the subject are collected in notes 5 and 6, 27 A. & E. Encycl. of L. 535, and in a note in *Blades v. Dewey* (N. C.) 103 Am. St. Rep. 932. This court in *Riddel v. School District No. 72*, 15 Kan. 168, definitely took a position in line with the cases which favor the surety by limiting his liability closely to matters arising in the regular term for which his principal was chosen. So in *Life Association v. Lemke*, 40 Kan. 661, 20 Pac. 512, it was said: "It will be conceded that, if the bond is an official and an annual one, the obligors are only bound for the defaults that occurred during the year for which the bond was given. The contract of a surety is favorably regarded by the law, and even in cases where the officer is authorized to hold over his term and until his successor is elected and qualified the liability on the official bond is not extended beyond the duration of the term. When an officer is chosen for a term of limited duration, and a bond for the faithful performance of duties is given, the presumption is that the obligors or sureties only con-

tract for the faithfulness of the officer during that time, and the obligation of the sureties is not extended by the mere fact that such officer is re-elected or for any reason holds over the term."

The present case is peculiarly one which calls for the application of the principle by which a liberality of interpretation is allowed for the benefit of a surety. When Sparks' bond was given, those who signed with him might perhaps have been expected to take into account that through some accidental circumstances, such as the delay of his successor to qualify, his term of office might be extended for some inconsiderable period beyond the normal two years. But they could not have anticipated that the Legislature would add a whole year to his time of service. No such change could possibly have been contemplated; and, if the contention of the county is correct, the practical effect of the statute was to impose upon them an obligation which they might never have been willing voluntarily to assume. In *King Co. v. Ferry*, 5 Wash. 536, 32 Pac. 538, 19 L. R. A. 500, 34 Am. St. Rep. 880, the precise question here presented arose. Upon the authority of that case it is said in 27 A. & E. Encycl. of L. 535: "Where the term of office is extended by statute after the execution of the bond, the sureties thereon are not liable for the faults occurring during the extended term, though the statutes provide that the officer shall continue in office until his successor is elected and qualified." The grounds of the decision are shown by this excerpt from the opinion: "No consideration of the interests of the public will justify a court in extending by construction the obligation of a citizen under his contract beyond the scope of its natural import. The contract which embodies this obligation, like any other contract, must be construed to give effect to the intention of the parties, and that intention is to be gathered from the language employed and the circumstances surrounding the execution of the instrument. Now, what were the circumstances surrounding the execution of this bond, and what length of time would these bondsmen naturally think they were contracting with reference to it? The correct answer to the last question determines their liability. There need be no artificial rules of law applied. It is a simple question of intention gathered from the language of the contract, read in the light of the surrounding circumstances. At the time this bond was given the term of office of the treasurer as provided by law was two years. It is argued that the bondsmen entered into this obligation in view of the possible modification of their liability by the legislative assembly, and with notice that the Legislature would have a right to continue the incumbent in office beyond the term for which he was elected. So far as the first proposition is concerned, the Legislature would not have any right to pass a law that would change the terms of the contract or in any way impair its

obligation; and, so far as the second proposition is concerned, while the sureties might be held to take notice that the Legislature could extend the term, they would not be required to take notice that the Legislature in such an event would make no provision for the giving of a bond by the treasurer for the extended term. The sureties had a right to take notice of the law as it existed, and to contract with reference to the law as it existed; that is, the law which would naturally be in their minds when they entered into the contract. And the idea that they would at such a time enter into a speculative calculation of what the law might be in the future, and shape their contract with reference to such possible change, is a strained one. The law at that time made the office one of a definite term. That term was two years, and the sureties had a right to, and no doubt did, take that law into consideration, and that was the law that was imported into their contract. There is no doubt that the central idea was that the term was for two years. This was the law. This was the ordinary state of affairs, and the ordinary time for which bonds for county officers were given. A man might willingly go on a bond for two years who would hesitate or absolutely refuse to go on for a longer period."

We think the view taken by both the referee and the trial court as to the nonliability of the sureties is in accordance with sound reason, as well as with the weight of authority. The question as to the sheriff himself however, must be decided upon other considerations. While the petition necessarily states facts sufficient to constitute a cause of action against him for the violation of his official duty, if he is to be held in this proceeding, it must be upon the bond itself, since it is only by reason of declaring upon that that the plaintiff was able to proceed against him and the bondsmen in the same action. He stands upon a very different footing from that of the sureties. He can invoke no liberality of construction or leniency of treatment. Moreover, while the bond was in a sense a contract even as to him, he executed it in compliance with the statute, as a prerequisite to his induction into office. It was on his part a mere acknowledgment of obligations which the law devolved upon him. The extension of his term was a benefit conferred rather than a burden imposed upon him. Unlike the sureties, he had it in his power to end his responsibility at any time by resignation. He could not have taken the office without having executed the bond, and his continuing to act as sheriff was a constantly renewed assertion of its vitality. Notwithstanding the exemption of the sureties, the principal cannot be heard to say that his own liability upon the bond had ceased while he was in effect asserting a right under it.

The judgment is affirmed. All the Justices concurring.

(76 Kan. 380)

DAUB v. MCCOY.

(Supreme Court of Kansas. July 5, 1907.)

APPEAL—REVIEW—GRANT OF NEW TRIAL.

Where a district court properly sets aside a verdict in favor of the defendant on the ground of misconduct of the jury, and grants a new trial, this court, pending such new trial, cannot, at the instance of the defendant, reverse the decision of the district court and direct a judgment in favor of the defendant upon the merits of the case.

(Syllabus by the Court.)

Error from District Court, Shawnee County; A. W. Dana, Judge.

Action by David J. McCoy against Henry Daub. Motion by plaintiff to set aside verdict for defendant. From an order granting a new trial, defendant brings error. Affirmed.

Hazen & Gaw, for plaintiff in error. Robert D. Garver, for defendant in error.

GRAVES, J. This was an action to recover damages for breach of contract, commenced in the district court of Shawnee county. On the trial the defendant recovered a verdict. On motion of the plaintiff, the verdict was set aside, and a new trial granted. The defendant brings the case here and asks this court to reverse the order of the court granting a new trial, and, in addition thereto, to direct a judgment in his favor.

The new trial was granted on account of misconduct of the jury during their deliberations. The plaintiff in error insists that the verdict was right, regardless of the methods by which it was reached. In fact, he claims that, under the law, the plaintiff has no right to recover against the defendant in any view of the case. But the question for the consideration of this court is, did the district court err in granting a new trial on the ground of misconduct of the jury? We think not. This is as far as we need to inquire. A new trial has been granted, and this court cannot assume that the trial court will not administer the law correctly upon the new trial. Until the case is finally disposed of by the trial court, this court cannot review the case on its merits.

The judgment of the district court is affirmed. All the Justices concurring.

(76 Kan. 386)

STATE v. CITY OF CLAY CENTER et al.

(Supreme Court of Kansas. July 5, 1907.)

1. MUNICIPAL CORPORATIONS — ISSUE OF BONDS—ELECTION NOTICE.

The first publication of a notice of a bond election to be held under the provisions of chapter 101, p. 137, Laws 1905, authorizing certain cities to issue bonds for natural gas, water, lighting, and heating purposes, may be made in the same issue of the official newspaper which contains the publication of the ordinance directing the calling of the election.

2. SAME—INJUNCTION.

The issue and sale of municipal bonds voted for the construction of an electric light plant

will not be enjoined merely because the city officials entertain and express an intention to expend the money to be derived in equipping the plant to supply electric power to the inhabitants of the city.

(Syllabus by the Court.)

Error from District Court, Clay County; Sam Kimbal, Judge.

Action by the state against the city of Clay Center and others. Judgment for defendants, and plaintiff brings error. Affirmed.

F. S. Jackson, Atty. Gen., Coleman & Williams, and John E. Hessin, for the State. F. P. Harkness and Dawes & Rutherford, for defendants in error.

BURCH, J. The action in the district court was commenced to restrain the defendants from issuing, selling, and delivering bonds of the city in the sum of \$25,000, which had been voted at a special election for the purpose of constructing works to supply the inhabitants of the city with electric light. The election was held under the provisions of chapter 101, p. 137, of the Session Laws of 1905. Section 2 of the act reads as follows: "Whenever the city council of any such city shall desire to procure authority for the issuance of bonds under the terms of this act, they shall pass an ordinance directing the calling of an election for the submission of the question to the electors thereof. Notice for such election shall state the amount of bonds proposed to be issued, the purpose of the issue, and state the polling place or places at which the election will be held. Said notice shall be signed by the mayor and city clerk and shall be published in at least one newspaper for three consecutive weeks. The first publication of said notice to be at least twenty days prior to the day fixed for such election."

The ordinance directing the calling of the election and the notice of the election were published in the same issue of the official newspaper. It is claimed that the ordinance became effective only after publication, that no authority existed to call the election until after the ordinance was in force, and hence that the first publication of the notice cannot be counted. The objection is technical in the extreme, and involves a refinement in respect to time which the court is not inclined to regard. The moment the ordinance took effect authority to call the election and publish notice of it existed. That moment the authority was exercised, and the notice appeared, and the circumstance that the two facts occurred simultaneously cannot impair the notice. If authority in support of the principle be necessary, it may be found in the cases of *Clark v. City of Janesville*, 10 Wis. 136, and *Warsop v. City of Hastings*, 22 Minn. 437.

On the trial evidence was offered and rejected to the effect that the city officials entertained and had expressed an intention to

expend the money to be derived from the sale of the bonds when issued in equipping the proposed electric light plant to supply electric power to inhabitants of the city. The people of Clay Center voted these bonds to raise money to be expended for a specified purpose, and are entitled to have them issued and sold in execution of that purpose. If after that has been done an attempt should be made to misappropriate the funds obtained, there will be time enough to determine what is a misappropriation and to interfere, if necessary.

The judgment of the district court denying an injunction is affirmed. All the Justices concurring.

OLYMPIA MINING CO. v. KERNS et al.

(Supreme Court of Idaho. June 18, 1907.)

1. APPEAL—REHEARING — EFFECT OF GRANTING.

Where a rehearing is granted generally, the case stands as though no hearing had been had, and all points and questions that might have been presented on the original hearing may be presented on the rehearing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3241, 3243.]

2. SPECIFIC PERFORMANCE—PERFORMANCE OF CONDITIONS PRECEDENT.

Where an action is brought for the specific performance of a contract, in order to recover, the plaintiff must show that he has performed all of the provisions of the contract to be performed by him, or that he is able, ready, and willing to perform them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 249-256.]

3. SAME.

Where the judgment and decree does not require the performance of conditions precedent in a contract before declaring the specific performance of the contract, the judgment will be set aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 426.]

4. SAME.

Held, under the provisions of the contract sued on, the appellant Kerns was entitled to receive from the corporation stipulated to be organized one-tenth of the capital stock, fully paid up and nonassessable until after all the other nine-tenths of the capital stock of the corporation had paid 10 cents per share to said corporation for the development of the mining claims involved in this case.

5. SAME.

In this case all of the material issues presented by the pleadings should have been determined by the findings of fact and judgment.

6. CONTRACTS—PERFORMANCE.

Under the provisions of said contract, K. and C., the parties thereto, both being residents of this state at the time the contract was entered into, were to form a corporation, and as it appears from the record, C. organized the plaintiff corporation under the laws of the state of Washington without the consent of K. *Held*, that the organization of the plaintiff corporation was not a compliance with the terms of said contract and that K. had a right, under the terms of said contract, to insist on the organization of such corporation under the laws of the state of Idaho.

(Syllabus by the Court.)

Appeal from District Court, Shoshone County; Ralph T. Morgan, Judge.

Action by the Olympia Mining Company against A. G. Kerns and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

J. H. Forney and John P. Gray, for appellants. A. E. Mayhew and E. C. Macdonald, for respondent.

SULLIVAN, J. This action was commenced by the Olympia Mining Company, a corporation, as plaintiff, against Abner G. Kerns, William J. Hall, and the Federal Mining & Smelting Company, a corporation, as defendants, for the purpose of having the plaintiff corporation declared the equitable owner of an undivided three-fourths interest in the Olympia, Portland, Seattle, Alice, Olympia Fraction, Pacific, Darling, Diamond Fraction, and an undivided one-fourth interest in the Rose and Lincoln lode mining claims, all situated along Nine Mile creek, in Placer Center and Lalande mining districts, Shoshone county, and to compel the appellant Kerns to convey to the plaintiff corporation by good and sufficient deed an undivided three-fourths interest in and to said mining claims, upon the payment to him of \$900, with interest, and upon delivery to him of 100,000 shares of the capital stock of the plaintiff corporation, paid up to the amount of 10 cents per share, and to compel the defendant the Federal Mining & Smelting Company to convey to the plaintiff an undivided one-fourth interest to each of said mining claims upon the payment to it of \$3,300, with interest thereon.

This action is based upon the following contract or agreement, to wit: "This agreement, made and entered into on this 28th day of May, 1901, by and between Clarence Cunningham, party of the first part, and A. G. Kerns, party of the second part, all of the city of Wallace, county of Shoshone, state of Idaho, witnesseth: Whereas, the estate of Edward T. Elom, deceased, is the owner of an undivided five-eighths of the Olympia, Seattle, Portland, Olympia Fraction, and Alice, and an undivided one-half of the Darling, Pacific, Rose, Lincoln, and Diamond Fraction, lode mining claims, situated in the Placer Center and Lalande mining districts, in the county of Shoshone, state of Idaho, lying between the Mammoth and Sixteen to One mines, and south of the Custer mine, and the party of the second part is the owner of the other portion of the said mining claims, except the Rose and Lincoln; and whereas, the party of the second part as such co-owner has petitioned the probate court for an order of sale of the interest of the estate of said deceased in said mining claims, and said petition is to be heard on the 3d day of June, 1901, and it is anticipated that an order for the sale of said property will be made; and whereas, it is the desire of the parties hereto to purchase

the interests of said estate in said properties, if the same can be bought for a reasonable sum and upon reasonable terms, for the purpose of consolidating all of the interests therein, and forming a mining corporation to prospect, develop, and work said mining claims; and whereas, the party of the first part is about to leave the state of Idaho, expecting to be absent for a period of two months, more or less, and the sale of said premises may occur during said period: It is therefore mutually agreed that the party of the second part shall offer to purchase and purchase the interest of the estate of said decedent in said mining claims, if the same can be purchased for the appraised value of said premises, or any less sum, and that the party of the first part will assume and be responsible for the bid and purchase of the party of the second part, and furnish the necessary money to make such purchase at the time when called for by the party of the second part. And in consideration of the premises, and the services to be so rendered by the party of the second part, it is further mutually agreed that said party of the second part shall be entitled to one-tenth of all of said mining claims, in which he at present has no ownership. And it is further mutually agreed that upon the formation of the corporation hereinbefore referred to, which corporation is to be formed as soon as practicable after making said purchase, the party of the second part shall have and be entitled to one-tenth of the stock of said corporation, which stock shall be fully paid up and nonassessable until after all of the other nine-tenths of the stock have paid 10 cents per share to said corporation for the development of said mining claims. And as a further consideration the party of the first part hereby agrees to do and perform on each of said mining claims the assessment work required for the year 1901, free of expense to the party of the second part. And as a further stipulation the party of the second part agrees to convey to the party of the first part, or his assigns, all his right, title, and interest in said mining claims for the sum of \$5,000, to be paid upon completion of the purchase of the interest of said estate in the premises or sooner. Witness our hands and seals this 28th day of May, 1901. Clarence Cunningham. A. G. Kerns."

It is alleged in the complaint: That, pursuant to said agreement, the defendant Kerns did prosecute a proceeding in the probate court asking for a sale of the interest of Edward T. Elom, deceased, in and to said mining claims, and procured an order from said court on the 3d day of June, 1901, directing the sale thereof. That thereafter, on the 20th day of July, said Kerns did purchase at public sale the said interest for the sum of \$2,500 of which \$500 was paid in cash, and the remaining portion, \$2,000, was secured by mortgage upon said mining inter-

ests due and payable within one year from the date thereof, and that said sale was confirmed thereafter by said court. That thereafter, pursuant to said agreement, Clarence Cunningham, the first party to said agreement, representing himself and his associates, did expend approximately the sum of \$25,000 in developing and working the said claims, and they did pay the said Kerns \$4,100 on account of the payment of the \$5,000 due said Kerns under said agreement, together with one-tenth of all of said mining claims upon the formation of the corporation referred to in said contract, which interest was represented by 100,000 shares of the capital stock of plaintiff, which stock was to be fully paid up and nonassessable until after the other nine-tenths of the stock had paid 10 cents per share to said corporation for the development of said mining claims, which was the consideration paid for the interests held by Kerns in said mining claims and for services to be rendered by him in securing patents therefor. That the sum of \$500, the first payment on the purchase price of said Elom's interest, was paid to said Kerns by the said Cunningham and his associates. That after the confirmation of said sale the administratrix of the estate of the said Elom, deceased, executed and delivered a deed to said mining interests belonging to the estate of the said Elom to said Kerns, grantee, and that said Kerns made and executed to said administratrix of said estate a mortgage upon said mining interests to secure the payment of the balance due therefor. That said Kerns took the title to said mining interests in trust for the corporation provided to be formed under the terms of said agreement. That it was understood and agreed between said Kerns and the said Cunningham and his associates that their successor in interest, the corporation to be formed, would furnish the additional money necessary to pay for the said interests and to pay the said mortgage when it became necessary to pay the same in order to protect said trust estate. That after the purchase of said Elom's interest as aforesaid, and after receiving deed therefor, said Kerns did make, execute, and deliver a declaration of trust as follows: "I, A. G. Kerns, of the city of Wallace, county of Shoshone, state of Idaho, do hereby declare and acknowledge that I hold the legal title to the following interests in certain mining claims in trust for the use and benefit of a corporation to be hereafter formed and to be named the Olympia Mining Company, provided Clarence Cunningham, of the city of Wallace, in the county of Shoshone, state of Idaho, or the said corporation, shall comply with the provisions of an agreement in writing, dated the 28th day of May, 1901, between the said Clarence Cunningham and the said A. G. Kerns. The said mining premises being particularly described as follows, to wit: the Olympia lode mining claim; the Portland lode mining claim; the Seattle lode mining claim; the Alice lode

mining claim; the Olympia Fraction lode mining claim; the Darling lode mining claim; the Pacific lode mining claim; the Diamond Fraction lode mining claim; one-half of the Rose lode mining claim; one-half of the Lincoln lode mining claim—all situated on the divide between Canyon creek and the East Fork of Nine Mile creek, in Placer Center and Lalande mining district, county of Shoshone, state of Idaho. Dated this 17th day of August, 1901. Witness my hand and seal. A. G. Kerns. [Seal.]" That thereafter said Kerns, in his own name and in fact as trustee for the said contemplated corporation, applied for United States patents for part of said mining claims. That in applying for said patents the said Kerns acted only as trustee for said corporation to be formed under the terms of said agreement and declaration of trust. That he was also acting as agent and attorney for said corporation and the parties organizing the same, and that said parties furnished and paid all the necessary expenses of said application for patent. That said Cunningham and his associates, by and with the full consent of the said Kerns, and under the terms of said agreement and declaration of trust, continued to expend money in the development of said mining claims up to and until about the 1st day of March, 1903, pursuant to said agreement, and the said Cunningham and his associates, acting in pursuance of said agreement and declaration of trust, caused to be organized the plaintiff corporation under the laws of the state of Washington, with a capital of \$1,000,000, divided into 1,000,000 shares, of the par value of \$1 each. That said Kerns was notified of said organization, and acquiesced in and concurred therein, and agreed to the same, and made no objection thereto. That thereafter said corporation duly complied with all the laws of the state of Idaho authorizing it to hold mining claims and prosecute business in said state, and that it is now authorized to take and hold and convey real estate and to do business in said state. That in the year 1903, after the organization of the plaintiff company, on account of large expenditures made by the incorporators in the development of said mining claims and in the payments made to said Kerns by the plaintiff corporation, there was not sufficient money in the treasury of said company to pay said mortgage, and that said Cunningham, who had the management of the affairs of the company and was about to leave for a trip to Alaska, entered into an arrangement, for and on behalf of the plaintiff corporation, with J. C. Cunningham, vice president of the company, and F. Cushing Moore and Francis Jenkins, stockholders of the company, that, in case payment of said mortgage should be insisted upon, they would advance the money for the company to pay the same, and notified said Kerns of such arrangement, and directed him that, in case payment should be insisted upon, he should

call upon said parties for the money to pay said mortgage, and that Kerns promised to do so. That on or about the 1st day of June, 1903, the administratrix of the estate of the said Elom, deceased, did commence an action to foreclose said mortgage. That said Kerns did not notify the plaintiff corporation, nor said Cunningham, nor any of the officers or stockholders of the said company, but permitted a decree and judgment of foreclosure to be entered directing the sale of said mining claims to pay said mortgage. That the date of said sale was fixed, and the said J. C. Cunningham, vice president of the company, for the purpose of protecting the plaintiff corporation, did advance the money for the plaintiff to bid in the said property at the sale, and did bid the same in his own name for the use and benefit of the plaintiff company, and received the sheriff's certificate of sale, receiving the same and holding the same in trust for the plaintiff corporation upon the repayment of the amount of money so paid by him, all of which was well known to the defendant Kerns. That thereafter, on the 18th day of August, 1904, the defendant Kerns, in violation of his said trust and with intent to cheat and defraud the plaintiff, and in violation of the confidence reposed in him as attorney for the plaintiff, sold and conveyed to the defendant William J. Hall an undivided one-fourth interest in said mining claims, and received therefor the sum of \$3,300, and with the said money he redeemed said property from said sheriff's sale, and at the same time the said Kerns entered into an agreement with the defendant Hall to sell and convey to him the remaining interest in said claims. That at the said time said Hall well knew the said property in equity belonged to the plaintiff, and well knew that the said defendant Kerns held the legal title in trust for the plaintiff and had no legal right to sell and convey the same. That said Hall, in making said purchase and contract, was acting as the agent for the defendant the Federal Mining & Smelting Company, and said company furnished the money which was paid to said Kerns as aforesaid. That in making said sale to said Hall and entering into said contract with him the said Kerns violated the trust and confidence reposed in him as trustee of the plaintiff for the sole and simple purpose of defrauding the plaintiff and securing to himself an additional sum of money. That on the 29th day of May, 1905, the plaintiff corporation demanded of said Kerns the deed conveying all the Olympia, Portland, Seattle, Alice, Olympia Fraction, Darling, Pacific, and Diamond Fraction, and an undivided one-fourth interest in and to the Rose and Lincoln, lode mining claims aforesaid, and tendered to said Kerns in lawful money of the United States \$900 and a certificate for 1,000 shares of the capital stock of the plaintiff corporation, which certificate of stock was paid up to the amount of 10 cents per share, for all that was due

him under the original contract between said Cunningham and said Kerns, and for his services as attorney as aforesaid. That the plaintiff has been at all times, and is now, ready and willing to make said payment, and now brings said money and stock into court to be delivered to him. Then follows prayer for the relief above indicated.

Many of the formal allegations of the complaint were admitted by the answer, and denials of other allegations put in issue many of its material allegations. For a separate and second defense the defendant Kerns sets up the transaction which occurred between him and Cunningham in detail, and sets up the violation of said contract by Cunningham, in that he failed to make the payment required by said contract and perform the work required to be performed by him upon said claims, and in the formation of the corporation under the laws of the state of Washington, instead of under the laws of the state of Idaho; that he was required to spend large sums of money in protecting his own interests in said mining claims during the years 1903, 1904, and 1905 because of the failure of the said Cunningham to keep his part of said agreement; that by reason of such negligence and laches by said Cunningham, and his breach of said agreement, he impaired the title of the defendant Kerns by making the default in said payments and allowing the premises to be sold to a stranger. The defendants Hall and the Federal Mining & Smelting Company answered, denying many of the allegations of the complaint, and as an affirmative defense, among other allegations, alleged that they had advanced the defendant Kerns \$3,300, which sum was devoted and used in redeeming said mining property from said foreclosure sale and paying the necessary expenses for obtaining patents thereto; that thereafter said Kerns executed a deed to said Hall, but really for the use and benefit of said mining company, being an undivided one-fourth interest in and to said mining claims, and that said Hall held said one-fourth interest for the use and benefit of said mining company, and now holds the same for that purpose; that at the time he executed said deed said Kerns entered into an agreement with said Hall for the purchase of the remaining three-fourths interest in said mining claims; that said contract of purchase was entered into for and on behalf of said mining company; that said contracts were made with said Kerns without any knowledge, information, or belief of any right, title, or claim on the part of the plaintiff corporation in and to said mining claims or any of them. It is further alleged that the money so advanced by Hall was used to perfect the title to said mining claims, and that, in case it is adjudged that the plaintiff is the owner of said premises, said defendants in equity ought to be reimbursed for said advances with interest thereon; and

they pray for relief in accordance with the denials and averments of their answer.

Upon the issues thus made the cause was tried to the court without a jury, and a great deal of evidence was taken on the trial. Judgment was entered in favor of the plaintiff, from which judgment this appeal is taken. As this action is based upon the contract and declaration of trust hereinbefore set forth, we will first consider the duties assumed by Clarence Cunningham in the execution of said contract. However, before taking that up in detail, we will state some of the facts that appear from the record. On May 15, 1900, an option for the purchase of certain mining claims, including at least a part of those mentioned in said contract, was given by the defendant Kerns and the said Elom, now deceased, to Clarence Cunningham, for \$12,000. A considerable amount of work was done upon said claims under this option by Cunningham and his associates. By mutual consent that option was terminated, and in October, 1900, a new contract was entered into. Under the new contract work continued during several months. Thereafter, in February, 1901, said Elom died, and after his death the contract sued on herein was entered into. It appears that this last contract was really a continuation of the two former ones, excepting that it was on more liberal terms. At the time the first contract was entered into Cunningham had associated with him several persons, residing in Spokane and elsewhere, who carried on the work and development of said mining claims as an association doing business under the name of the Olympia Mining Company. It appears that the work under the first two contracts was practically continuous up until the time of entering into the contract sued on herein. The defendant Kerns was aware of the fact that Cunningham had associates connected with him in said matter, and, we think, understood that these associates were assisting Cunningham in the payment of the development work done on said mines, and that Cunningham and his associates expended something over \$21,000 in such development work; and it also appears that Kerns subscribed for 10,000 shares of the stock of said corporation, to be thereafter formed, at 10 cents per share, and paid the sum of \$50 on such shares, leaving a balance of \$950 owing to said corporation.

It is contended, in limine, by counsel for respondent, that, as some of the questions raised on the rehearing were not raised on the original hearing, they cannot now be considered. In reply to this we say that the rehearing was granted generally, and upon no specified points or questions, and therefore any questions that could have been properly raised on the original hearing could be presented on the rehearing. But, as we understand the record, the appellant Kerns did raise the questions referred to on the first hearing. As we view this case, we need only

pass upon, in this decision, a few of the errors assigned.

Counsel for appellant first contend that the judgment and decree of the lower court does not provide a specified time in which respondent shall pay to appellant the sum of \$900, the balance due on the purchase price, and turn over to him 100,000 shares of stock, and that it does not provide that respondent shall proceed to work, prospect, and develop their property in dispute until the proceeds of the 900,000 shares of stock at 10 cents per share shall have been expended. On an examination of the judgment, we find that it provides in part as follows: "It is further ordered, adjudged, and decreed that the defendant Abner G. Kerns, upon delivery to him by the plaintiff of the \$900 due under the contract herein, with legal interest from the time the same became due until May, 1905, and upon the delivery to said Kerns of one hundred thousand (100,000) shares of the capital stock of said plaintiff corporation, paid up to the amount of 10 cents per share, do forthwith execute and deliver to the plaintiff, Olympia Mining Company, a good and sufficient deed conveying to said plaintiff an undivided three-fourths interest in and to the said above described mining claims; that, in the event of his failure to execute and deliver such conveyance within 30 days after the entry of this decree, then and in that event Stanley P. Fairweather, Esq., clerk of this court, and, in case of his death or inability to act, then his successor in office, is hereby appointed as a commissioner of this court, and as such commissioner is hereby ordered and directed in the name of the defendant to execute and deliver to the plaintiff a deed conveying to it the said three-fourths interest in said mining claims above described. And it is further ordered and adjudged that said deed of said commissioner, when executed and delivered, shall have the same force and effect as though executed by the defendant."

It will be observed that that provision of the judgment or decree is not in accordance with the terms of the contract sued on, which contract is above set out in full in this opinion. Under that provision of the decree it is provided that Kerns, upon the payment to him by plaintiff of \$900 and the delivery to him of 100,000 shares of the capital stock of said corporation, "paid up to the amount of 10 cents per share," should forthwith execute and deliver to the plaintiff a good and sufficient deed to an undivided three-fourths interest in the mining claims mentioned, and that, in the event of his failure to do so within 30 days after the entry of the decree, then in that event the clerk of the court should make such conveyance. Of course, the decree provides that Kerns shall make such deed upon the payment of said sum of money and the delivery of said shares of stock; but it provides that, in case he fails to execute and deliver such deed within 30 days after the

entry of this decree, the clerk shall execute the deed, regardless of whether said \$900 had been paid and said 100,000 shares of stock delivered. For that reason said provisions of the judgment are not in accord with the covenants in said contract. Said judgment provides that the respondent shall deliver to Kerns 100,000 shares of the capital stock of said corporation, "paid up to the amount of 10 cents per share," while the contract provides that said corporation shall deliver to Kerns one-tenth of its capital stock, which, on the basis of 1,000,000 shares, would be 100,000 shares, and provides as follows: "Which stock shall be fully paid up and non-assessable until after all of the other nine-tenths of the stock have paid 10 cents per share to said corporation for the development of said mining claims." It will be observed, from this provision of the contract, that the 100,000 shares of stock to be delivered to Kerns was to be fully paid up—not, as provided in said decree, "paid up to the amount of ten cents per share," but fully paid up and nonassessable until all of the other nine-tenths of the stock have paid 10 cents per share to said corporation for the development of said mining claims. Under the decree the 100,000 shares of stock to be delivered to Kerns were to be paid up to the amount of 10 cents per share, when under the contract it was to be fully paid up and nonassessable until all of the other nine-tenths of the stock had paid 10 cents per share in assessments toward the development of said mining claims. If Kerns' stock was to be paid up to the amount of 10 cents on the share only, the par value being \$1, it would leave his stock at the mercy of the "mutatious whims" of the other stockholders in creating indebtedness in the operation and development of said mines; and, if they failed to pay any and all indebtedness incurred in the development of said mines up to \$90,000, the creditors could recover of Kerns to the extent of 90 cents per share on his stock, as the stock mentioned in said decree is only paid up to the extent of 10 cents per share.

We held in the former opinion that under the provisions of said contract Cunningham had obligated himself to organize the corporation referred to in said contract, and that the organization of the respondent corporation was a sufficient compliance with said provisions. The provision of said contract in that regard is as follows: "Whereas, it is the desire of the parties hereto to purchase the interest of said estate in said properties, if the same can be bought for a reasonable sum and upon reasonable terms, for the purpose of consolidating all of the interests therein, and forming a mining corporation to prospect, develop and work said mining claims." Under the provisions of that clause of the contract it was the desire of the "parties" thereto to form a corporation, and the clear inference therefrom is

that the "parties" were to form a corporation, and the "parties" were Kerns and Cunningham. Now, it appears from the record that Kerns was not consulted in any manner in the formation of the foreign corporation, the Olympia Mining Company, and that said corporation was organized under the laws of the state of Washington; and it is earnestly contended by counsel for respondent Kerns that the organization of such corporation is not in compliance with said terms of the contract. It appears from the record that Kerns insisted that the corporation should be organized under the laws of the state of Idaho, and thereby become subject to the jurisdiction of the courts of this state, the same as a private individual. Under the provisions of the contract Kerns had a right to insist on the organization of such corporation under the laws of the state of Idaho. That being the conclusion we have reached after a careful consideration of this case on the petition and arguments on the rehearing, the decision of that question ends this case; for, until a corporation is organized in compliance with the provisions of said contract, neither Cunningham nor the respondent corporation can enforce the provisions of said contract against Kerns. Until a corporation has been organized under the provisions of the contract, and has fully complied with the terms and provisions of said contract, the contract cannot be enforced against Kerns. As that is a controlling question in this case, it is not worth while for us to consider the other questions raised.

Under the provisions of this agreement Kerns was entitled to the same voice as Cunningham in the organization of the corporation. It is true that it would take more than two persons to organize a corporation under the laws of this state, or, for that matter, under the laws of Washington. Still, had the corporation been organized in compliance with the provisions of this agreement, Kerns would have been entitled to a voice in the selection of the other directors and incorporators, and he would also have been entitled to a voice in determining where the corporation should be organized, whether it should be a domestic or foreign corporation. Again, after the organization of the corporation, under the cumulative method of voting stock at stockholders' meetings (article 11, § 4, Constitution), Kerns might have been able to name at least one director, and would by this method have been enabled to have a continuing voice in the business and affairs of the corporation. While it is true the contract does not provide in terms that the corporation to be organized should be a domestic corporation, at the same time the appellant had reserved to himself by the terms of the contract as much power and authority and an equal voice with the other party to the contract. The corporation could not own any property, and had no corporate

stock to be represented by stockholders until after it was organized. Therefore Kerns would have had as much power and authority in the matter of the organization as Cunningham, even though Cunningham and his associates were to own nine-tenths of the capital stock after the organization. The contract is not one providing for Cunningham and his associates to organize a corporation, but for Cunningham and Kerns to organize a corporation. A corporation organized under the laws of Washington, with its principal place of business in Spokane, and its corporate stock books in a foreign jurisdiction, is not the kind of a corporation and the kind of protection that Kerns would likely have sought or availed himself of, where he was turning over all his property to the corporation and in turn taking a minority of the stock. The courts of Idaho could not reach the books and officers for the purpose of ordering a specific performance in directing issuance of stock, or requiring performance of work, or directing, supervising, or ordering assessments.

It is next urged that the judgment does not bind or obligate the plaintiff to the defendant Kerns, or to any of the defendants, to perform its contract with Kerns, or to pay the \$3,300 and interest to the Federal Mining Company, and that the evidence shows that the defendant Kerns could not maintain an action in Idaho against the plaintiff for the specific performance of the contract. Counsel for respondent declares this proposition to be absurd, for the reason that respondent has an agent in Idaho authorized to accept service of process, and has mining property in this state in which it has invested over \$21,000, and that ought to be ample to make such judgment collectible. Counsel thus concedes that for a complete settlement of this matter it will require further litigation, and that this judgment does not settle all of the rights of the parties in the subject-matter of this litigation. It is certainly cold satisfaction to the appellant to be informed that he may proceed and get judgment for the amount of money due him and a decree for the delivery of the 100,000 shares of stock. It is clearly evident that the judgment is far short of what it ought to have been. The respondent should have been compelled to keep its tender of the \$900 and 100,000 shares of stock good. The contract clearly contemplates the performance of development work on said mining claims to the extent of \$90,000, and it is admitted by counsel for respondent, in his brief filed the 2d day of April, 1907, that neither that amount nor no part of it has been expended in the development of said mines, by stating that said corporation had invested over \$21,000 in said mining claims, which amount, the record shows, was invested long prior to the commencement of this suit. Under this judgment the respondent, a foreign corporation, is not required to pay to the appellant Kerns

at any certain time the \$900, with interest thereon. It is not required to deliver to said Kerns one-tenth of its capital stock, which stock should be fully paid up and nonassessable until after all of the other nine-tenths of the stock has paid 10 cents per share to said corporation for the development of said mining claims. The provisions of the contract on which this action is based require those things to be done, and the judgment utterly fails to give Kerns the relief he is entitled to in this suit, if he is compelled to perform his part thereof.

The judgment entered in this case does not conform to the provisions and requirements of the contract entered into between the appellant and Cunningham, and we have concluded that it should be reversed, and a new trial granted. We are not in a position to direct a judgment in this case. It has now been more than a year since the case was tried in the lower court, and while it has been suggested, and even shown by affidavit, that no attempt has been made on the part of this respondent to comply with the terms of the decree, still the matter is not presented here in such a manner as to justify us in ordering a judgment thereon. The conduct of the respective parties since the entry of this decree with reference thereto, and also touching the subject-matter and under the contracts which were the basis of this action, will be proper subjects for consideration, and they will necessarily influence the trial court in the further proceedings had herein.

The judgment is therefore reversed, and the cause remanded, with direction to the trial court to take such further action in the matter, in harmony with the views herein expressed as to the law of the case, as may seem proper under any additional showing that may be made. Costs awarded in favor of appellant.

AILSHIE, C. J., concurs.

**COSGRIFF v. BOARD OF ELECTION
COM'RS OF CITY AND COUNTY
OF SAN FRANCISCO et al.**
(L. A. 1,982.)

(Supreme Court of California. June 19, 1907.)

**1. TIME—COMPUTATION—EXCLUDING FIRST OR
LAST DAY—ELECTIONS—FILING CERTIFICATE
OF NOMINATION.**

Pol. Code, § 1192, as amended in 1901, provides that certificates of party nominations may be filed not less than 20 days before the day of election. *Held*, that a certificate of party nominations offered for filing on October 17th, containing the names of persons to be voted for at an election on November 6th, was in time.

**2. ELECTIONS—ACCEPTANCE OF CERTIFICATE FOR
FILING.**

Where a certificate of party nominations was presented to the registrar of voters after the hour prescribed by law for closing his office, but before it was closed, it was his duty to receive and file it.

In Bank. Application for a writ of mandamus by E. H. Cosgriff, to compel the board of election commissioners of the city and county of San Francisco and G. P. Adams, registrar of said city and county, to receive and file in the registrar's office a certificate of nominations. Granted.

Page, McCutchen & Knight, for petitioner.
Thos. V. Cator, for respondents.

SHAW, J. This is an original proceeding in mandamus to compel the board of election commissioners of the city and county of San Francisco, and G. P. Adams, as registrar of voters of said city and county, to receive and file in the registrar's office a certificate of nominations of certain persons as candidates of a political party, styling itself in said certificate the "Nonpartisan Judicial Party," to be voted for at the election in November, 1906, for the offices of justices of the superior court and justices of the peace of said city and county, and to compel said board and registrar to place the names of said candidates upon the official ballots to be used at said election, as party candidates, in a party column under said party name. The cause was decided for the petitioner by this court in October, 1906, and a peremptory writ was issued at that time, as prayed for.

The certificate of nomination, duly verified, with the requisite number of signatures of electors thereto, was duly presented to the registrar for filing on October 16, 1906, after 5 o'clock in the evening. It was again duly presented on October 17, 1906, during the usual and lawful business hours. The offer of October 16th was refused, because it was made after 5 o'clock in the afternoon, and that of October 17th, because, as it is claimed, it was not made within the time limited by law. It is provided in section 1192 of the Political Code, as amended in 1901, that being the law in force in 1906, that certificates of party nominations not made by a party convention, but by electors signing the same and designating themselves as a political party with a specified party name, may be filed "not more than 50 days nor less than 20 days before the day of election."

The word "days," as here used, refers to a day as a unit of time, and not as an aggregation of a certain number of hours, minutes, or seconds. In this sense, and for the purpose thus used, a day is not capable of subdivision into hours, minutes, or seconds, but is to be taken as a whole. In such computations the hours are not counted to ascertain whether a period of 24 hours, or a given number of such periods, have elapsed between the act to be done and the day from which the time is to begin running. The fractions of the days are no more taken into consideration than are the fractions of the seconds. The consequence is that every day, and every part of that day, is, by this rule,

one day before every part of the succeeding day. The last moment of any day is, in contemplation of law in such cases, one day before the first moment of the next day, although the elapsed time is infinitesimal. The rule is strictly one of convenience. Any other method of computation would require an accurate account to be kept of the exact hour, minute, and second of the occurrence of the act to be timed, would produce endless confusion and strife, and would prove impolitic, if not wholly impracticable. By the method stated, it is clear that the offer of October 17th was in time. Manifestly, on that theory, the 5th day of November would be one day before the 6th day of that month, and not less than one day before, since the number 5 is one less than 6. So, by counting the consecutive days backward from November 6th, it will be found that October 17th was 20 days, and if 20 days, then not less than 20 days before November 6th. This is what is contemplated by section 12 of the Political Code, declaring that in computing time by days the first day is to be excluded and the last day included. Excluding November 6th, the first day, we find October 17th, to be the twentieth day, or the last day of the period, and as it is to be included in the count, it must be counted as part of the period. Thus, it makes the full number of 20 days before the day of the election, and it cannot be "less than 20 days before" that day. This application of the rule is well established. *Misch v. Maybew*, 51 Cal. 514; *Hagenmeyer v. Mendocino Co.*, 82 Cal. 217, 23 Pac. 14; *Derby v. Modesto*, 104 Cal. 522, 38 Pac. 900; *Bates v. Howard*, 105 Cal. 182, 38 Pac. 715; *Bellmer v. Blessington*, 136 Cal. 4, 68 Pac. 111; *Hannah v. Green*, 143 Cal. 21, 76 Pac. 708.

The petition is in two counts. The first count presents the single question whether or not the offer of the certificate after 5 o'clock in the afternoon of October 16th was a lawful offer with respect to the time of the day at which it was made. A separate general demurrer to this count was filed, and the disposal of this demurrer renders it necessary to decide the question. While we do not hold that the registrar would be required to keep his office open for such business after the hours prescribed by law, yet we have no doubt that, in cases like this, where the political rights of citizens are involved, if he does keep his office open after those hours, it is his duty to receive and file such a document, though presented after the lawful hours. The certificate should have been received and filed when offered, and the names of the candidates should have been placed on the ballots as party nominations, in a party column, under the designated party name.

We concur: BEATTY, C. J.; McFARLAND, J.; LORIGAN, J.; SLOSS, J.; HENSHAW, J.; ANGELLOTTI, J.

151 Cal. 488

**LAMBERSON v. SUPERIOR COURT OF
TULARE COUNTY et al. (L.
A. 2,013.)**

(Supreme Court of California. June 25, 1907.)

**1. CONTEMPT—MISCONDUCT IN PRESENCE OF
COURT.**

An attorney, presenting to the judge in open court a scandalous affidavit in support of an application for a change of judges, commits contempt in the presence of the court, within Code Civ. Proc. § 1211, providing that, where a contempt is committed in the presence of the court, it may be punished summarily, etc., notwithstanding section 1209, subd. 12, defining contempt, so that the court may proceed summarily or by citation to show cause, and may allow a showing in defense, extenuation, or mitigation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 142.]

**2. JUDGES — DISQUALIFICATION — BIAS —
AFFIDAVIT FOR CHANGE—CONTEMPT—PRO-
CEEDINGS TO PUNISH.**

A judge is not disqualified from sitting in proceedings to punish an attorney for contempt, based on his presenting to the judge in open court an affidavit attacking the judge's integrity and containing imputations on his motives.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Judges, § 187.]

**3. SAME—MISCONDUCT CONSTITUTING CON-
TEMPT.**

A party after obtaining a new trial on appeal for error in rulings at the trial presented an affidavit in support of an application to change judges. The affidavit declared that the party believed that the judge's rulings were made willfully and corruptly, and that the party believed that the judge knew that such rulings were erroneous, etc. Held, that the affidavit constituted contempt of court on the part of affiant, notwithstanding Code Civ. Proc. § 170, subd. 4, authorizing the filing of affidavits in support of a motion for a change of judges on the ground that the party cannot have a fair and impartial trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 9.]

4. SAME—MISCONDUCT AS OFFICER OF COURT.

An attorney, who knowingly presents on behalf of his client an affidavit containing averments attacking the integrity of the judge and containing defamatory matter, is guilty of contempt.

In Bank. Application for a writ of prohibition by Charles G. Lamberson against the superior court of the county of Tulare and another. On disagreement of the judges of the District Court of Appeal, the proceedings were certified to the Supreme Court. Writ discharged.

Alfred Daggett, for petitioner. W. B. Wallace, in pro. per.

HENSHAW, J. Petitioner was and is the attorney at law of John Bashore, who is plaintiff in two actions pending before the superior court of Tulare county. John Bashore made application for a change of judges in these actions, supporting his application by his own affidavits, verified before petitioner as notary public, and by petitioner filed with and presented to the court. Two of these affidavits were filed in connection with separate applications for change of

judges in one of the cases, while the third was presented in support of the application for a change of judges in the other case. Both actions are still pending. The first two applications were met with counter affidavits and denied. The third affidavit contained substantially all of the alleged defamatory and contemptuous matter embodied in the preceding affidavits, and went even further in attacking the integrity of the judge. Upon presentation of this last affidavit, the judge, believing that he could not with self-respect longer sit at the hearing of these causes, announced that John Bashore could have a change of judges in any case pending in his court, whether theretofore denied or not, upon application, and without the filing of any affidavit. He then issued a citation to petitioner to show cause why he should not, as the attorney for John Bashore, and as an officer of the court who had presented these scandalous affidavits, be punished for contempt in so doing. This citation to show cause set forth at length the proceedings had in the matter and the language of the affidavits which the court regarded as unwarranted, contemptuous, and deliberately designed to bring into disrepute himself, as judge, and the court over which he presided. Petitioner then applied for and obtained from the district court of appeal an alternative writ of prohibition. The questions involved were considered by that tribunal, and, upon disagreement of the judges, the proceedings were certified to this court.

Dealing first with the questions of procedure which petitioner presents, this contempt (assuming for the moment that a contempt was actually committed) was one which took place in the immediate view and presence of the court, and the citation to show cause, which was timely made, did not require an affidavit to support it. The second and third affidavits were filed and presented to the judge in open court. In *McCormick v. Sheridan* (Cal.) 20 Pac. 24, an attorney had presented to this court a petition for a rehearing, whose language reflected upon an opinion written by one of the commissioners. Some days thereafter, when the matter of the petition had come under review, an order was issued from this court, which order was in fact a citation directed to the offending attorney, and commanding his presence to show cause why he should not be punished for contempt. A hearing was had, and this court declared: "Upon the facts contained in the petition for rehearing, and quoted above, we adjudge the respondent Waterman guilty of contempt, committed in the face of the court." In *re Foote*, 76 Cal. 543, 18 Pac. 678, declares merely that in contempt proceedings, which contempt consisted of contumacious language addressed to the judge in the trial of a cause, an order adjudging an attorney in contempt made 50 days thereafter and in his absence, and without citation or notice to him of any kind, was improper,

upon the ground that by its laches the court had lost jurisdiction. It is not in conflict with the rule and procedure applied in *McCormick v. Sheridan*, and, if it were, *McCormick v. Sheridan* is the latest expression of this court upon the matter. *McCormick v. Sheridan*, moreover, is in full accord with the views of the Supreme Court of the United States expressed in *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405, where it is said: "Jurisdiction of the person of the petitioner attached instantly upon the contempt being committed in the presence of the court, and was neither surrendered nor lost by delay on the part of the circuit court in exercising its power to proceed. It was within the discretion of the court whose dignity he had insulted, and whose authority he had openly defied, to determine whether it should, upon its own view of what occurred, proceed at once to punish him, or postpone action until he was arrested upon process, brought back into its presence, and permitted to make defense." In *People v. Barrett*, 121 N. Y. 678, 24 N. E. 1095, the respondent had secreted himself in the jury room while the jury were deliberating, and had taken notes of their proceedings. He was discovered and afterwards charged with having committed a contempt of court. By the Supreme Court (*People v. Barrett*, 56 Hun, 351, 9 N. Y. Supp. 321) it was held that it was a contempt committed in the immediate view and presence of the court, and the Court of Appeals affirmed this determination. In *Hughes v. People*, 5 Colo. 436, an affidavit for a change of judges was presented to the court while in session by respondent's attorney, respondent, himself an attorney, being absent. The affiant was brought before the court by attachment, and the Supreme Court declared: "It was in the face of the court, and warranted the judge in taking cognizance of it summarily as though the words, instead of being written or read in court, had been spoken in *facie curiæ*." The contempt being one committed in the presence of the court required no supporting affidavit. Code Civ. Proc. § 1211. The court could have proceeded upon it summarily, or by citation to show cause—the course here adopted—and could have allowed a showing in defense, extenuation, or mitigation. Nor is this matter in any wise controlled by subdivision 12 of section 1209, Code of Civil Procedure. While conceding to the Legislature the fullest power in the matter of contempts to lay down rules of procedure, we repeat what was said in *Re Shortridge*, 99 Cal. 526, 34 Pac. 227, 21 L. R. A. 755, 37 Am. St. Rep. 78: "No authority has been found which denies the inherent right of a court, in the absence of a limitation placed upon it by the power which created it, to punish as a contempt an act, whether committed in or out of its presence, which tends to impede, embarrass, or obstruct the court in the discharge of its duties. It is a doctrine which is admitted in

all its rigor by American courts everywhere, and does not need the support of foreign authorities, based upon the fiction that the majesty of the King, represented in the persons of the judges, is always present in the court. It is founded upon the principle, which is coeval with the existence of the courts, and as necessary as the right of self-protection, that it is a necessary incident to the execution of the powers conferred upon the court, and is necessary to maintain its dignity, if not its very existence. It exists independent of statute. The legislative department may regulate the procedure and enlarge the power, but it cannot, without trenching upon the constitutional powers of the court, * * * fetter the power itself."

Nor is the judge disqualified from sitting in the contempt proceedings. Petitioner's theory in this regard, if we understand it, is that the judge is disqualified from hearing the proceedings in contempt, because the contempt itself consists in imputations upon his motives, and attacks upon his integrity. Such is not and never has been the law. The position of a judge in such a case is undoubtedly a most delicate one, but his duty is none the less plain, and that duty commands that he shall proceed. However willing he may be to forego the private injury, the obligation is upon him by his oath to maintain the respect due to the court over which he presides. As was said by the Chief Justice of this court in *Re Philbrook*, 105 Cal. 471, 38 Pac. 511, 884, 45 Am. St. Rep. 59: "The law which in such cases makes us the judges of offenses against the court places us in an extremely delicate and invidious position, but it leaves us no alternative except to allow the court and the people of the state, in whose name and by whose authority it acts, to be insulted with impunity, or to exercise the authority conferred by law for the purpose of compelling attorneys to maintain the respect due to courts of justice and judicial officers." Were the rule otherwise so that it was required that another judge should be called in to sit in the proceeding, the recalcitrant and offending party would need only to insult each judicial officer in turn until the list was exhausted, and thus, by making a farce of legal procedure, go scathless and unpunished.

Coming, now, to the facts constituting the alleged contempt, it appears that John Bashore is a man about 70 years of age, who has been an invalid for more than 20 years, has been partially deaf for several years, and whose wife attended to and conducted all of his business transactions, while he remained upon the ranch where they lived, some miles from Visalia; that he prosecuted an action to recover certain properties which had been sold under execution. The cause was tried before a jury, resulting in a verdict and judgment adverse to him, and upon his appeal to this court a new trial was ordered for cer-

tain errors in the admission of evidence and in the giving of instructions. *Bashore v. Parker*, 146 Cal. 525, 80 Pac. 707. The affidavit in support of the application for a change of judges, with other impertinent and defamatory matter, declares as follows: "Which said rulings upon the admission of such evidence this affiant believes and alleges was done willfully and corruptly and for the purpose of preventing this affiant from having a fair and impartial trial of said action; and affiant believes that said Hon. W. B. Wallace is a sufficiently good judge of law to know that the said rulings so made by him, and such instructions given to said jury in said action, were erroneous, and such rulings and instructions were not the law of said case; and this affiant believes that said instructions were so given and such rulings made with a full knowledge on the part of said judge that they were erroneous at the time they were given and made. And this affiant believes that the dislike and hatred of said W. B. Wallace, judge, as aforesaid, is so great that he would willfully make unlawful rulings in the trial of this action against this affiant, and that he would find all matters of fact against this affiant, whether there was any evidence to sustain such findings or not, and that he would not give the testimony of this affiant, or the witnesses produced by him upon the trial of said action, any credit whatever as against any witness of any kind or character that might be produced upon the side of the defendant in said action." This application for change of judges is founded upon subdivision 4 of section 170 of the Code of Civil Procedure, the provision of which is simply that, "when it appears from the affidavits on file that either party cannot have a fair and impartial trial before any judge or court of record about to try the case by reason of the prejudice or bias of such judge, said judge shall forthwith secure the services of some other judge of the same or some other county." It must need little consideration to show that the language above quoted, as addressed to the law, is flagrantly and willfully contemptuous. It states the mere belief of Bashore, without any supporting fact, as in *Morehouse v. Morehouse*, 136 Cal. 332, 68 Pac. 976, unless it can be said that the fact that the judge fell into error upon the first trial of the case is sufficient to justify the imputation of a corrupt intent—an argument too preposterous to merit even enunciation. But, outside of this circumstance, the whole declaration is but the purported belief of this aged invalid, with no attempt to state even the source of his information or origin of that belief. It cannot impress the unprejudiced mind as being other than a deliberate intent to insult and defame the judge. Let it be understood that we are not here declaring that if a judge has in fact indulged in corrupt practices, or has in fact given a ruling or decision through a corrupt motive, that those facts may not be stated. They may be.

And they would be prepotent evidence of bias and prejudice. But it may not for one moment be countenanced that, without supporting facts, lawyer or litigant may wantonly charged a judge with corrupt and improper motives, and seek protection from the just consequences of such outrage under the shield of the Code provision. *McCormick v. Sheridan* (Cal.) 20 Pac. 24; *In re Philbrook*, 105 Cal. 471, 38 Pac. 511, 884, 45 Am. St. Rep. 59; *People v. Brown*, 30 Pac. 338, 17 Colo. 431; *In re Mains*, 80 N. W. 714, 121 Mich. 603; *Hughes v. People*, 5 Colo. 436; *In re Snow*, 75 Pac. 741, 27 Utah, 265; *Harrison v. State*, 35 Ark. 458; *In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747. So, while it is true that matters which are pertinent to the consideration and which are charged as facts are admissible, without reference to their effect upon the reputation of the judge, or of any one else, it is equally true that neither attorney nor litigant has any right to present such degrading accusations under the guise of mere belief, without the aid of a single supporting fact. *May v. Ball* (Ky.) 67 S. W. 257.

Indisputably, therefore, John Bashore, upon the face of this record, was guilty of contempt committed in the immediate presence of the court. Is his attorney, who presumptively prepared, and who certainly presented to the court, this affidavit, any less guilty? As the case now stands, we think not. Under his oath to maintain the respect due to courts, every attorney stands responsible, not only for his own individual conduct in court, but for every paper which, knowingly, he presents on behalf of his client. As the matter is here before us, the petitioner knowingly presented this affidavit on behalf of his client, and for this he is equally culpable with his client. Defenses are open to him, and he may exonerate himself upon the hearing from intentional wrongdoing. If the facts warrant, but no doubt can be entertained of the jurisdiction of the court, under the circumstances shown, to proceed with that hearing.

The writ is discharged.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; McFARLAND, J.; LORIGAN, J.

(151 Cal. 451)

LAMB v. WEBB, Atty. Gen., et al. (L. A. 1,864.) *

(Supreme Court of California. June 24, 1907.
Rehearing Denied July 24, 1907.)

1. MANDAMUS—SUBJECTS OF RELIEF—ACTS OF PUBLIC OFFICERS—MATTERS OF DISCRETION.

The power of a court to compel the Attorney General to grant leave to commence a suit against his conscientious belief that such leave should not be given, should be exercised only where the abuse of discretion in refusing leave, is extreme and clearly indefensible.

2. SAME—LEAVE TO BRING QUO WARRANTO PROCEEDINGS.

Code Civ. Proc. § 1111, provides that any elector may contest the right of any person to an office to which he has been declared elected,

and the procedure described includes a recount, but there is no provision for a recount where no one is declared elected. Pol. Code, § 1067, provides that a special election must be ordered in case of a tie between those receiving the highest number of votes. Code Civ. Proc. § 803, provides that an action may be brought by the Attorney General in the name of the people upon the complaint of a private party against any person who usurps, intrudes into, or unlawfully holds or exercises any public office or franchise in the state, and that he must bring the action whenever he has reason to believe that any such office has been usurped, etc. At a general election plaintiff and defendant, G., were the only candidates for a certain office. The election returns showed a tie as to them, and the canvassing board declared the vote a tie, and ordered a special election at which G. was elected and was so declared. A certificate of election was issued to G., who assumed and has since held the office. The regularity of the special election was not objected to, nor its legality assailed, but plaintiff applied to the Attorney General for leave to bring quo warranto proceedings against G. under Code Civ. Proc. § 803, proposing to show that by a recounting of the ballots plaintiff was elected at the first election. The only showing made to the Attorney General was a verified complaint which plaintiff proposed to file, which on information and belief alleged generally that four nonresidents had been allowed to vote, and their ballots had been counted for G.; that ballots bearing marks of identification were counted for G. and unobjectionable ballots for plaintiff had been rejected. *Held*, that the showing was not sufficient to justify compelling the Attorney General by mandamus to grant leave to sue.

Department 2. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by Cyril G. Lamb against Ulysses S. Webb, Attorney General, and another, for a writ of mandamus. From orders overruling a demurrer to the complaint and granting the writ, defendants appeal. Reversed, with directions to sustain the demurrer.

Rehearing denied; Beatty, C. J., dissenting.

U. S. Webb, Atty. Gen., Geo. A. Sturtevant, B. F. Thomas, and Henley C. Booth, for appellants. Canfield & Starbuck, for respondent.

McFARLAND, J. At the general election held throughout the state on November 8, 1904, the plaintiff, Lamb, and the defendant Glass were the only candidates for the office of supervisor of the third supervisorial district of the county of Santa Barbara. The board of supervisors, sitting as a canvassing board, declared the vote for this office to be a tie between said two persons, and thereupon the board ordered a special election to be held in said district to elect a supervisor therefor as provided in section 1067 of the Political Code. It is admitted that the election returns showed a tie. Lamb and Glass were both candidates at the special election which resulted in Glass receiving a majority of 11 of the votes cast thereat. The board declared the result accordingly, and a certificate of election was issued to Glass, who en-

tered upon the duties of the office on the first Monday of July, 1905, and has ever since been and now is the acting supervisor of said district. On June 9, 1905, plaintiff, Lamb, made application to defendant Webb, as Attorney General, for leave to sue defendant Glass under section 803, Code of Civil Procedure, on the ground that Glass was "usurping," etc., the franchises of said office of supervisor. The purpose of the proposed action was to show that by a recounting of the ballots cast at the said general election on November 8, 1904, there was not actually a tie, but that by a legal count of said ballots plaintiff had a majority of the votes. The Attorney General, after a hearing, refused to grant the leave, whereupon the plaintiff applied to the Governor of the state for an order directing the Attorney General to grant said leave for suit, but the Governor refused to make such order. Thereupon plaintiff brought this present proceeding to have the Attorney General compelled by mandamus to grant the leave to sue. The defendant demurred to the complaint. The court overruled the demurrer, and gave judgment ordering a peremptory writ to issue as prayed for, and from this judgment the defendant appeals.

The application to the Attorney General for leave to sue was accompanied by a document in the form of a complaint, which plaintiff intended to file in the action which he proposed to bring against Glass if permitted to do so. This "complaint" was verified in the usual form adopted in this state for the verification of a pleading, and it constituted the only showing under oath made to the Attorney General. Section 803, Code Civ. Proc., under which the application was made, is as follows: "An action may be brought by the Attorney General, in the name of the people of this state, upon his own information, or upon the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state. And the Attorney General must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the Governor." Section 1111, Code Civ. Proc., declares that any elector may contest the right of any person to an office to which he has been "declared elected." And the procedure is prescribed for such contest including a recounting of the ballots. There is no provision for a contest for a recounting of the ballots where no one has been "declared elected," but section 1067 of the Political Code provides that, "if at any election two or more persons * * * receive an equal and the highest number of votes, there is no choice, and a special election to fill such office must be ordered by the proper board or officer." As the board of supervisors has no power to open and count the ballots, the above provision evidently means that the

board must act upon the only evidence before it, to wit, the returns of the election officers.

Under our views of the case, we do not deem it necessary to decide a number of questions discussed in the briefs, as, for instance, whether or not the discretion of the Attorney General under section 803 to grant or refuse leave to commence a quo warranto proceeding is limited only by the control of the Governor as expressly prescribed in said section; whether the provision that in case of a tie (which necessarily means a tie appearing upon the returns) there shall be a special election is not exclusive of any other proceeding in the premises; whether the submission by respondent of his claims to the voters at the special election did not estop him from objecting to such special election as a final conclusion of the whole matter. These and certain other questions we shall not discuss because, assuming for the purposes of this appeal that the Attorney General's discretion under the said section is not entirely beyond the control of the court, and that the other points discussed should be determined in favor of respondent, still it is clear that the power of a court to compel him to violate his own judgment by ordering him to grant leave to commence a suit against his own conviction and conscientious belief that such leave should not be given should be exercised only where the abuse of discretion by the Attorney General in refusing the leave is extreme and clearly indefensible. When such an extreme case does not appear, a decree of a court compelling him to act against his judgment is erroneous, and is itself an abuse of discretion.

Now, if we apply the above principles to the case at bar, we find that in refusing leave to plaintiff to commence his proceeding in quo warranto the Attorney General was not only not guilty of a violation of his discretion in any extreme sense, but was not guilty of any want of discretion. What was the case presented to him upon the application of plaintiff for leave to sue? In the first place, it appeared that there had been a tie between the parties at the general election; that in pursuance of the provisions prescribed for such an emergency a special election was ordered; that at such election the defendant Glass received a majority of the votes cast at said election and received his certificate of election; that by virtue of such election and certificate he entered upon the possession of the office and was discharging its duties; and that no objection to the regularity and legality of the said special election had ever been made, and no proceeding had ever been instituted to assail it. Here, then, was a perfect *prima facie* case showing that Glass had not usurped the said office, but was rightfully in its possession. And it must be remembered that the question with an Attorney General always is: Has

any person usurped the franchises of the office? Did plaintiff overthrow or undermine this *prima facie* case by any showing which he made to the Attorney General? The only showing which he made was this: He presented to the Attorney General a document in the form of a verified complaint which he intended to file in his proposed suit. In the complaint there were only two statements made, which, if supported by evidence of their truth, should have had any effect on the Attorney General. The first was that at the said general election four named persons were allowed to vote who were not residents of the precincts in which they were so allowed to vote, and that these votes were counted for Glass. But this statement was made wholly and expressly "upon information and belief," and therefore was of no value to the Attorney General as the presentation of any fact. The other statement was that the election officers had counted for Glass votes which were cast upon ballots that had distinguishing marks placed there for the purpose of identifying them, and rejecting the ballots for plaintiff which were unobjectionable. The character of the distinguishing marks is not given. The plaintiff says in the said complaint that he does not know the number of ballots with such distinguishing marks which were allowed by the election board, or the number with plaintiff's name on which were rejected. He does not positively identify even one. But these statements are also made upon "information and belief." Outside of this "complaint" there was no attempt at any showing whatever. No affidavit or oral testimony of any person as to any fact within his knowledge touching such election was offered. The only showing made by plaintiff before the Attorney General was therefore that he had been informed that certain things had occurred before the election board at the general election; and upon no further evidence he asked the Attorney General to allow him to introduce litigation and confusion into the county affairs by permitting him to use the former's name to commence a suit for the purpose of discovering by a recounting of the votes whether there might not have been some error committed by said board of election. Clearly, to our minds, this was not a sufficient showing to warrant a court in holding that the Attorney General ought to have been convinced that he had "reason to believe" that Glass had unlawfully intruded into and usurped said office of supervisor. The true rule on the subject is, in our opinion, expressed by the court in *Lamoreaux v. Ellis*, 50 N. W. 814, 89 Mich. 146, as follows: "It has been held by the King's Bench that a chief object in requiring leave is to prevent vexatious prosecutions, and the rule is inflexible that there must be affidavits so full and positive from persons knowing the facts as to make out a clear

case of right in such a way that perjury may be brought if any material allegation is false"—citing many authorities.

For the reasons above given, the judgment appealed from is reversed, with directions to the court below to sustain the demurrer to the complaint.

We concur: LORIGAN, J.; HENSHAW, J.

5 Cal. App. 586

BEKINS v. DIETERLE et al. (Civ. 372.)
(Court of Appeal, Second District, California.
May 25, 1907.)

APPEAL—TIME OF TAKING—STATUTORY PROVISIONS.

A judgment "that the temporary injunction heretofore issued herein to the sheriff of said county be and the same is hereby dissolved and vacated" is not an order, within the meaning of Code Civ. Proc. § 939, providing that appeals from certain orders and interlocutory judgments may be taken within 60 days from their entry.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Kate Bekins against Minnie Dieterle and another. On motion to dismiss appeal. Motion denied.

J. Marion Brooks (Henry E. Willis, of counsel), for appellant. E. W. Freeman and A. D. Laughlin, for respondents.

SHAW, J. Motion to dismiss an appeal from that portion of the judgment wherein it was adjudged "that the temporary injunction heretofore issued herein to the sheriff of said county be and the same is hereby dissolved and vacated." The appeal was not taken within 60 days from the entry of this judgment, and upon this ground respondent insists that the same should be dismissed.

The judgment was not an order, within the meaning of section 939 of the Code of Civil Procedure, and the motion to dismiss is denied.

We concur: ALLEN, P. J.; TAGGART, J.

5 Cal. App. 587

PEOPLE v. FONG CHUNG, alias FAT JIM.
(Cr. 74.)

(Court of Appeal, First District, California.
May 27, 1907.)

1. CRIMINAL LAW—CONTINUANCE—ABSENT TESTIMONY.

A continuance was improperly refused defendant, where he offered an affidavit that a material witness, without whose testimony he could not safely proceed to trial, had been subpoenaed several days before the trial, but was seriously ill; that defendant could prove by the witness an alibi, a good reputation for truth, etc., and could not prove those facts by any other witness; the attending physician corroborating the defendant as to the witness' inability to attend court, and defendant's counsel having apprised the district attorney before the trial and upon hearing of the witness' illness that defendant could not go to trial on the day set, and the necessity for granting a continuance was not obviated by the district attorney stating, "We will

concede that this Chinaman [the absent witness] will testify to anything in that affidavit."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1321, 1342-1347.]

2. RAPE—EVIDENCE—ADMISSIBILITY.

In a rape trial, it was error to exclude testimony that the prosecutrix had a venereal disease when the rape is alleged to have occurred; it appearing she had such disease shortly thereafter, and that defendant had never had it, though it is contagious.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 62.]

3. SAME.

In a trial for raping a girl under age, it was error to exclude testimony that she had had intercourse with Chinamen other than defendant prior to the alleged offense; the evidence being admissible to repel an inference that he had conveyed a loathsome disease to her, to show that perhaps she was mistaken in defendant's identity, and as tending to affect her credibility.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 59.]

4. SAME—EVIDENCE AFFECTING CREDIBILITY.

In a trial for raping a child under age, it was error to exclude testimony that she made no outcry, and that no one was permitted to see her except the authorities after she was placed in jail, since it affected her credibility.

5. CRIMINAL LAW—APPEAL—PREJUDICIAL ERROR.

In a rape trial, error in allowing a witness to be asked if he had not heard in Chinatown that defendant was taking little white girls there and was warned he would get into trouble if he continued it, and if witness had not heard that members of the Hop Sing Tong accused defendant of producing white girls there, was not cured by negative answers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3130, 3131.]

6. SAME—APPEAL—PREJUDICIAL ERROR.

In a rape trial, error in allowing a witness to be asked if he had not conducted a lottery and a poker game until a grand jury investigation was not cured by negative answers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3130, 3131.]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Fong Chung, alias Fat Jim, was convicted of rape, and he appeals. Reversed.

John W. Sullivan, for appellant. U. S. Webb and James H. Campbell, for the People.

COOPER, P. J. The defendant is charged in the indictment with the crime of rape, in having had sexual intercourse on the 26th day of September, 1905, with Lillie Ida Davis, an unmarried female under the age of 16 years. After trial the jury returned a verdict of guilty, and judgment was thereupon entered, sentencing defendant to a term of 10 years in the state prison.

The facts disclosed by this record are revolting. The party upon whom the rape is alleged to have been committed was just 13 years of age, and had an elder sister Eliza who was 15. It seems, with the apparent knowledge and consent of the father and mother, that these two young girls were and had been in the habit of having sexual intercourse with Chinamen and other parties at their home, in which the father and mother

and the smaller children of the family resided. For this they received small sums of money and presents. There were six other cases of alleged rape upon these sisters, charged to have been committed by different individuals, pending, and set for hearing at the time this case was called. Three of these were apparently against Chinamen, and three of them against white men or boys. The sisters were each suffering from venereal disease. While it is not clear that such disease existed at the time of the alleged crime by this defendant, it is clear that it existed, and both sisters were afflicted with it, when examined a short time afterwards. The offense is statutory, and no matter how depraved was the girl upon whom the act is alleged to have been committed, nor how many others were equally guilty, the defendant would be held none the less amenable to the law for his acts, if the evidence supported the verdict, and no error appeared of record; but, as the offense charged is one that of itself creates a feeling of prejudice and hostility in the minds of the jury, particularly in the case of a Chinaman, the court will look carefully into the record to see that all the substantial rights of the defendant were given him by the trial court. In this class of cases, as well as in all others, a defendant should be fully protected during the trial in all his rights, and, if he cannot thus be convicted, he should not be convicted at all.

The first contention made by defendant is that the court erred in refusing to postpone the trial for a reasonable time on account of the absence of a material witness, and the contention must be sustained. When the case was called for trial the defendant's counsel answered that he was not ready, and moved for a continuance on account of the absence of Charlie Yan Tie, a material witness for defendant. In support of the motion counsel for defendant offered and read the affidavit of defendant, which stated in substance that Charlie Yan Tie was a material witness, without whose testimony he could not safely proceed to trial; that a subpoena had been duly issued and served upon the said witness several days before the day set for trial; that the witness was seriously ill, under the care of a physician, and unable to appear in court; that the defendant could prove by said witness, if present, and expected to prove by him, that defendant was not in the presence of said Lillie Ida Davis at the time of the commission of the alleged crime; that the defendant bought from said witness two dress skirts and sold the same at a profit to the two Davis sisters, and that the defendant's reputation for truth, veracity, peace, and quietude is good; that defendant could not prove the said facts by any other witness. In support of said motion defendant's counsel testified that before the trial, and immediately upon learning of the illness of the said witness, he notified the district attorney that the witness was ill, and that defendant could

not safely go to trial on the day set. Dr. Trueman testified that he was attending the witness Charlie Yan Tie, and that the witness was in bed very ill with a high fever, suffering from blood poisoning, and would not be out of bed for at least three weeks, and that it would be dangerous for said witness to attend court. Upon the above showing the judge remarked to the district attorney that in his opinion the continuance would have to be granted. The district attorney thereupon remarked, "We will concede that this Chinaman will testify to anything in that affidavit—everything that is material." Thereupon the court denied the continuance, and to this ruling the defendant duly excepted.

It must be borne in mind that no question was raised as to the sufficiency of the facts as stated in the affidavit. The ruling of the court was based squarely upon the theory that the admission of the district attorney to the effect that the absent witness, if present, would testify to anything in the affidavit, answered the purpose and obviated the necessity of a continuance; that the statements in the affidavit could be taken in lieu of the evidence of the witness. Such is not the law. The Constitution of the state (article 1, § 13) gives a defendant the right to have the process of the court to compel the attendance of witnesses in his behalf. It is the duty of the court, when due diligence has been used, and it appears that the application is made in good faith, and the evidence is material, to continue the case for a reasonable time so that the case may be fairly tried on its merits. In the early case of *People v. Diaz*, 6 Cal. 248, it was held that the admission of the district attorney that the witness, if present, would have testified as set forth in defendant's affidavit, was not sufficient, but that, in order to obviate the necessity of a continuance, the district attorney should have admitted the truth of the facts set forth in the affidavit. The court said: "The materiality of the evidence having been shown, it was the duty of the court, in the absence of evidence tending to discredit or throw suspicion on the application to postpone the cause, to afford the prisoner reasonable time to secure the attendance of his witness. It was not sufficient that the district attorney agreed that the witness would have deposed to certain facts, if present. He should have admitted the truth of the facts absolutely. It was the right of the accused to have his witnesses orally examined in court, and this right could not be frittered away by compelling him to go to trial in their absence without the benefit of their testimony upon a statement of what the evidence would be, subject to impeachment. The value of oral testimony over all other is too well understood to suppose for a moment that such declarations will have the same weight on the minds of the jury as the testimony of the witness if he had been examined before them in open court." The above case has never been over-

ruled or modified by any case to which our attention has been called. It has been followed in *Graham v. State*, 50 Ark. 167, 6 S. W. 721, and in *Newton v. State*, 21 Fla. 70. Its reasoning is logical. The district attorney could not by a concession as to "this Chinaman" deprive the defendant of the benefit of a substantial right. It was the time and the occasion when his each and every right should have been guarded both by the district attorney and the court. It was the first continuance asked. There was no question raised as to the good faith of the defendant in making the application. If the question as to the good faith of the application, or the sufficiency of the matters and things stated in the affidavit, had been raised, and sufficient showing made so as to appeal to the discretion of the court, the question would be different; but here we have squarely presented the ruling of the court based upon the statement of the district attorney quoted above. The court not only proceeded upon such theory, but instructed the jury to regard the statement in the affidavit as part of the evidence in the case, "as though Charlie Yan Tie had in open court as a witness so testified."

The evidence on the part of the prosecution tended to show that the alleged act of sexual intercourse took place about 7 o'clock of the evening of September 26, 1905. Lillie Ida Davis so testified. In cross-examination the defendant's counsel asked her the following question: "Q. Now, is it not a fact that on the 26th day of September last at 7 o'clock in the evening you had venereal and running sores on your private parts, in your vagina, and on the lips thereof?" The district attorney objected to the question as irrelevant, immaterial, incompetent, and not proper cross-examination. The court sustained the objection, to which ruling defendant duly excepted. The ruling of the court was erroneous. Dr. McMahon, a witness for the prosecution, testified that he examined the girl in October, 1905, and that she was then suffering from venereal disease. In fact, the evidence shows without contradiction that she had such disease early in October, 1905. Defendant testified that he never at any time had sexual intercourse with Lillie Ida Davis, and that he had never had any kind of venereal disease in his life. Dr. Cothran, a graduate of the medical department of the University of California, testified that he examined defendant about two weeks before the trial for any evidence of any variety of venereal disease; that he examined physically all the parts affected in such cases; and that defendant had never had chancroids (the disease from which the girl was suffering). The evidence shows that in most cases a male having sexual intercourse with a female suffering from venereal chancroids would contract the disease. Now, if defendant had no venereal disease, and never had chancroids, it seems to us that it was very material as to whether or

not the girl, with whom he is alleged to have had sexual intercourse, was suffering from venereal disease on the day of such alleged intercourse. What reason was there for excluding the evidence? The prosecution apparently desired to prove that in October, 1905, the girl was suffering from chancroids. This might, and was probably intended to, carry with it the inference that she contracted the disease from the defendant on the 26th day of September. Defendant had the right to meet this inference by showing that she had such disease on the 26th day of September. He further had the right to prove, and did prove, that he had never had such disease. Upon all the facts thus proven the jury had the right to determine the guilt or innocence of defendant. The court refused to allow any evidence as to whether or not the girl was suffering from the disease on the 26th day of September. The objection of the district attorney was sustained to a similar question asked of Eliza, the sister of the girl. Eliza was asked the direct question as to whether or not Lillie had chancroids, or running sores, on her private parts on the 26th day of September, 1905, but under the objection of the district attorney she was not permitted to answer it. The mother of the girl testified that she had chancroids on the 26th day of September, 1905; but, it appearing on cross-examination that the mother only knew it by Eliza telling her, the court, on the motion of the district attorney, struck out the testimony. The rulings of the court in this regard were highly prejudicial to defendant.

Other rulings are complained of which appear to be erroneous, but which it is not necessary to discuss in detail. The defendant's attorney asked Lillie Ida Davis in cross-examination if she had had intercourse with any one else in the past year. Upon objection of the district attorney the court refused to allow the question to be answered. She was further asked by defendant's attorney if she had not had sexual intercourse with a great number of Chinamen in her bedroom at her home during the past year. The court sustained the objections of the district attorney to this line of questions. The defendant's attorney then asked questions as to particular named Chinamen, and as to dates prior to September 26, 1905; but the court made the same ruling excluding the evidence. While the facts sought to be elicited by these questions would not justify the defendant in having sexual intercourse with a girl under 16 years of age as a matter of law, yet they were competent for the purpose of aiding the jury in arriving at the main facts. If the fact that the girl was suffering from a venereal disease a short time after the alleged act of intercourse was a circumstance tending to corroborate the girl's testimony as to the act with defendant, by raising an inference that the venereal disease was communicated by defendant, the defendant, in that spirit

of fairness which should prevail in all trials, should have been permitted to show that the girl might have been diseased by sexual intercourse with others. Or it might be that defendant could have shown that the girl was mistaken in his identity, and that it might have been some other Chinaman. The evidence sought to be elicited by the questions would have tended to show the credibility of the girl. If she had been having promiscuous sexual intercourse with Chinamen, or if she had been diseased by sexual intercourse with others prior to the date when it was shown that she had such disease, the jury had the right to consider these matters. We do not think the conviction of the defendant, under the circumstances of this case, was so important that everything else except the single fact should have been excluded from the jury. The district attorney in his zeal desired the case to be presented to the jury upon evidence as to the one act with defendant, and the corroborating fact of the girl having a venereal disease. Such facts alone would give him a beautiful theory as to the defendant's outrage upon an innocent girl of tender years, and his giving her a venereal disease; but the defendant had some rights. If she was suffering from a venereal disease on September 26th, and defendant never had such disease, it is a strong circumstance in favor of the testimony of defendant. If the girl was entertaining a great number of Chinamen in the same manner, it was very important for defendant to show that she may have been mistaken as to his identity.

It was said, in *People v. Howard*, 143 Cal. 310, 76 Pac. 1116 (a similar charge to this): "The light of investigation should have been permitted to fall upon the witness, her statement and her conduct. If she was testifying to the truth, such investigation would not have injured the cause of the prosecution. If she was testifying to a falsehood, the defendant should have been allowed in every reasonable way to show it." In a concurring opinion by the Chief Justice it was said that, if the prosecuting witness made no outcry, or complaint to others, or if she was induced by threats of imprisonment to make the accusation, the jury had the right to take these facts into consideration in determining her credibility. The court in the case at bar refused to hear evidence that the witness made no outcry. The defendant's counsel endeavored to prove by cross-examination of the prosecuting witness that ever since she was placed in jail, October 16, 1905, no one was permitted to see her except the sheriff and his deputies, the district attorney and his deputies and detectives. The court, under the objection of the district attorney, would not allow the testimony. It seems to us that such testimony should have been allowed, and would affect the credibility of the wit-

ness. That a prosecuting witness of tender years was in a case like this kept in the sole custody and control of the officers of the law, and permitted to see no one else, is a circumstance that the jury should have known. Every lawyer and every judge under such circumstances would at once infer that the witness was testifying under the influences that had been surrounding her.

Sam Chew was called, and testified for the defendant. Under defendant's express objection and protest the district attorney was allowed to ask the witness many insulting and immaterial questions on cross-examination. Among these the district attorney asked the witness if he had not heard in Chinatown that the defendant was taking little white girls down there, and was warned that he would get into trouble if he continued it; if he had not heard that the members of the Hop Sing Tong accused defendant of producing white girls there; if it was not a fact that witness was conducting a lottery on First street back of Bachigalupi's cigar store; if witness was not selling lottery tickets at such place; if he was not running a poker game at the same place; if witness was not selling lottery tickets and running a poker game up to the time the grand jury before last began to investigate those things. We can conceive of no reason why such questions should have been allowed. It is true that the witness denied that any of the matters were true that were implied by the questions, but that does not cure the error. The district attorney did not attempt to prove the truth of any of the many things implied by the questions. They may have entirely destroyed the effect of the testimony of the witness, and, more than that, they may have created the belief that defendant was in the habit of seducing young girls. A witness cannot be impeached by evidence of particular wrongful acts, except it may be shown that he has been convicted of a felony. Code Civ. Proc. § 2051. A witness need not give an answer which will have a tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. Id. § 2065. Not only this, but a witness has the right to be protected from irrelevant, improper, or insulting questions. Id. § 2066. The above provisions of the Code apply alike to all witnesses, whether the witness be a Chinaman, a negro, one in the most humble walks of life, or one in high position, the rule is the same.

It is not necessary to consider other questions raised in the briefs.

The judgment and order are reversed.

I concur: KERRIGAN, J.

I concur in the judgment: HALL, J.

5 Cal. App. 614

HURWITZ v. GROSS. (Civ. 309.)

(Court of Appeal, Second District, California.
May 29, 1907. Rehearing Denied by Supreme Court July 27, 1907.)

1. ACTION—JOINDER OF CAUSES—COMPLAINT.

A complaint for breach of agreement to pay mortgages, alleging that by reason thereof the mortgagee applied to the indebtedness the proceeds of plaintiff's property held as security, and plaintiff was obliged to pay the balance, while alleging two elements of damages, states but one cause of action.

2. CONTRACTS—ACTION FOR BREACH—PARTIES.

To an action for breach of contract to pay mortgages, by reason of which the mortgagee applied to the indebtedness the proceeds of plaintiff's property held as security, and plaintiff was obliged to pay the balance of the indebtedness, the mortgagee is neither a necessary nor proper party.

3. SAME—ACTION FOR BREACH—DEFENSES.

Defendant having as part consideration of a conveyance from plaintiff agreed to pay a mortgage on plaintiff's property, and having failed to pay, but directed the mortgagee to apply to its payment the proceeds of plaintiff's property held as security thereof, and plaintiff having paid the balance, defendant may not question the validity and enforceability of plaintiff's obligation to pay.

4. EVIDENCE—BOOKS OF ACCOUNT—PRELIMINARY PROOF.

The regularly kept and original books of a corporation identified as such by the proper custodians, and constituting the records of the business transactions of the corporation, required by Civ. Code, § 377, to be kept by all corporations for profit, are admissible in an action between other parties without further preliminary proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1623-1646.]

5. APPEAL—HARMLESS ERROR.

Any error in allowing witnesses to testify to what books in evidence contain and do not contain is harmless, the statements being correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

6. SAME.

Where plaintiff's measure of damages is the amount of the mortgage obligation which defendant agreed to, but did not, pay, any error in showing the amount of it which plaintiff paid in one way, the balance being paid in cash, is harmless.

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Morris Hurwitz against S. L. Gross. Judgment for plaintiff. Defendant appeals. Affirmed.

Herbert Cutler Brown and George H. Moore, for appellant. Charles L. Batcheller and Thomas C. Ridgway, for respondent.

TAGGART, J. This is an action to recover damages for failure to perform an agreement to assume payment of two certain chattel mortgages. Judgment was for plaintiff, and defendant appeals from the judgment and an order denying his motion for a new trial.

Plaintiff on the 19th day of January, 1905, was the owner of four parcels of land (designated in his complaint as 1, 2, 3, and 4, re-

spectively), located in Los Angeles county, upon which, or portions of which, there were growing crops. Against these lands and the crops thereon there subsisted four mortgages; two against the lands for \$13,000 and \$5,000, respectively, and two against the growing crops, dated April 29, 1904, and August 15, 1904, given to secure the payment of promissory notes for the sum of \$2,000 and \$700, respectively, and each due one day after date. These crop mortgages were held by the California Citrus Union, which, at the request of plaintiff, picked and removed of said mortgaged crops, before January 19, 1905, oranges belonging to plaintiff of the net value of \$1,004.47, as determined by the subsequent sales thereof made by said Citrus Union. On January 19, 1905, plaintiff sold to defendant parcels designated as 1 and 2, for a consideration expressed in the "escrow instructions" as follows: "We are to pay Mr. Hurwitz \$2300 twenty-three hundred for above property and assume \$13000.00 Mtg. or Tr. deed & all Int. due, & assume \$5000 Mtg. or Tr. deed & Int. from Jan. 20, '05 & assume \$2700 Chat. Mtg. & all Int. from Jan. 20, '05. Hurwitz to show statements from last 2 mtgees's that said int. is paid to said date." On the same day plaintiff, in execution of said agreement, made a conveyance to defendant of parcels 1 and 2, wherein was contained the following clause: "Subject to all incumbrances now of record against said property, all of which incumbrances the parties of the second part assume and agree to pay." Defendant complied with the other terms of the "escrow," but failed to pay the chattel mortgages and free parcels 3 and 4 from the lien thereof, and notified the Citrus Union to apply the proceeds of sales of said oranges, picked prior to January 19th, to the payment of the indebtedness secured by said mortgages, which was done. The complaint counts on a cause of action for damages for breach of contract, and fixes the amount of such damages at \$2,700—the aggregate of the principal sums of said two chattel mortgages, which damages are divided into two elements: The first (\$1,213) for partial failure of consideration for the conveyance made by plaintiff to defendant being measured by the proceeds of sales of oranges belonging to plaintiff, applied to the payment of the chattel mortgages by the Citrus Union after defendant had assumed the same; and, second (\$1,487) the unpaid balance necessary to clear said third and fourth parcels of land, retained by plaintiff, from the lien of said chattel mortgages. By answer and cross-complaint defendant claimed that plaintiff agreed that the entire orange crop for the year 1904 should pass by the conveyance mentioned in the complaint, and that plaintiff removed the portion of said orange crop so taken by the Citrus Union without defendant's knowledge or consent. No evidence was introduced on this issue, and the court properly found against the contention of defend-

ant in this regard. The burden was upon defendant to establish his allegations.

While there are two elements of damage specially alleged in the complaint, it states but one breach of contract, and but one cause of action. This is sufficiently stated. It appears from the allegations of the complaint that defendant agreed to clear parcels 3 and 4 from the liens of the chattel mortgages and to assume the payment thereof, that there was a sufficient consideration for such promise or agreement, that he failed to perform his agreement, and that plaintiff was injured by reason of such failure. The cause of action must not be confused with the remedy or relief sought. *Frost v. Witter*, 132 Cal. 426, 64 Pac. 705, 84 Am. St. Rep. 53. This view of the complaint disposes of the errors complained of in the rulings of the trial court upon defendant's demurrer to the complaint on the ground of misjoinder and the motions to strike out and to sever and separately state the two alleged causes of action which it was contended were misjoined in the complaint. The special demurrers based upon alleged uncertainty of statement of ownership and other allegations as to the oranges taken by the Citrus Union and applied to the payment of the indebtedness secured by the chattel mortgages were properly overruled. There was unnecessary detail, perhaps, in the allegations relating to this element of damage, but no uncertainty or ambiguity that could mislead the defendant in pleading to the complaint. The Citrus Union was neither a necessary nor proper party to the action. It had a right under its contract to apply the proceeds of the orange sales to the indebtedness due it, and plaintiff could not recover the money back merely because he had contracted with defendant to pay the whole of the mortgages and the latter had failed to do so. Plaintiff's only right of action was against defendant for the breach of his contract. The crop mortgage for \$2,000 given by Gore constituted a lien upon all of plaintiff's crops, and its assumption by defendant was made a part of the consideration for the conveyance to him. He cannot now question whether plaintiff's obligation to pay it was a legal or moral one. *Hartwig v. Clark*, 138 Cal. 668, 72 Pac. 149. Plaintiff treated it as a binding obligation and so did defendant when he directed the Citrus Union to apply the proceeds of sales of plaintiff's oranges to its payment, and also later when he paid the balance due thereon to the Citrus Union. Having directed the application of plaintiff's money to its payment, he is estopped to deny the validity and enforceability of the obligation against plaintiff's demand for a repayment of the money so applied.

The construction of the contract by the trial court was correct. In ascertaining what is meant by the language used in a written instrument, the object in view and the circumstances surrounding its execution must

be taken into consideration. *Neale v. Morrow* (Cal. App.) 88 Pac. 815. Taking the contract here under consideration by the four corners, and reading it with the eyes of those who made it, by the light and under the circumstances which surrounded its execution (*Walsh v. Hill*, 38 Cal. 487), we see that plaintiff had four parcels of land incumbered with mortgages; that defendant agreed in consideration of the conveyance to him of two of the parcels to assume the payment of all the liens on the four parcels and pay the plaintiff \$2,300. The consideration to plaintiff then was the clearing of parcels 3 and 4 from the mortgage liens and the \$2,300 cash in hand. The oranges severed from the land prior to the sale were the property of plaintiff. The amount of the crop mortgages, ascertained on the face of the agreement, was \$2,700. This amount was fixed as the liability of defendant by the contract, and the plaintiff was required to pay the interest thereon to the date of sale. This construction of the "escrow" and the clause in the conveyance justifies the conclusions reached by the trial court. The evidence introduced warrants the findings of the court, and justified it in denying the defendant's motion for a nonsuit.

A careful consideration of the errors assigned in connection with the admission of evidence discloses no prejudicial error. A number of exhibits, copies of account sales, check sheets of the California Citrus Union showing particulars of oranges received from, and sold for and on account of, M. Hurwitz, were admitted in evidence over the objections of defendant. These were identified by the employees of the company in whose custody they were, who testified that they were the original sheets received from the district agent at the Covina office, the place at which the oranges were received and from which the shipments purported to have been made; that the witness did not make the entries; they were not made in his presence; and that he had no information as to the knowledge of the district agent who made them. The district agent at Covina testified that the transactions took place during his predecessor's incumbency; that he knew nothing of the transactions to which they referred except as to the custom of making such records; that he received them from his predecessor as records of the office; that he was acquainted with the agent in whose handwriting they were and with his handwriting; and that they were in his handwriting. A "ledger sheet" and "weigher's receiving account slip" were also admitted in evidence over the objections of defendant. These were identified by the chief clerk in the office of the Citrus Union as original records from that office. He also stated that the bookkeeper who kept the book showing the account of Mr. Hurwitz was no longer in the employ of the company, and when last heard from was in Arizona. The wit-

ness testified that the "ledger sheet" introduced was the original card showing the only account kept with the chattel mortgages in question, and showed all the entries in relation thereto and all the credits given thereon. A number of questions were asked of these witnesses as to the matters displayed upon the records so introduced, all of which were objected to by defendant, and his objections were overruled; the trial judge stating in explanation of his rulings in this regard at one time that it might be understood that the witness made none of the entries, had no knowledge of the facts about which he was testifying, but that he had received the instruments, whose contents he was repeating, as records of the office which it was the custom of the company to keep, in the custody of the employé filling the position which the testifying witness did. The court by its remarks in some instances expressly distinguished between the statement of a fact known to the witness and the statement of matters appearing on the records introduced, and permitted the witness to state the latter. In one instance, at least, where the question called for that which it was apparent from the question the witness could only answer from the record, the court directed the witness: "He can state whether there is any record of any such payment, regardless of whether they existed in fact."

Questions relating to the correctness and accuracy of books sought to be introduced in evidence have generally arisen in cases where the books are introduced on behalf of the party keeping them, and are in the nature of self-prepared and self-serving declarations. They were permitted to be introduced at common law only because the party could not testify in his own behalf, and, when parties to an action were first permitted to testify, it was held by some of the courts that the books of a party could no longer be admitted in evidence. *Roche v. Ware*, 71 Cal. 377, 12 Pac. 284, 60 Am. Rep. 539. Books of account so belonging to the parties to the litigation are said to be in the nature of secondary or supplementary evidence of the facts therein stated (*Bushnell v. Simpson*, 119 Cal. 661, 51 Pac. 1080), but have been held admissible, when preliminary proof has been made, to support a claim against the estate of a deceased person, where the claimant cannot be a witness to testify to his own claim. *Cowdery v. McChesney*, 124 Cal. 363, 57 Pac. 221; *City Sav. Bank v. Enos*, 135 Cal. 172, 67 Pac. 52. The question of who may make the preliminary proof and the limitations upon the parties' testimony in such cases appears to be still open to discussion in this state. *Stuart v. Lord*, 138 Cal. 677, 72 Pac. 142. In *White v. Whitney*, 82 Cal. 166, 22 Pac. 1138, the rule is adopted from *Wharton on Evidence* that "a tradesman's book of original entries is, in most jurisdictions, re-

ceived in evidence as prima facie proof, when supported by the tradesman's oath," and cases in this state are cited which, it is said, sanction, although they do not expressly declare, this rule.

We think, however, that a different rule should be applied to the books here under consideration from that which is applied to the books of a party to the litigation producing them to serve his own purposes and aid his own claim. The exhibits here admitted are the records of the business transactions of a corporation required by law to be kept by all corporations for profit. Civ. Code, § 377. They constitute the "memory" of the transactions of the corporation. Having been produced as the regularly kept and original books of the corporation, identified as such by their proper custodians, they are admissible in evidence. *City Sav. Bank v. Enos*, 135 Cal. 172, 67 Pac. 52. The exhibits were therefore entitled to be admitted upon the preliminary proof given. The practice followed by the trial judge in permitting the witnesses who were merely custodians of the record, without pretense of knowledge as to the transactions recorded, to read from the record in response to direct questions as to the fact, is one much pursued by some trial judges where the case is tried without a jury. Such a practice is open to abuse, and should be pursued with great caution. Deductions made by bookkeepers greatly aid the court and materially reduce its labors, but in the statement of the record as a fact, if not confined to a literal reading of the record, the witness' own inferences are liable to creep in and a wrong interpretation of the writing be thus had.

A careful examination of the record discloses no statements of witnesses so testifying to what the record contained which do not appear in the exhibits, except, perhaps, one or two answers to questions as to what the books did not show which were competent and relevant questions in themselves. The exhibits being prima facie evidence, and no attack being made upon their correctness, we cannot see that appellant was prejudiced by the rulings of the court in permitting these questions to be asked and answers to be given. All the evidence relating to the Citrus Union's books merely tended to increase or diminish one branch of the damage alleged by a corresponding decrease or increase of the other branch. Twenty-seven hundred dollars were necessary to release tracts 3 and 4 from the lien of the chattel mortgages. To the extent that plaintiff's oranges were used to pay this sum he was entitled to recover from defendant, and to the extent that the defendant failed to pay the mortgages plaintiff was entitled to compel him to do so or pay the amount necessary for this purpose. It was immaterial to defendant upon which branch he was required to pay, and the books of the Citrus Union only determined into which pocket of plaintiff the money

should go, to reimburse him for his oranges taken or to clear his land from the lien against it. Conceding that some, or all, of the evidence relating to the books of the Citrus Union was improperly admitted, the defendant was not prejudiced thereby.

No error appearing in the record, the judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

5 Cal. App. 633

PEOPLE v. BIANCHINO. (Cr. 35.)

(Court of Appeal, Third District, California. May 28, 1907. Rehearing Denied by Supreme Court, July 27, 1907.)

1. CRIMINAL LAW—ORDER OF COMMITMENT—SUFFICIENCY.

Under Pen. Code, § 872, providing that the magistrate must in a criminal case indorse on the complaint an order signed by him that it appearing that the offense in the complaint mentioned had been committed, and that there was sufficient cause to believe the within-named A. was guilty thereof, etc., an order in the statutory form designating the offense as "felony, rape, in the within complaint mentioned" was sufficient.

2. INFORMATION — VARIANCE FROM COMMITMENT.

A variance between the commitment and the information, relating to the particular date of the commission of the crime, is unimportant, when it appears that only one offense was committed.

3. RAPE—EVIDENCE—COMPLAINT OF FEMALE.

In a prosecution for rape of a five year old child, committed towards the latter part of January, it appeared that prosecutrix was examined on the 5th of February by a physician, who a few days later discovered that prosecutrix was infected with a venereal disease. *Held*, that evidence of complaints of the injury made by prosecutrix shortly before and after February 5th was admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 67.]

4. SAME—FAILURE OF PROSECUTRIX TO TESTIFY.

In a prosecution for rape, the failure of prosecutrix to testify is not ground for excluding evidence of complaints made by her, where she is too young to testify.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 69.]

5. CRIMINAL LAW — APPEAL — HARMLESS ERROR.

Where, in a prosecution for rape of a child, the family physician testified as to an examination made by him of prosecutrix, the denial of defendant's motion for the appointment of a physician to examine prosecutrix was not prejudicial, since the result of another examination might have been unfavorable to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3085, 3088, 3089.]

6. SAME—TRIAL—ORDER OF PROOF.

While the corpus delicti should ordinarily first be shown, a ruling permitting evidence before the corpus delicti is established is not ground for reversal, unless it clearly appears that defendant was prejudiced thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3136.]

7. SAME—FAILURE TO TAKE EXCEPTIONS.

Rulings complained of will not be considered on appeal, where no exceptions thereto were taken at the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2665.]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Amadeo Bianchino was convicted of rape, and appeals from the judgment and from an order denying his motion for a new trial. Judgment and order affirmed.

J. C. Webster, for appellant. U. S. Webb, Atty. Gen., for the State.

BURNETT, J. Defendant was convicted of the crime of rape alleged to have been committed on the person of Annie Lertora, a child of the age of five years, and was sentenced to a term in the state prison at Folsom. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

1. It is contended that the court erred in denying the motion of defendant to set aside the information. The motion was as follows: "Now comes the defendant in the above-entitled action, and moves the court to set aside the information on file herein, on the ground that before the filing thereof he, the said defendant, had not been legally committed by a magistrate." The evidence, however, introduced in support of the motion proves to the contrary that the defendant was legally committed by the magistrate. The order indorsed on the complaint or deposition and signed by the committing magistrate is as follows: "It appearing to me that the offense, to wit, felony, rape, in the within complaint mentioned, has been committed, and there is sufficient cause to believe the within Amadeo Bianchino guilty thereof, I order that he be held to answer the same," etc. The foregoing order seems to be in strict accord with the requirement of section 872 of the Penal Code, which provides that: "The magistrate must make or indorse on the complaint an order signed by him to the following effect: It appearing to me that the offense in the within complaint mentioned (or any offense, according to the fact, stating generally the nature thereof) has been committed, and that there is sufficient cause to believe the within-named A. B. guilty thereof, I order that he be held to answer to the same."

It will be observed that the magistrate designated the offense as "felony, rape," thereby describing it generally as he is permitted to do, under the statute. He made it more definite, however, by stating that it was the "rape mentioned in the within complaint." It was such an order as the statute contemplates, and it afforded authority for the district attorney to file an information in the superior court. But it is contended that the district attorney filed an information charging a different offense from that for which defendant was held to answer, and therefore the motion should have been granted. The motion, as we have seen, did not raise the point, as it was based upon the ground that the defendant had not been legally committed at all and not that he had

not been committed for the offense charged in the information. A defendant should be required, in a technical matter of this character, to stand or fall upon the ground that he has deliberately chosen, and the law should impose upon him also the duty of pointing out in his motion the particular defect upon which he relies in order that the district attorney, if he deems it advisable, may amend the information and thereby avoid the danger and expense of a mistrial. If he fails to do so in a case like the one at bar, where the only point involved in the motion is an apparent variance between the date of the offense as it appears in the order and as shown by the information, he should be precluded from raising the question in any subsequent proceeding. However, assuming that the issue is properly before us, it must be held that the information does not charge a different offense from that recited in the order of commitment. There can be no pretense that the investigation before the committing magistrate and in the superior court concerned more than one offense. The evidence disclosed only one act of criminal intercourse, and the only variance between the commitment and the information relates to the particular date of the commission of the crime. This variance, however, is unimportant when it is apparent that only one offense was committed. The same rule should apply here as in the case of a variance between the evidence at the trial and the allegations of the information, as indicated by section 955 of the Penal Code, which provides that: "The precise time at which the offense was committed need not be stated in the indictment or information, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense."

If the contention of appellant should prevail, we would have this singular situation: The district attorney will be required to file another information alleging that the offense was committed on or about the 9th day of March, when he knows that the evidence will disclose that it was committed on or about the 1st day of February. In other words, because the magistrate has committed a mistake in the date of the offense, the district attorney must allege an error before he can be permitted to establish the true date. This, of course, is unreasonable. There is nothing in any of the cases cited opposed to our view. In *People v. Lee Look*, 143 Cal. 216, 76 Pac. 1028, it is held, as stated in the syllabus: "An information is based on the commitment and not on the complaint for arrest, and it is the duty of the committing magistrate to hold the defendant for the offense proved whatever might have been the offense charged." *People v. Warner*, 147 Cal. 546, 82 Pac. 196, is to the same effect, and cites with approval the *Lee Look* Case. In *People v. Nogiri*, 142 Cal.

596, 76 Pac. 480, it was held that the motion to set aside the information should have been granted; but the magistrate held the defendant for assault with a deadly weapon, and the district attorney charged the defendant with the crime of assault with intent to commit murder—a totally distinct offense.

2. It is complained that the testimony of witnesses for the prosecution was allowed, over defendant's objection, to the effect that the child, Annie Lertora, made complaint some time after the injury to her. Two grounds for this objection were urged—first, that the complaint was too remote from the time of the occurrence; and, second, that as the child did not testify it was error to allow any testimony as to a complaint made by her. The date of the alleged injury is not definitely fixed, but was, according to the evidence and defendant's admission, some time in January, 1906, towards the latter part of the month. Witness Stratton, the family physician, was called to treat the child on February 5, 1906, and found the involved parts much inflamed and somewhat lacerated, and a few days later discovered that the child was infected with a venereal disease. It was shortly before and after February 5th that the complaints referred to were made, some of which were voluntary and others after the child was questioned by the witnesses. The court seems to have been careful to keep within the rule in this class of cases, and, so far as we can discover, the complaints were not too remote under the circumstances. The child was too young to be fully conscious of anything wrong in the act, or to experience any sense of shame, and, considering the relations of defendant to the family and his familiarity with the child, she may not have comprehended the nature of the act, or thought of complaining earlier than she did. When the disease developed, and she found herself suffering additional pain, the complaint was naturally renewed. The more serious question is as to the admissibility of the complaint, inasmuch as the child did not testify at all in the case. The evidence is admissible as corroborative of the testimony of the prosecuting witness, and the authorities generally hold that, unless the prosecuting witness testifies, her complaint is mere hearsay and inadmissible. Our Supreme Court seems to have considered that the rule does not apply where the child is of too tender an age to testify. *People v. Figueroa*, 134 Cal. 159, 66 Pac. 202. We feel bound by this decision to sustain the ruling of the lower court.

3. Defendant moved the court for the appointment of a physician to examine the child. The motion was denied, and defendant excepted. If the court had made the order, it is difficult to see how it could have compelled an examination if the mother or child had objected. But, assuming that authority existed to make the order and that it could have been rendered effective, we

cannot say that the denial of the application resulted in prejudice, as the result of another examination might have been unfavorable to defendant. Besides, there is nothing to show that the defendant could not have had the child examined by any physician that he might select.

4. The testimony of the witness Stratton as to the physical condition of the child was objected to on the ground that the corpus delicti had not been shown. The order of proof is largely within the discretion of the court. The corpus delicti should first be shown ordinarily, but, unless it clearly appears that the defendant was prejudiced thereby, a ruling permitting evidence before the corpus delicti is established will not justify a reversal of the judgment. *People v. Jones*, 123 Cal. 65, 55 Pac. 698.

Some other alleged errors are assigned, but we find nothing in any of them to demand a reversal of the judgment. No exception was taken to certain rulings of which complaint is made, and they therefore cannot be considered.

We cannot say as a matter of law that the evidence is insufficient to support the judgment.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

5 Cal. App. 599

BRYAN v. GRAHAM. (Civ. 310.)

(Court of Appeal, Second District, California. May 27, 1907.)

1. APPEAL—REVIEW—FINDINGS OF FACT—CONCLUSIVENESS.

In a proceeding to determine the rights of parties to purchase certain land, where there was a conflict of testimony upon the issue as to whether or not defendant at the time he made the application to purchase did so for his own use and benefit, the finding of the court therein cannot be disturbed.

2. PUBLIC LANDS—CONVEYANCES—STATUTES.

Under the lake land act of 1893 (St. 1893, p. 341, c. 220), as amended by St. 1899, p. 182, c. 149, regulating the sale of lands uncovered by the recession or drainage of the waters of inland lakes, one who agreed to sell after filing his application and before the issuance of his certificate to purchase did not thereby lose his right to purchase; there being nothing in the law prohibiting such an agreement to sell.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Proceedings by B. L. Bryan against J. A. Graham to determine the rights of the parties to purchase certain land. From a judgment for defendant, plaintiff appeals. Affirmed.

Letus N. Crowell, for appellant. J. L. C. Irwin, for respondent.

SHAW, J. Appeal from judgment and order denying motion for new trial.

This proceeding arises out of conflicting claims of the parties due to the fact that both were applicants to purchase a quarter

section of land under "An act regulating the sale of the lands uncovered by the recession or drainage of the waters of inland lakes," etc., as enacted in 1893 (St. 1893, p. 341, c. 220), and amended in 1899 (St. 1899, p. 182, c. 149). The land in question is a part of the territory uncovered by the receding waters of Tulare Lake in Kings county. The application of the respondent was made December 14, 1904, and that of appellant made January 31, 1905. Both applications were in due form and accompanied by the required affidavits. Upon the filing of appellant's application the state surveyor general declared a contest to exist between said parties concerning the right to purchase the land, and made his order referring such contest to the superior court of Kings county for adjudication as to the respective rights of said parties in the premises. Plaintiff alleged that the affidavit of defendant was false, in that said defendant did not at the time of making said application and affidavit desire to purchase said land for his own use and benefit, but for the use and benefit of another; and that at the time of making the application and affidavit defendant had made a contract to sell the same. These allegations are denied by the answer, and upon the trial the court found said allegations of the complaint to be untrue and rendered judgment for defendant. Section 1 of said act, under which these applications were made, requires that the applicant shall, among other facts, state in his affidavit "that he desires to purchase the same [the land] for his own use and benefit, and for the use and benefit of no other person or persons whomsoever, and that he has made no contract or agreement to sell the same." It is admitted that the provisions of section 3500, Pol. Code, which provides that "any false statement contained in the affidavit provided for in section 3495, defeats the right of the applicant to purchase the land, or to receive any evidence of title thereto," likewise defeats the right of any applicant to purchase the land under section 1 of said act of 1893. On his own behalf defendant testified to the truth of the statements contained in his affidavit, and the only evidence offered in support of plaintiff's allegation that defendant's application was made for the use and benefit of another than himself was an agreement, the nature of which does not clearly appear, made with one Fowler about January 1, 1905, and a contract made January 23, 1905, some 40 days after the filing of his application, whereby defendant agreed to sell the land in question to one Rubenstein. Assuming these contracts subsequently made to constitute any evidence of the falsity of the affidavit, there was, nevertheless, a conflict of testimony upon the issue as to whether or not defendant at the time he made the application to purchase did so for his own use and benefit, and the finding of the court therein cannot be disturbed.

The contract to sell the land to Rubenstein was made before the certificate of purchase was issued, and it is contended that, by reason of entering into this contract prior to the issuance of this certificate, defendant lost his right to complete the purchase. In support of his contention appellant cites numerous cases, in all of which the decisions were based upon an express statutory provision either prohibiting or limiting the right of alienation or transfer; for instance, the statutes of the United States relating to homesteads require, upon the making of final proof, an affidavit that no part of such land has been alienated. Rev. St. U. S. § 2291 [U. S. Comp. St. 1901, p. 1390]. So, too, there is an express prohibition of transfer or alienation prior to the issuance of the patents as to lands held under claim of pre-emption. Rev. St. U. S. § 2263. Our attention has not been called to any such limitation or requirement contained in the law relative to public lands of the state. The contract is with the state, and in the absence of any legislative expression other than that contained in section 3500, Pol. Code, which clearly was not intended to apply to an agreement to sell, made subsequent to the filing of an application and prior to the issuance of the certificate of purchase, it cannot be held that appellant's rights are in any wise abridged by the agreement under discussion. Section 3515, Pol. Code, expressly provides that "certificates of purchase, and all rights acquired thereunder, are subject to sale," etc. This express statutory grant of the right to sell the certificate cannot be construed as an expression of legislative intent that one who agreed to sell after filing his application and before the issuance of his certificate to purchase should lose his right to purchase. The policy of the law is to discourage restraints upon alienation. *Rose v. Wood & Lumber Co.*, 73 Cal. 385, 15 Pac. 19; *Phillips v. Carter et al.*, 67 Pac. 1031, 135 Cal. 604, 87 Am. St. Rep. 152; *Lamb v. Davenport*, 85 U. S. 307, 21 L. Ed. 759; *Adams v. Church*, 193 U. S. 510, 24 Sup. Ct. 512, 48 L. Ed. 769; *Arnold v. Christy*, 33 Pac. 619, 4 Ariz. 19.

Prior to the amendment of 1885, section 3495, Pol. Code, providing for the purchase of school lands, contained a provision requiring the affidavit of the applicant to state therein that the purchase "was for his own use and benefit, and for the use and benefit of no other person," etc. In construing this statute—the facts being that H. had applied to purchase a section of school land under an agreement made with N. at the time of filing his application that one-half thereof was for the use and benefit of N., and which one-half thereof H. was to convey to N. as soon as purchased—the court held in *Thompson v. Hancock*, 51 Cal. 110: "There is nothing in section 3495 of the Political Code which prohibits the sale of any portion of a sixteenth or thirty-sixth section, belonging to

the state, to one who has contracted to convey to another a part of the land so acquired," reversing the lower court upon this point.

We find nothing in the lake land act of 1893, under which this application was made, which prohibits the applicant from making an agreement to sell the land before the issuance to him of the certificate of purchase therein provided for.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

5 Cal. App. 622

BOHN v. PACIFIC ELECTRIC RY. CO.
(Civ. 362.)

(Court of Appeal, Second District, California.
May 28, 1907.)

JURY—RIGHT TO JURY TRIAL—TAKING CASE FROM JURY—CONSTITUTIONAL AND STATUTORY PROVISIONS.

The right of the trial court to grant a nonsuit at the close of the evidence, where it would be obliged to set aside a verdict for plaintiff, exists, and the exercise thereof is not violative of Const. art. 1, § 7, declaring that the right of trial by jury shall remain inviolate, or of Code Civ. Proc. § 2101, requiring all questions of fact, where the trial is by jury, to be decided by the jury, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 235.]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by John L. Bohn, administrator of Peter Bohn, deceased, against the Pacific Electric Railway Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Kendrick, Knott & Ardis, for appellant. Bicknell, Gibson, Trask, Dunn & Crutcher (Norman S. Sterry, of counsel), for respondent.

SHAW, J. The defendant owned and operated an electric railway line running from the city of Los Angeles through the town of Compton to Long Beach. It appears without conflict in the evidence that on September 12, 1904, the defendant was running a car at the usual rate of speed north on Wilmington street in said town of Compton, and when approaching Main street, which crosses said Wilmington street, one Peter Bohn appeared in a vehicle, to which was hitched a team of horses which he was driving south along said Wilmington street parallel with and on the west side of defendant's tracks. The car, running at a speed of 15 to 20 miles per hour, which was not in excess of the usual speed, was approaching the crossing at which there was a sign, "Railroad. Look out for the Cars," and its approach was in plain view of said Peter Bohn. The usual signal whistle was given, and the gong was kept going. There was nothing in Bohn's manner which indicated that he contemplated trying to cross the track until the car had reached a point about

60 to 90 feet from the crossing, when he suddenly turned his horses upon the track, with the result that a collision occurred in which said Peter Bohn was killed. His administrator sues for damages. At the close of plaintiff's evidence, defendant moved for a nonsuit, which was denied. Defendant then introduced its evidence and renewed its motion for a nonsuit, which motion the court granted, and judgment was entered for defendant. Plaintiff's motion for a new trial was denied, and he appeals from that order.

The error assigned is the order granting the motion for nonsuit. It is not claimed that the deceased was not guilty of gross negligence, as he clearly was, but it is contended that the motorneer in charge of said car saw the deceased upon the track in time to have stopped the car, and by the exercise of ordinary care he could have stopped the car after he saw the danger to which said deceased was exposed by reason of his position. Appellant contends that the action of the court in granting the motion was in violation of section 2101, Code Civ. Proc., and section 7, art. 1, of the Constitution of this state, which provides: "The right of trial by jury shall be secured to all, and remain inviolate." Like constitutional provisions are contained in the organic law of every state in the Union; yet, notwithstanding this fact, the courts of last resort recognize the right of the trial judge in proper cases to direct a verdict in favor of the plaintiff, or to grant a nonsuit. The practice has from the earliest date in the history of this state received judicial sanction. In *Ringgold v. Haven*, 1 Cal. 115, the court says: "If, therefore, upon a given state of facts, a court would be obliged to set aside a verdict of the jury as against the evidence, we see no reason or propriety in submitting such facts to them for their consideration. When their determination will be a nullity, why compel them to deliberate? Such a course is neither creditable to the law, nor complimentary to the jury." This language was cited with approval in *Mateer v. Brown*, 1 Cal. 221, 52 Am. Dec. 303; and again in *Geary v. Simmons*, 39 Cal. 224, the court says: "A court is justified in granting defendant's motion for nonsuit, after the evidence on both sides has been heard, in a case where, if the motion had been denied and a verdict found for plaintiff, it would have been set aside as not supported by, but contrary to, the evidence." In *Fox v. Southern Pacific Co.*, 95 Cal. 234, 30 Pac. 384, a second motion for nonsuit was made and granted after all the evidence was in. In reviewing this ruling the court says: "Practically, therefore, the real question in the case at bar is whether or not the court abused its discretion in holding that the evidence was insufficient to support the verdict; and it is clear to us, from an examination of the evidence, that this question must be answered in the negative." To the same effect is *Vanderford v. Foster*, 65 Cal. 49,

2 Pac. 736, and *Fagundes v. R. R. Co.*, 79 Cal. 97, 21 Pac. 437, 3 L. R. A. 824. In *Estate of Morey*, 147 Cal. 495, 82 Pac. 57, the court in discussing a similar question says: "With regard to the granting of a motion for nonsuit made at the close of the evidence for plaintiff and defendant, the rule seems to be well established that the trial court has discretion, and that it is not error to grant the motion where, upon all the evidence, it is clear that if a jury should bring in a verdict against the defendant it would be the duty of the court to set it aside and order a new trial." To the same effect is *Estate of Dole*, 147 Cal. 188, 81 Pac. 534.

Nor is the practice confined to this state. Quoting from *Cooper v. Waldron*, 50 Me. 81: "When in any case it is clear that upon the evidence verdict for the plaintiff cannot stand, that in the end judgment must be rendered for the defendant, what good reason can be assigned for submitting the case to the jury? If their verdict is right, nothing is gained; and, if it should happen to be wrong, it must be set aside. To withhold a case from the jury is no greater interference than to set aside their verdict. To set aside their verdict impliedly impeaches either their intelligence or their integrity, and tends to lessen public confidence in the usefulness of the institution. * * * If the presiding judge is of the opinion that the facts admitted or clearly established are not sufficient to prove a want of probable cause, he must either nonsuit the plaintiff or direct the jury to find a verdict for the defendant. The better course is for the judge to nonsuit the plaintiff, for it is idle to submit to the jury a question that can be answered in only one way." And in *Reed v. Inhabitants*, 8 Allen, 522, the court held: "Where the whole evidence introduced by the plaintiff, if believed by the jury, is so insufficient to support a verdict that the court would not permit one to stand, it is the duty of the court to instruct the jury, as a matter of law, that there is not sufficient evidence to warrant a verdict for plaintiff." "Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character as that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence." *Byrd v. So. Express Co.*, 51 S. E. 851, 139 N. C. 273. "There is in every case a preliminary question, which is one of law, namely, whether there is any evidence upon which the jury could properly find the verdict for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a nonsuit, if the onus is on the plaintiff, or direct a verdict for the plaintiff, if the onus is on the defendant." The above is the English rule as expressed by Mr. Justice Willes in *Rider v. Wombell*, L. R., 4 Ex. 38, and the same

rule obtains in practically all of the states of the Union.

Measured by this rule, the question before us is one solely of an abuse of discretion by the trial court; and upon the evidence as disclosed by the record we are firmly convinced there was no abuse of discretion on the part of the court in making the order of which appellant complains. The evidence in support of the allegation that the motorman operating the car could, by the exercise of ordinary care, have stopped the car after he had become aware of the dangerous position occupied by deceased, is not only meager but of a character entitling it to little, if any, weight. Had the case been submitted to the jury and a verdict for plaintiff followed, it is clear that it would have been the duty of the court to have set the same aside and ordered a new trial. Under such conditions, no good purpose could be subserved by submitting the case to the jury. The same object is accomplished by a shorter legal route in ordering a nonsuit. As said in *Estate of Morey*, supra, the practice is only justified in very clear cases, and where there is even an approach to a substantial conflict in the evidence the issue should be left with the jury. The right of the court to set aside a verdict which is unwarranted by the evidence is beyond question. We are unable to perceive any constitutional distinction between the exercise of such right and the right to order a nonsuit in a proper case at the close of the evidence.

There was no abuse of discretion in granting the motion for nonsuit, and the order denying a new trial is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

5 Cal. App. 603

CARSTENBROOK et al. v. WEDDERIEN
et al. (Civ. 293.)

(Court of Appeal, Third District, California.
May 27, 1907.)

1. LANDLORD AND TENANT—RENT—ACTIONS— TIME TO SUE.

Under the terms of a farm lease, the lessors were to receive one-third of all crops grown and harvested by the lessees. The lessees, in addition to a sum paid upon the execution of the lease, were to advance on demand \$54 per month during the period of the lease, which was to be repaid by the lessors at the time of harvest; the lessees having a lien upon the lessors' share of the crops for the amount. Before the last monthly advancement was due, a flood rendered the raising of a crop impossible. *Held*, that the lessees were not required to wait until demand and payment of the last monthly amount before bringing an action against the lessors for the advancements.

2. TRIAL—FINDINGS—RESPONSIVENESS TO IS- SUE.

In an action by lessees to recover from their lessors advancements of rent, an issue tendered by the lessors' counterclaim was that the lessees used the premises for pasturage purposes solely, and that the reasonable value of the pasturage was \$1,000. *Held*, that a finding that the lessees were entitled to all the pasturage

during the term of the lease, and that the lessors take nothing by reason of their counterclaim, was sufficient to cover the issue.

3. LANDLORD AND TENANT—ENJOYMENT OF PREMISES—PASTURAGE RIGHTS.

Where there was no provision in a lease for years reserving to the lessors the right to the pasturage, the lessees were entitled to it, under Civ. Code, § 819, providing that a tenant for years, unless he is a wrongdoer or holding over, may take the annual products of the soil.

Appeal from Superior Court, Yuba County;
E. P. McDaniel, Judge.

Action by H. J. Carstenbrook and another against W. A. Wedderien and another. From a judgment for plaintiffs and an order denying a new trial, defendants appeal. Affirmed.

W. H. Carlin and Waldo A. Johnson, for appellants. M. F. Brittan and J. E. Evert, for respondents.

HART, J. This action is brought by plaintiffs to recover the sum of \$591, together with interest thereon at the rate of 8 per cent. per annum, alleged to have been loaned and advanced to defendants under and by virtue of the terms of a certain written agreement of lease entered into between the parties, involving the leasing of certain lands to plaintiffs by defendants. A jury was waived by the parties, and the case tried by the court. Plaintiffs were awarded judgment for the sum of \$859.86, which includes the principal sum sued for and interest in the sum of \$68.86. Defendants take this appeal from said judgment and an order denying their motion for a new trial.

By the terms of the said written agreement or lease, which was executed by the parties on the 21st day of January, 1904, the defendants leased to the plaintiffs certain real property, situated in Yuba county; said lease to take effect on and from the said date of its execution and to continue in force until and including the 28th day of September, 1904. It was provided in the lease that the plaintiffs should have the option, upon the expiration of the term thus expressly agreed upon, of extending the term of their lease of said lands for a further period of four years. The lease is made a part of the complaint and is set out in hæc verba in the findings, and so much thereof as may be necessary to an understanding of the issues presented by the pleadings reads as follows:

"Upon the following terms and conditions, to wit: Said second parties will at all proper times and seasons during the term of this lease, and according to the terms of good husbandry practiced in the neighborhood, crop said lands and premises to grain and hay and such other crops as they shall in their sound discretion deem advisable; that they will carefully plant, care for, protect and harvest all of said crops without any expense to said first parties except for sacks as hereinafter mentioned, and will deliver to said first parties, or their order, within a reasonable time after said crops shall have been gathered and

harvested, subject to the lien for advancements made hereunder and to be made hereunder by said second parties to said first parties as hereinafter mentioned, at such place as said first parties shall designate in the city of Marysville, one-third of all of said crops of grain, said first parties to furnish at their own expense sufficient sacks to contain their rental or share of one-third of all crops of grain grown and harvested upon said lands under the terms of this lease; and said second parties will further deliver to said first parties properly stacked on said premises one-third of all hay grown and cut upon said premises under the terms of this lease.

"Said second parties hereby covenant and agree to pay to said first parties, at the date of the execution of this lease, the sum of two hundred and thirteen dollars (\$213.00), and upon the request and demand of said first parties the further sum of fifty-four dollars (\$54.00) on the first day of each and every month commencing with the first day of February, 1904, during the period of this lease, that is, up to and including the 28th day of September, 1904, and the further sum of fifty-four dollars (\$54.00), on the like request and demand of said first parties, on the first day of each and first day of September, 1908, if said period or every month thereafter up to and including the term of said lease be continued and extended to September, 1908, as hereinabove provided. Said sum of \$213.00 and said sum of \$54.00 to be paid monthly as herein specified, shall be deducted with interest as herein specified, by said second parties, when paid, from the one-third share of said first parties in the crops raised under the terms of this lease and shall bear interest from the date of their several payments at the rate of eight (8) per cent. per annum, and said sum with interest as aforesaid shall be and constitute a lien on said one-third portion of said crops reserved herein as and for rental for said first parties, in favor of said second parties, until the same together with interest as aforesaid be repaid by said first parties to said second parties, and should the total of said advancements, together with interest as aforesaid, in any season, exceed said lessors' (said first parties) share in the entire crops for said season, then in such event said first parties shall pay to said second parties the excess thereof received by them from said second parties.

"It is further agreed by and between the parties hereto that said advancements made and to be made hereunder by said second parties to said first parties, together with interest as aforesaid, shall be repaid by said first parties to said second parties at the harvest of said crops, in gold coin of the United States of America."

The complaint is verified. The answer admits that the plaintiffs paid to the defendants the sum of \$591, but specifically denies all the other material averments of the complaint, and sets up a counterclaim upon a

quantum valebat, for the sum of \$1,000, alleged as the reasonable value of the use of the leased lands for the purposes of pasturage, to which use, it is alleged, it was converted by plaintiffs; said pasturage being, it is claimed, the sole and exclusive property of defendants. It is insisted that the judgment should be reversed for two reasons: "(1) Because the demands sued upon were not due when the action was commenced; (2) because the findings do not cover all the material issues raised by the pleadings."

The action was commenced on the 8th day of August, 1904. A demurrer was sustained to the original complaint, and thereafter and on the 6th day of February, 1905, plaintiff filed an amended complaint, which (a demurrer thereto having been overruled) tendered the issues of fact upon which the cause was tried. The court found from the evidence "that pursuant to the terms of said agreement said plaintiffs did, at the proper time in the year 1904, and in accordance with the terms of good husbandry as practiced in the neighborhood in which said lands are situated, carefully crop and plant said lands and premises to grain and hay, and did carefully care for and protect said crops during the said year 1904, and that thereafter and during the said year of 1904, and before the time for harvesting the said crops, the whole of said crops were totally destroyed by an act of God and without any fault or neglect of said plaintiffs, or either of them, and as a result thereof there were no crops or any crop to harvest upon said lands and premises described in said agreement during said year of 1904." The court was fully warranted in making this finding from the evidence received. The plaintiffs testified that, having entered into the possession of the lands referred to in the lease between the 10th and 15th of February, 1904, at once proceeded to plow the arable or tillable portions thereof, preparatory to seeding and cultivating the same in obedience to the covenants and conditions of the lease. The property, or the "ranch," as in common vernacular it is designated, embraces some 393 acres of land, of which 205 acres are "farming" lands, or lands adapted to and suitable for the cultivation of cereals. Approximately 140 acres of the land were plowed; the balance being too wet to undergo that process to any practical purpose. A short time thereafter heavy rains came, the water in the Feather river, on which the lands are situated, rose to such an extent as to overflow its banks, and the flood waters inundated a large part of the land; the same remaining thereon so that the land could not be utilized for farming purposes for a long period of time. The plaintiff H. J. Carstenbrook testified: "Some time in May I sent my teams there again and summer-fallowed 85 acres, on the north side of the road, and also a piece on the south side that had been winter plowed. All told, I replowed about 115 acres during that year

after I had entered into the lease. I made two plowings that year on the place. After the first plowing, I did not sow the piece on the south side of the house, next to the levee, because I could not get on it, because of the water on it. The other part I had just seeded to barley, when the water came up on it. This was about 70 acres. There were about 85 acres in the whole piece, but I did not seed 10 or 15 acres of it, because it was too wet. About 85 acres I plowed the second time. The portion of the land north of the house, about 85 acres, I seeded to barley twice, and the water came up and drowned out both times. The water came up the second time about the 28th of March and remained over it fully three weeks, and probably longer, and the ranch was not at any time afterward in such condition that it could have been cropped." This witness also testified to having had 22 years' experience in the business of farming in Sutter and Yuba counties. He stated that after the water had finally subsided and receded from the land there was nothing left "but a water hole," and that it was not possible under the conditions then existing to cultivate a crop of any character; that there was no volunteer crop in that year upon the 115 acres which were replowed and summer-fallowed; that the vegetation on the land after the floods was not such as could be made into good hay; and that therefore he turned about 288 head of sheep and 8 or 9 head of other live stock upon the land, and thus, from the latter part of June or the first of July to a short time before the 28th of September, used said land "off and on" for pasturage purposes. He testified that he and his coplaintiff had under lease at the time an adjoining farm, on which they also pastured their sheep and other cattle, alternately running them on the land leased from defendants and then on the adjoining land mentioned. The other plaintiff, J. D. Carstenbrook, corroborated the testimony thus given by his partner and coplaintiff as to the unfavorable conditions with which they were confronted in an effort to cultivate the land in accordance with the terms of the lease and their failure to do so for the reasons stated by the first-named witness, and also upon the point that the grass or vegetation on the land after the flood waters had receded, and it was too late to do anything in the way of seeding the land in wheat and barley or either, was unfit to be profitably mown for hay. Some five or six other witnesses—farmers residing and who had for many years lived and farmed in the neighborhood of the land in question—gave testimony corroborative of that given by plaintiffs. All of them testified that plaintiffs, by the exercise of the most prudent husbandry, did their utmost to cultivate and grow suitable crops upon the land, but failed because of the intervention of unfavorable climatic conditions; that, under the circumstances, it was impossible to crop the land;

that there grew upon the land after the water from the overflow of the river had disappeared "dog-fennel" and other weeds unfit even for the purposes of pasturage; that, while there was a small quantity of grass growing on the land upon which sheep and other cattle could thrive for a very limited time, it was measurably insignificant, and in consequence, for purposes of hay, not worth its cutting. In fact, the testimony of these witnesses was uniform upon the point that a crop of hay could not have been cut from the land after the recession of the waters of the overflow. From the conditions existing and as thus briefly described, it was manifestly impossible to have cultivated and advanced to a state of fruition any kind of a crop upon the land, and therefore it irresistibly followed that the terms upon which the plaintiffs took possession thereof under the lease could not be by them met and carried out. These conditions, as the court found, and as the evidence conclusively demonstrates, were not brought about through the fault or the negligence or default of the plaintiffs, but were the consequences of the course of nature and resulting circumstances, to repel, overcome, or control which is, of course, beyond the power of any known human agencies, except, perhaps, through efficient levee fortifications, constructed to guard against overflows of the flood waters. Under the stipulations of the lease, as will be observed, the defendants, in consideration of transferring the possession and use of their land to plaintiffs, were to receive one-third of any and all crops grown and harvested by said plaintiffs, "subject to the lien for advancements made hereunder and to be made hereunder" by said plaintiffs. The latter, under the terms of the lease, advanced to defendants, upon the execution of the instrument, the sum of \$213, and were to thereafter further advance to them on the first day of each month the sum of \$54 "commencing with the first day of February, 1904, during the period of this lease, that is, up to and including the 28th day of September, 1904"; said advances to be made "upon the request and demand" of said defendants.

The contention is that the action was prematurely brought because the plaintiffs defaulted in making the last advance of \$54; that is, the advance which they would have been required to make upon demand of defendants if the land had been successfully farmed. In other words, the sum of \$54 not having been advanced or loaned to appellants for the month of September, no right of action accrued to respondents for the total amount already so received by defendants. The contention is, in our opinion, wholly without any reason for its support. Upon the question of the time of repayment, the agreement is in no sense obscure. It provides that said "advancements made and to be made hereunder by said second parties, together with interest as aforesaid, shall be

repaid by said first parties to said second parties at the harvest of said crops, in gold coin," etc. It certainly would not be attempted to be maintained that this clause of the lease means that the money should not be returned until crops had been actually harvested, and it is not so contended. The proper and the only true construction of it is that the money should be repaid at that time of the season when crops, if there were any, should be harvested, or at any other time, we think, when it could become a certainty or settled fact that it was impossible, from the inordinate quantity of water from the river overflows covering the land, to grow crops thereon. The evidence shows that it was plainly apparent to the parties to the lease, at and before the time at which crops should have been harvested upon the land had they been seeded and grown, that there was no possibility of securing crops from the land, and, in consequence, no possibility of the receipt by the defendants of the compensation to which they would have been entitled had the season been more propitious. The conditions upon which the land was leased necessarily involved returns to both parties from their investment, as it may properly be styled, as indeterminate, uncertain, and problematical as must be usual to enterprises which, like this, are required to depend, as among the prime factors essential to their prosperousness and final success, upon favorable meteorological and other conditions. Each of the parties, in other words—the defendants as well as the plaintiffs—by their written covenants manifested, mutually, a willingness to take a chance of reaping the benefits which ordinarily attend such a venture, and of suffering together the disadvantages and losses which the interference of adventitious circumstances too often bring to it. The termination of the lease was fixed for the latter part of September in order, without doubt, that the entire harvesting season would thus be included in and covered by the lease, thereby giving plaintiffs full opportunity to properly gather whatever crops they might deem it the part of wisdom to grow. There is nothing in the language of the lease, reasonably construed, which bound plaintiffs to advance the \$54 a month after it became certain that there could be no possible hope or expectation of harvesting a crop of any character from the land. The moneys received by defendants from plaintiffs were, it is admitted, mere loans, to secure repayment of which it was agreed that plaintiffs should retain, until their accounts were adjusted, the share to which the defendants, by the terms of the lease, would be entitled, of any crops which might be harvested upon the land. That point or stage of the season having been reached where it must have been absolutely clear to both parties that no crop of any kind whatsoever could be gathered from the land, owing to the un-

favorable conditions which existed, by what process of reasoning can it be maintained that, under the terms of the lease, interpreted agreeably to reason, the plaintiffs were in no position to sue for advances already made, because they had not made the further loan of \$54, which they would probably have been required to make in the event that the land had been successfully cropped? The lease may well be construed as obligating plaintiffs to make the loans to defendants as stipulated therein so long as there existed a prospect or hope of realizing some returns from the cultivation of the land in the manner agreed upon, and that, when the time arrived that any reason for such prospect or hope ceased to exist, then the obligation to make such advances ceased to be binding or of any force. We can conceive of no reason, under a fair interpretation of the language of the lease, why the plaintiffs should have been forced, before acquiring a right to sue for moneys already loaned to defendants, to go through the form of advancing a further sum of \$54. The logic of the argument may be stated thus: "We owe you, it is true, the sum of \$590," say the defendants, "but you have no right now to sue us, nor can you ever acquire any such right until you have made the advance to us of the further sum of \$54. The reason for such further loan has, of course, ceased to exist, but we are, nevertheless, under the strict letter of the lease, entitled to a further advance of \$54. When you have thus carried out your part of the agreement, you are then authorized to and have the legal right, immediately thereafter to sue us, not only for the last advance made, but for the whole amount loaned to us." This, it seems to us, is the necessary effect of the argument, and the proposition is obviously a *reductio ad absurdum*.

We think the findings sufficiently respond to and include all the material issues tendered by the pleadings. The specific complaint upon this point is that the court omitted to make any finding upon the issue involved in the alleged counterclaim set up by the defendants to the effect that "during the period of the lease plaintiffs used the leased premises for pasturage purposes solely," etc., and that "the reasonable value of this pasturage was the sum of \$1,000." The finding of the court upon this question is as follows: "That said plaintiffs, under the terms of this agreement, are entitled to all of the pasturage on said land during the terms of said lease, and that said defendants take nothing by reason of their counterclaim." This finding is sufficient to cover the issue to which it relates. It appears to be clear enough to require no amplification or explanation to comprehend its meaning. The plain meaning of it is (and it can be construed as meaning nothing else) that the pasturage on the land was the property of plaintiffs, and that therefore the claim of defendants that it be-

ionged exclusively to them, and that they were entitled to damages in any sum from plaintiffs for taking and using it, is without any foundation in fact. The authorities cited by counsel are where no finding whatever was made upon a certain material issue raised by the pleadings, or even an attempt to make one.

The grounds upon which the motion for a new trial was based and urged here upon appeal from the order practically call only for a discussion of the questions presented on the appeal from the judgment, and which we have considered. Counsel insist that the court erred in refusing to grant the motions of defendants to dismiss the action and for judgment on the pleadings, and also in denying their motion for a nonsuit; but the questions arising thereon, as suggested, have been disposed of in the discussion of the points urged on the appeal from the judgment.

The plaintiffs were, we think, entitled to the use of the pasturage and feed growing upon the land. There is no provision in the lease reserving to the lessors the right to the pasturage, and unless such right was withheld from plaintiffs, who were tenants for years, by the terms or some covenant of the lease, the plaintiffs were acting within their rights when they grazed their stock upon the land. Section 819, Civ. Code; *Marshall v. Luiz*, 115 Cal. 625, 47 Pac. 597. Of course, it should be unnecessary to say that, if the lessees had succeeded in growing upon the land a crop of hay, or of barley or of wheat, worth harvesting, in point of quantity and quality, they would not have been justified in entirely appropriating the same for the pasturing of their stock or otherwise, without accounting to the defendants for their share thereof. But we feel convinced from the testimony adduced at the trial that, after the disappearance of the flood waters from the

land, the vegetation growing thereon which was at all capable of utilization was, even for the purposes of pasturage, of comparatively little value, and that the consequence of gathering it, if, indeed it was in such condition as to have rendered it practicable to reap it, considering the cost and labor required to do so, would have been loss rather than profit. The evidence indisputably establishes the fact that the plaintiffs, who are experienced farmers, and who, from having been engaged in the business of farming for many years in the section of the state where the leased lands are situated, must be thoroughly familiar with the methods and requirements of successful farming in that locality, unremittingly strove to cultivate and grow crops upon the property, as they agreed to do, by the covenants of the lease. There was no sane reason why they should not have done so. They had equal concern with the defendants in the success of the venture, for their failure because of negligence or for any other reason within their control to make the business prosperous and profitable could not result otherwise, quite naturally, than to militate against their own welfare as well as against that of the defendants.

We have carefully consulted all the authorities cited by counsel for appellants as sustaining their several contentions, and readily concede that they contain declarations of sound law, but are unable to perceive their apposition to the facts presented in the case at bar. We can find no reason for disturbing the judgment or the order.

For the reasons stated in the foregoing discussion, the judgment and order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

5 Cal. App. 638

**NEVADA NAT. BANK OF SAN FRANCISCO
v. BOARD OF SUPRS OF KERN
COUNTY et al. (Civ. 312.)**

(Court of Appeal, Third District, California.
May 28, 1907. Rehearing Denied by Supreme Court July 27, 1907.)

**1. MANDAMUS — PETITION — SUFFICIENCY —
WATERS AND WATER COURSES—IRRIGATION
DISTRICTS—BONDS—ASSESSMENTS.**

Laws 1897, p. 267, c. 189, § 39, provides that, in case the board of directors of an irrigation district refuse to make an assessment to pay interest on bonds or bonds maturing, the board of supervisors of the county in which the office of the board of directors is situated shall cause an assessment to be made, etc. *Held* that where, in mandamus to compel supervisors to make an assessment, it appeared that all the land of the district was situated in one county, the petition was not insufficient because it failed to state that the office of the board of directors was situated in the county where the proceedings were brought.

**2. WATERS AND WATER COURSES—IRRIGATION
DISTRICTS—BONDS—ASSESSMENTS—LEVY.**

Laws 1897, p. 267, c. 189, provides that the board of directors of an irrigation district shall levy an assessment sufficient to raise annual interest on bonds, and in any year in which the bonds shall fall due must increase the assessment to an amount sufficient to pay the principal, and, in case of the neglect or refusal of the board of directors to cause such assessment and levies to be made, the assessment shall be made by the county supervisors of the county in which the office of the board of directors is situated "in like manner and with like effect as if the same had been made by the board of directors, and all expenses incident thereto shall be borne by the district." *Held*, that expenses of a levy were properly included in the levy made by the supervisors.

3. MANDAMUS — WATERS — IRRIGATION DISTRICTS — BONDS — ASSESSMENT — COMPELLING LEVY.

Mandamus was properly awarded to compel supervisors to make an assessment and levy under the statute, though petitioner's demand was represented by a judgment against the district rendered in an action on the district's bonds.

**4. WATERS AND WATER COURSES—IRRIGATION
DISTRICTS — BONDS — ASSESSMENTS — LEVY
—STATUTES—VALIDITY.**

Section 39, providing for an assessment and levy by the board of supervisors, is not violative of Const. art. 11, § 12, declaring that the Legislature shall have no power to impose taxes upon counties or public or municipal corporations, but may by general laws vest in the "corporate authorities" thereof the power to assess and collect taxes.

5. SAME.

Laws 1897, p. 267, c. 189, § 39, provides that the board of directors of an irrigation district shall levy an assessment sufficient to raise the annual interest on outstanding bonds, and in any year in which any bonds shall fall due must increase the assessment to an amount sufficient to raise a sum sufficient to pay the principal of the bonds as they mature; and provides that, in case of the neglect of the directors so to do, an assessment and levy shall be made by the board of supervisors of the county in which the office of the directors of the district is situated. *Held*, that it is not necessary that the directors or supervisors make several assessments for each year, but the board of supervisors may make one levy and assessment for the payment of the aggregate amount of the installments of interest and principal due in successive years.

**6. MANDAMUS—IRRIGATION DISTRICTS—BONDS
—ASSESSMENTS—LEVY—JUDGMENT.**

In mandamus by a judgment creditor of an irrigation district to compel the supervisors to make an assessment and levy under Laws 1897, p. 267, c. 189, § 39, a judgment awarding the writ was not erroneous because it made no provision for other creditors.

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Mandamus by the Nevada National Bank of San Francisco to compel the board of supervisors of Kern county to levy and collect a tax for the payment of a judgment in favor of petitioner against the Poso Irrigation district. From a decree awarding the writ, respondents therein appeal. Affirmed.

J. W. P. Laird, C. L. Clafin, H. L. Packard, and G. W. Zartman, for appellants. H. V. Kimberlin and G. H. Smith, amicus curiæ. Heller & Powers, for respondent.

BURNETT, J. The judgment or decree from which the appeal has been taken is as follows: "The alternative writ of mandate issued in this action having been served on defendants, and the said defendants having appeared and answered the verified petition of plaintiff, and the issues thereby joined having been brought for trial before this court sitting without a jury this 13th day of February, 1905, Messrs. Heller & Powers appearing as attorneys for plaintiff and J. W. P. Laird, Esq., appearing as attorney for defendants, and documentary and oral evidence having been introduced, and the matter having been argued and submitted, this court finds that all of the allegations set forth in plaintiff's petition or complaint are true; and that the Poso Irrigation district is a municipal corporation organized under the laws of the state of California, and is wholly situated in the county of Kern, state of California; and that the superior court of the county of Kern, state of California, in the action therein pending, wherein the above-named plaintiff was plaintiff, and the said Poso Irrigation district was defendant, duly gave, made, and entered a judgment, requiring said Poso Irrigation district to pay the said plaintiff the sum of \$12,262.96, together with interest thereon, at the rate of seven (7) per cent. per annum, from the 26th day of August, 1902, and for other purposes; and that said Poso Irrigation district has no funds to be applied to the payment of said judgment; and that there is no property belonging to said Poso Irrigation district upon which execution could be levied; and that the officers of said irrigation district have refused and neglected to levy an assessment or do or perform any of the acts provided by law, to assess the real property in said district, for the purpose of paying the money due on said judgment; and that the defendant, board of supervisors, after petition to do so to it, has also refused to take the necessary steps to levy an assessment on the property of said district, or to cause any levy of any assessment to be made on the property in

said district, or to take any steps for the purpose of assessing said district, and collecting the taxes on the property in said district, in order to pay said judgment; and that plaintiff is a party beneficially interested and has no means of collecting its judgment without the action of said defendant; and that said plaintiff has no plain, speedy, adequate, or other remedy in the ordinary course of law. Now, therefore, it is hereby ordered, adjudged, and decreed that said defendants immediately proceed to levy an assessment in accordance with law upon the real property within the boundaries of said Poso Irrigation district which is subject to an assessment of said district sufficient to pay said judgment of plaintiff, to wit, the sum of \$12,262.96, together with the interest thereon at the rate of seven (7) per cent. per annum from the 26th day of August, 1902, and also all expenses incident to the making of said levy and assessment and incident to the collection of said assessment, which expenses shall be estimated by the said defendant, board of supervisors, and shall be included within said levy and shall also include plaintiff's costs in this action, which are hereby taxed at \$—— against said defendant, and which shall be included within said levy, and when sufficient money is collected the defendant shall pay to plaintiff from the sum collected whatever amounts are collected on said assessments until said plaintiff shall be paid the said amounts heretofore referred to, to wit, the sum of \$12,262.96, together with interest thereon at the rate of seven (7) per cent. per annum from the 26th day of August, 1902, and the costs of suit herein. And it is further ordered, adjudged, and decreed that a peremptory writ of mandate shall be issued to said defendants commanding them to forthwith do the acts herein ordered that they shall do, and that a return day be inserted in said writ as on or before the 15th day of September, 1905. Paul W. Bennett, Judge of the Superior Court."

The action is based upon the provisions of section 39 of "An act to provide for the organization and government of irrigation districts, approved March 31, 1897" (Laws 1897, p. 267, c. 189), which is in the following language: "Sec. 39. The board of directors shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds, and in any year in which any bonds shall fall due must increase said assessment to an amount sufficient to raise a sum sufficient to pay the principal of the outstanding bonds as they mature. The secretary of the board must compute and enter in a separate column of the assessment book the respective sums, in dollars and cents, to be paid as an assessment on the property therein enumerated. When collected, the assessment shall be paid into the district treasury and be apportioned to the several proper funds. In case of the neglect or refusal of the board of directors

to cause such assessments and levies to be made as in this act provided, then the assessment of property made by the county assessor and the state board of equalization shall be adopted, and shall be the basis of assessment for the district, and the board of supervisors of the county in which the office of the board of directors is situated shall cause an assessment roll for said district to be prepared, and shall make the levy required by this act, in the same manner and with like effect as if the same had been made by said board of directors, and all expenses incident thereto shall be borne by such district. In case of the neglect or refusal of the collector or treasurer of the district to perform the duties imposed by law, then the tax collector and treasurer of the county in which the office of the board of directors is situated must, respectively, perform such duties, and shall be accountable therefor upon their official bonds as in other cases."

The bonded indebtedness herein involved was incurred prior to the enactment of said statute, but this circumstance is unimportant in view of the fact that the act of 1889, passed prior to the issuance of the said bonds and amending the act of 1887, known as the "Wright Irrigation Act," contains a provision identical, as far as the question before us is concerned, with said section 39 of the act of 1897. The judgment herein is vigorously assailed by numerous counsel, including a learned "friend of the court," and we have examined with care the points and cases to which our attention has been directed, and we shall proceed to state our views thereon in the order in which the various propositions are advanced in the briefs.

The position of appellants, as stated by counsel, is that the judgment must be set aside, and the writ vacated, because: "(1) The petition upon which the writ is based is wholly insufficient to give the court jurisdiction to issue the peremptory or any writ herein. (2) The court exceeded its authority and jurisdiction in its direction to the board of supervisors by said writ: (a) In directing a levy and collection for plaintiff's costs expended in the present action. (b) In directing a levy for expenses to be incurred in such levy and collection. (c) In directing said board to estimate such expense for the purpose of levy and collection. (d) In directing said board to pay over to said plaintiff, when collected, the amounts due it on its said judgment. (3) The court exceeded its jurisdiction in directing said board of supervisors to make levy to pay said judgment. (4) That section 39, upon which this proceeding is based, is unconstitutional and void."

In addition to the foregoing, the brief filed by "amicus curiae" presents specifically these considerations: "(1) Upon the failure of the board of directors or of the board of supervisors, in any year, to levy an assessment for the interest, or the interest and installments

of principal, falling due in that year, its power ceases. In other words, the act does not confer upon the directors or the board the power to make a general assessment for the aggregate of indebtedness accruing for the previous years, or, as in this case, for a period of 16 years. The power, if it exists, can only be to make separate annual assessments for each year based on the values of that year; for otherwise the obligations of the parties would be varied, and the act would be unconstitutional. But this, from the nature of things, is impracticable, at least after the lapse of a year or two, and it is therefore submitted that the provision of the amendment of 1889, conferring the power of assessment upon the board of supervisors, is, on this account, a mere brutum fulmen, and practically void. (2) By the provisions of the statute the taxes collected constitute a common bond fund for the benefit of all the creditors, and all have a common interest in it. * * * A suit, therefore, to dispose of this fund, cannot be maintained without making the others parties, or suing for their common benefit. Code Civ. Proc. §§ 378, 379, 382, 389, and Meyer v. City of San Francisco (Cal. Sup.) 88 Pac. 722. (3) If in this state the equitable doctrine as to laches be held to apply to proceedings of the court generally (Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423), a very extreme case of laches is here presented."

In support of their first proposition, it is urged by appellants that the petition for the writ of mandate is fatally defective, in that it does not appear therein that the office of the board of directors of the irrigation district is situated in Kern county, where the suit was brought. The contention is based upon the language of said section 39 that "the board of supervisors of the county in which the office of the board of directors is situated shall cause an assessment," etc. There was no corresponding allegation nor finding in the case at bar, and it is claimed that this is jurisdictional. As far as the absence of any finding is concerned, no such issue was presented, and it is hardly necessary to cite authorities to the point that the findings must be confined to the issues made by the pleadings. But appellants are wholly at fault in their claim that the want of jurisdiction is disclosed by the allegations of the petition. They have entirely mistaken the rule as applied to the jurisdiction of courts of record. The presumptions here are in favor of jurisdiction, and not against it. There can be no question that, under the authority with which superior courts are clothed by the Constitution, the superior court in and for Kern county, in the exercise of its general powers, had jurisdiction to entertain an application for a writ of mandate against the supervisors of that county. If there were any exceptional circumstances which, if dis-

closed, would divest the court of jurisdiction, in the absence of any allegation concerning them in the complaint, the burden is upon the defendants to present them. Since it does not affirmatively appear that by reason of the peculiar condition suggested the court did not have jurisdiction, by virtue of its general authority, the presumption must be indulged against appellants' contention. But, again, it is manifest that the provision was intended for a case where the irrigation district comprised land in more than one county. Here it appears that it is confined entirely to Kern county. There seems to be no merit in this contention, and we have probably devoted to it more attention than it deserves.

In the specification of particulars where-in it is alleged the court exceeded its authority in its direction to the board of supervisors, exception is taken to that portion of the decree providing for the costs of the present action and expenses to be incurred in the levy and collection of the judgment. It is insisted that said section 39 limits the power of the board of directors of the district to the levy of an assessment sufficient to raise the annual interest on the outstanding bonds and in any year in which any bonds shall fall due to increase such assessment to an amount sufficient to pay the same as they mature, and that the delegation of authority to the board of supervisors cannot be more comprehensive than the authority conferred upon the board of directors in the first instance. The consideration of the costs of the present action may be eliminated, as the record shows that no amount was awarded for costs. The expenses of the levy and assessment would seem to be a legitimate portion of the burden to be borne by the property owners in whose behalf the bonded indebtedness was incurred. In fact, said section 39 makes provision for it in this language: "And all expenses incident thereto shall be borne by such district." If we understand the position of appellants, it is that other provision is made for said expenses in case of the levy by the board of directors, and, since there is a delegation of power to the supervisors, their authority is limited to the method pointed out for the directors to pursue. Of course, the act contemplates that the board of directors will do its duty, and ample provision is made in detail for incurring and liquidating a bonded indebtedness. But we do not understand that in the technical sense the authority conferred upon said directors is sought to be delegated to the board of supervisors. Rather is it true that the board of directors is empowered to bind the district by taking certain steps, and the authority of the said board to liquidate an indebtedness must be exercised in the manner pointed out. But in case of its refusal or neglect to act, then the board of supervisors is

granted directly by the Legislature the power to levy an assessment to provide not only for the payment of the amount due, but also for the expense of said levy. The statute does not expressly provide that the expense shall be included in said levy, but it is fairly implied, and any other construction seems unreasonable. The context clearly shows, we think, that in this way the expenses "shall be borne by the district."

The case of *Boskowitz v. Thompson*, 144 Cal. 724, 78 Pac. 290, cited by appellants, is not in point. That was not a case where the directors refused to act. It was a suit to enjoin the collection of an assessment, and no such question was considered as is involved here in reference to the authority of the board of supervisors in the premises. The important point decided therein is shown by the following quotation: "A court of equity, as such, in the absence of statutory authority, has no jurisdiction to enforce a lien that is created by statute, for the enforcement of which the statute has provided a mode. The enforcement of the lien in such case can be only in the mode provided by the statute." It was also held that the court should have determined the validity of the assessment which it was sought to collect. There is nothing in that case inconsistent with our position here, as we hold that the court below directed the board of supervisors to follow the mode that is at least implied by the statute. The objection that the board of supervisors is without authority to estimate the expenses of levying and collecting the assessment is also without persuasive force. As suggested by respondent, no one is presumably better fitted to make the estimate than the supervisors, and we think it is implied that they should do so when an emergency arises such as in the case at bar.

The position taken by appellants that the lower court exceeded its jurisdiction in directing the board of supervisors to pay over to the plaintiff from the sum collected a sufficient amount to satisfy plaintiff's demand seems to be in accord with the statute. Respondent rather concedes that the judgment is erroneous in this respect, but claims that it "does not affect the validity of other portions of the decree," and that the decree can be modified by striking out that provision, leaving other portions of the decree in full force and effect. Since the act provides in the first instance that the tax collector and treasurer of the district shall collect and receive the money, and, "in case of neglect or refusal of either of them to perform the duties imposed by law, then the tax collector and treasurer of the county in which the office of the board of directors is situated must respectively perform such duties and shall be accountable therefor upon their official bonds as in other cases," and as there is no authority to depart from the

provisions of the act, the portion of the decree complained of should be stricken out. There is no good reason, though, why this should necessitate a new trial.

We cannot see any merit in appellants' contention stated by them as follows: "The petition to the board of supervisors as well as the writ prays that a levy to pay the judgment therein set out be made by said board of supervisors in conformity with the act in question and more particularly in conformity with subdivision 39 thereof. As we have already pointed out, section 39 relates specially to interest on outstanding bonds. The decree and the writ directs the levy to pay a judgment. The original contract between plaintiff and the district is so completely merged in the judgment, in a new form of contract, that the court cannot see that it is for interest on outstanding bonds and therefore payable by the provisions of section 39." A large number of cases is cited in support thereof, but their effect seems to have been misapprehended. The quotation made by appellant from *Taylor v. Root*, *43 N. Y. 344, may be accepted as a fair expression of what is held in all of them: "The cause of consideration of the judgment is of no possible importance; that is merged in the judgment. When recovered the judgment stands as a conclusive declaration that the plaintiff therein is entitled to the sum of money recovered. No matter what may have been the original cause of action, the judgment forever settles the plaintiff's original claim. * * * This assent may have been reluctant, but in law it is an assent, and defendant is estopped by the judgment to dissent. Forever thereafter, any claim on the judgment is setting up a cause of action on the contract." It is hard to perceive how appellant can obtain any comfort from the quotation. It is too well settled to be controverted that a judgment does not create a new obligation. It simply presents in a different form the obligation already incurred, and, besides, it affords the highest sanction of the law to the validity of the obligation. It seems to be established by the authorities that the proper course to pursue when municipalities refuse to pay their bonds is by an action at law to establish the validity of the bonds and the amount due thereon, and then to apply for a writ of mandate to compel the proper authorities to raise what is required to satisfy the debt by the assessment and levy provided by statute. The following cases cited by respondent so hold: *Heine v. Commissioners*, 19 Wall. (U. S.) 655, 22 L. Ed. 223; *Herring v. Modesto Irrigation District* (C. C.) 95 Fed. 705, 710; *Marra v. San Jacinto & Pleasant Valley Irrigation District* (C. C.) 131 Fed. 780, 789; *Board of Supervisors of Riverside County v. Thompson*, 122 Fed. 800, 59 C. C. A. 70. The latter case was similar to the one at bar, in-

volving the same statute, and from it the following quotation seems germane: "The present proceeding is not a new action to establish the rights of the defendant in error as against other parties. It is a proceeding in the nature of an execution to enforce the judgment already rendered. The right of the defendant in error to call upon the board of directors to enforce the judgment was established in that judgment as well as his right to have recourse to the board of supervisors in case of the refusal or neglect of the board of directors to make the levy and assessment. Neither the board of directors nor the board of supervisors nor the taxpayers of the Perris irrigation district can be heard to defend the present proceeding on any of the grounds litigated, or which might have been litigated, in the former action."

The principal attack directed against the judgment is based upon the ground that said section 39 is unconstitutional for these reasons: (1) Because it delegates the power to assess and collect taxes in the district to other than corporate authorities thereof; (2) because it directs the assessment of property within the district to be made by persons not representatives of the district; (3) because it delegates to a legislative officer the power to perform the purely executive functions of the assessor. In this connection attention is directed to section 12, article 11, and section 10, article 13, of the Constitution of this state and numerous decisions of our Supreme Court. Said section 12, *supra*, provides that "the Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes," and said section 10 provides for the assessment of property where it is situated "in the manner prescribed by law."

As pointed out by respondent many of the decisions cited by appellant were rendered under the Constitution of 1849, which contained the following provision: "Taxation shall be equal and uniform throughout the state. All property in this state shall be taxed in proportion to its value, to be ascertained as directed by law; but assessors and collectors of town, county and state taxes shall be elected by the qualified electors of the district, county or town in which the property taxed for state, county or own purposes is situated." If that provision were a part of the organic law now, it is probable that said section 39 would be unconstitutional, in so far as it provides for the steps to be taken by the board of supervisors; but under the present Constitution the power to assess and collect taxes is conferred upon "the corporate authorities," with the restriction that

the assessment shall be made where the property is situated and in the manner prescribed by law. We cannot see that said section 39 is in conflict with this requirement. The board of supervisors is a "corporate authority" of the district, and the assessment and levy according to the terms of the decree are to be made as "prescribed by law."

In the case of *McCabe v. Carpenter*, 102 Cal. 470, 36 Pac. 837, it is said: "It is contended that the law [referring to a statute establishing high schools] is unconstitutional, in that it authorizes the county superintendent of schools to furnish to the board of supervisors an estimate for the tax and makes it the duty of the board to proceed to fix a rate which will realize the amount, thus leaving the amount of the tax wholly to the discretion of an executive officer, and leaving no discretion in the board." The conclusion of the court, announced by Commissioner Temple, was: "But since the power to levy a tax is purely legislative, it would seem to follow that the power cannot be vested in any other authority of the local corporation than the body in which is vested the legislative power of such municipal corporation. At all events it could not vest such power in an executive officer of such corporation." Here the board of supervisors is authorized to make the levy in case of the refusal of the directors to act, the statute in question makes the board a part of the "corporate authority" of the district, the board is undoubtedly a legislative body, it does not make the assessment, but bases the levy upon the assessment made by the county assessor, and we fail to see how there is any violation of the provisions of the Constitution, especially when, as here, the district is confined to one county.

In *Board of Education v. Board of Trustees*, 129 Cal. 604, 62 Pac. 173, there is an interesting discussion of article 1, § 12, of the Constitution, and it is said by the court through the commissioner who is the *amicus curiæ* herein: "These provisions apply to all kinds of public or municipal corporations, or we may say to all municipalities and quasi municipalities. These differ greatly in their organization. In some, as in cities generally, the powers of the government are distributed into separate departments; in others all the powers of the municipality are invested in one body—as, e. g., in the board of supervisors of a county, the board of trustees of a school district, etc. In the latter case the board of supervisors or board of trustees, or other governing body, constitutes the corporate authority of the municipality, in which might be vested the power to impose taxes." So it may be admitted that in the first instance the duty here is cast upon the board of directors of the district to make the levy; but in case of its refusal to act the board of supervisors constitutes the legislative corporate authority to supply the omission. The power of the Legislature is not exhausted

when it confers the authority upon the directors; but it may also authorize the supervisors to perform a similar function in certain contingencies. This it has done. It would seem just and reasonable that this power should be lodged in some body outside of the board of directors of the district to meet such an emergency as is here presented, where, according to the findings of the court, said directors have repudiated a legal obligation and have endeavored to prevent its enforcement.

There seems to be no decision of the Supreme Court passing directly upon the constitutionality of the proceeding herein involved, but an application of the principles so clearly enunciated in the able opinion of Mr. Justice Harrison in the leading case of *In re Madera Irrigation District*, 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106, wherein the Wright irrigation law is upheld, in our opinion leads to the conclusion that said section 39 is not obnoxious to the Constitution. In that case it is said: "Whenever a special district of the state requires special legislation therefor, it is competent for the Legislature by general law to authorize the organization of such district into a public corporation, with such powers of government as it may choose to confer upon it. It is not necessary that such public corporation should be vested with all governmental powers, but the Legislature may clothe it with such as in its judgment are proper to be exercised within and for the benefit of such district." And it was held that these corporations are mere agencies of the state in local government, that they possess only the powers conferred by the Legislature, and that it was the purpose of the Constitution to leave in the hands of the Legislature full discretion in reference to the government of said corporations. In the exercise of this discretion the Legislature has conferred upon the legislative body of the county a certain supervisory authority over the district. This seems to be a reasonable provision in furtherance of the design of the framers of the Constitution. As the section, when fairly construed, requires the board of supervisors to base the levy upon the assessment of the county assessor, there would seem to be no force in the contention of the appellant that the property owners have no opportunity to be heard to correct any defects in the assessment.

The most serious objection, probably, is the one made by the amicus curiæ: "That an annual assessment upon the real property in the district is the exclusive mode provided by the statute for the payment of the principal of the bonds authorized by the statute to be issued." In this connection he cites the case of *Merchants' Bank v. Escondido District*, 144 Cal. 329, 77 Pac. 937. It is therein stated: "The act providing for the organization of the district, and the organiza-

tion of the district under the provisions of the act by the votes of the electors, cannot be otherwise regarded than as a contract between the state and the individuals whose property was thereby affected." The soundness of that proposition would scarcely be questioned by any one. It is further stated that: "The burden thus imposed was that the bonds issued under the act should be paid by revenue derived from an annual assessment upon the real property of the district, and that their lands 'should be and remain liable' for such assessment, and this implied that this should be the extent of the burden. But by the amendatory act the board of directors is authorized, without the consent or even the knowledge of the landowners, to pledge or hypothecate the property acquired with their money." Hence it was held that the amendment would deprive the landowners of their property without due process of law and was also a violation of the inhibition against impairing the obligation of contracts, since the property owners were only liable "for continued assessments until the balance of the bonds shall be paid." No fault can be found with that decision as applied to the facts of the case. The amendment held unconstitutional was enacted after the issuance of the bonds, and it is too clear for argument that it gave the bondholders security that was not provided by the law at the time the obligation was incurred by the district, and was therefore in violation of the terms of the contract between the debtors and creditors. The case is in point here if it can be shown that the method provided for the collection of the debt adds to the property owners an additional burden to what was imposed by the statute at the time the bonds were issued. But, as we have seen, the statute has not been substantially changed, and so the question resolves itself into one as to the proper construction of said section 39. The statute no doubt contemplates annual assessments, as it is constructed upon the theory that the board of directors will do its duty, but it does not prescribe that this shall be the exclusive method of raising the money to pay the bonds.

The argument made by respondent is substantially this: The board of directors of the district is not required to levy the assessment at any particular date, but must make it after the equalization of the assessment made by the assessor of the district. This levy by said board may be as late, then, as the end of the fiscal year, and hence it could not be said to be in default till the end of the year, and hence the powers of the supervisors could not be invoked till after that time. The power of the board of supervisors must therefore be exercised in making the levy for the payment of interest coupons or installment coupons which matured in a

previous year. Furthermore, the statute does not provide the time when the levy shall be made by the supervisors, and there is nothing therein inconsistent with the position that one levy may be made for the payment of the aggregate amount of installments of interest and principal due in successive years. The contention of the *amicus curiæ* is: "If the power still exists in the directors or supervisors to make any assessment and levy, it can only be to make several assessments for each year, and each assessment must be of the values of the lands of the district in that year." This, he contends, is impracticable, and hence he would have the court reach the conclusion that there is no method provided for the payment of the debt and the bondholders are without redress.

We are not inclined to consider the law so impotent as is implied by appellants' argument. We hold that the burdens of the property owners have not been increased since they incurred the obligation to pay these bonds. The statute, in our opinion, does not expressly nor by implication prohibit the method adopted herein for the collection of the money due. In fact, the forbearance to sue for several years and the use of one levy, instead of many, constituted a favor to the debtors and tended, not to increase, but to reduce, the burden of the property owner.

We fail to see any force in the contention that the judgment is erroneous because it

makes no provision for other creditors. The debtor should hardly be allowed to raise this question when it appears that the amount claimed is due the creditor who has brought the suit. Again, there is nothing to show that the other bonds issued have not been paid, or that there is any other creditor who desires to participate in the fund. If there are other creditors whose claim the appellants are solicitous to have paid, it is fair to presume that respondent will not object to an increase in the amount of the levy so as to meet the other obligations of the district.

The question of laches suggested by appellants is disposed of by the case of *Cahill v. Superior Court*, 145 Cal. 42, 78 Pac. 467. We think the circumstances detailed in the petition for the writ excuse the delay, and show that no prejudice has been caused thereby to appellants.

The court below is directed to modify the judgment by striking therefrom the following: "And when sufficient money is collected the defendant shall pay to plaintiff from the sum collected whatever amounts are collected in said assessments until said plaintiff shall be paid the said amounts hereinbefore referred to, to wit, the sum of \$12,262.96, together with interest thereon at the rate of 7 per cent. per annum from the 26th day of August, 1902, and the costs of suit herein"—and as so modified the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

CHRISTENSEN v. BEEBE, Sheriff.

(Supreme Court of Utah. June 25, 1907. On Rehearing, Aug. 1, 1907.)

1. HOMESTEAD—SALE—EXEMPTION OF PROCEEDS.

The acceptance of an oral promise to deliver brick in consideration of the conveyance of land constituting a homestead is not a "receipt of the proceeds" of a sale thereof within Rev. St. 1898, § 1158, exempting the "proceeds" of a sale of a homestead for one year after the "receipt thereof," and the year of exemption does not run from that time, but from the time of delivery of the brick.

2. SAME.

The term "proceeds," used in Rev. St. 1898, § 1158, exempting the "proceeds" of a sale of a homestead for one year after the receipt thereof, means some tangible thing which is the subject of manual delivery and receipt.

On Petition for Rehearing.

3. SHERIFFS—LIABILITY FOR MISCONDUCT.

Though property may have been lawfully seized by a sheriff under an execution, yet, if he thereafter wrongfully converted it to his own use, he is liable.

Appeal from District Court, Seventh District; Ferdinand Erickson, Judge.

Action by Lars Christensen against Oscar Beebe, as sheriff. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions.

F. E. Woods, S. A. King, and Saml. Russell, for appellant. H. J. Dinniny, for respondent.

FRICK, J. The plaintiff sues to recover the value of certain property alleged to have been converted by the defendant. The questions to be determined arise out of the facts stated in the complaint wherein it is, in substance, alleged that plaintiff, at the time mentioned in the complaint, was, and now is, a resident of Utah, the head of a family consisting of his wife and three children, all of whom are dependent on him for support; that on June 26, 1905, and from thenceforth the plaintiff was, and now is, the owner of and entitled to the possession of 10,000 brick of the value of \$65; that on the said 26th day of June, at Castle Dale, Emery county, Utah, by virtue of an execution duly issued by the clerk of the district court of said county upon a judgment duly filed therein, the defendant, as sheriff of said county, wrongfully and unlawfully levied upon and seized said 10,000 brick as the property of the plaintiff; that the judgment upon which said execution was issued was not recovered, either in whole or in part, for the purchase price of said brick; that said brick at the time of levy and seizure were, and now are, exempt from execution sale under process under the laws of this state; that said brick were the proceeds of a sale of plaintiff's real estate constituting his homestead, not exceeding in value the sum of \$150, which plaintiff, on or about the month of May, 1903, sold and thereafter duly conveyed to

one Peterson for a consideration of \$100, which consideration Peterson agreed to pay to plaintiff in the summer or fall of 1904 by the delivery of bricks or adobes to him; that plaintiff always has claimed, and now claims, said brick as exempt, the same being part of the proceeds of the sale of said homestead, and that said homestead was sold and said brick were agreed to be delivered and received and used for the purpose of constructing a dwelling house as a home upon plaintiff's real estate at Castle Dale, Emery county, Utah, now owned and occupied as a homestead by the plaintiff, the value of which does not exceed the value of \$800, and which is all the real estate owned by the plaintiff; that no part of said brick had ever been delivered to plaintiff, and he had never received the same, or any part thereof, but that the same were levied upon by the defendant as the property of plaintiff before delivery to or the receipt thereof by him; that ever since the levy and seizure of said brick the defendant has wrongfully detained the same from the plaintiff, and on the 6th day of July, 1905, at Castle Dale, Emery county, Utah, the said defendant wrongfully converted said brick to his own use, to the damage of the plaintiff in the sum of \$65; that on the 25th day of July, 1905, and before the commencement of this action, the plaintiff demanded said brick from the defendant, and on said day notified him that he claimed the same as exempt from levy upon execution. Upon substantially the foregoing allegations plaintiff prayed judgment against said defendant for the value of said brick. The defendant appeared and demurred to the complaint upon the ground that it failed to state facts sufficient to constitute a cause of action. The demurrer was sustained; and, the plaintiff electing to stand on his complaint, the court duly entered judgment against him, dismissing the action, from which plaintiff appeals.

The only error assigned is the action of the court in sustaining the demurrer. It will be observed that the complaint is not as clear as it might be with regard to the allegations constituting the alleged conversion of the brick. There is no direct allegation that defendant sold the brick under the execution, under which the levy was made, but it is directly alleged that defendant wrongfully converted the same to his own use. If this were so, the levy under the execution, however lawful, would afford the defendant no protection, regardless of whether the brick were subject to execution or not. With regard to this, however, and in respect to other minor defects of the complaint, both parties, with a most commendable spirit of fairness, have stripped the matter from technicalities, and have asked that the real and only question involved, to wit, the exempt character of the brick, be considered and determined by us, and have expressed a

desire that for that purpose the complaint should be considered as sufficient. In deference to those wishes we shall so consider it. The question therefore is, were the 10,000 brick exempt as a part of the proceeds of the sale of plaintiff's homestead, within the purview of section 1158, Rev. St. 1898, which, so far as material here, provides, "and the proceeds of the sale thereof (homestead), to the amount of the exemption existing at the time of sale, shall be exempt from execution or other process for one year after the receipt thereof by the person entitled to the exemption"? We remark, first, that there can be no reasonable doubt with regard to the 10,000 brick as constituting a part of the proceeds of the sale of plaintiff's real estate, which it is alleged, and admitted by the demurrer, constituted his homestead, and thus at the time of the sale thereof was exempt, together with the proceeds thereof to the extent of at least \$1,500. The exempt character of the proceeds, however, continued so only for the period of one year after the "receipt thereof" by the plaintiff, and thus the question arises, what constitutes the receipt of the proceeds of the sale, within the purview of section 1158 above quoted? Defendant's counsel contends that the proceeds as applicable to voluntary sales of homestead consists in whatever the seller agrees to accept and receive as the consideration or payment for the homestead, be the same money, property, or anything else which represents property or value. This contention seems not only just upon principle, but, as might well be expected, is also sustained by the authorities. *Bailey v. Steve*, 35 N. W. 735, 70 Wis. 316; *Phelps v. Harris*, 101 U. S. 380, 25 L. Ed. 855; *Hoppe v. Goldberg*, 53 N. W. 17, 82 Wis. 660. Of course, the meaning of the term "proceeds" may be extended or restricted in accordance with the particular subject-matter out of which they arise, or with regard to the peculiar disposition or application to be made of them. With regard to a forced sale upon execution, the proceeds are, of course, always understood to be in the form of money, or some other medium of exchange, the equivalent of money; or, if an agent were empowered to sell goods, or collect accounts, and account for the proceeds derived therefrom, in the absence of an express agreement to the contrary, he would have to account in money, or in some medium of exchange which passed as such. When we have reference, however, to a voluntary sale or disposition of a homestead, within the provisions of section 1158, "proceeds," of necessity, and for the benefit of the owner, must be considered as comprising any tangible thing of value he is willing to accept. The exemption of a homestead, or the proceeds thereof, is grounded on public policy, and should not be restricted to money only. The different meanings applied to proceeds are shown in volume 6 of Words and

Phrases, under the title "Proceeds," commencing on page 5639, to which we refer for further illustration.

Plaintiff's counsel strenuously insist that the 10,000 brick and nothing else constituted the proceeds of the sale or exchange of plaintiff's homestead, and in view that they had not been segregated, that is, set apart as his brick, and had not been delivered to nor received by him within a year prior to the levy, that therefore they did not lose their exempt character, and were not subject to sale on execution. Upon the other hand, defendant's counsel contends with equal fervor that the proceeds of sale of plaintiff's homestead consisted of Peterson's promise and obligation to deliver the brick to plaintiff, and that plaintiff accepted this promise, and therefore received it in May, 1903, when the sale of the homestead took place, and that the promise and obligation, that is, the debt owing by Peterson to plaintiff, was exempt for a period of one year and no longer. This brings us to the real question in this case, to wit, what is meant by the phrase in section 1158, in referring to the proceeds, that they shall be exempt "for one year after the receipt thereof"? The section should be construed, if possible, so as to carry into effect the obvious purpose and intention of the Legislature in adopting it. Statutes of this kind are grounded upon sound public policy, and thus fall within the category of statutes usually favored by the courts, and hence are generally accorded what is termed a liberal construction, with the view of fully effecting the purpose aimed at by the Legislature in adopting them. While all this is true, courts cannot rightfully extend the period of time within which a certain class of persons may claim designated property as exempt from forced application to the payment of their debts. This power belongs to the Legislature, not to the courts. But this court should not by strict construction frustrate that which the Legislature sought to accomplish; nor should it do this by permitting the case actually presented to be determined upon principles other than those applicable to the facts, simply because it might be easier to do so, or because from an apparent analogy the case seems to fall within a class of decisions which are, in fact, based upon statutes greatly differing from our own. By adopting section 1158 the Legislature evidently intended that the owner of a homestead should enjoy the fullest opportunity to use and to dispose of it and to have one full year in which to acquire another with the proceeds derived from the first, and for that purpose to be in actual possession of such proceeds, so that he may apply them to the purpose intended. If the Legislature did not intend just this, it would have been easy for it to have limited the time within which another homestead was to be acquired to one year from the sale of the first. The mere fact that the terms "proceeds" and the "receipt thereof" are used is conclusive that

it was not intended to limit either the medium that could be accepted, or the time in which it must be received; but the time for which the "proceeds" are exempt only was limited to one year "after the receipt thereof." The owner may thus take sheep, cattle, horses, or any other species of property in exchange for his homestead, and whatever he receives retains its exempt character for the period of one year after he has received it. It is contended, however, that if plaintiff had received sheep, cattle, horses, or a promissory note, or any other tangible property for his homestead, and had not converted what he received into another homestead within one year thereafter, the property received would, after that time, have been subject to levy and sale on execution. This, no doubt, is true, but does the mere promise of Peterson to deliver 10,000 brick not then in existence, and at no time, not even constructively, delivered to plaintiff, constitute the receipt of the proceeds for the homestead, as contemplated in section 1158?

It is urged that the promise and obligation of Peterson to deliver the brick constituted the thing of value, that it could have been reached by the process of garnishment, that the plaintiff could have made the promise available by giving an order on Peterson, or by the assignment of the claim. That plaintiff could have given the order on Peterson for the claim, if he had found some one willing to take it, and that it was a subject of assignment, cannot be doubted. Whether it was subject to successful garnishment, without the consent of plaintiff, is, however, another question. Suppose plaintiff had sold his homestead for cash, or had exchanged it for other property upon an oral promise that the money would be paid, or the property taken in exchange delivered within 10, 30, or any other number of days; would the time limit of one year begin to run from the date of the sale or exchange, when the promise to pay or deliver was made, or from the time plaintiff received the cash or other property as the consideration for his homestead? If it was intended to limit it from the former, why did not the Legislature fix the time from the sale or exchange rather than from the date of the receipt of either cash or other property agreed to be received? Is it not manifest that the Legislature intended that the owner of a homestead who parts with it should be in actual possession of the means with which to acquire another for the full period of one year after its receipt, and that within that time that which is received for the homestead shall be just as immune against forced seizure or sale under any process as the homestead would be? Why fix the limit of time one year after the receipt of the proceeds, if it was intended to give only one year from the sale or exchange of the homestead? For argument's sake it may be conceded that if plaintiff had taken a

promissory note, secured or unsecured, the note and security might constitute the proceeds, but in such a concession is embodied the fact that the note and security would be recognized as property as easily convertible into money or as readily exchangeable for other property as would sheep, cattle, horses, or other personalty. Moreover, it might then be argued that the owner had actually received something tangible. Does a mere oral promise take the place of the proceeds, and the receipt thereof, as mentioned in section 1158? We think not. If such had been the intention of the Legislature, the statute would have been worded differently, as we have already pointed out. Quite true, if a person exchanges his homestead for nonexempt property, which he cannot convert into a homestead within one year, such property loses its exempt character after that time, and is subject to forced sale. The Legislature, however, it seems to us, clearly indicated that the property agreed to be taken in exchange for the homestead, or in case the property itself is not received, then, at least, that which represents it is a substitute therefor, must be received. In other words, it was intended that the seller should receive something tangible, and not merely an intangible promise or obligation from the purchaser. If, for instance, the owner of a homestead should sell it to his neighbor for \$1,000, and the neighbor took possession under a conveyance, but did not expressly promise to pay the amount, and no time for payment being fixed, the law would supply both the promise to pay and a reasonable time within which the payment must be made. In such a case would the implied promise constitute the proceeds, and if not why should any express promise to pay do so? Of course, it might be contended that a promissory note, even if secured, is only the evidence of the promise. But this may be so with regard to bank notes, or some other such evidences that pass as a medium of exchange. They all are matters of substance, however capable of manual delivery and receipt. But the question of whether the receipt of a promissory note would or would not be deemed a receipt of the proceeds under section 1158 is not before us now, and we do not decide that question. We have alluded to it merely to make clearer, if possible, our conclusions. We think, therefore, that the proceeds mentioned in section 1158 has reference to some tangible thing which is the subject of manual delivery and receipt. Further, that "the receipt thereof" likewise means more than a mere right to have or acquire possession of such proceeds. It evidently was not intended that the person who has disposed of his homestead should lose the benefit of the exemption by being compelled to go into court to obtain actual possession of the proceeds. If this were so, the year given him to acquire another homestead might have gone

by, and thus he would be deprived of the means to acquire another homestead. To hold that a mere right to the proceeds, which another may dispute or withhold, constitutes "the receipt thereof," would simply present another case of keeping the word of promise to the ear while breaking it to the hope. It follows, therefore, that the district court erred in sustaining the demurrer.

The judgment is reversed, the cause remanded, with directions to the district court to overrule the demurrer, grant the defendant leave to answer, if he desires to do so, and to proceed with the case in accordance with the views herein expressed; appellant to recover costs.

MCCARTY, G. J., and STRAUP, J., concur.

On Rehearing.

FRICK, J. An application for rehearing is made in this case in which it is strenuously insisted that this court erred in the conclusion reached. Four reasons are assigned why a rehearing should be granted, namely: (1) That the court erred in holding that the appellant had "sold his homestead for bricks and adobes and not for money"; (2) that the court erred in holding "that the agreement for sale was oral"; (3) that the court erred in holding that appellant "had not received the bricks more than a year before they were taken by appellant (respondent)"; (4) that the court erred in holding that the complaint states a cause of action.

As to the first ground, we remark that counsel for respondent has manifestly overlooked or forgotten the construction he placed upon the complaint in his original brief and upon the oral argument in this court. In his brief he says: "The complaint alleges * * * that before the said month of May, 1903, he [appellant] sold said real estate to James E. Peterson for \$100, which sum was to be paid by the delivery to plaintiff [appellant] of some brick in the summer or fall of 1904." Then the statement follows in the brief that the brick were levied on by the sheriff (respondent) by virtue of an execution issued upon a judgment in favor of a third person named. The foregoing statement of counsel is a complete answer to his first objection, in that it concedes that the \$100 was merely a statement of the amount due which was to be paid or satisfied by the delivery of the brick.

With respect to the second ground, it is true that the complaint did not in terms allege whether Peterson's promise was evidenced by a writing or not. It was argued by appellant's counsel in their brief, and stated in open court on the oral argument, however, that the promise was oral, all of which was not denied by respondent's counsel. In fact counsel stated in open court that he had no knowledge upon the subject, but contended that this promise, whether oral or writ-

ten, constituted the proceeds of sale. The case was submitted by both parties upon this theory, and hence decided accordingly.

As to the third ground, we need do no more than to refer to the statement of counsel for respondent with regard to how he understood the complaint. In his brief he says: "From the whole complaint it seems that at the time of the levy by the defendant [respondent] the plaintiff [appellant] did not have the brick upon the new homestead when [where] he said he intended to use them in building a house. * * * The inference is that Peterson had the brick in his possession, the plaintiff [appellant] regarding himself as the actual owner. * * * Admitting that all the allegations of the complaint are true, as we were bound to do, the defendant [respondent] claimed in the lower court that the brick taken as alleged were not exempt as the proceeds of the sale of the homestead of the plaintiff [appellant], which point was raised by the demurrer and sustained." From counsel's own statement, therefore, he presented, and desired to present, but the one question, namely, whether the brick were or were not exempt. We thus deemed it best to avoid all purely technical questions, and did so.

Upon the last ground it is urged that we erred in holding that the complaint was sufficient to withstand a general demurrer. Upon this point we remark that the complaint was framed upon the theory of trover. Some evidentiary facts were alleged which were not necessary to a complete statement of a cause of action. All of the allegations taken together, however, amounted only to an artificial statement of a complete cause of action, and the complaint was clearly sufficient within the rule announced by Mr. Justice Straup in *Casady v. Casady* (Utah) 88 Pac. 32. The essential allegations were ownership, unlawful taking, conversion of the brick, and their value. This was alleged, and was admitted by the demurrer; but, as appellant had alleged the judgment, execution, and levy by the respondent, counsel attempted to raise all the legal questions by demurrer to the complaint. He, however, overlooked, and still seems to disregard, the fact that appellant did not allege a sale of the brick on the execution, but simply alleged the levy, and then alleged that on a certain day thereafter respondent wrongfully and unlawfully converted the brick to his own use. In the face of these allegations, admitted as they were by the demurrer, respondent could not have prevailed, although the brick had not been exempt. Respondent could, by virtue of the execution, lawfully seize the brick; but if thereafter, as alleged, he wrongfully and unlawfully converted the same to his own use, he was liable whether the brick were exempt or not. This technicality we overlooked in favor of respondent, because both parties urged at the hearing that they desired the

question of exemption determined, and for that purpose the allegations in the complaint were to be deemed sufficient. In deference to the wishes of counsel, we did so. In view of the allegations of the complaint, respondent at least cannot complain.

In connection with the last ground it is finally urged that the final conclusion is inconsistent with the following statement contained in the opinion, namely: "The mere fact that the terms 'proceeds' and 'the receipt thereof' are used is conclusive that it was not intended to limit either the medium that could be accepted, or the time in which it must be received, but the time for which the 'proceeds' are exempt only was limited to one year 'after the receipt thereof.'" In reference to this statement counsel says: "How the two holdings can be reconciled we do not see, and perhaps it is not necessary that we should." We confess that we did not think the confusion was quite so serious. It is certainly our aim to bring the logic of our statements within the comprehension of counsel. It is quite possible that sometimes we fail in this, but it is equally possible that the fault sometimes is with counsel. Taking the foregoing statement as an illustration, counsel's misconception arises out of the fact that he simply assumes that the "proceeds of sale" are received at the time the promise to pay them is made. He overlooks the distinction between the agreement to pay money or to deliver some other article, and the actual payment or delivery of the article. If counsel's contention that the acceptance of the promise or agreement to pay money, or in lieu thereof, to deliver other articles of value, constitutes receipt of the proceeds of sale, is correct, what is it that the homestead claimant receives when payment or delivery is actually made? In such event does the claimant receive the proceeds of the sale twice, once when he enters into the agreement to receive, and again when he actually receives the money or thing for which he sold or exchanged his homestead? Is not the conclusion palpable that it is the substance received in exchange for the homestead and not the promise to pay or deliver it that is intended in the statute as constituting the proceeds of sale? A promise to pay cannot, by argument, however ingenious, be made the equivalent of actual payment, and hence the entering into an agreement to receive proceeds is not tantamount to the actual receipt thereof. This would be so whether the promise was oral or in writing.

Counsel's suggestion that, if it be held that the acceptance of the promise or agreement to receive does not constitute the receipt of the proceeds, the seller of the homestead may sell on time and thus hold the proceeds as an investment free from execution does not necessarily follow. The statute was enacted for his protection and to insure for himself and family a home. When a case

arises where it appears that the homestead claimant is evading the statute, it will then be proper for the court to pass upon the question whether the homestead claimant is entitled to the exemption or not in view of the facts involved. This case is free from such complications, and hence should not be hampered with them, although a possibility may exist that they may arise in some assumed case. In this case we held that the acceptance of a mere promise to deliver brick did not constitute the receipt of the "proceeds of sale," although the brick may constitute such proceeds; that an agreement to pay the proceeds at some future time was not tantamount to the receipt thereof; and that the acceptance of a promise to pay may be one thing, and the fulfillment thereof quite another thing.

No valid reason having been advanced why a rehearing should be granted, the application therefor should be, and accordingly is, denied.

McCARTY, C. J., and STRAUP, J., concur.

(32 Utah, 418)

STATE ex rel. PEART et al. v. THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, et al.

(Supreme Court of Utah. May 9, 1907. On Rehearing, Aug. 1, 1907.)

1. JUSTICES OF THE PEACE—APPEAL—NOTICE OF FILING OF UNDERTAKING.

Under Rev. St. 1898, § 3748, relating to appeals from a justice's court to a district court, and providing that on the filing of an undertaking on appeal notice thereof shall be given the adverse party, who may, within two days, except to the sufficiency of the sureties, notice merely of an intention to file an undertaking will not support an appeal, but under that section notice that the undertaking has been filed must be given.

On Petition for Rehearing.

2. SAME—NOTICE OF APPEAL—TIME OF FILING.

Under Rev. St. 1898, § 3744, requiring an appeal from a justice's court to a district court to be taken by filing notice thereof with the justice and serving a copy on the adverse party, the filing of a notice must either precede its service, or the filing and service must be contemporaneous, that is, on the same day.

3. SAME—APPELLATE JURISDICTION—CHANGE OF LAW.

The jurisdiction of a district court of an appeal from a justice's court must be determined with regard to the law at the time of that appeal.

Application by the state, on relation of Jacob Peart and others, for a writ of prohibition against the Third judicial district court, Salt Lake county, and T. D. Lewis, judge. Writ issued.

E. A. Walton, for petitioner. James Ingebritzen, for respondent.

STRAUP, J. This is an application made to this court for a writ of prohibition. The relator obtained a judgment in the justice

court against one William Hendrickson which was rendered on the 23d day of September, 1904. On the 28th day of that month the attorney for Hendrickson served on the attorney of the relator a notice of an appeal from the justice court to the district court, and at the same time served a notice "that the defendant is about to file his undertaking on appeal with ———," sureties, naming them. Both notices were filed in the justice court on the 1st day of October, but the undertaking was not filed until the 4th day of October. The transcript of the record was transmitted by the justice to the district court on the 24th day of October. On the 31st day of December the relator moved the district court to dismiss the appeal for want of jurisdiction. The motion was denied, and hence the application is here made to prohibit the district court from assuming jurisdiction of the case and trying it on merits.

Section 3748, Rev. St. 1898, relating to appeals from the justice court to the district court, provides: "When an undertaking on appeal is filed, notice of such filing shall be given to the respondent. * * * The adverse party may, however, except to the sufficiency of the sureties within two days after notice of the filing of the undertaking, and unless they or other sureties justify before the justice from whose court the appeal is taken, within two days thereafter, upon notice to the adverse party, the appeal shall be regarded as if no undertaking had been given." Section 3747 provides that an appeal from a justice court shall not be effectual for any purpose unless an undertaking be filed within five days after filing the notice of appeal. The contention made by the relator is that the defendant Hendrickson was required to give notice, not of an intention of filing an undertaking, but notice of the filing of the undertaking; that such a notice was not given, and hence the filing of the undertaking must be regarded as no undertaking, and therefore the appeal is ineffectual and the district court is without jurisdiction. We think the position is well taken.

The filing of the undertaking and the serving of notice of such filing is by statute made a prerequisite to effectuating an appeal. To hold that a notice of a mere intention to do so, which the adverse party is bound to respect and treat as a compliance with the statute, makes it incumbent upon him to watch the record during the period within which an appeal might be taken, in order that he may not lose his right to except to the sufficiency of the sureties. To so hold, would give a party appealing from a justice court the right to serve his notice of appeal and notice of intention of filing an undertaking the day after the rendition of the judgment, hold both and file them on the thirtieth or last day on which an appeal might be taken, and then within five days thereafter file the undertaking, during all

of which time the adverse party would be under obligation to watch the record in order that he may avail himself of the privilege of excepting to the sufficiency of the sureties. If, on the other hand, it should be said that the exception could be made within two days after the service of the notice of intention, it is apparent that such exception would be of no legal effect, because there would be no undertaking on file, to the sureties of which he could properly take exception. In this case six days intervened between the service of the notice of the intention and the filing of the undertaking. The statute provides that the adverse party may except to the sufficiency of the sureties within two days "after notice of the filing of the undertaking." Had the relator excepted to the sufficiency within two days after the service made upon him, he would have found that no undertaking was on file. He was not bound to keep watch of the record thereafter, and to take notice of the filing of the undertaking when made, for the statute plainly requires notice of the filing of the undertaking. We, however, do not wish to be understood as saying that notice of filing an undertaking cannot be given at the same time or on the same day that the undertaking is filed, although the service of notice, in point of time, precedes the filing of the undertaking. What we do say is, that a party appealing cannot serve his notice of appeal and a mere intention of filing an undertaking, hold them at his pleasure, and then file them, together with the undertaking, any time thereafter within the period in which an appeal may be taken, without giving notice of the filing of the undertaking, and thus compel the adverse party to watch the record during all that time in order that he may not lose his right to except to the sufficiency of the sureties. The evident purpose of the statute was to obviate just such a difficulty, by requiring the giving of notice of the filing of the undertaking.

Let the writ issue. Such is the order.

MCCARTY, C. J., and FRICK, J., concur.

On Rehearing.

STRAUP, J. In our original opinion we reached the conclusion that the district court was without jurisdiction because no notice was given of the filing of the undertaking as required by statute. At the hearing a further point was made, that the notice of appeal was ineffectual because served on the 28th day of September and filed on the 1st day of October. Having held that the district court was without jurisdiction because of the first point, we deemed it unnecessary to determine whether it also was without jurisdiction because of the second point. On petition for rehearing the respondent complains because the second point was not decided, principally for the reason, as is stated, that there are other cases pend-

ing in the district court awaiting a decision of this question. We have concluded to decide it without granting a rehearing.

The statute provides that "the appeal [from the justice court to the district court] shall be taken by filing a notice thereof with the justice and serving a copy on the adverse party." Under this statute the plaintiff contends that the notice must be first filed and then served, or that the filing and service must be contemporaneous, that is, on the same day; and as the notice was served on the 28th day of September and filed on the 1st day of October it, for that reason, was ineffectual, and the court was without jurisdiction. The decisions are not harmonious upon the question. The following cases hold that under such a statute the filing of the notice must either precede or be contemporaneous with the service, else it will be ineffectual: *State v. Dist. Court*, 34 Mont. 112, 85 Pac. 872; *McCauley v. Jones* (Mont.) 88 Pac. 572; *Buffendeau v. Edmondson*, 24 Cal. 94; *Lynch v. Dunn*, 34 Cal. 518; *Lyon County v. Washoe County*, 8 Nev. 177; *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657; *Courtright v. Berkina*, 2 Mont. 404; *Slocum v. Slocum*, 1 Idaho, 589; *State v. Superior Court*, 17 Wash. 54, 48 Pac. 733. The following cases seem to hold that the order of filing and service of the notice is immaterial, if both are done within the time the statute prescribes an appeal may be taken: *Coker v. Superior Court*, 58 Cal. 177; *Hall v. Superior Court*, 68 Cal. 24, 8 Pac. 509; *Hall v. Superior Court*, 71 Cal. 551, 12 Pac. 672; *Reynolds v. Corbus*, 7 Idaho, 481, 63 Pac. 884.

We are unable to harmonize these conflicting views. We are inclined to the view that the filing of the notice must precede the service, or that the filing and service must be done at the same time, that is, on the same day. We think this is so, for the reasons stated by the courts in the cases first cited, which are, that the filing of the notice is made a constituent element of its character as a notice, and if the filing does not precede the service, nor is contemporaneous therewith, that which may purport to be a copy of a notice fails to be such for the want of an original or counterpart, and that it compels the respondent to continually watch the clerk's or the justice's office to see when it is done. We are somewhat led to this conclusion because of the amending of section 3744, Rev. St. 1896, making the order of service immaterial. Sess. Laws 1907, p. 257, c. 160, § 3744. Before making the amendment the Legislature evidently considered the order of service material. If not, the amendment was useless. This amendment was made more than two years after the appeal from the justice to the district court was taken and the ruling on the motion to dismiss the appeal was made.

We are asked to consider the question of the court's jurisdiction with respect to the amendment. We cannot do so. The juris-

diction of the court must be determined as the law was when the appeal was taken.

We are of the opinion that the notice of appeal was ineffectual, and that the court, also, for that reason, was without jurisdiction.

Let the petition for rehearing be denied. It is so ordered.

MCCARTY, C. J., and FRICK, J., concur.

(29 Nev. 375)

PORTEOUS DECORATIVE CO., Incorporated,
v. FEE. (No. 1,713.)

(Supreme Court of Nevada. July 30, 1907.)

MECHANICS' LIENS—STATEMENT OF LIEN—SUFFICIENCY.

A mechanic's lien claim, stating that it is for "outside work on house and painting of inside blinds, \$190," does not substantially comply with Comp. Laws, § 3835, requiring the claimant of a mechanic's lien to file a statement setting forth the terms, time given, and conditions of the contract, and is insufficient to support a lien.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 239.]

Appeal from District Court, Washoe County.

Action by the Porteous Decorative Company, Incorporated, against Dr. George Fee. From a judgment for defendant, and from an order denying its motion for a new trial, plaintiff appeals. Affirmed.

Mack & Shoup, for appellant. Boyd & Salisbury, for respondent.

SWEENEY, J. An action was instituted in the district court of the Second judicial district in Washoe county to foreclose a lien filed by the Porteous Decorative Company against Dr. George Fee. During the opening of plaintiff's case, which was tried before the court without a jury, plaintiff's attorney offered in evidence the lien in question, to which defendant's attorney objected upon the ground that the "lien is void and invalid, in that it does not conform to the requirements of the statutes of our state upon the ground that the claim of lien fails to state the terms, the time given, or the conditions of the contract upon which the same is based as required by the statute." The court sustained said objection upon the ground "that the lien is defective . . . in not stating the terms of the contract which was entered into," and rendered judgment against plaintiff in favor of defendant for his costs. From this judgment and order denying plaintiff's motion for new trial, plaintiff appeals.

The part of the objection sustained by the lower court being fatal to appellant's contention, it will be unnecessary to consider any other objections urged by counsel. The testimony adduced at the hearing of this action discloses that an express oral contract was entered into between appellant and respondent, and plaintiff's complaint is based on an express contract. An averment in the

complaint of appellant alleges: "That on or about the 4th day of June, 1906, at the city of Reno, Washoe county, Nev., the plaintiff and defendant entered into an agreement, whereby the plaintiff agreed to furnish the labor and material and make certain alterations and repairs upon the premises of the defendant known as 'No. 141 Sierra Street,' lot 7, block 5, city of Reno, Washoe county, state of Nevada, and the defendant agreed to pay the plaintiff therefor the prices as set forth in the plaintiff's statement and claim of lien, amounting to the sum of \$221.93, a copy of which statement and claim of lien is hereto attached, marked 'Exhibit A,' and made part of this complaint"—and further avers that all of said work and material were furnished in accordance with the terms thereof. Respondent denies the material allegations of the complaint, and avers that the work agreed upon in said contract was to be for no greater sum than \$190, specially denies that respondent fully performed the conditions of the contract entered into between them, and in the way of a further and separate and distinct defense to said action sets forth: "That * * * plaintiff commenced the work of painting and repairing the said house and fence, but that the said work was done in a careless and negligent manner so as to be of little or no benefit to the said dwelling house and fence; that plaintiff painted portions of the said house with two coats of paint, and other portions of the house with only one coat of paint; and that the said house and fence still remain incomplete." The terms and conditions required to be set forth in the lien therefore become of vital importance.

The lien in question contains the following item: "Outside work on house and painting of inside blinds, \$190," by which it is attempted to set forth in the said lien terms and the conditions or things to be done for the money agreed upon in the contract on which this lien is based and asked to be foreclosed. A statutory lien can only legally exist when it is perfected in the manner prescribed by the statute creating it, and, being a statute of a remedial nature, we believe should be liberally construed, and that a substantial compliance with the law is sufficient to create a valid lien. *Skyrme v. Occidental M. & M. Co.*, 8 Nev. 221; *Hunter v. Truckee Lodge*, 14 Nev. 28; *Lonkey v. Wells*, 16 Nev. 274; *Maynard v. Ivey*, 21 Nev. 245, 29 Pac. 1090. There are, however, certain plain requirements prescribed by the statute which are legally essential to the validity of every lien and without which it cannot exist or be enforced. As is well stated by Phil. Mech. Liens, § 9, a lien is "a remedy given by law which secures the preference provided for, but which does not exist, however equitable the claim may be, unless the party brings himself within the provisions of the statute, and shows a sub-

stantial compliance with all its essential requirements." As stated in the case of *Malter v. Falcon Mining Co.*, 18 Nev. 213, 2 Pac. 51, "whatever is made necessary to the existence of the lien must be performed, or the attempt to create it will be futile. A substantial adherence to the terms of the statute in the notice of the lien is indispensable. The omissions, if any, in the notice and claim as recorded, cannot, in essential particulars, be aided by any averments in the complaint or by extrinsic evidence." *Bertheolet v. Parker*, 43 Wis. 551; *Santa Monica L. & M. Co. v. Hege*, 119 Cal. 379, 51 Pac. 555; *Malone v. Big Flat, etc., Co.*, 76 Cal. 578, 18 Pac. 772; *Reed v. Norton*, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426; *Wagner v. Hansen*, 103 Cal. 104, 37 Pac. 195.

The object of a lien, in addition to notifying the owner of what is claimed and securing the lienor's rights, is to apprise prospective purchasers, or persons who might desire to become interested in the property, of the nature of the claim against the property, and under what conditions, if they acquire the property, they must assume the same. Our statute provides, among other things, that a lien must contain a statement of the terms, time given and conditions of the contract." Section 3885, Comp. Laws. No one can definitely say from the vague statement in the lien purporting to set forth the conditions of the contract upon which this lien is based whether or not the house was to receive one, two, or three coats of paint, or whether the "outside work on the house" called for the shingling of the roof, the construction of an additional porch, or the building or repairing of a fence or walk around the premises, and would not be sufficiently explicit to a prospective purchaser of the property, or to any one who might desire to become interested in the same, whether, if he assumed the lien, he would secure the value called for by the contract upon which the lien was based. Wherever an express contract is entered into, as was the case in the present action, the terms and conditions of such contract should be substantially set out in the lien filed sufficiently clear to inform any reasonable person of what work was intended to be performed or material furnished as originally agreed on between the parties.

The vague statement in the lien heretofore quoted, attempting to state the terms and conditions of the contract, does not substantially comply with this essential provision of the statute, and thereby renders the lien void. Nothing in this judgment shall be construed as affecting the rights of the parties, except in so far as it relates to the validity of the lien.

The judgment of the lower court is affirmed.

TALBOT, C. J., and NORCROSS, J., concur.

Ex parte TANI. (No. 1,721.)

(Supreme Court of Nevada. July 30, 1907.)

CRIMINAL LAW — SENTENCE — ERRONEOUS IN PART—EFFECT.

On conviction of a felony, the sentence imposed was within the discretion vested in the district court as to the amount of the fine and the time of alternative imprisonment in the event the fine was not paid, and was erroneous only in that it declared that such alternative imprisonment should be in the state prison, whereas, under the express provisions of Comp. Laws, § 2267, it should have declared that the same should be in the county jail. *Held*, in habeas corpus proceedings, that such direction as to the place of imprisonment might be rejected as surplusage, and did not vitiate the entire sentence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3320, 2528, 3318.]

Application by S. Tani for a writ of habeas corpus against the warden of the state prison. Denied, and the warden of the state prison directed to deliver petitioner to the sheriff of Washoe county, to be by him detained in the county jail for the remainder of the term of imprisonment imposed by his sentence, unless the part of the fine remaining unsatisfied be sooner paid.

Benj. Curlier, for petitioner. R. C. Stoddard, Atty. Gen., for the State.

TALBOT, C. J. Defendant was indicted for the crime of assault with intent to kill. He entered a plea of guilty of assault with a deadly weapon with intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, and the sentence of the court was that he be fined \$1,000, and, in the event the fine be not paid, that he be imprisoned in the state prison for a period of 500 days, or one day for each and every \$2 of the fine not satisfied. No payment being made, he was committed to the custody of the warden of the state prison, and now asks to be released by writ of habeas corpus, asserting that the district court was without jurisdiction to confine him in that institution, and that therefore the sentence is void.

Section 4701 of the Compiled Laws of Nevada provides: "An assault with a deadly weapon, instrument, or other thing, with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant heart, shall subject the offender to imprisonment in the state prison not less than one year, or exceeding two years, or to a fine not less than one thousand nor exceeding five thousand dollars, or to both such fine and imprisonment." Section 3988: "A felony is a public offense punishable with death, or by imprisonment in the territorial prison." Section 4413: "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which shall not

exceed one day for every two dollars of the fine, or in that proportion." Section 4418: "If the judgment be imprisonment, or a fine and imprisonment until it be satisfied, the defendant shall forthwith be committed to the custody of the proper officer, and by him detained until the judgment be complied with." Section 4646: "If the fine be not paid the court may order the defendant to be imprisoned one day for each two dollars of the fine not paid." Section 2267: "Whenever any prisoner, under conviction for any criminal offense, shall be confined in jail for any inability to pay any fine, forfeiture, or costs, or to procure sureties, the district court, upon satisfactory evidence of such inability, may, in lieu thereof, confine such person in the county jail, at the rate of two dollars per day, until the fine, forfeiture, or cost so imposed shall have been satisfied." Section 3761 provides that it shall be the duty of the judge hearing the writ of habeas corpus, "if the time during which such party may be legally detained in custody has not expired, to remand such party, if it shall appear that he is detained in custody by virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree, or in cases of contempt of court"; and section 3762 that: "If it appears on the return of the writ of habeas corpus that the prisoner is in custody by virtue of process from any court of this territory, or judge or officer thereof, such prisoner may be discharged, in any one of the following cases, subject to the restrictions of the last preceding section: First—When the jurisdiction of such court or officer has been exceeded. Second—When the imprisonment was at first lawful, yet by some act, omission, or event, which has taken place afterwards, the party has become entitled to be discharged. Third—When the process is defective in some matter of substance required by law, rendering such process void. Fourth—When the process, though proper in form, has been issued in a case not allowed by law. Fifth—When the person having the custody of the prisoner is not the person allowed by law to detain him. Sixth—Where the process is not authorized by any judgment, order, or decree of any court, nor by any provision of law."

On behalf of petitioner, it is urged that under section 2267 the district court was without jurisdiction to order the defendant imprisoned in any place other than the county jail, and that the direction in the judgment that he be confined in the state prison, in lieu of payment of the fine, was unauthorized and rendered the whole judgment void. Of the cases relied upon by him the first four following support this contention: In *Ex parte Page*, 49 Mo. 291, the sentence of 10 years for grand larceny was excessive, and it was held that the court had no power to reduce the term of imprisonment so as to bring it within the statutory limit, and the

prisoner was discharged. In *Ex parte Cox*, 32 Pac. 197, 3 Idaho (Hasb.) 530, 95 Am. St. Rep. 29, an Idaho case, defendant was convicted of an assault with a deadly weapon likely to produce great bodily harm, and sentenced to confinement in the state prison for the term of five years, when the statutory penalty was imprisonment not exceeding two years, or a fine of \$5,000, or both. The judgment was declared void, and the petitioner released. In *Ex parte Kelly*, 65 Cal. 154, 3 Pac. 673, it was held that the portion of the judgment requiring the performance of labor on the streets was not authorized, that the judgment was a unit, and that this portion of it, being without the jurisdiction of the court, made the whole void. *Ex parte Bernert*, 62 Cal. 524, is of similar effect.

But the views of the courts regarding the proposition involved are as numerous and varied as the different liquors from the magician's bottle. The most of the decisions, and especially those more in consonance with reason and justice, are averse to the discharge of criminals who have been duly convicted when the application for their release is by petition for habeas corpus based on some error, omission, or mistake in the sentence which might have been cured or corrected by writ of error or appeal. As we shall see, the Supreme Court of California has not always been consistent in its opinions, and the doctrine advanced by the foregoing cases has been severely criticised by the Supreme Courts of the United States, of Pennsylvania, and Massachusetts, and is contrary to the weight of authority.

In *Ex parte Max*, 44 Cal. 580, it was said: "The application for the writ of habeas corpus made here proceeds upon the ground that the judgment, under the circumstances appearing, is not merely erroneous, but is void in the absolute sense, and so affords no authority to the warden of the prison to detain the petitioner. We are of opinion, however, that the position cannot be maintained. The indictment upon which the judgment is founded is sufficient in all respects. The offense of which the petitioner was convicted was one within the scope of the indictment, and the judgment one which the county court had the authority to render upon the appearance and plea of the petitioner. These conditions constitute jurisdiction. All others involve questions of mere error, and the latter cannot be inquired into upon writ of habeas corpus, but only upon proceedings in error. The obvious distinction between the office of a writ of error or an appeal, on the one hand, and a writ of habeas corpus upon the other, was not presented, but was overlooked in *Ex parte Ah Cha et al.*, 40 Cal. 426, which was a writ of habeas corpus heard and determined at chambers, and that case must in that respect be overruled."

In *Ex parte Mooney*, 26 W. Va. 36, 53 Am. Rep. 59, it was held that, where the court has jurisdiction of the subject-matter and of

the person, and pronounces a severable judgment or sentence, one part of which is authorized by law, and another distinct part which is not authorized, the prisoner will not be discharged on habeas corpus, when it does not appear that he has undergone the full punishment imposed by the legal portion of the sentence. It was said that, as to that part which the court had the power to pronounce, the sentence was valid upon proceeding for habeas corpus; that errors which rendered the judgment merely voidable and not absolutely void could not be inquired into under such a writ (citing *In re Prime*, 1 Barb. [N. Y.] 340; *State v. Shattuck*, 45 N. H. 211; *Ross' Case*, 2 Pick. 171; *Ex parte Watkins*, 8 Pet. [U. S.] 201, 7 L. Ed. 650), and that, if the judgment is in excess of that which the court rendering it by law had the power to pronounce, such judgment is void for the excess only (citing *Brook's Case*, 4 Leigh [Va.] 669; *Murry's Case*, 5 Leigh [Va.] 724; *Hall's Case*, 6 Leigh [Va.] 615, 29 Am. Dec. 236; *People v. Liscomb*, 60 N. Y. 560, 19 Am. Rep. 211; *Feeley's Case*, 12 Cush. [Mass.] 598; *Ex parte Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55; *People v. Markham*, 7 Cal. 208; *People v. Baker*, 89 N. Y. 467). At page 43 of 26 W. Va., in regard to the Missouri case (*Ex parte Page*) relied upon here by petitioner and cited above, it was said: "But, if that case could be regarded as decided upon principle, it must be disapproved, since it is not only contrary to the general rules hereinbefore stated, but it is in positive conflict with numerous other and seemingly better considered decisions of courts of other states. In *re Petty*, 22 Kan. 277; *Ex parte Parks*, 93 U. S. 18, 23 L. Ed. 787; *People v. Jacobs*, 66 N. Y. 9; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *People v. Baker*, 89 N. Y. 460."

In *People v. Cavanagh*, 2 Parker, Cr. R. (N. Y.) 662, release was sought from an erroneous sentence and imprisonment. It was held that there was no force in the point raised that the defendant should have been sentenced to the penitentiary and not to the county jail; that, if it were error to designate the county jail as the place of confinement, it could not be reviewed and corrected in a habeas corpus proceeding, and was no ground for his discharge.

In *Ex parte Bond*, 9 S. C. 80, 30 Am. Rep. 20, the prisoner had been convicted of an assault with intent to kill, and sentenced to confinement at hard labor in the penitentiary. The court held that the offense was not punishable by imprisonment in the state penitentiary; that the sentence was therefore erroneous, but not void, and refused to discharge the petitioner on habeas corpus.

In *People v. Kelly*, 97 N. Y. 212, upon a conviction for assault in the third degree, the sentence was to imprisonment at hard labor in the state prison for one year. The Court of Appeals held that the offense was a misdemeanor, that the sentence was ex-

cessive upon a valid conviction, but refused to discharge the prisoner and remanded him to the sheriff to be further dealt with by the trial court.

In *Re Graham*, 74 Wis. 451, 43 N. W. 148, 17 Am. St. Rep. 174, it was held that a judgment sentencing a person to imprisonment for a longer term than the statute authorizes is merely erroneous, and not void for want of jurisdiction. The court proceeded: "We deny the writs, for the reason that the error in the judgments does not render them void, or the imprisonment under them illegal, in that sense which entitles them to be discharged on a writ of habeas corpus. The judgments are doubtless erroneous, and would be reversed on writ of error." *Fitzgerald v. State*, 4 Wis. 395; *Haney v. State*, 5 Wis. 529; *Benedict v. State*, 12 Wis. 314; *Peglow v. State*, 12 Wis. 534. But the judgments are not void. *State ex rel. Welch v. Sloan*, 65 Wis. 647, 27 N. W. 616. The court had jurisdiction of the persons and subject-matter or offense, but made a mistake in the judgment. For mere error, no matter how flagrant, the remedy is not by habeas corpus. The law is well settled in this court that on habeas corpus only jurisdictional defects are inquired into. The writ does not raise questions of errors in law or irregularities in the proceedings. In *re Crandall*, 34 Wis. 177; In *re Pierce*, 44 Wis. 444."

In *Ex parte Van Hagan*, 25 Ohio St. 432, sentence had been pronounced under a statute which had been repealed. The Supreme Court of Ohio stated: "The punishment inflicted by the sentence, in excess of that prescribed by the law in force, was erroneous and voidable, but not absolutely void. It follows that a writ of error to reverse the proceedings or sentence is the remedy that the relator should have resorted to in order to obtain a discharge from illegal imprisonment, and not habeas corpus, which is not the proper mode of redress where the relator was convicted of a criminal offense and erroneously sentenced to excessive imprisonment therefor by a court of competent jurisdiction. *Ex parte Stephen M. Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55, approved and followed on this point."

In *Sennot's Case*, 146 Mass. 489, 16 N. E. 448, 4 Am. St. Rep. 344, it was claimed that the commitment of a juvenile offender to the state board to be sent to the Lyman School, was not authorized and was not the proper place. The Supreme Court of Massachusetts said: "If there was in the sentence or the prior proceedings any irregularity affecting the validity of the judgment, it can be corrected upon a writ of error. But neither irregularities nor errors, so far as they were within the jurisdiction of the court, can be inquired into upon a writ of habeas corpus. *Clarke's Case*, 12 Cush. (Mass.) 320; *Herrick v. Smith*, 1 Gray (Mass.) 1, 50, 61 Am. Dec. 381; *Adams v. Vose*, 1 Gray (Mass.) 51; *Ex parte Watkins*, 3 Pet.

(U. S.) 193, 7 L. Ed. 650; *Ex parte Siebold*, 100 U. S. 371, 373, 25 L. Ed. 717; In *re Underwood*, 30 Mich. 502; *Platt v. Harrison*, 6 Iowa, 79, 71 Am. Dec. 389. That a writ of habeas corpus cannot perform the functions of a writ of error, in relation to proceedings of a court within its jurisdiction, is universally agreed. The only conflict of authority touching the subject is in regard to what acts are open to inquiry upon the question of jurisdiction. It is held in this state, and by good authorities elsewhere, that the constitutionality of a law which a court is attempting to apply lies at the foundation of the jurisdiction under it, and may be called in question upon habeas corpus. *Herrick v. Smith*, 1 Gray (Mass.) 1, 49, 61 Am. Dec. 381; *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717; *People v. Roff*, 3 Parker, Cr. R. 216. But this doctrine has been contradicted, and action founded upon an unconstitutional law has been held a mistake which can only be corrected upon a writ of error. In *re Harris*, 47 Mo. 164. So there has been diversity of opinion among different courts as to sentences which are not authorized by law. The better rule seems to be that where a court has jurisdiction of the person, and of the offense, the imposition by mistake of a sentence in excess of what the law permits is within the jurisdiction, and does not render the sentence void, but only voidable by proceedings upon a writ of error. *Ross' Case*, 2 Pick. (Mass.) 165; *Feeley's Case*, 12 Cush. (Mass.) 598, 599; *Semler, Petitioner*, 41 Wis. 517; *Ex parte Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55; *Ex parte Van Hagan*, 25 Ohio St. 426; *Phinney, Petitioner*, 32 Me. 440; *Kirby v. State*, 62 Ala. 51; *Lark v. State*, 55 Ga. 435. It has sometimes been held that such a sentence is legal so far as it is within the provisions of law, and void as to the excess. *People v. Jacobs*, 66 N. Y. 8; *People v. Baker*, 89 N. Y. 460; *Bigelow v. Forrest*, 9 Wall. 339, 19 L. Ed. 696."

Extracts from other decisions pertinent to the inquiry at hand are:

Justice Holmes, speaking for the court, in *Re Stalker*, 167 Mass. 12, 44 N. E. 1068, said: "We assume, as contended for the petitioner that there was error in his sentence because it did not include solitary imprisonment. *Lane v. Commonwealth*, 161 Mass. 120, 122, 36 N. E. 755. But on a writ of error this could be corrected. Pub. St. 1882, c. 187, § 13; *Jacquins v. Commonwealth*, 9 Cush. (Mass.) 279. * * * Manifestly, it would be an absurd result if the petitioner could get his discharge on habeas corpus when he could not get it by a regular proceeding to reverse his sentence. But whether the sentence could be corrected or could not be, the rule which has been approved by this court denies relief by habeas corpus when the court has jurisdiction to sentence the petitioner, and errs simply in regard to the extent of the punishment. *Sennot's Case*, 146 Mass. 489, 492, 16 N. E. 448, 4 Am. St. Rep. 344; *Feeley's*

Case, 12 Cush. (Mass.) 598, 599. See *Ex parte Bigelow*, 113 U. S. 323, 5 Sup. Ct. 542, 28 L. Ed. 1005; *In re Belt*, 159 U. S. 95, 15 Sup. Ct. 987, 40 L. Ed. 88."

Petition of Bishop, 172 Mass. 36, 51 N. E. 191: "The general rule is that where the court has jurisdiction, and errs merely in regard to the punishment, relief will not be granted by habeas corpus, but that the remedy is by a writ of error, in which the mistake can be corrected and such sentence pronounced as should have been imposed. *Ross' Case*, 2 Pick. (Mass.) 165, 172; *Sennot's Case*, 146 Mass. 489, 16 N. E. 448, 4 Am. St. Rep. 344; *Stalker*, Petitioner, 167 Mass. 11, 44 N. E. 1068; *Ex parte Bigelow*, 113 U. S. 323, 5 Sup. Ct. 542, 28 L. Ed. 1005; *In re Belt*, 159 U. S. 95, 15 Sup. Ct. 987, 40 L. Ed. 88. In exceptional cases, relief may be granted by habeas corpus, or questions of constitutionality considered. *Feeley's Case*, 12 Cush. (Mass.) 598; *Plumley's Case*, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839. We discover nothing in this case which takes it out of the general rule."

In re Belt, 159 U. S. 100, 15 Sup. Ct. 988, 40 L. Ed. 88: "The general rule is that the writ of habeas corpus will not issue unless the court, under whose warrant the petitioner is held, is without jurisdiction; and that it cannot be used to correct errors. Ordinarily, the writ will not lie where there is a remedy by writ of error or appeal; but in rare and exceptional cases it may be issued, although such remedy exists."

Elsner v. Shrigley, 80 Iowa, 35, 45 N. W. 393; "In *Jackson v. Boyd*, 53 Iowa, 536, 5 N. W. 734, it is expressly stated that a failure to fix the time in the judgment 'would not render it void'; and also 'the extent of the imprisonment is fixed and declared by the statute, and when the defendant has been imprisoned the required length of time he is entitled to be discharged.' Without attaching to this language a broader significance than is required by the facts considered, it sustains the view that the law is a limitation as to the extent of the imprisonment, when no time is fixed in the judgment, and is against the view that the judgment is void because under it the imprisonment might be 'indefinite'; that is, to the time of the actual payment of the judgment. We reach the conclusion that habeas corpus is not available to question the correctness of the proceedings of the district court with reference to the judgment in question. Our conclusion has support, more or less direct, in many cases, and among them are *Turney v. Barr*, 75 Iowa, 758, 38 N. W. 550; *Hurd*, 114b. Corp. (2d Ed.) 328; *Cooley*, Const. Lim. 347; *Shaw v. McHenry*, 52 Iowa, 182, 2 N. W. 1096; *State v. Orton*, 67 Iowa, 554, 25 N. W. 775; *Platt v. Harrison*, 6 Iowa, 79, 71 Am. Dec. 389; *Zelle v. McHenry*, 51 Iowa, 572, 2 N. W. 264; *Herrick v. Smith*, 1 Gray (Mass.) 50, 61 Am. Dec. 381; *Adams v. Vose*, 1 Gray (Mass.) 51; *Ex parte Watkins*, 3

Pet. (U. S.) 193, 7 L. Ed. 650; *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717; *In re Underwood*, 30 Mich. 502; *Ross' Case*, 2 Pick. (Mass.) 165; *Feeley's Case*, 12 Cush. (Mass.) 598; *Semler*, Petitioner, 41 Wis. 517; *Ex parte Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55; *Ex parte Van Hagan*, 25 Ohio St. 426; *Phinney*, Petitioner, 32 Me. 440; *Kirby v. State*, 62 Ala. 51; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *Sennot's Case*, 146 Mass. 489, 16 N. E. 448, 4 Am. St. Rep. 344; *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872. It is said the judgment of imprisonment, by not fixing a limit, is indefinite; but the law itself defeats such a claim, for beyond its limits the judgment is void, and this proceeding is available for protection against illegal imprisonment."

In *People v. Kelly*, 97 N. Y. 212, the defendant had been convicted of assault in the third degree and sentenced to imprisonment at hard labor in the state prison, and it was held that, while the sentence was void, as the conviction was valid, the prisoner was not entitled to discharge upon habeas corpus, but should be remanded to the custody of the sheriff.

In *Re Harris*, 68 Vt. 243, 35 Atl. 55, on habeas corpus, it appeared that the petitioner was properly convicted. The sentence of imprisonment in the state prison was void. It was held that, while he was unlawfully in the state prison, he was not unlawfully restrained, and should be remanded to the sheriff of the county in which he was convicted to be resented.

In *Ex parte McGuire*, 135 Cal. 339, 67 Pac. 327, 87 Am. St. Rep. 103, it was held that the writ of habeas corpus lies not only when the prisoner is entitled to his liberty, but also when he is held by one person, and another is entitled to his custody. Chief Justice Beatty, speaking for the court, said: "My conclusion is that the imprisonment of the petitioner in the county jail, in execution of his sentence for the misdemeanor, is unwarranted and illegal; but it does not follow, as he contends, that he should be set at liberty. He is entitled to the benefit of the writ of habeas corpus only so far as necessary to secure him in his legal right to be placed in the proper custody. It is therefore ordered that he be remanded to the custody of the sheriff for the purpose of delivery forthwith to the warden of the state prison."

In *Kingen v. Kelley*, 28 Pac. 44, 3 Wyo. 566, 15 L. R. A. 177, the court quoted approvingly from *O'Brien v. Barr*, 49 N. W. 68, 83 Iowa, 51: "The imprisonment and its duration could alone be determined by the court. But fixing the particular penitentiary in which the petitioner should be confined is not a part of the judgment. The effect and duration of confinement is all that was judicially determined by the judgment."

In *Ex parte Waterman (D. C.)* 33 Fed. 29, the petitioner was sentenced to hard labor in the state prison at Auburn for three years,

but the marshal ascertained on his arrival with her that the state law did not allow female prisoners in that institution. Later the court, in her absence, made an order substituting the Erie county penitentiary. The court denied the petition for writ of habeas corpus, and remanded the prisoner, on the ground that the order fixing the place of imprisonment was not necessarily a part of the judgment.

In *Re McDonald*, 33 Pac. 22, 4 Wyo. 150, the court cited with approval *Elsner v. Shirlgley*, supra, and *People v. Foster*, 104 Ill. 156, and said: "The judgment * * * does not in itself fix the term or rate of imprisonment for the failure to pay * * * the fine imposed; but, if this were erroneous, it could only be reached by proceedings in error. It is not the office of a writ of habeas corpus to correct errors or irregularities of a trial court."

In *re Bonner*, 151 U. S. 258, 259, 260, 14 Sup. Ct. 323, 326, 327, 38 L. Ed. 149: "When the jury have rendered their verdict, the court has to pronounce the proper judgment upon such verdict, and the law, in prescribing the punishment, either as to the extent, or the mode, or the place of it, should be followed. If the court is authorized to impose imprisonment, and it exceeds the time prescribed by law, the judgment is void for the excess. If the law prescribes a place of imprisonment, the court cannot direct a different place not authorized. It cannot direct imprisonment in a penitentiary, when the law assigns that institution for imprisonment under judgments of a different character. * * * A question of some difficulty arises, which has been disposed of in different ways, and that is as to the validity of a judgment which exceeds in its extent the duration of time prescribed by law. With many courts and judges—perhaps with the majority—such judgment is considered valid to the extent to which the law allowed it to be entered, and only void for the excess. * * * The prisoner is ordered to be confined in the penitentiary, where the law does not allow the court to send him for a single hour. To deny the writ of habeas corpus in such a case is a virtual suspension of it, and it should be constantly borne in mind that the writ was intended as a protection of the citizen from encroachment upon his liberty from any source, equally as well from the unauthorized acts of courts and judges as the unauthorized acts of individuals. * * * The judges of all courts of record are magistrates, and their object should be, not to turn loose upon society persons who have been justly convicted of criminal offenses, but, where the punishment imposed, in the mode, extent, or place of its execution, has exceeded the law, to have it corrected by calling the attention of the court to such excess. We do not perceive any departure from principle or any denial of the petitioner's

right in adopting such a course. He complains of the unlawfulness of his place of imprisonment. He is only entitled to relief from that unlawful feature, and that he would obtain if opportunity be given to that court for correction in that particular.

* * * Some of the state courts have expressed themselves strongly in favor of the adoption of this course, where the defects complained of consist only in the judgment, in its extent, or mode, or place of punishment; the conviction being in all respects regular. In *Beale v. Commonwealth*, 25 Pa. 11, 22, the Supreme Court of Pennsylvania said: "The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogether, because the court committed an error in passing the sentence. If this court sanctioned such a rule, it would fall to perform the chief duty for which it was established."

This court has decided that the writ of habeas corpus is not intended to take the place of an appeal, writ of error, or certiorari, and cannot be used for the purpose of reviewing errors or irregularities in the proceedings of a court having jurisdiction (*Ex parte Smith*, 2 Nev. 338; *Ex parte Maxwell*, 11 Nev. 428; *Ex parte Winston*, 9 Nev. 71; *Ex parte Twohig*, 13 Nev. 302; *Ex parte Bergman*, 18 Nev. 331, 4 Pac. 209); that, if the prisoner is held under a valid commitment, the legality of other commitments need not be considered until his term of service under the good commitment has expired (*Ex parte Ryan*, 17 Nev. 139, 28 Pac. 1040; *Ex parte Ryan*, 10 Nev. 261); that under this writ the court will review the question of the constitutionality of an act under which petitioner has been convicted, and if the act is unconstitutional discharge him (*Ex parte Rosenblatt*, 19 Nev. 439, 14 Pac. 298, 3 Am. St. Rep. 901; *Ex parte Boyce*, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47; *Ex parte Kair*, 28 Nev. 127, 80 Pac. 463, and cases therein cited); that the petitioner will be released from an order committing him for contempt for an act not committed in the immediate view of the court, when the court was without jurisdiction to make such order by reason of its failure to first require an affidavit and to cite the offender to show cause why he should not be punished (*Ex parte Hedden*, 29 Nev. —, 90 Pac. 737); and that the addition of the words "at hard labor" in the sentence, although not authorized by statute, would be treated as mere surplusage and in no manner affecting the validity of the judgment (*Ex parte Maher*, 25 Nev. 424, 62 Pac. 1).

From these cases it is apparent that a few courts have held that, where the sentence upon a valid conviction is excessive or erroneous in part, the whole of the judgment must fall as being without the jurisdiction

of the court, and that the convicted criminal must be discharged, while others hold that the sentence may be corrected and the proper punishment inflicted, others that it is void only as to the excessive punishment it orders, others that the erroneous sentence will stand and be enforced against habeas corpus proceedings, and can only be attacked or corrected by the regular methods of appeal or writ of error, and still other courts, among which are notably the Supreme Courts of the United States, of Massachusetts, and Nevada, adhere to the latter rule generally, but allow some elasticity and exceptions for the correction of errors, where the petitioner is restrained under an unconstitutional act, or there is some special urgency and hardship, and the sentence was wholly or partly unauthorized.

If the rule, supported by the decisions upon which petitioner relies, holding that the sentence is void where it specifies a longer period, or different place for the imprisonment, or a heavier fine, than the statute warrants, was adopted by this court, it might lead to grave injustice in the future, for under it, in cases having some omission or mistake in the judgment, criminals sentenced after due conviction of the most heinous crimes would have to be released and turned loose upon the community. If, after conviction of murder in the first degree, the district court should sentence the accused to be hanged in the yard of the county jail under the former law and the practice in this commonwealth, instead of at the state prison, under the more recent statute now in force, the sentence would be void, and the defendant would have to be discharged. Justice ought not to be thwarted by such strained technicalities. We cannot favor such a rule, and we are impelled to join those courts which have determined against it.

It will be perceived that section 2267, Comp. Laws, is the only one which specifies the place of imprisonment in lieu of the payment of a fine, and that it directs that, whenever a prisoner, upon conviction for any criminal offense, fails to pay the fine, the district court may imprison him in the county jail at the rate of \$2 per day until the fine or forfeiture imposed shall have been satisfied. In this connection no distinction is made in regard to the grade of the crime, and there is no limitation to misdemeanors. Under section 4701, the defendant was guilty of a felony, and could have been sentenced directly to the state prison for not less than one nor exceeding two years, or to a fine of not less than \$1,000 nor exceeding \$5,000, or to both. But the language of this section does not provide for confinement in the state prison or elsewhere in lieu of the payment of the fine, and there is nothing in this section or the others which authorized the court to commit the defendant to the state prison upon his failure to pay. And when we turn to

section 2267, the one which does provide for imprisonment as an alternative in lieu of nonpayment, the language fixes the place of confinement as such alternative in all cases, and without making any distinction between felonies and misdemeanors, at the county jail. The fine imposed was authorized, being the minimum amount specified in the statute, and the judgment follows the other provisions in ordering that the defendant be imprisoned at the rate of \$2 per day upon his failure to pay the fine. The only error in the sentence was the direction that the defendant work out the fine in the state prison, when the statute specifies the county jail. If he had been fined the maximum of \$5,000, instead of \$1,000, it would take him about seven years to work out the fine at the rate of \$2 per day. Whether it would be better to have a statute, such as exists in some states, providing that where the fine exceeds \$500, or a specified amount, or the imprisonment may exceed six months or one year, the confinement in lieu of the payment of a fine shall be in the state prison, is a matter for the Legislature, and not for the courts, to regulate. It is our duty to enforce these statutes as we find them.

The sentence being in accordance with the law and within the discretion vested in the district court as to the amount of the fine and the time of the alternative imprisonment imposed, and being erroneous only as to a matter which is definitely fixed by the statute, the place of confinement, and regarding which no court has any discretion or power to change, it seems unnecessary to have the judgment of the district court modified, even if the mistake may be considered as one apparent upon the record and of the kind usually corrected by courts upon mere suggestion or of their own volition. The direction that the confinement be in the state prison may be rejected as surplusage and of no force or effect. In the face of the statute which controls and fixes the county jail as the place of imprisonment, without it being so designated in the judgment. There was a necessity for the correction of the sentence as ordered by the Supreme Court of the United States in the Bonner Case, which does not exist here. When it was held there that imprisonment in the penitentiary was not authorized by the federal statute, it became necessary for the trial court to exercise the discretion vested in it and correct the sentence by designating some one of the different jails it had power to select, no particular one of which was fixed by the statute for the imprisonment, as in this state.

The warden of the state prison is directed to deliver the petitioner to the sheriff of Washoe county upon his appearance and demand at the state prison and the latter is ordered to take the petitioner into custody, and detain him in the county jail of that county for the remainder of the term of im-

prisonment imposed by the sentence of the district court, unless a part of the fine remaining unsatisfied is sooner paid.

NORCROSS and SWEENEY, JJ., concur.

STATE v. JACKMAN. (No. 1,710.)

(Supreme Court of Nevada. Aug. 1, 1907.)

1. HOMICIDE—EVIDENCE — ADMISSIBILITY — THREATS.

Where, on a trial for murder, self-defense is pleaded, threats by decedent to kill defendant the first time he saw him, made within an hour of the shooting, are admissible, though they were not communicated to defendant, on the issue of who was the aggressor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 405.]

2. CRIMINAL LAW—APPEAL—HARMLESS ERROR—ERRONEOUS EXCLUSION OF EVIDENCE.

An instruction, on a trial for murder, wherein self-defense was pleaded, not to consider evidence of threats which were not communicated to defendant, was none the less prejudicial error because the threats were testified to by a prostitute; her testimony, no matter what her character, being admissible for such weight as the jury might give it.

Appeal from District Court, Esmeralda County.

Albert T. Jackman, indicted under the name of John Thompson, was convicted of murder in the first degree, and from the judgment and an order denying his motion for a new trial he appeals. Reversed, and remanded for a new trial.

Thompson, Morehouse & Thompson and Wm. Woodburn, for appellant. R. C. Stoddard, Atty. Gen., for the State.

SWEENEY, J. Defendant was indicted for killing John Moritz at Goldfield, Nev., on September 16, 1906, tried and convicted of murder in the first degree in the district court of the First judicial district of the state of Nevada in and for the county of Esmeralda, and sentenced by the court to be hanged by the neck until dead. From an order denying defendant's motion for a new trial, and from the final judgment convicting defendant of murder in the first degree, defendant appeals.

It appears from the testimony that the defendant, 21 years of age, a gambler by occupation, about 3 o'clock a. m. of the 16th day of September, 1906, was crossing the main street of Goldfield on his way to the Royal Café for breakfast, when he saw the deceased, John Moritz, aged 23, whose business appeared to be that of a messenger in the tenderloin district, coming down the sidewalk on a bicycle, when, according to the defendant, "he rode almost to me, jumped off his bicycle, and I would not say for sure whether he leaned his bicycle up against a post or the building. He walked down in

front of me, headed me off. I asked him: 'What do you mean, do you intend to make another gun play like you tried at the dance hall?' He answered: 'Yes (uttered an oath), and I am going through with it.' As he said that I stepped back, he threw his hand back to his hip like that (witness illustrating by throwing his left hand back to hip), and as he did so I shot him. * * * I thought he was going to shoot me; that he was going to kill me if I gave him the chance. I would not have shot him otherwise, if I did not think he was going to shoot me. * * * I shot once; that is, two shots were fired from the gun. One was my intention and purpose. The first I shot on purpose. After the first shot he staggered, and I cocked my gun, that is, to see if he was going to pull his gun to shoot or kill me. I stepped sideways toward the Mohawk, and as I did he fell. As he fell my finger was on the trigger and my thumb cocking the hammer. I had the trigger pulled back with my finger, and as he fell my thumb slipped off the hammer, and the gun exploded the second time. * * * I did not fire the second shot intentionally." There were no witnesses to the commencement of the tragedy. It appears further from the testimony that the defendant about 1 o'clock of the same morning was in company with one Sherman Crumley, when Crumley was accidentally run into by deceased on a bicycle in an alley in the red light district of Goldfield, whereupon Crumley and Moritz had a wordy argument, culminating in the deceased, Moritz, drawing a revolver and ordering Crumley to "stand back." A revolver was found on the person of the deceased when brought to the hospital after the shooting. To the indictment charging defendant with murder in the first degree, defendant pleaded "not guilty," and interposed a plea of self-defense. During the progress of the trial, a prostitute by the name of Myrtle Smith was introduced as a witness on the part of the defense, and testified as follows: "By Mr. Morehouse: Q. Where do you reside? A. Goldfield. Q. Did you know in his lifetime a young man by the name of Moritz? A. Yes, sir. Q. Where did you know him? A. In Goldfield. Q. Did you see him on or about the morning of the 16th of September? A. Yes, sir. Q. Where? A. Down to my house. Q. What was he doing there? A. He brought me a lunch down to my house. Q. About what time was this? A. Some time between 2 and 3 o'clock; I could not exactly tell the time. Q. In the morning? A. In the morning. Q. On that occasion did he make any remark of and concerning Albert Jackman, known as Jack Thompson? A. Yes, sir. Q. Will you state to the jury what he said, and how he came to say it? A. Yes, sir. He brought a lunch from the Palm Restaurant to me. He went back and got one for Miss Florence and came back with Miss Florence's lunch and was to take

my empty dishes. I heard him in my room, and stepped into the room, and he said: 'For Christ's sake, don't scare me.' I said to him: 'Why are you so frightened?' He said: 'Well, I had trouble down the street with Jack Thompson.' And made the remark: 'I am going to kill the son of a bitch the first time I see him.'" The court gave the following instruction to the jury, asked for by the state, which is assigned as error by the defendant: "Threats, however deliberately made, do not justify an assault and battery, much less the taking of the life of the party making them, and evidence of threats previously made, if any threats were made, but not communicated to the defendant, should not be considered by the jury in arriving at their verdict."

The effect of this instruction was to preclude the jury from considering the testimony of Myrtle Smith testifying to a threat made by the deceased less than an hour before the shooting against the life of the defendant. The evidence of Myrtle Smith testifying to the threat made by the deceased against the life of the defendant, under the circumstances in this case, though uncommunicated to the defendant, was clearly admissible and of such vital importance to the defendant that the instruction of the court, commanding the jury not to consider this threat in arriving at their verdict, was of such a prejudicial nature that this case must be reversed. In cases of self-defense, where the question is doubtful as to who was the aggressor, as is the fact in the present case, there being no witnesses to the homicide, evidence of threats made against the life of a defendant preceding the affray, even though uncommunicated, are admissible. In the present case, a material point at issue was: Who was the aggressor? The defendant says the deceased was the aggressor; that he shot the deceased when the latter "threw his hand back into his hip pocket" for the purpose, as defendant believed, according to his testimony, of killing him if he got the chance. No one was present at this fatal moment but the deceased and the defendant. If this threat testified to by Myrtle Smith was true, and was made by the deceased, how vitally important this fact then became to the defendant when the testimony discloses that the first time the deceased saw the defendant after the making of this threat was the very time when the shooting took place. The jury were considering whether or not the defendant, according to his plea of self-defense, was justified in defending his life at the time he shot Moritz. The determination of this fact by the jury as to who was the aggressor is in this case and in most if not all murder cases wherein the plea of self-defense is interposed, almost decisive of the innocence, or, if guilty, the degree of guilt of the defendant, and in the determination of this

important fact, all threats against the life of the defendant by the deceased, even though uncommunicated, are admissible, and the exclusion of this evidence, so vitally important to the defendant, is reversible error. *State v. Hennessy*, 90 Pac. 221 (to be published in 29 Nev. —); *People v. Arnold*, 15 Cal. 481; *People v. Scoggins*, 37 Cal. 676; *People v. Alivire*, 55 Cal. 263; *Wigmore on Evidence*, vol. 1, § 110; *Stokes v. People*, 53 N. Y. 174, 13 Am. Rep. 492; *Wilson v. State*, 30 Fla. 242, 11 South. 556, 17 L. R. A. 654.

The threat, as testified to, was: "I am going to kill the son of a bitch the first time I see him." The shooting, according to the testimony, took place about 3 o'clock a. m. and this threat is testified to as having been made within an hour previous to the shooting. In arriving at their verdict, the fact of who was the aggressor became of vital importance to the jury in determining the innocence or degree of guilt of the defendant, and one which they must necessarily have passed upon in arriving at their verdict. The jury in the present case were instructed, in effect, not to consider the testimony of Myrtle Smith because the threat, being uncommunicated, was inadmissible, and the jurors, whose duty it is to be governed by the instructions given by the court as to the law, we must presume acted in accordance with their obligation, and did not consider this testimony. It will not do to say that the jury did not believe Myrtle Smith because the threat testified to in her testimony was expressly ruled out by the court. Her testimony, no matter what her character, was admissible for such weight as the jury might give to it, and, no matter from what source the testimony came, the defendant was entitled to have this testimony passed upon by the jury. In the case of *State v. Hennessy* (very recently determined) 29 Nev. —, 90 Pac. 225, this court, in passing upon testimony of uncommunicated threats assigned as error, said: "Such threats, even if uncommunicated, would be competent for the purpose of aiding the jury in determining who was the aggressor in the encounter which subsequently occurred between Ganahl and Cole, on the one hand, and Elftman, on the other." The rule as to the admissibility of uncommunicated threats made by the deceased against the life of the defendant, where the plea of self-defense is interposed, is succinctly stated in the late work of *Wigmore on Evidence*, vol. 1, § 110, as follows: "Where, on a charge of homicide, the excuse is self-defense, and the controversy is whether the deceased was the aggressor, the deceased's threats against the accused are relevant. The deceased's design to do violence upon the defendant is of some value to show that on the occasion in question he did carry out, or attempt to carry out, his design. Moreover, it is the fact of his design, irrespective of its com-

munication to the defendant, that is evidential."

The judgment and order of the trial court are reversed, and cause remanded for a new trial.

TALBOT, C. J., and NORCROSS, J., concur.

(50 Or. 36)

SEARS et al. v. DUNBAR.*

(Supreme Court of Oregon. July 30, 1907.)

1. APPEAL—ORDERS APPEALABLE—FINALITY.

Under B. & C. Comp. § 547, as amended by Laws 1907, p. 313, c. 162, limiting appeals to orders affecting substantial rights and in effect determining suits, etc., an order, in a suit by a taxpayer against a former Secretary of State to require him to account for moneys received, denying defendant's motion to dismiss on demurrer being sustained to the complaint for plaintiff's incapacity to sue, and granting substitution of the state as plaintiff, was not appealable; the sustaining of the demurrer and the substitution under B. & C. Comp. § 101, providing that if a demurrer be sustained the court may allow an amendment, and section 102, authorizing the name of a party to be added or stricken before trial, not being final as to the suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 643, 644.]

2. PLEADING—AMENDMENT—ERROR—EFFECT.

Granting leave to plaintiff to amend his pleading is within the power of a court, and, though the power be exercised erroneously, the order is not void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 575, 601.]

3. APPEAL—MOTION TO DISMISS—MERITS.

The merits of an appeal may not be decided on a motion to dismiss.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3162.]

Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Proceeding by J. K. Sears to require F. I. Dunbar, former Secretary of State, to account for moneys received; the state of Oregon, upon the relation of J. H. McNary, district attorney, being substituted as plaintiff. Defendant appealed from an order denying his motion to dismiss and granting substitution, and plaintiff moves to dismiss the appeal. Appeal dismissed.

Upon motion to dismiss the appeal. This proceeding was originally commenced by J. K. Sears, a citizen and taxpayer of the state of Oregon, against F. I. Dunbar, who was the Secretary of State of the state of Oregon from January 9, 1899, to January 14, 1907. It is alleged that during that time he collected and received for the benefit of the state of Oregon a large amount of money, viz., \$100,000, as fees for various filings, copies of records, issuing various commissions and licenses, and recording various papers in his office, and neglected and refused to deliver the same or any part thereof to his successor in office, or to any one authorized to receive the same, but has converted the same

to his own use, and asks for an accounting thereof and a decree requiring him to pay the same to the state of Oregon. The defendant demurred to this complaint, which was sustained by the court on March 29, 1907, upon the ground, as we understand, that plaintiff had not legal capacity to sue, and thereafter, on the same day, John H. McNary, district attorney for the Third judicial district, moved the court that the state of Oregon ex rel. J. H. McNary, as district attorney, be substituted for Sears as plaintiff in said suit, said motion being based on affidavit; and also tenders an amended complaint entitled, "The State of Oregon, upon the relation of J. H. McNary, as District Attorney of the Third Judicial District of Oregon, Plaintiff, v. F. I. Dunbar, Defendant." Except the title, such amended complaint is in substance and effect the same as the original, and seeks the same relief. Afterward, on April 9, 1907, the defendant filed a motion to dismiss the suit, for the reason that the demurrer was sustained and no amended complaint filed by Sears within the time provided by law. This motion was, on April 12, 1907, overruled, and the motion of J. H. McNary for substitution of the state of Oregon as plaintiff and leave to file the amended complaint was allowed, and defendant was given until April 25th to answer thereto. Thereafter, on April 22d, defendant took this appeal from the order of the court denying his motion to dismiss the suit and granting plaintiff's motion for substitution, and on May 21, 1907, plaintiff filed a motion here to dismiss the appeal for the reason that the order appealed from is not a final order, nor one from which an appeal will lie.

G. C. Fulton and Geo. G. Bingham, for appellant. L. E. McMahan and John H. McNary, for respondent.

EAKIN, J. (after stating the facts). The question is whether the order appealed from is a final order, or one from which an appeal will lie at this stage of the proceeding. Our statute (section 547), as amended (Laws 1907, p. 313, c. 162), provides: "A judgment or decree may be reviewed as prescribed in this chapter, and not otherwise. An order affecting a substantial right, and which in effect determines the action or suit so as to prevent a judgment or decree therein, or a final order affecting a substantial right, and made in a proceeding after judgment or decree, or an order setting aside a judgment and granting a new trial, for the purpose of being reviewed, shall be deemed a judgment or decree." It is held in *State v. Security Savings Co.*, 23 Or. 410, 43 Pac. 162, and *School District v. Irwin*, 34 Or. 431, 56 Pac. 413, that an appeal is statutory and cannot be extended to cases not within the statute, and it has frequently been decided by this court that an appeal will not lie except from

* Rehearing denied September 3, 1907.

a final order affecting a substantial right. *State v. O'Day*, 41 Or. 495, 69 Pac. 542, and cases cited. Counsel for defendant insists, however, that, the demurrer to the complaint of Sears being sustained, the substitution of the state by the amendment is the commencement of a new suit, and that the order was final as to the Sears complaint or suit. No authorities are cited by defendant in support of his position. Whether the amendment is one authorized by the statute is not the question, but whether the court lost jurisdiction of the defendant by the substitution. The effect of the amendment is to eliminate Sears because he was not a necessary or proper party, and it is final as to him; but the defendant is claiming no relief against him, and is not affected thereby. Granting leave to plaintiff to amend his pleading is within the power of the court, and, even though such power was exercised erroneously, yet the order is not void. The action of the court in sustaining the demurrer to the complaint did not terminate the jurisdiction of the court. B. & C. Comp. § 101, provides: "If the demurrer be sustained, the court may in its discretion allow the party to amend the pleading demurred to." Id. § 102, provides: "The court may, at any time before trial, in furtherance of justice, * * * allow any pleading * * * to be amended by adding the name of a party, or * * * by striking out the name of any party." While the court has jurisdiction of the case, the order allowing the amendment is one within its jurisdiction, even if erroneous.

At the hearing counsel argued this motion upon the merits of the appeal, on the theory that, if the order allowing the substitution was error, then it is appealable; but we may not decide the merits upon this motion. If, in determining the motion to dismiss the appeal, it is necessary to determine the merits as to the substitution, then this motion must be denied. Whether the order was error or not, it is not appealable, unless it terminates or disposes of defendant's rights in the subject of the suit. Many courts have discussed the right to such substitution, usually brought to the appellate court upon the appeal from final judgment, and it was always treated as a matter within the jurisdiction of the court, and not affecting the merits. Such are the following cases: *Davis v. Mayor of New York*, 14 N. Y. 506, 67 Am. Dec. 186; *Dubbers v. Goux*, 51 Cal. 153; *Vinegar Bend Lbr. Co. v. Chicago T. & T. Co.*, 30 South. 776, 131 Ala. 411 (cited by defendant on the merits); *Johnson v. Martin*, 54 Ala. 271; *Campbell & Zell Co. v. Barr Pumping Eng. Co.*, 182 Mass. 304, 65 N. E. 396; *Wells v. Stombock*, 59 Iowa, 376, 13 N. W. 339; *McCall et al. v. Lee*, 120 Ill. 261, 11 N. E. 522; *Lake Erie & West. Ry. Co. v. Town of Boswell*, 137 Ind. 336, 36 N. E. 1103; and many other cases might be cited. In *Chicago, K. & W. Ry. Co. v. Butts*, 55 Kan. 660, 41 Pac. 948, it is held that an order of substitution is not a final

order, and therefore not appealable. To the same effect are *Bossler v. Johns*, 2 Pen. & W. (Pa.) 331; *Welch v. Allen*, 54 Cal. 211; *Hall v. Vanler*, 7 Neb. 397; *Grant v. Los Angeles & Pac. Ry. Co.*, 116 Cal. 71, 47 Pac. 872. In *Chicago, K. & W. Ry. Co. v. Butts*, supra, it is held that the order of substitution was error, but not appealable, and it was reviewed upon the appeal from the final judgment. If the order of the court was made in a matter beyond its jurisdiction or in relation to a matter of which it had not acquired jurisdiction, then it might be appealable; as to the adverse party to that proceeding it would be final. But error in an interlocutory order within the jurisdiction is not sufficient to render it void or operate as a final order. In *Hume v. Bowle*, 148 U. S. 245, 252, 13 Sup. Ct. 582, 584, 37 L. Ed. 438, the court had before it a question involving the same principle. In that case a motion was made to vacate a decree rendered at a previous term and to grant a new trial, which motion was allowed by the court below. It was insisted by respondent that the order was not final, and therefore not appealable. Mr. Chief Justice Fuller says: "This case comes before us on a motion to dismiss the writ of error for want of jurisdiction, upon the ground that the judgment brought here by the writ is not a final judgment. * * * The question involved is one of power, for if the court had power to make the order, when it was made, then it was not a final judgment, as it merely vacated the former judgment for the purpose of a new trial upon the merits of the original action. If the court had no jurisdiction over that judgment, the order would be an order in a new proceeding, and in that view final and reviewable." And in *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 727, the same identical question arose, in which it was held that, if there was no jurisdiction, then the order was final; otherwise, not. In *Phillips v. Negley*, 117 U. S. 665, 671, 6 Sup. Ct. 901, 903, 29 L. Ed. 1013, it is held: "If, properly considered, the order in question was an order in the cause, which the court had power to make at the term when it was made, the consequence may be admitted that no appellate tribunal has jurisdiction to question its propriety. * * * The vacating of a judgment and granting a new trial, in the exercise of an acknowledged jurisdiction, leaves no judgment in force to be reviewed. If, on the other hand, the order made was made without jurisdiction on the part of the court making it, then it is a proceeding which must be the subject of review by an appellate court." The same is held in *Deering v. Quivey*, 26 Or. 556, 38 Pac. 710. Although these cases all relate to motions to vacate judgments, they determine what constitutes a final or appealable order. How can it be said that an order is final when it does not terminate the suit or in any manner end the litigation as to the subject-matter or

as to defendant? An order that may be deemed a decree is defined in B. & C. Comp. § 547, supra, as one "which in effect determines the action or suit so as to prevent a judgment or decree therein"; but no such effect results from this order. Mr. Chief Justice Moore, in *Marquam v. Ross*, 47 Or. 375, 78 Pac. 698, 83 Pac. 852, 86 Pac. 1, reviews the Oregon cases as to what are final orders, and construes B. & C. Comp. § 547, supra, and concludes: "It will be seen that the original adjudication of the right involved within the issues is the judgment or decree from which an appeal lies." In *State v. Security Savings Co.*, 28 Or. 410, 417, 43 Pac. 162, it is held that, where the right to the relief sought is determined, it is final and appealable. "An order or decree is final for the purposes of an appeal when it determines the rights of the parties, and no further questions can arise before the court rendering it except such as are necessary to be determined in carrying it into effect." In *Basche v. Pringle*, 21 Or. 24, 26 Pac. 863, Mr. Justice Bean says an appealable judgment "is one which concludes the parties as regards the subject-matter in controversy in the tribunal pronouncing it."

From these authorities it is clear that, if the ruling had the effect to finally terminate defendant's rights or interest in the subject of the suit, it was final as to him, even though it did not determine the merits of the case, or if it was made without jurisdiction; that is, in a case or as to matter not within the power of the court it would be final, even though only an interlocutory order.

In this case the defendant's rights are not concluded by the ruling. Neither is the order one made without jurisdiction, and the appeal is premature, and must be dismissed.

GRAHAM v. MAYOR AND BOARD OF TRUSTEES OF CITY OF FRESNO.

(S. F. 4,762.)

(Supreme Court of California. July 1, 1907.)

1. JUSTICES OF THE PEACE—AUTHORITY—CONSTITUTIONAL AND STATUTORY PROVISIONS.

The amendment to Const. art. 11, § 6, adopted November 3, 1896, inserting "except in municipal affairs," in the provisions that cities and towns and all charters thereof adopted by authority of the Constitution shall be subject to and controlled by the general laws and Constitution, and Const. art. 11, § 8½, being an amendment adopted November 3, 1896, providing that it shall be competent for all charters formed under the authority given by Const. art. 11, § 8, to provide for the constitution, jurisdiction, etc., of police courts, the manner, time, and terms for which the judges thereof shall be elected or appointed, and for the compensation of the judges, etc., do not affect the power of the Legislature to provide for justices' courts in cities and towns as part of the state system of justices' courts.

2. MUNICIPAL CORPORATIONS—LEGISLATIVE CONTROL—CONSTITUTIONAL PROVISION.

Under Const. art. 11, § 6, as amended, the provisions of freeholders' charters are supreme

as to all matters which the Constitution authorizes to be provided for therein, and are exempt from any control by any subsequent act of the Legislature.

3. SAME—CITIES OF FOURTH CLASS.

Under Const. art. 11, § 8½, being an amendment adopted November 3, 1896, providing that it shall be competent in all charters formed under the authority of Const. art. 11, § 8, to provide for constitutional regulation, government, and jurisdiction of police courts, and for the compensation, etc., of judges thereof, the provisions of Code Civ. Proc. § 103, requiring a city of the fourth class to furnish the city justice of the peace a suitable office in which to hold his court, does not apply to a city of the fourth class whose charter provides for a police court.

Sloss, J., dissenting.

In Bank. Mandamus by George B. Graham against the mayor and board of trustees of the city of Fresno. Application denied.

Geo. B. Graham, in pro. per. D. S. Ewing (Frank Karke, of counsel), for defendants.

ANGELLOTTI, J. The city of Fresno is a city organized under a freeholders' charter framed and adopted under the provisions of section 8, art. 11, of the Constitution of this state, and approved by the Legislature on January 28, 1901 (St. 1901, p. 832, c. 9). According to the federal census of 1900 it has a population of more than 10,000 and less than 15,000, and therefore, if we assume that the provisions of the general classification act, as amended March 5, 1901 (St. 1901, p. 94), apply, it is a city of the fourth class within the meaning of section 103, Code Civ. Proc. Its charter provides for a court to be known as the "police court of the city of Fresno"; the same to consist of one judge to be elected at the general municipal election, who shall receive a salary from and be furnished with a courtroom by the city, which court shall have exclusive jurisdiction in all prosecutions for violations of city ordinances and actions for the recovery of fines, etc., and the enforcement of obligations or liabilities created by the city ordinances, and, within the city limits, concurrent jurisdiction with township justices' courts in all matters wherein said justices' courts may have jurisdiction. Sections 61, 61, 62, 68, 200, 221, Charter. Under these provisions, a police court has been established and is now being maintained in the city; one H. F. Briggs being the judge thereof. The city of Fresno constitutes a portion of the third judicial township of the county of Fresno. At the general state election held November 6, 1906, the plaintiff, George B. Graham, was elected "city justice of the city of Fresno," and qualified in the manner required of justices of the peace. He claims that it is the duty of the defendants to furnish him, as such city justice, with a suitable office wherein to hold his court. Defendants have refused to comply with his demand in this regard, and plaintiff has instituted this proceeding to obtain a peremp-

tory writ of mandate compelling such compliance.

Plaintiff's claim is based on section 103, Code Civ. Proc.; the general section providing for justices' courts, their number in townships and cities, their election, etc. That section, after providing for the justices of townships, to be elected at a general state election, provides that: "In every city or town of the third and the fourth class there must be one justice of the peace, * * * to be elected in like manner by the electors of such cities or towns respectively." It further provides that such justice of the peace of cities or towns shall have the same jurisdiction, civil and criminal, as justices of the peace of townships, and also jurisdiction of all proceedings for the violation of any ordinance of a city, and all actions for the recovery of any licenses required by any ordinance of the city, and shall exercise all powers, duties, and jurisdiction, civil and criminal, of "police judges, judges of the police court, recorder's court, or mayor's court within such city." It further provides that every city justice of the peace in any city or town of the fourth class shall receive as his sole compensation a salary of \$1,500 per annum from the salary fund of such city or town, and shall be provided by the city authorities with a suitable office in which to hold his court, and requires him to pay into the city or town treasury all fees chargeable by law for services rendered by him.

Prior to the adoption of certain constitutional amendments in 1896, it was established that, by reason of section 1, art. 6, providing that the judicial power of the state shall be vested in certain courts therein named, "justices of the peace, and such inferior courts as the Legislature may establish in any incorporated city or town, or city and county," section 11 of the same article providing that the Legislature shall determine the number of justices of the peace to be elected in townships, incorporated cities or towns, or cities and counties, and shall fix by law the powers, duties, and responsibilities of such officers, and section 13 of article 6 providing that the Legislature shall fix by law the jurisdiction of any inferior courts which may be established in pursuance of section 1 of the article, and fix by law the powers, duties, and responsibilities of the judges thereof, the whole matter of the establishment and regulation of justices and other inferior courts in cities and towns, and the compensation of the judges thereof, was in the hands of the Legislature, and that such laws as section 103, Code Civ. Proc., constituted a valid exercise of the legislative power. *People v. Cobb*, 133 Cal. 74, 65 Pac. 325; *People v. Sands*, 102 Cal. 12, 36 Pac. 404; *Coggins v. City of Sacramento*, 59 Cal. 599; *Jenks v. Council, etc.*, 58 Cal. 576; *Bishop v. Council, etc.*, 58 Cal. 572. In *Bishop v. Council, supra*, a writ of mandate was granted to com-

pel the city authorities to furnish such a city justice, elected at a general state election, with a suitable office. In *Jenks v. Council, supra*, a similar writ was granted requiring the payment of the salary of such a justice from the city treasury. In *Coggins v. City of Sacramento, supra*, an action by a city justice against the city for salary and office rent, was sustained, and by *People v. Sands, supra*, and *People v. Cobb, supra*, it was thoroughly established that such justices are to be elected in the same manner as other justices of the peace, at a general state election, and that vacancies in the office are to be filled in the manner prescribed by the state law. It was further established that a police court created by the provisions of a freeholders' charter was not a court created by the Legislature, and therefore that it was not competent to provide therefor in such a charter. *People v. Toal*, 85 Cal. 333, 24 Pac. 608; *Ex parte Ah You*, 82 Cal. 339, 22 Pac. 929; *People v. Sands, supra*. Defendants' claim is that by reason of certain constitutional amendments made in the year 1896, not only is the charter provision for a police court of the city valid and effectual, which is admitted, but that the provision of section 103 of the Code of Civil Procedure for a city justice of the peace cannot be held applicable, and especially that the provisions of said section for the payment of a salary to such justices from the city treasury and the furnishing of an office at the cost of the city are without force as to said city. The constitutional amendments relied on are: First, the municipal affairs amendment of section 6, art. 11; and, second, section 8½ of article 11. The latter section adopted November 3, 1896, so far as applicable, is as follows: "It shall be competent in all charters framed under the authority given by section eight of article eleven of this Constitution, to provide, in addition to those provisions allowable by this Constitution, and by the laws of the state, as follows: (1) For the constitution, regulation, government, and jurisdiction of police courts, and for the manner in which, the times at which, and the terms for which the judges of such courts shall be elected or appointed, and for the compensation of said judges and of their clerks and attaches."

We cannot find in subdivision 1 of section 8½ of article 11 any intention to interfere with the power of the Legislature in the matter of provision for justices of the peace for cities and towns. That subdivision is limited in terms to "police courts," and there is no mention whatever therein of justices of the peace or justices' courts. The term "police court" ordinarily refers to an inferior municipal court with a limited jurisdiction in criminal cases only, a court with the power to try certain misdemeanor cases arising from the violation of state law or municipal ordinance, and with the power to conduct preliminary examinations in cases of felony,

and certain misdemeanors, and to hold defendants to answer for trial for the same, and does not include the justices' courts established by our law. The term should probably be here construed to also include such inferior courts as may properly be held to be purely municipal, though given by the state certain jurisdiction in state as distinguished from municipal matters, courts coming within the class specified in the Constitution as "such inferior courts as the Legislature may establish in any incorporated city or town or city and county," such as a city recorder's court or a mayor's court. See *Ex parte Soto*, 88 Cal. 624, 626, 26 Pac. 530. But the city justice of the peace provided for by section 103, Code Civ. Proc., does not come within this category. *People v. Sands*, supra; *People v. Cobb*, supra. Justices of the peace are part of the constitutional judicial system of the state, having concurrent jurisdiction with superior courts in certain matters expressly given by the Constitution (section 11, art. 6, Const.), and also having such jurisdiction in civil and criminal cases as is given by the general laws of the state to all justices of the peace. In this regard there is no distinction whatever between township and city justices. See cases last cited. A city justice is simply a part of this general state system, elected for a certain subdivision thereof. It is immaterial in this connection that the Legislature has attempted to confer upon city justices an additional jurisdiction in matters peculiar to the city, such as cases arising from violations of municipal ordinances, etc. The Constitution in terms provides that the Legislature shall determine the number of such justices of the peace to be elected in townships, incorporated cities and towns, or cities and counties, and shall fix by law the powers, duties, and responsibilities of such office. Section 11, art. 6. In view of the explicit provisions of the Constitution as to justices of the peace for cities and towns, as well as townships and cities and counties, and the decisions of this court in regard thereto, it is inconceivable that this amendment, limited in terms to police courts, was intended to trench in the slightest degree upon the power of the Legislature to provide for justices' courts in cities and towns as part of the general state system of justices' courts, and we cannot give it any such effect.

It does not follow, however, that the provisions of section 103, Code Civ. Proc., as to the payment of the salary of such a city justice from the municipal treasury, and the furnishing to him of an office by the municipality, will be held valid as to a city having a police court established under a valid charter provision. The decisions heretofore cited sustaining the statutory provisions in that behalf were all cases decided prior to the adoption of the constitutional amendments, and at a time when, as we have already seen,

no effectual provision for any court could be made in such a charter. The city justice of the peace established by the Legislature has always been given, in addition to the ordinary jurisdiction of a justice's court, the power and jurisdiction of an ordinary police court of a city, the expense of maintenance of which has always been considered a proper charge on the city, and his office thus partook of the character of both a county and township office and a city office. *People v. Sands*, supra; *People v. Cobb*, supra. The Legislature having had, prior to the amendments, the sole power to provide such a police court in a city or town, also had the power to provide for the maintenance of the same by the city or town, and the city justice's court being the court invested by the Legislature with that jurisdiction, and thus, in effect, made also a city police court, the Legislature was authorized to require the expense thereof to be borne by the municipality.

The effect of subdivision 1 of section 8½ of article 11 was to make the matter of such police courts purely a municipal affair as to any freeholders' charter city which subsequently made appropriate provision in its charter for such court. It confided the subject-matter of such courts, and the election and compensation of the judges thereof, to any such city desiring to assume, and assuming, control thereof, just as, by the same section, the matter of fixing the compensation of county officers in consolidated cities and counties was confided to the city and county to be provided for in its freeholders' charter. Such jurisdiction could not coexist in both the Legislature and the city, and the provision for the assumption of such jurisdiction by the city necessarily contemplated the removal of the same from the Legislature, whenever the jurisdiction was assumed by the city. Any act of the Legislature relative to such subject-matter would necessarily be inconsistent with a charter provision in regard to the same subject-matter. As to such matters as the Constitution authorizes to be provided for in freeholders' charters, the provisions of the charter are supreme, superseding all laws inconsistent therewith (section 6, art. 11, Const.), and being exempt from any control by any subsequent act of the Legislature.

For a city maintaining a police court under valid provisions in that behalf in its freeholders' charter, the Legislature, therefore, no longer has the power to provide such a court. While it still has the power to provide a justice's court for any such city as part of the general state system of justices' courts, it no longer has the power to make such court also a city police court, maintainable at the expense of the city. This would be, in effect, the same thing as providing a separate police court for the city, to be maintained at the expense of the city. Any provision of that

character would be an invasion of the jurisdiction of the municipality, and inconsistent with the charter provision regarding the subject-matter of city police courts, as to which the plain object of the constitutional provision was to vest entire control in any freeholders' charter city electing to assume such control, and to free any city so doing from legislative control in that regard. As to such cities, the city justice of the peace provided by section 103, Code Civ. Proc., must be held to be the same in all respects as a township justice, simply a county or township officer performing no municipal functions whatever.

The Legislature is not empowered to direct the appropriation of municipal funds for the payment of the salary or office expenses of one who is simply a county or township officer. Municipal funds can be appropriated, under our system, only for municipal purposes. *Conlin v. Board of Supervisors, etc.*, 114 Cal. 404, 46 Pac. 279, 83 L. R. A. 752. The only ground upon which the decisions heretofore cited upholding the provision for the payment of salaries and office expenses of city justices by municipalities can be sustained is that such justices, under the law then in force, in addition to being justices of the peace with the same jurisdiction as township justices, were also city police judges, performing municipal functions. See *People v. Sands, supra*; *People v. Cobb, supra*. As we have seen, such is no longer the situation in a city having a police court established under valid provision therefor in its freeholders' charter.

We are therefore of the opinion that the provision of section 103, Code Civ. Proc., requiring a city of the fourth class to furnish the city justice of the peace with a suitable office in which to hold his court, cannot now be held applicable to the city of Fresno.

The application for a peremptory writ of mandate is denied.

We concur: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

SHAW, J. I concur in the opinion of Justice ANGELLOTTI. I wish to say, however, that I do not understand that opinion to hold that when a freeholders' charter has created a police court, and vested in it jurisdiction over offenses against city ordinances and suits to collect city license taxes, or any other jurisdiction that could be vested in such police court, such provisions of the charter would have the effect of preventing the Legislature from vesting the same jurisdiction in a justice's court created by general laws under the provisions of article 6 of the Constitution, or that such charter provisions would at all affect the jurisdiction of any such justice's court, whether theretofore or thereafter established. The proposition, as I understand it, is that, when the special charter has provided a police court, it is not competent for the Legislature to charge up-

on the city the expenses of any justice's court created by general laws. Whether, in any case, the expenses of such justice's court created under article 6 of the Constitution, could be imposed upon a city operating under a special charter, is a question not decided, and one which does not necessarily arise in this case.

I concur: BEATTY, C. J.

SLOSS, J. I dissent, and think the writ should issue. In my opinion, neither of the amendments of 1896 to article 11 of the Constitution affects the rule declared in *Bishop v. Council*, 58 Cal. 572, and *Jenks v. Council*, 58 Cal. 576.

(151 Cal. 474)

CITY OF REDLANDS et al. v. BROOK, City Treasurer. (S. F. 4,775.)

(Supreme Court of California. July 1, 1907.)

1. MUNICIPAL CORPORATIONS—POWER TO ISSUE BONDS—LIGHTING STREETS.

Municipal Incorporation Act 1883 (St. 1883, p. 269, c. 49), § 862, empowers municipal corporations to lay out, alter, improve, etc., streets and other public highways and to drain and light them, etc. Section 866 (page 271) provides that municipal corporations of the sixth class may incur a bonded indebtedness whenever the board of trustees shall deem it necessary to supply a deficiency in the funds applicable to the payment of any expense which they are empowered to incur. Held to give a city power to issue bonds to meet the expense of purchasing electric lighting for streets from a private company and of maintaining the streets and public places.

2. SAME—EFFECT OF CURATIVE STATUTES.

Act March 4, 1907 (St. 1907, p. 104, c. 80), to legalize bonds to be issued and sold by municipalities where authority for such issuance had already been given by a vote of more than two-thirds of the electors, operates to legalize such an issue of bonds by a city, although the act under which they were issued had been repealed by implication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1951.]

3. CONSTITUTIONAL LAW—CURATIVE STATUTES—POWER OF LEGISLATURE.

In the absence of constitutional restrictions, the power of the Legislature to validate past transactions which it could have authorized in advance is restrained only by the necessity of protecting vested rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 536.]

4. STATUTES—SPECIAL LAWS—CURATIVE STATUTES.

An act to legalize bonds to be issued and sold by municipalities, which embraces all municipal corporations and every case in which not less than two-thirds of the electors voting at a special election called for the purpose have approved the proposed issue of bonds, is not a special law within Const. art. 4, § 25, subds. 14, 18, forbidding special laws giving effect to invalid instruments, or legalizing except as against the state the unauthorized or invalid act of an officer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 81.]

5. SAME.

The fact that the law is limited in its application to bonds sold after its passage, and,

for not less than par, does not render it a special law in a constitutional sense.

In Bank. Mandamus by the city of Redlands and others against A. E. Brook. Writ granted.

F. A. Leonard, for plaintiffs. Henry M. Willis, for defendant.

BEATTY, C. J. This is an original proceeding in which the plaintiffs pray for a writ of mandate to compel the defendant to sign certain municipal bonds which the plaintiffs propose to issue. The cause has been submitted upon a general demurrer to the complaint for want of facts. The material facts alleged, and by the demurrer admitted, are that Redlands is a city of the sixth class. That its board of trustees at a regular meeting duly adopted, by a vote of more than two-thirds of all its members, a resolution declaring it necessary to incur an indebtedness of \$50,000 for the following purposes: "For electric lighting of said city to be furnished by private company for the fiscal year 1907; and for the care and maintenance of streets and public parks of said city for said fiscal year (not including, however, any municipal improvements of any kind or nature whatever)." That said resolution was approved by the executive of said city. That an ordinance was duly passed calling for a special election at which the electors of said city should vote on the question of the issuance of the bonds. That the election was duly held and out of a total of 852 votes 753 were in favor of issuing the bonds. That thereupon an ordinance was duly passed providing for the issuance and sale of the bonds by which it was made the official duty of the defendant to sign the bonds and coupons. That demand was made upon him to sign said bonds and coupons, but he refuses to do so, alleging as his reason for such refusal "that said bonds are invalid and void and would not create a legal obligation against said city if signed or executed by him." It is further alleged that said proposed indebtedness of \$50,000 will not exceed, together with all the indebtedness of said city, in the aggregate, 15 per cent. of the assessed value of all the real and personal property in said city. These, with other allegations of the complaint, it is conceded, show that all the constitutional and statutory requirements as to procedure in the matter of the issuance of municipal bonds have been fully complied with; but it is objected that the purposes for which the proceeds of the bonds are to be used are not among those for which municipal corporations are authorized to borrow money.

The declared purposes to which the proceeds of the bonds were to be applied, no less than the concluding portion of the resolution to incur the indebtedness—the part in

parenthesis—which was carried into the ordinance subsequently passed, show that the proceedings were not intended to be based on the act of February 25, 1901 (St. 1901, p. 27, c. 32), which confers authority to create a bonded indebtedness for the sole purpose of acquiring, constructing, or completing permanent improvements, the cost of which will be too great to be paid out of the ordinary annual income and revenue of the municipality. The limited authority granted by this act would seem to indicate an intention on the part of the Legislature to withhold the power to borrow money to pay for current expenses, and if it was the only law relating to the subject it would seem very plain that the bond issue in question here is illegal. But section 866 of the municipal incorporation act of 1883 (St. 1883, p. 271, c. 49) is far more liberal in terms and effect. It is therein provided that municipal corporations of the sixth class may incur a bonded indebtedness in the method here followed whenever the board of trustees shall deem it necessary for the purpose of supplying a deficiency of the funds in the treasury applicable to the payment of any expense which they are empowered to incur in behalf of the municipality. And by section 862 (page 269) of the same act they are empowered to "lay out, alter, keep open, improve and repair streets, sidewalks, alleys, squares and other public highways, and places within the city or town, and to drain, sprinkle, oil and light the same." In view of this provision there can be no question as to the power of the board of trustees to incur the expense of purchasing electric lighting from a private company or the expense of the care and maintenance of the streets and public places in the city. And if they can lawfully incur such expenses it is very clear that section 866, by its terms, confers the power to supply any deficiency in the funds applicable to these purposes by the issuance of bonds.

The only question that suggests itself is whether section 866 is still in force; whether, in other words, it may not have been repealed by the passage of the later act of 1901, in which, as above shown, the power of municipal corporations to incur a bonded indebtedness is limited to the acquisition, construction, or completion of permanent improvements the benefit of which will inure to the future inhabitants of the city or town, in contradistinction to those things which are properly deemed a current expense payable out of the revenue of the year in which they are consumed. This is a question of very serious import, which does not seem to have engaged the attention of counsel, and in the absence of argument we are not willing to decide it. We merely direct attention to the fact that here is a general law applicable to all municipal corporations organized under the law of 1883, later in date than that act.

and covering the subject of municipal bonds. Such laws, notwithstanding repeals by implication are not favored, have sometimes been held to operate such repeal of older statutes to which they make no express reference.

We are, however, relieved of the necessity of deciding this question in the present case by reason of the enactment of a curative statute approved March 4, 1907 (St. 1907, p. 104, c. 80), by which the proceedings in this and all similar cases have been validated.

In the absence of constitutional restrictions, the power of the Legislature to validate past transactions which it could have authorized in advance is restrained only by the necessity of protecting vested rights. Here are no vested rights to be guarded, and the only constitutional restrictions to which our attention has been called are contained in subdivisions 14 and 18 of section 25 of article 4 of the Constitution, which forbid the enactment of special laws giving effect to invalid deeds, wills, or other instruments, or legalizing, except as against the state, the unauthorized or invalid act of any officer. The answer to the objection based on these provisions is that the act of March 4, 1907, is not a special law. It is a curative act, and, of course, is retroactive in its operation, applying exclusively to past transactions; but it embraces all municipal corporations, and every case in which not less than two-thirds of the qualified electors voting at a special election called for the purpose have approved the proposed issue of municipal bonds. The fact that the law is limited in its application to bonds sold after its passage, and for not less than par, does not render the law special in a constitutional sense. There was an excellent reason for discriminating between such bonds, and others that might have been marketed prior to the statute for less than their value, for the very reason that there was a doubt as to their validity.

We do not deem it necessary to discuss this matter more in detail, or to cite the cases referred to in the briefs. It is enough to say that there is no constitutional objection to the validating act, and that the proceedings of the plaintiffs in ordering the issue of these bonds, if not originally valid, certainly became valid immediately upon the passage of the act of March 4, 1907. A very instructive opinion of the Supreme Court of Minnesota in a case closely resembling this, and in which the authorities are extensively reviewed, is *City of Minneapolis v. Brown*, 106 N. W. 477, 97 Minn. 402.

It is ordered that peremptory writ of mandate issue as prayed.

We concur: HENSHAW, J.; MCFARLAND, J.; SLOSS, J.; LORIGAN, J.

151 Cal. 479

NEW LIVERPOOL SALT CO. v. WESTERN SALT CO. (L. A. 1,820.)

(Supreme Court of California. July 2, 1907.
Rehearing Denied Aug. 1, 1907.)

1. TROVER AND CONVERSION—EVIDENCE TO ESTABLISH.

Defendant contracted for the sale of all the salt in its possession to a salt company, the title to vest at once in the purchaser. It then sold a part of the salt to other parties. The salt company thereafter sold the entire salt covered by the contract to plaintiff. All of the payments were made to defendant as provided by the contract. *Held*, that defendant was liable to plaintiff for the conversion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, §§ 119, 120.]

2. SALE—CONSTRUCTION OF CONTRACT—PAYMENT OF PRICE—EFFECT OF DEFAULT.

A contract for the sale of a certain salt provided that it be paid for in certain payments made at stated times, and also that the seller be allowed 25 cents per ton for expenses of delivery, payable each month, the amount thus paid being deductible from the last payment to be made on the salt, and that on default in payments the title should revert to the seller. *Held*, that the provision for forfeiture referred only to those sums which constituted a part of the purchase price, and not to the charge allowed for expenses of delivery.

3. SAME — ACTION BETWEEN SELLER AND THIRD PERSON.

Where defendant sold salt to a company which before delivery the company sold to plaintiff, in a suit against the defendant for converting a part of the salt to its own use after the sale to the company, the defendant cannot complain that the plaintiff has failed to pay the company for the salt, and that according to his contract of sale the title to the salt has reverted to the salt company, since the enforcement of the forfeiture of plaintiff's title to the salt could be waived, and the salt company had taken no action to enforce the same.

4. TROVER AND CONVERSION—DAMAGES—VALUE OF PROPERTY—EVIDENCE.

In an action to recover a large quantity of salt or its value converted by the seller, a wholesale merchant, after the sale, the defendant is liable for the wholesale price or value only, and evidence of the market value at retail, unsupplemented by proof of the difference between the wholesale and retail prices, was insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trover and Conversion, § 242.]

Department 1. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by the New Liverpool Salt Company against the Western Salt Company to recover possession of a quantity of salt or its value. From a judgment for defendant and an order denying plaintiff's motion for a new trial, plaintiff appeals. Reversed.

Purcell Rowe, C. H. Rippey, and A. Haines (J. S. Chapman, of counsel), for appellant. Victor E. Shaw and Titus, Wright & Creed, for respondent.

SHAW, J. The plaintiff appeals from the judgment and from an order denying its motion for a new trial. The action was for the possession of 4,600 tons of salt, or its value, if possession could not be recovered.

The salt in controversy consisted of salt sold by the Western Salt Company to another corporation, known as the "Amalgamated Salt Company," by a written contract executed December 20, 1902. At the time of the sale the salt was left in the possession of the Western Salt Company in accordance with the terms of the contract. Afterwards, on January 2, 1904, the Amalgamated Salt Company sold the salt embraced in that contract to plaintiff. The following is a statement of the material parts of the agreement of sale of December 20, 1902, between the Western Salt Company and the Amalgamated Salt Company: The Western Salt Company, which was the party of the first part, thereby sold to the Amalgamated Salt Company "all salt now owned by the party of the first part which is now lifted from the vats, sacked and stored in piles, bins and warehouses on the premises of the party of the first part," at the head of the bay of San Diego. The buyer agreed to pay for this salt \$8,000 of its capital stock, to be transferred to the Western Salt Company, and, in addition thereto, as follows: "Twenty-three hundred dollars (\$2,300.00) on or before January 13, 1903, and the further sum of thirty-four hundred and fifty dollars (\$3,450.00) on or before the 13th day of April, 1903. And the party of the second part further agrees to pay to the party of the first part twenty-five cents (25) per ton, on the 13th of each month for the salt delivered by the party of the first part and taken by the party of the second part in the preceding month, said 25 cents per ton to represent the sewing, sacking and delivery of said salt on board cars at the works of the party of the first part on said premises; * * * providing however, that the party of the second part agrees to further pay to the party of the first part on or before January 1, 1904, the further sum of eleven hundred and fifty dollars (\$1,150.00), after deducting from said sum the amount which the party of the second part may have paid under the provision in this contract for the payment of 25 cents per ton upon the 13th of each month for sewing, sacking and delivery of said salt. It is further understood and agreed, that said party of the second part has the right to the immediate possession of said salt and that it shall be lawful for said party of the second part, its agents and employes, to enter any premises on which said salt may be stored, or such other places as said salt is, or may be stored, and take and carry away said salt, and to occupy and use so much of any place where said salt may be stored so far as is necessary for use for such purpose while preparing said salt for transportation, without any charge therefor by way of rental or otherwise, but nothing in this clause shall be a waiver on the part of the party of the first part to the compensation as hereinbefore agreed upon. The title to said salt is hereby vested in the party of the second part, and it

is further agreed between the parties hereto that in case any of the payments aforesaid shall not be made as above specified, then the title to said salt shall revert to the party of the first part, and it shall have the right to sell the same for the amount due it under this agreement, and no salt shall be removed from said premises by the party of the second part until said sums, amounting to \$5,750.00, shall be paid."

1. The findings are that the salt on the premises on December 20, 1902, at the time of the sale to the Amalgamated Salt Company, amounted to only 1,788 tons; that after that date, and prior to the sale to the plaintiff in January, 1904, the defendant had sold, shipped, and converted to its own use 963 tons of the said salt, leaving only 825 tons remaining on the premises at the time of the latter sale. The court concluded that the effect of the agreement by which the salt was sold to plaintiff in 1904 was that the plaintiff thereby acquired title only to the salt then remaining upon the premises; that is, to the 825 tons aforesaid. In this, we think, the court was in error. The contract of sale in 1904, by its terms, purports to sell to the plaintiff "all that certain salt, 4,600 tons or more, which said salt was purchased by the party of the first part (Amalgamated Salt Company) of the Western Salt Company, and is particularly described in that certain agreement made and entered into by and between the said Western Salt Company (and) the party of the first part, on the 20th day of December, 1902." This clearly describes and purports to sell and transfer title to all the salt included in the act mentioned, wherever it might then be situated. The defendant contends that the previous sale and conversion of the 963 tons, involving, as it is claimed, the removal of that salt from the defendant's premises, or its destruction, excludes that part of the salt from the operation of the contract of sale to the plaintiff. There is no evidence that any part of the salt was destroyed. The evidence merely shows, as the court found, that it had been sold, shipped, and converted by the defendant. It is therefore unnecessary to determine what would be the effect upon the validity of the sale if it had been actually destroyed at the time. Under the contract with the Amalgamated Salt Company, the defendant was the bailee of all the salt, and that company was the bailor. Civ. Code, §§ 1748, 1822. It was the defendant's duty, as bailee, to safely keep the salt bailed and deliver it to the bailor, or its successor in interest, on demand. Lawson on Bailments, § 22; Story on Bailments, § 122. Neither the wrongful conversion of property to his own use by a bailee, nor his wrongful transfer of the possession thereof to another, can divest the title of the true owner. This is settled in this state by the decision in *Howe v. Johnson*, 117 Cal. 41, 48 Pac. 978, and *Faulkner v. Bank*, 130 Cal. 258, 62 Pac. 463. The title

thus remaining in the Amalgamated Salt Company, after the conversion, was a species of property, and as such it was subject to sale and transfer by the owner. Civ. Code, §§ 1044, 1047; *Rice v. Whitmore*, 74 Cal. 623, 16 Pac. 501, 5 Am. St. Rep. 479; *Curtin v. Kowalsky*, 145 Cal. 434, 78 Pac. 962. The contract of sale by that company to the plaintiff described the salt converted, as well as that remaining in the defendant's possession, and therefore its effect was to transfer to the plaintiff the title to all the salt in controversy wherever situated, and notwithstanding its previous removal by the defendant. The plaintiff, by virtue of its purchase of all the salt embraced in the contract of December 20, 1902, above quoted, and the extension of the time of making the \$1.150 payment from January 1, 1904, to February 1, 1904, was entitled to the immediate possession of all the salt at the time of its purchase thereof. The payment of \$1.150 was not a condition precedent to the existence of the right of immediate possession, at least not until February 1, 1904, when it became due. To avoid all question upon this point, however, the plaintiff paid it before that day, and thus complied with every condition that could at any time become necessary to entitle it to demand delivery of the salt from the defendant, including that removed and converted as well as that remaining on hand. It made the demand, and possession was refused. A right of action for possession, or for the value of the salt, if possession could not be recovered, immediately accrued to the plaintiff.

The fact that the defendant had, before the demand, or before the action was begun, parted with the possession of the salt, was no defense. Nor would the fact that plaintiff was vendee of the original bailor affect the case in this particular. This question was fully considered in *Faulkner v. Bank*, supra. It was there held that an assignment of a note by the owner, after the bailee had parted with its possession to a stranger, transferred the title and right of possession to the owner's assignee, and that the bailee could not defend an action by the assignee for its possession or value, on the ground that, before the demand by the assignee, he had delivered it to a third person who claimed to be the owner, and that he was therefore unable to deliver possession in compliance with the demand. The opinion declares that the action is of the character formerly known as an action in detinue, and that the rights of the parties are to be determined by the principles of the common law applicable to that form of action. It then quotes passages from 1 Chitty's Pleadings, 138; *Haley v. Rowan*, 5 Yerg. 301, 26 Am. Dec. 268, and *Reeve v. Palmer*, 5 Com. B., N. S. 84, to the effect that, if a bailee wrongfully deliver the goods to another, he will continue liable in detinue for the goods or their value, that it

does not lie in his mouth to set up his wrongful act in answer to such action, or to say that he is unable to comply with the demand for possession because of his own breach of duty, and that the burden is on him to show any excuse, such as that his possession ceased before suit brought, by accident, or some means beyond his control and without his fault. The opinion proceeds to say that these principles "are eminently just, and are founded on the maxim that no man can take advantage of his own wrong, and they are as applicable now to an action based on a contract of bailment as they were to such action when it had to be brought under the special form of detinue." The following authorities are of similar effect: 14 Cyc. 259, 260; 5 Cyc. 188, 189; 8 Am. & Eng. Ency. of Law, 763; *Lawson, Bailments*, § 23; *Schouler, Bailments* (2d Ed.) p. 30, note; *Cobbe on Replevin*, § 212; *Howe v. Johnson*, supra; *Serat v. Utica*, 102 N. Y. 681, 6 N. E. 795; *Rogers v. Windoes*, 48 Mich. 630, 12 N. W. 882; *Brady v. Whitney*, 24 Mich. 156; *Tome v. Dubois*, 73 U. S. 543, 18 L. Ed. 943.

2. The two payments amounting to \$5,750, called for by the contract of December 20, 1902, were duly made as agreed, but no salt was delivered under the contract, prior to February 1, 1904. The plaintiff made the final payment of \$1.150 to the defendant in January, 1904, and thereupon demanded delivery of the salt. During the months of February, March, and April, after the suit was begun, the defendant delivered the remaining 825 tons. The plaintiff has not paid any additional sum for the expenses of delivering this salt. The court below held that the 25 cents per ton, for delivery expenses of the salt thus subsequently delivered, was not included in the final payment of \$1.150, but was additional thereto, basing this conclusion upon the fact that the delivery was made after the making of said final payment. The court was of the opinion that the provision that the delivery expenses were to be deducted from the final payment applied only in case the salt was delivered before that payment was made, and that, if it was delivered after that payment, the charge was to be an addition to the price. From this it concluded that the failure to pay \$206.25 for expenses of delivering the salt delivered after the suit was begun caused the forfeiture of the plaintiff's title to that part of the salt and defeated its right of action, and that the defendant was therefore entitled to judgment. The contract should not be thus construed. A contract is not to be construed to provide a forfeiture, unless no other interpretation is reasonably possible. The 25 cents per ton for expenses of delivery was not to be due until after delivery, and then only to the extent of the salt delivered. Delivery could not be enforced until after the first two money payments, amounting to \$5,750, were made. The defendant was given

power to sell the salt that might be forfeited, a power which ordinarily requires delivery of possession to make the sale complete, thus implying that the forfeiture was to be of salt in its possession, and not salt delivered to the purchaser. It was evidently expected that all the salt would be delivered long before the \$1,150 became due. If so, the amount to be deducted for delivery expenses would be ascertained before that installment was paid. Considering all the provisions of the contract, together with the surrounding circumstances, we think its true construction is that the provision for a forfeiture upon failure to make any payment specified in the contract, referred only to those sums which constituted the part of the purchase price of the salt payable in money, and which might become due before delivery, and not to the charge of 25 cents per ton for sewing, sacking, and delivery of the salt on board cars, which was not to be paid until the 13th of the month succeeding such delivery. It is unnecessary, in this action, to determine whether or not the defendant is entitled to further charges for these delivery expenses, after having received full payment of the final installment of \$1,150. Our conclusion is that, after having paid the final installment, the failure of the plaintiff to pay delivery charges for subsequent deliveries did not cause the title to such salt to revert to the defendant.

3. The contract of sale from the Amalgamated Salt Company to the plaintiff also contained a provision that, if payment of the price was not made as specified, the title should revert to the Amalgamated Salt Company. The court found that at the time of the trial the plaintiff had not yet paid that company for the 825 tons of salt received by it under the contract. It would seem that from this fact the court believed that the plaintiff's original title to the property had been defeated, and that it could not recover possession. We think this was a matter of no concern to the defendant. If a forfeiture took place, as was claimed, it was after the suit was begun. The enforcement of such forfeiture could be waived. Some affirmative action by the Amalgamated Salt Company would be necessary as evidence of an intention to enforce it. It does not appear that any such action was taken, and its enforcement will not be presumed in favor of the defendant for the purpose of defeating this action.

4. There is a claim by the plaintiff that the finding that the salt which was the subject of the sale of December 20, 1902, was only 1788 tons, is not sustained by the evidence, and that the court should have found that it consisted of 4,600 tons. It was not seriously contended that the evidence was such as to require a finding that there was at that time 4,000 tons of salt on the premises "lifted, sacked and stored in piles, bins

and warehouses," as stated in the contract, nor that any specific quantity was described in the contract. The contention is, in this behalf, that one Wadsworth and one Babcock, as agents of the defendant, negotiated the sale of the salt to the Amalgamated Salt Company; that they then represented to that company that there was at least 4,600 tons of salt situated as described; that, because of these representations, the defendant is, as a matter of law, estopped to deny that any less quantity was so situated and sold; and that this estoppel operates not only in favor of that company, but also in favor of plaintiff, as defendant's vendee. We need not determine the soundness of the propositions that the representations created an estoppel, and that the estoppel operates in favor of the vendee. There was evidence from which the court may have concluded that Wadsworth was not the agent of the Western Salt Company, but was the agent and promoter of the Amalgamated Salt Company; that in that capacity, and before the latter company was incorporated, he visited the salt works of defendant and saw the salt there on hand; that whatever statements were made to the Amalgamated Salt Company were made by him in his report to that company after its incorporation, as its own agent; and that the principal object of the Amalgamated Salt Company in making the contract was not to purchase any particular quantity of salt, but to buy the stock of salt which the Western Salt Company then had ready for market so as to prevent the continued competition of the latter in the salt business. Upon such facts the court might justly hold that the contract should be taken literally, as its words imply; that is, as a sale of the salt on hand at that place ready for market, without especial regard to its quantity. We express no opinion upon the question whether it could, under different circumstances, be construed otherwise. If the court believed the facts were as above indicated, there could be no estoppel.

5. The plaintiff further contended that the pleadings admitted that the amount of salt on hand at the time of the sale on December 20, 1902, was 4,600 tons. We need not decide this proposition. It may be conceded that the pleadings are somewhat ambiguous upon that point; but, as the judgment must be reversed and a new trial had, the defendant may be allowed to amend its pleadings, if it so desires, so as to remove all doubt upon that subject.

We may add, with respect to the value of the salt, that evidence of the market value of salt at retail, in lots of less than a ton, in the city of San Diego, would be a very unsatisfactory measure of value of salt in lots of 1,000 tons or more at wholesale, and that, unless such evidence was supplemented by proof of the difference between the wholesale and retail prices, it would not, of itself, en-

able the court to find the value. The defendant is liable only for the wholesale price or value; that is, of the going price when sold in similar lots by manufacturers to the trade.

The judgment and order are reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.

5 Cal. App. 678

SUMMERFIELD v. DOW. (Civ. 397.)

(Court of Appeal, Second District, California.
June 4, 1907. Rehearing Denied by Supreme Court Aug. 3, 1907.)

JUSTICES OF THE PEACE—COMPENSATION—
STATUTES—VALIDITY.

Pol. Code, § 4014, as amended in 1907, provides for two justices of the peace in each township, except in townships containing cities in which city justices are elected, and in townships having a population of less than 5,000, there shall be but one, and except in townships containing a population of more than 100,000 and less than 300,000, there shall be four. Section 4231, subd. 15, as amended by St. 1907, p. 424, c. 10, fixes the salary of justices of the peace by allowing them the fees allowed by law, except that no justice shall receive more than \$1,500 per annum for services rendered by him in criminal cases, and except that in townships having a population of more than 100,000 and less than 300,000, each justice shall receive a salary of \$3,000 per year, which shall be in lieu of all fees for the performance of any official act. *Held*, that section 4231, subd. 15, as amended, is not in conflict with Const. art. 11, § 5, providing that the Legislature shall regulate the compensation of all officers in proportion to duties, since the adjustment of compensation between the different classes of justices is based on proper distinctions.

Petition for a writ of mandate by Joseph W. Summerfield against Herbert G. Dow, as auditor of Los Angeles county, to compel respondent to draw a warrant on the county treasurer to pay petitioner his salary. Writ granted.

C. L. Shinn, for petitioner. Anderson & Anderson, for respondent.

TAGGART, J. Petition for writ of mandate. Petitioner is a justice of the peace for Los Angeles township, Los Angeles county. Respondent is the auditor of Los Angeles county. On May 11, 1907, petitioner demanded of respondent that he draw a warrant upon the treasurer of Los Angeles county for \$250, payable to petitioner as his salary for the month of April, 1907, under the provisions of subdivision 15 of section 4231 of the Political Code, as amended March 18, 1907 (St. 1907, p. 424, c. 10). Respondent refused to issue said warrant, and, as cause why the mandate of this court should not issue commanding him to do so, says the statute providing for such salary is unconstitutional. The provision of the Constitution said to have been violated by the Legislature in enacting the section mentioned is the requirement of section 5 of article 11 that "It [the Legislature] shall regulate the compensation of all such officers [county, township and municipal officers] in proportion

to duties," etc. Section 4014 of the Political Code, as amended in 1907, provides for two justices of the peace in each township of the state; provided that in townships containing cities in which city justices or recorders are elected and in townships having a population of less than 5,000 there shall be but one, and provided further that in townships containing a population of more than 100,000 and less than 300,000 there shall be four justices of the peace. Subdivision 15 of section 4231, which relates to the compensation of justices of the peace in counties of the second class (Los Angeles), provides that justices of the peace shall receive as compensation "such fees as are now or may be hereafter allowed by law; provided that no justice of the peace shall receive more than \$1,500 per annum, which may be paid in monthly installments of not exceeding \$125 per month for all services rendered by him in criminal cases * * * or proceedings to which the people of the state of California are parties. * * * And provided further, that in townships having a population of more than one hundred thousand and less than three hundred thousand each justice of the peace shall receive a salary of three thousand dollars per year, payable in like manner and out of the same fund, and at like times as county officers are paid and such salary shall be in lieu of all fees due or to become due such justice for performance of any official act. And all fees * * * shall be and become the property of the county in which such justice exercises his jurisdiction." Another proviso requires the board of supervisors of the county to provide an office and necessary furniture therefor and appoint a clerk for each of said four justices' courts, and a salary of \$100 per month is provided to be paid to each of said clerks.

Los Angeles township is the only one in Los Angeles county to which the provisions as to clerks, salary, offices, etc., can apply, and it is contended: First, that the compensation provided is not in proportion to the duties that the respective justices of that township may be required to perform; and, second, that, when compared with the compensation fixed for justices of the peace in other townships of Los Angeles county, the salary allowed is not in proportion to the duties of the office.

While it is possible, we might even say probable, judging from human nature in the average, that some of the justices of the township in question will perform more of the duties of the office than others, we do not think this is a failure of uniformity of operation which can be reached in this manner. This presents one of those evils of our governmental system which must find relief at the ballot box. A statute which provides four officers to attend to all the business of a specified kind within a certain district at equal salaries impliedly imposes a duty upon

these officers to equitably apportion the business among them, whether there be any express statutory regulations in this regard or not. Any inconvenience to the public from the overzeal of one or more of the incumbents of the office of justice of the peace to do too much (or too little) will have to be borne until the opportunity arises to change the personnel of the offices. That a more excellent system was provided for San Francisco by the Code of Civil Procedure (section 85 et seq.) does not imply that the latter is the only constitutional plan. The validity of a law is not to be tested by its application to extreme cases, or by assuming that public officers will grossly and arbitrarily violate their duties. If every law were declared unconstitutional which by the application of such tests could be shown capable of working injustice, we would have very few laws left. *Rode v. Siebe*, 119 Cal. 520, 51 Pac. 869, 39 L. R. A. 342.

The greater stress, however, is laid upon the objection that there is not a due apportionment of duties and compensation between the justices outside of Los Angeles city and those inside. The path of judicial interpretation through the field of county and township legislation discloses many byways. Conflicting views are not wanting in the various declarations of the law on the subject by the courts. But we are not called upon to distinguish these cases, nor to attempt to reconcile them in reaching a conclusion on this point. The two cases relied upon by respondent to sustain his position that the law is unconstitutional (*Tucker v. Barnum*, 144 Cal. 266, 77 Pac. 919, and *Millard v. Kern County*, 147 Cal. 682, 82 Pac. 329) hold that a classification of townships by population for the purpose of fixing the compensation of the officers thereof, according to the method prescribed by the Constitution for classifying counties, is valid and proper. In *Tulare County v. May*, 118 Cal. 308, 50 Pac. 427, it is held that different methods of fixing compensation of county officers may be provided in different counties. In *Vall v. San Diego Co.*, 128 Cal. 35, 58 Pac. 392, the same doctrine is declared and rule applied where a county officer in one class of counties was compensated by salary and the same officer in all the other classes of counties in the state received fees and a per diem for services rendered. This rule is recognized and applied to township officers in two different classes of counties in the later case of *Johnson v. Gunn*, 148 Cal. 745, 84 Pac. 665. In *Tucker v. Barnum*, the unequal limitations upon the fees that might be collected for the same services was declared to violate the rule that compensation must be in proportion to duties, and also to violate the rule as to local and special laws affecting the fees and salaries of officers. The act before the court in *Millard v. Kern Co.* was declared invalid on the authority of the

former case, and was subject to the same objection when considered independent of the provision relating to the justices of the peace to whom were given a fixed salary for all services in civil and criminal cases. The section classifying townships and fixing the compensation of the justices of the peace was considered as an indivisible act, and on the theory that one part could not be permitted to stand without the other, the decision in that case may be sustained. This view of the opinion in that case is supported by the fact that no attempt is made to point out the differences between the two cases, and the decision in the *Millard Case* is rested solely upon the rule of stare decisis. This is also further strengthened by the special concurring opinion of Justice Angellotti in the latter case. These cases are easily distinguishable from the case at bar. Subdivision 15 of section 4231 does not in express words classify the townships of Los Angeles county. It fixes a uniform rule of compensation by fees for all the justices of the peace in the county, with a limitation of \$1,500 per annum in criminal cases, and, by a proviso, establishes salaries for the four justices of the peace provided for one of the classes of townships created by the general law. Section 4014, Pol. Code. Both the other classes created by section 4014 receive the fees allowed by law, with the same limitations in criminal cases. The Legislature in its discretion has fixed a different mode of compensation in the two classes created by the legislation for the purpose of fixing compensation, and there is nothing before this court from which it can ascertain whether the compensation of one class will be less or more than the other.

Conceding full force and effect to all that has been said since *Longan v. Solano Co.*, 65 Cal. 122, 3 Pac. 463, in regard to compensation being fixed in proportion to duties, rather than according to population, the same rules of interpretation of statutes are applicable. The mode and measure of compensation of public officers are both peculiarly matters of legislative discretion, and an act of the Legislature in relation thereto ought to be clearly shown to be unconstitutional before being so declared by the courts. The validity of statutes should not be determined upon mere possible contingencies. So long as the classification seems based upon conditions which suggest the propriety of the different adjustments made between the classes, and the adjustments proceed upon intrinsic differences, and are not based upon mere arbitrary distinctions, it should be upheld. *Vall v. San Diego*, supra.

While the population of a township may not alone be sufficient to determine the duties required of an officer, density of population has always been regarded as one of the prime considerations in ascertaining the amount of compensation to be paid a public

officer for discharging the duties of his office, and also in determining the system to be adopted in measuring such compensation. Salary is the method most generally adopted to compensate officers of large cities, and fees those of smaller cities and towns and nonurban communities. The adjustment between the classes in the act under consideration appears to proceed not only upon intrinsic differences existing between the townships of the respective classes, but is based upon well-recognized distinctions, which go directly to the duties required of such officers, and to the methods of compensation ordinarily and generally used. To sustain respondent's position here would be to hold any act unconstitutional which provided fees as the measure of compensation in one class of townships and salaries in another. We find no authority to sustain such a position.

We are of the opinion that the Legislature did not violate its legislative discretion in enacting the portion of subdivision 15 of section 4231 of the Political Code, as amended in 1907, which fixes the salary of the justices of the peace of Los Angeles township at \$3,000 per annum for the personal discharge of their official duties. In arriving at this conclusion, however, we have not considered those provisions relating to salaries of clerks, office rent, supplies, etc., as affecting the compensation of the justices of the peace. These are matters which naturally suggest questions which have not been presented on this application. For instance, the question of whether or not it is competent to create special township officers for one class of townships in one county (that is, clerk of the justice's court), under a classification of such townships by population for the purpose of fixing compensation. Neither have we considered the proviso as to rent, furniture, supplies, etc., because we deem it unnecessary to the decision of the question raised on this application. The Legislature has made express provision for a salary of \$3,000 for the justices of the peace in Los Angeles township, and petitioner is entitled to receive the salary of \$250 per month as demanded.

The writ of mandate of this court is directed to issue commanding respondent to draw his warrant upon the county treasurer of Los Angeles county for the amount as prayed for.

We concur: ALLEN, P. J.; SHAW, J.

(5 Cal. App. 654)

PEOPLE v. COLLINS. (Cr. 88.)

(Court of Appeal, First District, California.
June 1, 1907.)

1. RAPE—ASSAULT WITH INTENT TO COMMIT RAPE—INDICTMENT AND INFORMATION—SUFFICIENCY.

Under Pen. Code, § 220, providing that every person who assaults another with intent to commit rape, etc., is punishable, etc., an

information charging that defendant unlawfully made an assault on, etc., a female under the age of 16 years, etc., with the intent to ravish, etc., was sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 37-41.]

2. SAME—SUFFICIENCY OF EVIDENCE.

In a prosecution for assault with intent to commit rape, evidence examined, and held sufficient to support a conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 78-82.]

3. SAME—QUESTIONS FOR JURY.

In a prosecution for assault with intent to commit rape, the intention with which defendant made the assault was a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 87.]

4. CRIMINAL LAW—APPEAL—OBJECTIONS NOT RAISED BELOW.

Where no objection is made to testimony given without the witness being sworn, the objection cannot be made for the first time on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2640, 2643.]

5. SAME—APPEAL—REVIEW—DISCRETION OF TRIAL COURT—WITNESSES—COMPETENCY.

The question as to the competency of a witness of tender years is one peculiarly within the discretion of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3062.]

6. SAME—TRIAL—MISCONDUCT OF JUDGE.

Where, in a prosecution for assault with intent to commit rape, the attitude of defendant's counsel disconcerted prosecutrix, a timid child, the court properly admonished counsel to keep without the railing where prosecutrix was being examined as a witness; it not appearing that counsel could not hear the answers of the witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1522.]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

William H. Collins was convicted of assault with intent to commit rape, and appeals. Affirmed.

H. A. Krouse, for appellant. U. S. Webb, Atty. Gen., for the People.

COOPER, P. J. The information charges the defendant with assault with intent to commit rape; the charging part being as follows: "Said William H. Collins * * * unlawfully, violently and feloniously did make an assault upon one Katie Simonetti, a female under the age of sixteen years, to wit, of the age of six years, who was not then or there the wife of said William H. Collins, with the intent then and there feloniously and by force and violence to carnally know and ravish the said Katie Simonetti and accomplish with her an act of sexual intercourse against her will, without her consent and by force, contrary to the form," etc. Defendant's counsel insists that the information is not sufficient because it does not allege that the assault was an attempt to commit a violent injury upon the person of the child so as to show an assault, as de-

fined in section 240 of the Penal Code. There was no demurrer to the information, and the point is for the first time raised in this court. However, we are of the opinion that the information is sufficient. It substantially follows the language of the statute, which is: "Every person who assaults another with intent to commit rape," etc. Pen. Code, § 220. It states the acts constituting the offense in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended. In such case the information is sufficient. The word "assault" as used in the statute implies force by the assailant, and resistance by the one assaulted. It has always been held in this state that, where a crime like this is charged to have been committed upon a child under 16 years of age, there can be no consent, as the law resists for her. *People v. Verdegreen*, 106 Cal. 215, 39 Pac. 607, 46 Am. St. Rep. 234; *People v. Vann*, 129 Cal. 118, 61 Pac. 776. It is not necessary for courts to draw fine analytical distinctions between an attempt to commit an offense, and an assault with intent to commit such offense. *People v. Lee Kong*, 95 Cal. 666, 30 Pac. 800, 17 L. R. A. 626, 29 Am. St. Rep. 165; *People v. Christian*, 101 Cal. 471, 35 Pac. 1043.

We have carefully examined the evidence, and find it sufficient to support the verdict. Without going into minute detail, there is evidence tending to show the following facts: Defendant roomed on the third floor of a lodging house at 694 Fourth street in the city of San Francisco. About 9 o'clock, or a little before, in the evening, he was seen going upstairs to his room carrying two little girls in his arms, of which the child upon whom the assault is alleged to have been made was one. He remained in the room for some 20 minutes, and came downstairs with both children in his arms. The child upon whom the assault is alleged to have been made went home, and immediately complained to her mother that the defendant had hurt her, showing the mother her private parts. The mother examined her person, and found the parts red, but did not notice any blood or bruises of any kind. The child testified that defendant got down on his knees, and took up her clothes, and put something in her private parts which hurt her; that he took down her "panties" and took his thing out of his pants; that she was scared, but did not cry, because defendant held her mouth. The police officer to whom complaint was made on the same evening visited the room of defendant at 9:30, and again at 12:30, but did not find defendant there. On the following evening, about half-past 7, he met the defendant and asked him about the matter, and defendant denied that he had the two little girls in his room on the evening of the 8th, or that he was there himself. Defendant in his testimony admits that he had the

two little girls up in his room at the time alleged, and attempted to explain it by saying that he took them up to see his own little girl; but, as his own wife and little girl were not there at the time, the explanation may very well have been such as not to be believed by the jury. Defendant further testified as to leaving his room on the evening of the 8th a little before 9 o'clock, and that he went with a Mr. Kaiser to Fifth and Townsend streets, and stayed there until half-past twelve that night, and that at 2 o'clock a. m. he went with Kaiser to Fourth and Bluxome streets. He does not appear to have gone to his room any more that night.

It is argued that, as the child had not been torn or penetrated, defendant could not have actually tried to have sexual intercourse with her. What his intentions were was a question particularly for the jury. The jury heard the evidence, and saw the witnesses and the defendant when he was testifying in his own behalf. The facts in this case are very similar to the facts in *People v. Johnson*, 131 Cal. 511, 63 Pac. 842, and that case is direct authority for the view we have taken in this case. It was there said: "The defendant assaulted the child. Being under 16 years of age, she was incapable of consenting, and therefore the assault in law was without her consent. If he had in fact had sexual intercourse with her, he would have been guilty of rape. As he did not have sexual intercourse with her, but did assault her, the question as to his intent was to be determined by all the circumstances and by the acts of defendant. The fact that defendant unbuttoned his trousers, that he took out his private parts, and that he wanted to have sexual intercourse with the child, were sufficient to justify the jury in drawing the logical rational conclusion that defendant's object was to have sexual intercourse with the child. Whether he desisted because he had satisfied his morbid depraved passions in the manner described in the evidence, or because he was afraid of an outcry from the child, or because of his impotence, are all matters of conjecture. We do not think the crime charged against this defendant, and of which he was convicted, is of such a nature that we should attempt to shield him upon imaginary reasons, or upon a theory that might possibly account for his acts as being done with the intent only to gratify an unnatural desire. We must suppose that his acts were done with the purpose and desire that would ordinarily characterize the acts of an individual of the male sex when such acts were done with one of the female sex. That a man should entice a little girl into his room, undress her, and fondle her for the purpose of gratifying an unnatural desire, and not for the purpose of having sexual intercourse, is possible, but not at all probable. The in-

tent of a person cannot be proven by direct and positive evidence. It is a question of fact to be proven like any other fact, by acts, conduct, and circumstances."

It is contended that the record does not show that Katie Simonetti was sworn, and further that her examination showed that she was of tender age, and incapable of receiving just impressions of the facts respecting which she was examined, or of relating them truly. The minutes of the trial do not show that she was sworn, but the bill of exceptions shows that she was examined as to her competency before being sworn, and that after such examination she "was duly sworn." Counsel, in the discharge of their duty, owe it to the court not to raise and discuss a point entirely devoid of merit, especially where the record does not sustain the statement. It is an elementary principle, supposed to be understood by every member of the bar, that if no objection were made to the testimony of a witness, and the testimony was given without the witness being sworn, the objection could not be made for the first time in this court. Here the record does not show that the witness was not sworn, nor that any objection was made to her evidence upon this ground, and the bill of exceptions shows that she was sworn.

Equally without merit is the contention that the court erred in allowing the child to testify. She was carefully examined by the judge, and her examination shows that she was capable of receiving just impressions of the facts, and knew and understood them sufficiently to give her version of them. The question as to the competency of a witness of tender years is one peculiarly within the discretion of the trial court. *People v. Wilmot*, 139 Cal. 103, 72 Pac. 838; *People v. Craig*, 111 Cal. 460, 44 Pac. 186; *People v. Bradford*, 1 Cal. App. 41, 81 Pac. 712.

It is claimed that "the most glaring and prejudicial error and deprivation of the right to a fair and impartial trial" occurred when the court requested the defendant's attorney not to step within the railing where the little girl was being examined as a witness, and to take his seat. From our information as contained in the record we are of opinion that the court properly admonished counsel. The child was timid, and both the counsel for the prosecution and the judge were endeavoring to get her to narrate in her own way what occurred. Defendant's counsel had interrupted time and time again with needless objections devoid of merit. Finally, when counsel arose and walked up inside the railing and near the child, the judge informed him that he had "the right to make any objection, but your activity inside the railing disconcerts the witness." It does not appear that counsel could not hear the answers of the witness. The court seems to have been very liberal with him, as he was allowed to ask questions in cross-examina-

tion which take up page upon page of the transcript with no apparent merit.

Many other questions are raised in the brief, but are as devoid of merit as those we have discussed.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

5 Cal. App. 659

HOLMES et al. v. SALAMANCA GOLD MIN. & MILL CO. et al. (Civ. 344.)

(Court of Appeal, Second District, California. June 1, 1907.)

1. MINES AND MINERALS—RECOVERY OF UNPATENTED MINING CLAIMS—PLEADINGS—ISSUES—EVIDENCE.

Where the complaint, in an action for the possession of unpatented mining claims, alleged plaintiff's ownership, possession, and right of possession at a specified date and his ouster by defendant, defendant, under a general denial, might show that the deeds under which plaintiff claimed title were bad.

2. DEEDS — EXECUTION — EVIDENCE — SUFFICIENCY.

On the issue of the execution of a deed, evidence examined, and held to warrant a finding that the possession of the deed was wrongfully obtained by the grantee without the knowledge or acquiescence of the grantor, and title did not pass.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 645.]

3. CORPORATIONS — DEEDS — REQUISITES — DELIVERY.

The board of directors of a corporation authorized the execution of a conveyance by its secretary and president. The secretary retained possession of the deed, signed by the president and himself, until after the grantee therein brought suit for the possession of the premises described therein, when the officers acknowledged the same, and it was placed on record. It did not appear that an immediate delivery was intended, or that the grantee paid anything of value for the property. Held to justify a finding that the deed was not delivered to the grantee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1784.]

4. MINES AND MINERALS—RECOVERY OF UNPATENTED MINING CLAIMS—PLEADINGS—ISSUES—EVIDENCE—ADMISSIBILITY.

Where, in an action for the possession of unpatented mining claims, plaintiff claimed ownership through conveyances executed by the original locator, and defendant pleaded the general denial, evidence of a forfeiture of the rights of the original locator or his successors, under Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1427], because of the nonperformance of the annual assessment work and of defendant's entry on the premises and his relocation of the same, was admissible.

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by W. H. Holmes and others against the Salamanca Gold Mining & Milling Company and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Powers & Holland, for appellants. Collier & Smith, Works, Lee & Works, Lawler, Allen & Van Dyke, and C. F. Smith, for respondents.

ALLEN, P. J. Action to recover possession of certain unpatented mining claims. Defendants had judgment. Plaintiffs in due time appealed, upon a statement, from the order denying a new trial.

The only questions presented upon this appeal relate to the action of the trial court in admitting certain testimony and as to the sufficiency of the evidence to support certain material findings. The complaint is in the usual form, alleging plaintiffs' ownership, possession, and right of possession on December 30, 1903, of three unpatented lode mining claims, designated as the "Bonanza," "Blossom," and "Lucinda," and of plaintiffs' ouster therefrom by defendants. The answer is a denial of the ownership and right of possession in plaintiffs, and of the ouster. Under these issues the court found that on the date named plaintiffs were not the owners or entitled to the possession of said mining claims, although they were in actual possession; that plaintiffs had not performed the annual assessment work thereon for three years; and that defendants had made valid locations of such claims after forfeiture by plaintiffs and had taken peaceable possession and continued work thereon up to the commencement of the trial.

Plaintiffs deraigned title through mineral locations, the validity of which is not questioned, and through deeds from such locators and intermediate owners. The court, under objections, permitted the defendants to introduce testimony tending to vitiate two deeds affecting plaintiffs' title to the "Bonanza" claim. This action of the court is assigned as error, because no question of fraud was raised by the answer. The recent decision of *Chrast v. O'Connor*, 83 Pac. 238, 41 Wash. 360, would seem to settle this question adversely to appellants. That decision is based upon *Mather v. Hutchinson*, 25 Wis. 27, where it is held that, under a complaint averring ownership in general terms, the defendant must be allowed to prove anything which would defeat the title offered by the plaintiff. The reason assigned is most convincing, for plaintiff not being required to set up his deraignment of title he might upon the trial prove under such general averment any source of title available. Any other rule applying to defendants would require them to foreknow and avoid, by specific allegations, a title which plaintiff was not bound to disclose at all. This rule has support, also, in *Cooper v. Miller*, 113 Cal. 246, 45 Pac. 325; *Goldberg v. Bruschi*, 146 Cal. 710, 81 Pac. 23; and *Sparrow v. Rhoades*, 76 Cal. 211, 18 Pac. 245, 9 Am. St. Rep. 197.

The court found that the plaintiffs were not the owners or entitled to possession of the mining property on December 30, 1903, nor were they on said date ousted therefrom by defendants. These findings are attacked by appellants upon the ground that there is no evidence in the record sufficient for their support. The findings of the court as to

ownership and right of possession may be sustained upon either of two theories: First, that plaintiffs failed in their deraignment of title from the original locators; or, second, that all rights under the original location had lapsed by reason of the failure to do the annual assessment work required by the federal statutes in order to perpetuate the possessory right, and that defendants exercising a right of citizenship had entered thereon and made a subsequent location before resumption of work by appellants. The first theory, in so far as the "Bonanza" claim is concerned, derives its support alone from the testimony of one Acosta, which is to the effect that he never knowingly or voluntarily made any conveyance of this mine to plaintiffs, and never knew that he had any title to the mine and never made any claim of ownership thereto; that his only contract with the plaintiffs was that if they would pay him \$400 in settlement of a claim of \$650, which he held against certain trustees, he would give them a receipt in full; that pursuant to this agreement he went with plaintiffs to the town of Hedges, where several papers were spread upon a counter; that when he signed one plaintiffs took it away and presented him with another; that in that way he signed two, three, or four papers; that no notary or other officer ever made known to him the contents of the papers so signed, or asked him any questions in relation thereto; that personally he did not know or care what he was signing, but simply wanted to get his money and get away from the mine; that he never had knowledge of any deed having been made to him by such trustees until he received that information in court upon the trial. If the court accepted Acosta's statements as true, which fact is suggested by the findings, it would follow that the possession of the deed from Acosta was obtained by the plaintiffs surreptitiously. A deed, the possession of which is fraudulently or wrongfully obtained from the grantor, without his knowledge, consent, or acquiescence, is no more effectual to pass title to a supposed grantee than if it were a total forgery. *Devlin on Deeds*, § 287, and cases cited. The validity of the deed from Acosta to plaintiffs depends upon his due execution thereof and voluntary delivery. That such deed be voluntary, it is essential that the character of the instrument be known, as well as that the act of delivery should be intended by the party. If the delivery be not voluntary, the instrument is a nullity, unless some act is shown in respect thereto which would estop the grantor from denying its validity, or by some subsequent act a ratification is established. There is nothing in the record from which it may be claimed that plaintiffs were, by the conduct of Acosta, led to do what they otherwise would not have done to their pecuniary prejudice—this being said to be the vital principle of equitable estoppel. *Cary v. Dowdell*, 116 Cal. 677,

47 Pac. 695. If Acosta's statements be true, under the contract with plaintiffs the payment of the \$400 made by plaintiffs was not upon the faith of any conveyance, nor was it intended that a conveyance should enter into the transaction connected with the payment of money to him. Neither can it be said that, with knowledge of the transaction brought home to him, Acosta ever acquiesced in said deed or ratified the same.

As to the "Blossom" mine, the record discloses that the title thereto was never in Acosta; that as early as 1891 the owners of said mine joined in a conveyance of the "Blossom" mine to a corporation known as the "Blossom Mining & Milling Company." If the plaintiffs ever acquired any title to this particular mine, it was through a conveyance directly to them by the Blossom Mining & Milling Company, authorized by the board of directors in 1902. It appears from the testimony of the secretary that, notwithstanding the authorization at the date last named and the physical signing of the deed pursuant thereto by the president and secretary of the corporation, the secretary retained possession of the deed and put the same in the minute book of the corporation, where it remained until long after the commencement of this action, when the officers acknowledged the same, and it was placed upon record. From this evidence the court was justified in an implied finding that the conduct and acts of the parties in 1902 did not amount to a delivery; nor does it appear from the record that an immediate delivery was intended, notwithstanding the secretary was also one of the grantors; nor is there anything shown indicating that plaintiffs ever paid to the corporation anything of value for this property, or ever acquired any equitable interest therein.

As to the "Lucinda" claim, nothing appears in the record supporting plaintiffs' claim of ownership and right of possession. If, therefore, these plaintiffs, without color of title, entered into the possession of any of these mineral claims without relocation or initiating any right thereto, the same was open to relocation at any time after the legal owners were in default in the annual assessment work. It is contended, however, by appellants, that evidence of the nonperformance of the annual assessment work was inadmissible because no claim of forfeiture was alleged in the answer. Under a general denial or its equivalent, each party to a contested action claims the title out of which the right of possession springs, and the court determines which of the two holds it. *Marshall v. Shafter*, 32 Cal. 197. It must be conceded that, if the defendants' title is in issue, they are entitled to prove those facts which tend to support it, and it is essential in determining defendants' ownership in the case at bar

for the court to know whether or not the mineral ground which they claim to have relocated and own was at the date of relocation open thereto. Section 2324, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1427], provides that, upon a failure to comply with the conditions relative to the annual assessment work, the claim or mine "shall be open to relocation in the same manner as if no location of the same had ever been made; provided, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." There is little room for controversy as to the default upon the part of the owners under the original location in the performance of the annual assessment work for the three years preceding the relocation. Whoever were the successors to the ownership of the original locators, if they failed for three years to perform the annual assessment work, the mines and claims became open to relocation. It is determined in *Contreras v. Merck*, 131 Cal. 214, 63 Pac. 336, that the principal fact at issue was the ownership of the mine; that it was not necessary for plaintiff to allege forfeiture or abandonment by defendant. If this be the rule, as applying where the issue of ownership is raised by the answer with the presumptive denial upon the part of plaintiff, no reason is apparent why the same should not apply to the issues raised by a complaint and answer. If the original locator, or his successors in interest, be in default in such annual assessment work, they are no longer the owners of the exclusive possessory right; and the defendant should be permitted to show that such exclusive possessory right has terminated, and that after such termination he peaceably entered upon the premises and relocated the same. The mere naked possession of mineral land does not guaranty any rights as against a subsequent locator entering in good faith and making a valid location of the property. *Horswell v. Ruiz*, 67 Cal. 112, 7 Pac. 197.

It is further claimed by appellants that there is no evidence connecting any of the defendants, other than Clark, with the relocation, or title to these claims. We think this point need not be considered further than to suggest that the plaintiffs have made all of these defendants parties and have alleged that they had ousted plaintiffs from the possession and were the present occupants of the premises. They allege that the Salamanca Gold Mining & Milling Company is a corporation, and no finding in that regard was necessary.

A careful examination of the record convinces us that there is no prejudicial error apparent therein, and the order is affirmed.

We concur: SHAW, J.; TAGGART, J.

5 Cal. App. 668

KEIFER v. MYERS. (Civ. 343.)

(Court of Appeal, Second District, California.
June 3, 1907. Rehearing Denied by
Supreme Court Aug. 1, 1907.)

SALES—SALE DISTINGUISHED FROM PLEDGE.

Plaintiff's transfer of 198 shares of corporate stock to defendant was a pledge and not a sale, where, when the transfer was made, they executed an agreement reciting the transfer, that defendant was the owner of the stock, that it was pledged to a bank as additional security for plaintiff's debt, that the company was indebted to M., that plaintiff had loaned and would lend money to the company, that plaintiff desired an option to purchase 198 shares of the stock, and binding defendant to sell within one year, upon plaintiff reimbursing defendant for money paid the bank for plaintiff, for one-half the money advanced the corporation by M. and defendant; there being no other consideration for the transfer, and none of plaintiff's liabilities being canceled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 14.]

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by J. H. Keifer against R. H. Myers. Plaintiff appeals from a judgment of nonsuit. Reversed.

Lynn Helm and E. S. Williams, for appellant. W. R. Hervey and R. H. Myers, for respondent.

SHAW, J. Appeal from a judgment of nonsuit. At the time in question, the Sanitary Laundry Company was a corporation with a capital stock of \$40,000, divided into 400 shares of the par value of \$100 each. Of this stock the appellant, J. H. Keifer, owned 198 shares, one George R. Myers owned 198 shares, and the remaining four shares were owned by three other persons, who, with said Keifer and said George R. Myers, constituted the board of directors of said corporation. The corporation was in financial distress, and it appears that neither appellant nor said George R. Myers was in a position to extend it the aid needed. The appellant had borrowed from the Broadway Bank & Trust Company \$4,500, evidenced by two promissory notes, and as security for their payment had, in addition to giving a mortgage upon certain real estate owned by him, deposited his 198 shares of stock in pledge with said bank as collateral security. The laundry company was largely indebted to said George R. Myers for moneys which he had loaned it. Under these conditions, the respondent, R. H. Myers, and J. H. Keifer entered into negotiations, which, on December 30, 1903, culminated in a transfer of respondent's 198 shares of stock to said R. H. Myers, and contemporaneously therewith the execution of an agreement in writing, wherein it was recited that said Keifer had sold, assigned, and transferred to R. H. Myers 198 shares of stock, and that R. H. Myers was the owner and holder thereof. That said stock was pledged to said bank as additional security for the payment of a certain

promissory note of \$4,500, executed by said J. H. Keifer and his wife, which said note was also secured by a mortgage of real estate. That said laundry company during the time said Keifer was a stockholder had become largely indebted to George R. Myers for moneys by him loaned to said company. That said R. H. Myers had loaned and advanced, and would thereafter loan and advance, divers sums of money to discharge a part of the indebtedness of the said company in order to save it from bankruptcy, and to pay such of the operating expenses as might be necessary for the best interests of the company. That said Keifer desired an option to purchase 198 shares of said stock, and wherein said R. H. Myers covenanted and agreed to sell to said Keifer, within one year, time being made the essence of the contract, 198 shares of said stock, upon Keifer making payment to R. H. Myers of: First, all moneys paid to said bank by R. H. Myers on account of the notes of said Keifer, for the payment of which said stock was held as collateral security; second, one-half of all moneys theretofore or thereafter, up to the exercise of the option, advanced to said company by R. H. Myers, less any payments made thereon by said company; third, one-half of all moneys theretofore loaned to said laundry company by said George R. Myers, less any payments made thereon by said company; and, fourth, interest on said sums at 7 per cent. per annum. It was further provided that an accounting for any dividends paid upon said stock should be made and credited to said Keifer at the time of his exercising said option to purchase. R. H. Myers covenanted to advance to the company from time to time such sums of money, not exceeding \$4,000, as might be necessary to save the company from bankruptcy. At the same time, and with the consent of appellant, an agreement in writing was made between said bank and said R. H. Myers, whereby the bank agreed to deliver the 198 shares of stock so pledged to it by Keifer to the said R. H. Myers at any time upon his paying the sum of \$1,000, to be applied on Keifer's indebtedness to said bank, and the delivery to the said bank of an agreement on the part of R. H. Myers to pay any deficiency, not exceeding \$750, which might remain upon Keifer's notes after exhausting the real estate so held by it as security for the payment thereof.

It will be noted, by this agreement with the bank, R. H. Myers assumes no obligation whatever. There was no other consideration for said transfer than that mentioned in the agreement. It appears that R. H. Myers did pay upon said indebtedness of Keifer the sum of \$714.92, and no more, and that from the proceeds of the real estate so held by the bank the sum of \$2,540 was paid on the principal, together with \$260 interest thereon. From time to time after December 29, 1903, which was the date of both the

agreement made between Kelfer and Myers and that between Myers and the bank, though neither was delivered until the 30th of December, 1903, R. H. Myers advanced to said laundry company divers sums of money, part of which was paid by said company. Kelfer did not exercise his option to repurchase the stock within the year, but on January 24 and January 27, 1905, he offered to repurchase and redeem said stock under the terms of said agreement, and asked respondent to render him a statement and account of the amount due thereon, which he, in writing, tendered and offered to pay. No objection was made to this tender. Respondent claimed that the transaction constituted an absolute sale, and that appellant, having failed to exercise his option within the year, had lost the right to purchase the stock. On the other hand, appellant contends that the transfer was a pledge of stock.

"The motion for nonsuit admits the truth of plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against defendant." *Hanley v. California, etc., Co.*, 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597; *Goldstone v. Merchants', etc., Storage Co.*, 123 Cal. 625, 56 Pac. 776. The record shows that the agreements dated December 29, 1903, were delivered on the following day, on which date the certificate of stock representing the 198 shares of stock which Kelfer had pledged to the bank was withdrawn and a new certificate for said stock issued to R. H. Myers and by him redeposited with said bank. The agreement whereby Kelfer was given the right to repurchase the stock and the transfer of the stock to R. H. Myers constituted one and the same transaction. "Several contracts relating to the same matters, between the same parties, and made as parts of substantially the one transaction, are to be taken together. Civ. Code, § 1642." *Curtin v. Ingle*, 137 Cal. 95, 69 Pac. 836, 1013. It appears that R. H. Myers paid no consideration whatever for the transfer of the stock; that he assumed no obligation whatever to pay anything upon Kelfer's indebtedness to the bank, nor did he secure the release of Kelfer's obligations as a stockholder of the company, or assume or agree to pay them. If the company failed to pay George R. Myers, Kelfer was still liable for his proportion of its indebtedness, notwithstanding the loss of his stock. There was no cancellation or surrender of the evidence of any of Kelfer's indebtedness. The only obligation assumed by R. H. Myers was to advance money to the company only in case it became necessary to save the company from bankruptcy. Such contingency might never arise; but, if any advances were made, it was provided that Kelfer should pay one-half thereof upon a repurchase of the stock. If Myers was the owner of the stock, instead of the pledgee, as he claims, the covenant was an

obligation to protect his own property, and not Kelfer's—a proposition which borders upon absurdity.

The fact that the agreement giving Kelfer the right to repurchase and the transfer of the stock were contemporaneous (*Weiseham v. Hocker*, 54 Pac. 464, 7 Okl. 250; *Clark v. Woodruff* [Mich.] 51 N. W. 357; ¹ *Watkins v. Williams*, 31 S. E. 368, 123 N. C. 170); that the stock had a substantial value, and Myers neither paid nor agreed to pay anything in consideration of its transfer to him (*Hushon v. Hushon*, 71 Cal. 407, 12 Pac. 410; *Rubo v. Bennett*, 85 Ill. App. 473); that none of Kelfer's existing liabilities were canceled, and Myers assumed no part thereof under the terms of the agreement; that as a condition of retransfer Kelfer was to pay one-half of the company's unpaid indebtedness to George R. Myers and one-half of the money which respondent had loaned the company, which shows that to this extent at least the stock was transferred as security (sections 2986, 2987, Civ. Code) for existing debts of the company for a part of which Kelfer was liable (*Ahern v. McCarthy*, 107 Cal. 386, 40 Pac. 482; *Farmer v. Grose*, 42 Cal. 169); that no fixed price was specified as a consideration for the repurchase, but the amount was to be as much as would reimburse R. H. Myers for one-half of such sums as he might advance and which might remain unpaid, including one-half of the amount due from the company to George R. Myers; that Kelfer was chargeable with interest and to be credited with dividends—all are circumstances which tend, some of them very strongly, to prove that the transfer was a pledge, and not a sale of the stock.

Respondent lays much stress upon the words used in the agreement, but the use of the words "sold, transferred, and assigned," and the recital that Myers is the owner of the stock, cannot change the character of the transaction. For the purpose of ascertaining the real contract made by the parties, the court looks beyond the terms of the instrument. *Hodgkins v. Wright*, 127 Cal. 688, 60 Pac. 431.

The judgment is reversed.

We concur: ALLEN, P. J.; TAGGART, J.

5 Cal. App. 665

WILLMON v. PECK et al. (Civ. 290.)

(Court of Appeal, Second District, California.
June 3, 1907.)

1. SPECIFIC PERFORMANCE—CONTRACTS—ENFORCEABLE—CERTAINTY—DESCRIPTION OF SUBJECT-MATTER.

To warrant the specific performance of a contract for the conveyance of land, the agreement to convey must not only be in writing and subscribed by the party to be charged, but the writing must contain such a description of the property, either in terms or by reference, that it can be ascertained without resort to parol evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 69-82.]

¹ 90 Mich. 32.

2. EVIDENCE—PAROL EVIDENCE—ADMISSIBILITY.

Under Civ. Code, § 1741, providing that a contract for the sale of land must be in writing, where the description in a contract for the sale of land was definite, certain, and complete, parol evidence was inadmissible to show that the subject of the contract was entirely a different piece of land from that described therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1778-1780.]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by J. C. Willmon against George H. Peck and others for specific performance of a contract to purchase real estate. From a judgment for defendants, plaintiff appeals. Affirmed.

D. M. McDonald and Harris & Harris, for appellant. Frank Karr, and Wellington Clark, for respondents.

SHAW, J. Plaintiff appeals from a judgment rendered in favor of defendants in an action for the specific performance of a contract to purchase real estate. At the time of the transaction, George H. Peck was the owner of the east $\frac{1}{2}$ of the only block numbered 61 located in the city of San Pedro, which east $\frac{1}{2}$ of said block comprised lots 7 to 12, both inclusive. Neither defendant had or claimed any interest in the west $\frac{1}{2}$ of said block, which comprised lots 1 to 6, both inclusive. It appears from parol testimony that some time prior to February 3, 1903, the date of the alleged purchase, a real estate broker, as the agent of said George H. Peck, and at his request, made a rough pencil sketch of said east $\frac{1}{2}$ of said block 61, showing the same to be divided into lots numbered 1 to 14, both inclusive, which sketch was shown to said George H. Peck and posted in his office. This sketch or subdivision of the east $\frac{1}{2}$ of said block was exhibited to the plaintiff by said agent, who pointed out to him upon the ground that portion of said east $\frac{1}{2}$ of said block corresponding to lots designated as 5 and 6 upon said rough pencil sketch so made by said agent. This sketch was never filed for record, nor was it produced at the trial, though the said agent then made and exhibited a copy of said sketch as nearly as he could reproduce the same, which, like all of the foregoing parol testimony, was received in evidence over the objections of the defendants. No survey was ever made of the east $\frac{1}{2}$ of said block for the purpose of subdividing it. It was agreed between plaintiff and said agent acting for defendant George H. Peck that plaintiff would purchase lots 5 and 6, as designated on said pencil sketch, whereupon plaintiff gave to said agent his check, payable to said George H. Peck, for \$100, as a deposit upon the purchase price of said lots, which check said Peck received and cashed, and thereupon delivered to said plaintiff a receipt reading as follows: "San Pe-

dro, February 3, 1903. Received from J. C. Willmon one hundred dollars part payment on lot 5 and 6, block 61, San Pedro. Full price \$1,500.00. Geo. H. Peck." Plaintiff thereafter tendered the balance of the purchase price and demanded a conveyance of lots 5 and 6, as designated upon said so-called subdivision of the east $\frac{1}{2}$ of block 61, which deed also described said lots by metes and bounds, and upon a refusal of said demand brought this action.

Both the check and the receipt describe the property sold as being "lots 5 and 6, block 61, city of San Pedro," both of which lots are in the west $\frac{1}{2}$ of said block, and neither of which was owned by either of the defendants. The lots involved in this action are admittedly not the ones so described, but are lots 5 and 6 as delineated upon the alleged pencil sketch of what was represented to plaintiff as being Peck's subdivision of the east $\frac{1}{2}$ of block 61; and, while the trial court permitted parol evidence tending to prove that the lots sold were other than those so described in the writing, it, in effect, found that such evidence was valueless; and as a conclusion of law the court found, inasmuch as parol testimony could not be received for the purpose of supplying the description of real estate in the contract for the sale thereof, that said contract was fatally defective for want of description of the lands claimed to be covered thereby, and that said defects could not be supplied by parol evidence. In making this finding the court arrived at the same result, though in a roundabout way, as though it had excluded the testimony in the first instance. The evidence was improperly admitted, and, having been admitted, "it was entitled to no weight whatever, and should be given none in arriving at a conclusion as to the sufficiency of the evidence." *Hoult v. Baldwin*, 78 Cal. 410, 20 Pac. 864.

The conclusion of the trial court was undoubtedly correct. The land described in the receipt, lots 5 and 6, block 61, in the city of San Pedro, is situated in the west $\frac{1}{2}$ of said block; but it was not these lots, the conveyance of which the plaintiff sought to enforce, but other lots situated in the east $\frac{1}{2}$ of said block, and which he sought to identify and describe by parol testimony. The law seems well settled that, in order to warrant the specific performance of a contract for the conveyance of real property, the agreement to convey must not only be in writing and subscribed by the party to be charged, but the writing must also contain such a description of the property agreed to be sold, either in terms or by reference, that it can be ascertained without resort to parol evidence. *Marriner v. Dennison*, 78 Cal. 208, 20 Pac. 386; *Craig v. Zellan*, 137 Cal. 106, 69 Pac. 853. Where there is an incomplete description, parol evidence not inconsistent therewith may be offered in aid thereof, not,

however, for the purpose of introducing a new description. Thus, where the subject of a contract of sale was a certain quantity of fruit from sundry orchards in Ontario and Cucamonga, parol evidence was held admissible to identify the orchards. Ontario, etc., *Ass'n v. Cutting F. P. Co.*, 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681, 86 Am. St. Rep. 231. Here the description in the contract is definite, certain, and complete, and it is sought by parol evidence to show that the subject of the contract was entirely a different piece of land. This would be in violation of express statutory provision. Section 1741, Civ. Code. "It must, of course, appear from the memorandum what is the subject-matter of the defendant's engagement. Land, for instance, which is purported to be bargained for, must be so described that it may be identified." *Browne on Stat. of Frauds*, § 385; *Ferguson v. Blackwell*, 58 Pac. 649, 8 Okl. 489.

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

5 Cal. App. 686

DODD v. PASCH et al. (Civ. 339.)

(Court of Appeal, First District, California.
June 5, 1907.)

1. EVIDENCE—PAROL EVIDENCE AS TO WRITINGS—LEASES.

Where, on an issue as to whether a lease was from month to month or for a year, the tenant produces a written lease for a year, it was error to admit oral evidence to show an understanding that it was to be from month to month.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1741.]

2. LANDLORD AND TENANT—LEASE—REQUISITES.

A written lease is binding when signed by the lessor, though not signed by the lessee, when the lessee has taken possession thereunder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 66.]

3. SAME.

A written instrument, reciting that the owner of certain premises had received a certain sum on account of the premises at a monthly rental from October 1st, for the first six months, and at a certain other sum per month for the remainder of the year closing the first of the next October, constituted a lease for a year.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 61.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Fred Dodd against H. C. Pasch and another. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

Johnston & Jones and W. P. Thompson, for appellants. Lewis H. Smith, for respondent.

HALL, J. Appeal from judgment and order denying defendants' motion for a new trial.

Plaintiff brought this action to recover the possession of certain premises rented of plaintiff by defendants. The complaint was framed upon the theory that the defendants were tenants from month to month and were holding over after one month's notice terminating their tenancy. Defendants pleaded that they leased the premises for one year ending October 1, 1906, and at the trial introduced in evidence in support thereof a writing signed and delivered to defendants by plaintiff in the words following, to wit:

"Fresno, Cal., Sep. 25, 1905.

"Received of Pasch Bros. Twenty and no/100 dollars on a/c of old Schlen store at a monthly rental from Oct. 1, of \$125.00 per month for first 6 months, i. e. to April 1st; of \$75.00 per month for the remainder of the year closing Oct. 1, 1906. \$105 (one hundred and five) due and payable.

"\$20 no/100

Fred Dodd."

Defendants went into possession October 1, 1905, and paid all rent up to March 1, 1906, at which time they tendered the rent for March, which was refused by plaintiff; he having on February 28th given defendants a notice to surrender possession March 1, 1906. The trial court, over the objection and exception of defendants, permitted the plaintiff to give testimony of an oral agreement to the effect that he leased the premises sued for, known as the old Schlen store, to defendants from month to month, although he admitted that he executed and delivered to defendants the writing above set forth, and that the money specified had been paid. The court made findings in accord with the theory of plaintiff, and gave judgment accordingly.

Defendants contend that the writing above set forth constituted a written contract of lease for the term of one year ending October 1, 1906, and that no evidence of any oral agreement contrary to the terms thereof was admissible. Of the correctness of this contention we have no doubt. The instrument clearly shows the contracting parties, the premises leased, the rent, and the term, which is clearly one year, ending October 1, 1906. These are all the essential requisites of a lease that need be specified in the contract of lease. Other conditions usually contained in leases are nonessential. The time of payment even need not be specified, for when not stated in the lease, nor governed by usage, it is fixed by the law. Civ. Code, § 1947. "To constitute a lease no particular form of words is necessary. Whatever words show an intention on the part of the lessor to dispossess himself of the premises, and on the part of the lessee to enter and hold in subordination to the lessor's title, are sufficient." 18 Am. & Eng. Ency. of Law, 605. *Munson v. Wray*, 7 Blackf. (Ind.) 403, was an action against Mrs. Munson for holding over her term as tenant, brought on the theory that she was a tenant at will or at sufferance.

Defendant (Mrs. Munson) gave in evidence an instrument in writing signed by the complainant as follows: "Rec'd of Mrs. Munson \$3.50 for rent of my brick house in Covington for one month, with privilege of keeping it six months at the same rate. No. 91 or 95. Dec'r 1st, 1843"—and proved that it had reference to the premises sued for. The court held it a good lease, and that the lessee could not be dispossessed, if she paid the rent, until the expiration of the six months. In *Eastman v. Perkins*, 111 Mass. 30, a writing at the foot of a receipted bill for hay in these words: "Left at stable on Oak street, where Andrew J. Perkins takes possession. Rent to begin October 1, 1870, for one year at \$150. John C. Hoadley"—was held to be a good lease. The court said: "The memorandum affixed to the bill of parcels expresses the consent of the owner that the defendant should have immediate possession of the stable, and should continue to occupy it at a specified rent and for a definite time. Although brief and informal, therefore, it had all the essential elements of a present demise [citing cases]. Being accepted by the defendant, it gave him all the rights of a lessee."

In the case at bar, defendants, by paying the rent and entering into possession of the premises, accepted the lease. It was not necessary for the lessee to sign the lease. *Johnson, Landlord & Tenant*, § 77; *Taylor on Landlord & Tenant*, § 147; 18 Am. & Eng. Ency. of Law, 606; *Castro v. Gaffey*, 96 Cal. 421, 31 Pac. 363; *Scott v. Glenn*, 97 Cal. 513, 32 Pac. 573. The instrument in question being a valid lease, and unambiguous as to the term of the tenancy, it was error to allow oral evidence that the tenancy was from month to month. Civ. Code, § 1625; *McDonald v. Poole*, 113 Cal. 437, 45 Pac. 702.

The cases relied on by respondents on this question are not in point. In *Kreuzberger v. Wingfield*, 96 Cal. 251, 31 Pac. 109, the writing relied on was a mere memorandum so vague and uncertain as not to constitute a contract at all.

The case at bar was not an attempt to explain a clause or term susceptible of two different interpretations (*Williams v. Ashurst*, 144 Cal. 619, 78 Pac. 28), or to prove a collateral parol agreement not inconsistent with the writing (*Sivers v. Sivers*, 97 Cal. 518, 32 Pac. 571; *Guldery v. Green*, 95 Cal. 680, 30 Pac. 786), but a bald attempt to contradict the terms of the written contract.

Neither can the action of the trial court be sustained on the theory that the writing was a receipt, for, while it is a receipt, it is also something more. It is a contract of lease of the premises described for the term of one year.

The judgment and order are reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

5 Cal. App. 674

PEOPLE v. MEYERS. (Cr. 83.)

(Court of Appeal, First District, California.
June 4, 1907.)

1. LARCENY.—EVIDENCE.—SUFFICIENCY.

On a trial for larceny, evidence examined, and held to support a conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 164-169.]

2. CRIMINAL LAW.—VERDICT.—CONCLUSIVENESS.

Under Const. art. 6, § 4, as amended November 8, 1903, conferring on District Courts of Appeal jurisdiction of questions of law alone in criminal cases, a verdict in a criminal case, supported by legal evidence, is conclusive on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3076.]

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

George Meyers was convicted of larceny, and he appeals. Affirmed.

E. W. Rowland and J. J. Earle, for appellant. U. S. Webb, Atty. Gen., for the People.

KERRIGAN, J. Defendant was charged with the crime of grand larceny, and upon the trial was found guilty. His motion for a new trial was denied, and appeal is taken from the judgment and from the order denying such motion. The sole point made by the appellant is that the verdict of the jury is entirely unsupported by the evidence.

Briefly, the testimony is as follows:

Mrs. Grace Hopkins testified: "On the evening of November 23, 1905, at about midnight, in front of a hotel on Mason street in San Francisco, I saw Arnold, Noelke, and defendant, Meyers, all strangers to me. There three men and myself, at the invitation of Arnold, went into a saloon nearby, and had several drinks of whisky, the last of which looked smoky. At that time I had \$48 in a purse in my stocking, and on my fingers three diamond rings worth \$125, \$90, and \$60, respectively. While in the saloon, in attempting to remove my glove, Arnold saw my rings and made a grab for my hand. I withdrew my hand and replaced my glove." She further testified: "I remember nothing that happened for several hours after my drinking that smoky liquor. The next thing that I recollect is awakening in a filthy room in which I had never been before. I was in bed, and not entirely dressed, but my clothes had been loosened. My dress was open. My corset strings had been cut, and the corset removed and thoroughly searched. My shoes and stockings were on the floor and had been carefully examined; even the soles of the shoes having been inspected. My rings were not to be found, and on the dresser I discovered my purse inverted and empty."

The defendant, George Meyers, testified: "I am one of the defendants charged jointly with Arnold and Noelke. I have known Noelke for some time. I first met Arnold on the night of November 23, 1905. Noelke in-

roduced us. About half-past 1 in the morning of November 24, 1905, the three of us were standing on Mason street in front of the Alturas, where Noelke lived, when Mrs. Hopkins passed by. She was intoxicated, and asked us: 'Which of you is going to buy me a drink?' Arnold said that he would do so, and started down the street with her. Noelke and I followed, and the four of us went into a saloon near the Linwood. Arnold sat next to Mrs. Hopkins at the table. We had several drinks, but I did not notice any that appeared cloudy or smoky. We left the saloon about 2:30 a. m. and went into the Linwood; Arnold and Mrs. Hopkins leading the way. Arnold went to the desk and engaged a room, and the night clerk took him and Mrs. Hopkins up in the elevator. Arnold motioned to Noelke and me to remain in the office, and we did so. Later I took Noelke home to the Alturas. He was quite drunk. When I left him there he said to me: 'Arnold has a good job at the Park, and I'd hate to see him lose it on account of a woman. Don't let him oversleep, but send him out to work. I returned to the Linwood, inquired of the clerk the number of the room occupied by Arnold and Mrs. Hopkins, and having been refused the key went upstairs and pounded on the door to arouse Arnold. This I was doing as an accommodation to my friend Noelke, as I had no interest in Arnold, having only met him the night before. Before I had received any response from Arnold, I was compelled to desist by the night clerk, who told me that I was disturbing the whole house. I returned to the office, but presently went upstairs again hoping that I might awaken Arnold, renewed the knocking at the door less violently than before, and was asked by Arnold what I wanted. I told him to get up, that it was time for him to go to work, and he said: 'All right, I'll be out in a minute.' I waited for him. Presently he came out and asked me to go with him and have a drink, and we left the Linwood together. I had not entered the room occupied by Arnold and Mrs. Hopkins since she went up with Arnold in the elevator. I did not take or assist in taking any property from her person. On leaving the Linwood, Arnold and I had a drink together, and he then asked me if I was acquainted at any pawnshop in the city. I said that I knew a clerk at a place on Kearny street, and Arnold asked me to take him there, and said that his girl had given him some things to pawn for her. So I went with him to Jacobs', and there he pawned three rings for \$100. I had never seen the rings before that moment, and had no idea where he obtained them, except from his statement that his girl had given him some articles to pawn. We left the pawnshop together and had another drink. We then separated, and I do not know what Arnold did during the rest of the day. After that I saw

Arnold nearly every day until we were arrested, about a week later. We were arrested by Officer Ryan, with whom I subsequently talked once or twice about the case. His account of our conversations was in the main correct. I never received any money from Arnold on account of the deal between him and the pawnbroker, nor on any other account; and I never said that I did."

Charles Clark testified: "I was on duty as night clerk at the Linwood Hotel on Mason street at about 2 o'clock November 24, 1905, when Mrs. Hopkins, Arnold, Noelke, and defendant, Meyers, arrived. Arnold came to the desk and engaged a room. I asked him his name, and he replied: 'Any old name, say Burke.' The room I assigned them was on the second floor. I entered the elevator to take the party up. Arnold and Mrs. Hopkins stepped in, and Noelke and Meyers started to follow, when Arnold motioned them to stay back, and they retired. They remained in the office while I took the others upstairs. Mrs. Hopkins remarked while in the elevator that the place was 'dirty' and 'a pretty poor looking dump.' I showed them to the room, and saw them enter and shut the door. The door locked with a snap lock. I then returned to the office, where Noelke and Meyers were waiting. They remained for some time, then went out, and returned. Noelke was quite drunk. At about 5:30 o'clock Meyers and he went outside, and Noelke did not return. Meyers returned in a few minutes. He said something about getting Arnold up and sending him to work. He learned which was his room, and then ran upstairs. He asked me for the key to the room, which I refused to give him, as Arnold had given me particular instructions not to allow any one to enter the room. Presently I heard a terrible racket upstairs. I went up and found Meyers in the hall outside of the door of the room which I had given to Arnold and Mrs. Hopkins. He was pounding and kicking on the door. I forced him to stop and to go down to the office with me as he was creating a sufficient disturbance to arouse the whole house. Presently Meyers went up again and made a good deal of noise, but was not quite so holsterous as on the former occasion, so I did not disturb him this time. I do not know whether he was in the room on these several trips or not. Presently he and Arnold came down together and left the hotel at about half-past 7."

H. Wilkins and A. E. Trimple testified that they were clerks at the Jacobs' pawnshop; that they knew Meyers; that on November 24, 1905, at about 8 o'clock in the morning, Meyers and another man, whose name was given as Burke, called at the pawnshop, and Burke pawned three diamond rings for \$100. It is conceded that it was Arnold, under the name of Burke, who pledged the diamond rings.

James L. Ryan, a member of the detective force of the city and county of San Francisco, testified that Meyers told him that he (Meyers) had received from Arnold a commission of \$15 out of the \$100 in the pawnshop transaction.

If there was no legal evidence to support the verdict of the jury in this case, as is contended by appellant, then there would be presented a question of law upon which, of course, this court would have jurisdiction to pass. The record, however, shows clearly there was legal evidence to prove all the facts constituting the crime alleged. In such a case the decision of a jury, in so far as this tribunal is concerned, is absolutely final. Article 6, § 4, Const. Cal. amended November 8, 1906; *People v. Maroney*, 109 Cal. 279, 41 Pac. 1097; *People v. Fitzgerald*, 138 Cal. 41, 70 Pac. 1014; *People v. Donnolly*, 143 Cal. 398, 77 Pac. 177; *People v. Gonzales*, 143 Cal. 606, 77 Pac. 448. In *People v. Maroney*, supra, it is said: "The power of a jury in determining the weight to be given to testimony is, within the rules of evidence, exclusive and supreme, and appeals to this court in criminal cases do not lie from the verdict of the jury upon controverted questions of fact, but solely upon propositions of law." In *People v. Fitzgerald*, supra, it is said: "By the Constitution appellate jurisdiction is conferred upon this court in criminal cases prosecuted by indictment or information in a court of record on questions of law alone." Where there is evidence therefor to sustain the verdict, a question of law cannot arise, but only in a case where there is in effect an entire lack of evidence."

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

5 Cal. App. 684

In re LONG'S ESTATE. (Civ. 367.)

(Court of Appeal, Second District, California.
June 5, 1907. Rehearing Denied by
Supreme Court Aug. 3, 1907.)

1. EXECUTORS AND ADMINISTRATORS—JUDICIAL SALE—ORDERING RESALE—DISCRETION.

Code Civ. Proc. § 1554, provides that if, after the confirmation of the sale of decedent's estate, the purchaser neglects or refuses to comply with the terms of sale, the court may order a resale. Decedent's property was bid in March 6th, on condition that the bidder be furnished a certificate showing clear title, and the bid was confirmed. On July 20th, motion was made to set aside the sale and order a resale for the bidder's neglect to pay the balance; the hearing of the motion being continued to August 10th at the bidder's request, and he stating that he could not then raise the money. Title had been accepted in June, and a tender of the deed and a demand for the balance of the purchase price were admitted. *Held*, that there was no abuse of discretion in ordering a resale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1517.]

2. APPEAL—REVIEW—APPEAL FROM FINAL ORDER—REVIEW OF SUBSEQUENT ORDER.

Where, after an order was made August 10th, setting aside a sale of decedent's property and ordering a resale, the bidder filed an affidavit purporting to embody his objection to granting the order, and October 12th the affidavit was ordered stricken from the files, no appeal being taken from that order, neither the affidavit nor the ruling in striking it may be considered on an appeal from the order setting aside the sale taken three weeks before October 12th.

Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

In the matter of the estate of Louisiana R. Long, deceased. E. R. Fox appeals from an order setting aside a sale of real estate of the estate to him and ordering a resale. Affirmed.

L. M. Fall and E. R. Fox, for appellant.
Frank James, for respondents.

SHAW, J. This is an appeal from an order of the court setting aside a sale of certain real estate belonging to the estate of Louisiana R. Long, deceased, and ordering a resale of the property.

The only facts material to the case are that on March 6, 1906, appellant in open court bid \$15,400 cash for certain real estate belonging to the estate of deceased, upon condition that he should be furnished an unlimited certificate of title showing the property entirely clear of all liens or clouds. The bid was accepted, appellant paid \$1,550 on account of the purchase price, and thereupon the court made its order confirming the same. Thereafter, on July 20, 1906, pursuant to notice duly given, respondents moved the court to set aside the sale so made to appellant and order a resale of the property; the grounds of the motion being that said appellant had neglected and refused to pay the balance of the agreed purchase price of the property. The hearing of this motion was, at the request of appellant, continued from July 20th to August 10th, on which last-mentioned date the court made the order setting aside the sale, and from which this appeal is prosecuted.

Some time in June, 1906, there was delivered to appellant a certificate of title executed by the Title Insurance & Trust Company of Los Angeles, and appellant then accepted the title to the property as shown by this certificate, provided the respondents, who were the executors of the estate of said deceased, would credit him on his bid with the sum of \$63 paid on a street improvement bond, to all of which the executors consented and agreed. A tender of the deed and a demand for the balance of the purchase price was admitted. The only objection urged against granting this motion was the condition of the money market; Fox stating that he was not able at that time to raise the balance of the purchase price. Whereupon the court, at his request, continued the hearing to August 10, 1906, at which time the order granting the

motion was made. Section 1554, Code Civ. Proc., provides: "If, after the confirmation, the purchaser neglects or refuses to comply with the terms of the sale, the court may, on motion of the executor or administrator, and after notice to the purchaser, order a re-sale to be made of the property." Under this provision of the statute, the making of the order was a matter solely within the discretion of the court. The record discloses no abuse of discretion. Indeed, the circumstances would seem to permit no other course than that pursued. After the order was made, appellant filed an affidavit, which purported to embody his objections to the granting of the motion. This affidavit was, by an order of the court made October 12, 1906, stricken from the files. No appeal was taken from this order, and neither the affidavit nor the ruling of the court in striking it from the files can be considered on this appeal, which was taken some three weeks prior to said October 12th.

The order appealed from is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

5 Cal. App. 696

WHITTLE v. WHITTLE. (Civ. 275.)

(Court of Appeal, First District, California.
June 6, 1907.)

1. APPEAL—RECORD—REVIEW.

The record is not in condition for review of the overruling of defendant's objection to proceeding with the case till the original pleadings were produced or other papers were substituted therefor; the pleadings being in the record on appeal, and it not appearing that they are not the original papers, nor that they were not found and used on the trial.

2. WITNESSES—EXAMINATION—REFRESHING MEMORY—WRITINGS ADMISSIBLE.

The complaint, in an action for money had and received, having alleged the money was received from C., plaintiff may introduce a note executed by C. to plaintiff and defendant, preliminary to asking defendant, who was being examined as a witness for plaintiff, if she collected part of the note.

3. LIMITATION OF ACTIONS—MONEY RECEIVED.

The statute commences to run against an action for money had and received from the time the money was received, and not from the time the note, in payment of which the money was received, was due.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 268, 269.]

4. JUDGMENT—RES JUDICATA.

The judgment of defendants, in an action on a note by one of the joint payees against the maker and the other payee, the latter being made a defendant because she would not consent to become a plaintiff, and the judgment being because of the maker having paid the note to the defendant payee, is not a bar to an action by the former payee against the latter payee, for money had and received of the maker in payment of the note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1092-1097.]

5. MONEY RECEIVED—DEFENSES—HUSBAND AND WIFE.

To an action for money had and received it is a good defense that defendant is the wife of plaintiff, and that, after he had deserted and

left her without means, she received the money in payment of a note, of which they were the joint payees, and used it for the necessities of life.

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Robert Whittle against Annie Whittle, sued as Anne Whittle. Judgment for plaintiff. Defendant appeals. Reversed.

J. C. Bates, for appellant. P. J. Mogan and M. S. Eisner, for respondent.

COOPER, P. J. The complaint alleges that the plaintiff and defendant are husband and wife, but that they have been living separate and apart since August, 1893; that in November, 1893, the defendant received \$1,097.60 to and for the use of plaintiff; that said money was partly the separate property of plaintiff and partly community property; and that defendant has not paid the same nor any part thereof. The answer alleges that all the money received by the defendant was received by her as the wife of the plaintiff, and was necessarily used by her for the necessities of life for her board and maintenance after plaintiff had willfully deserted and separated from her without just cause. The cause was tried, findings filed, and judgment thereupon entered for plaintiff. This appeal is from the judgment and the order denying defendant's motion for a new trial.

Several errors are assigned and argued in appellant's brief, which we will notice in the order in which they are discussed. It is claimed that error was committed in trying the case without the pleadings being before the court. It appears from the bill of exceptions that the plaintiff's attorney stated to the court that the papers in the case were missing from the files, but that he had copies that he could supply in case the originals were not found. Defendant's attorney objected to proceeding with the case until the original papers were produced or other papers substituted in lieu thereof. The court overruled the objection, and the trial proceeded. The correct practice would have been to find the originals or supply copies before the trial of the case, but that may have been done. The pleadings are now here as a part of the record, and it does not appear that they are not the original documents, nor does it appear that they were not found and used during the trial. No further question appears to have been raised concerning them, and no injury to defendant is made to appear.

The plaintiff offered in evidence a note for \$924.60, dated February 19, 1891, made by Mary D. Carpenter and payable to plaintiff and defendant. To this the defendant objected upon several grounds, among others that it was not admissible under the pleadings, and that it appeared to be barred by the statute of limitations. The court overruled

the objection. The ruling of the court was not erroneous. The complaint alleges that the money was received from Mary D. Carpenter. The note was only used to refresh the memory of defendant, who was being examined as a witness for plaintiff. She was asked if she collected any part of the said note, and she answered that she did collect one-half of it, \$462.30, about November 3, 1893. This was the basis of the judgment entered up for plaintiff. The question under investigation was as to the fact of defendant receiving the money, and the date when it was received.

The defendant, by way of estoppel, offered in evidence the judgment and judgment roll in a former suit in the superior court of the city and county of San Francisco, in which the present plaintiff was plaintiff, and the present defendant and Mary D. Carpenter were defendants; the action being to recover judgment upon the promissory note hereinbefore referred to. The court sustained the plaintiff's objection to said judgment roll, to which ruling the defendant excepted, and now claims that the court erred in so doing. Without regard to the question, discussed in the briefs, as to the estoppel not having been pleaded in the answer, we are of opinion that the judgment was not admissible. The former suit was between the same parties, but the question involved and the issue under investigation was not the same. That was an action to recover the amount of the promissory note against Mary D. Carpenter, the maker thereof. The present defendant was made a defendant in the former action because, as alleged, she would not consent to become plaintiff. She was one of the parties to whom the note was payable, and no judgment was asked against her. The court in the former suit found that defendant Mary D. Carpenter had paid the said note to this defendant. Judgment was accordingly entered for the defendants in such former suit. The fact that it was adjudged and declared in such former suit that the plaintiff could not recover upon the note, for the reason that the maker of the note had paid it to one of the payees, was not an adjudication that the plaintiff could not maintain an action against the joint payee who had received the money. Upon discovering that the note had been paid to defendant, he had the right to bring an action for money had and received to his use. The statute of limitations in such case would not begin to run until the money was received by defendant. In order to constitute an estoppel, the former judgment must have been between the same parties, in the same right, in regard to the same subject-matter, and must necessarily have involved the determination of the same fact, to prove or disprove which it is introduced in evidence. *Laguna Drainage Dist. v. Charles Martin Co.* (Cal. App. 1st Dist.) 89 Pac. 993.

Cal.Rep. 89-91 P.—45

We come now to the important question in the case, and the one which in our view necessitates a reversal. The answer, as has been shown, alleges that the money was received by the defendant as the wife of the plaintiff, and had been used by her for the necessities of life after the plaintiff had deserted her and left her without means. In receiving the money defendant was guilty of no wrong. The note by its terms was payable to her as one of the payees. She received it as lawfully as if she had received it from the hands of her husband. She had the right to use it, because she was the wife of the plaintiff, and he was liable for her support and maintenance, and had left her without means. While the defendant was upon the stand as plaintiff's witness, and after she had testified to receiving the money, her counsel asked her in cross-examination what she did with it. Counsel for plaintiff objected to the question on the ground that it was incompetent, irrelevant, and immaterial, and not cross-examination. The court sustained the objection, to which defendant's counsel duly excepted. After the plaintiff rested, the defendant took the witness stand in her own behalf, and was again asked by her counsel the same question. The same objection was made as to the competency, relevancy, and materiality of the question, followed by the same ruling. She was then asked if she was living with plaintiff, and if plaintiff had contributed anything to her support for the past eight years. These questions were objected to by the plaintiff as being incompetent, irrelevant, and immaterial, and the objections were sustained. The ruling was thus clearly made that the defendant could not show that she had used the money for the necessities of life after the plaintiff had willfully deserted and abandoned her, leaving her without means. It appears clear to us that if the money had come into the hands of the defendant while plaintiff and defendant were living together as husband and wife, and that the plaintiff, during the time they were so living together, necessarily used the money for the family, or for the necessities of life, the plaintiff could not recover. There is no difference in principle between the facts of the present case as alleged in the answer. The defendant, although deserted, was still the wife of plaintiff. In law she was part of his family. He had not been released from the legal obligations resting upon him. He could not, by wrongfully deserting the defendant, take advantage of his own wrong. He certainly ought not to be in a better legal position by reason of his desertion than he would be if still living with defendant. By the marriage plaintiff contracted the obligation of supporting defendant. Civ. Code, §§ 155, 174. It was said by the Supreme Court, in *Galland v. Galland*, 38 Cal. 266: "Amongst other rights secured to the wife is the right to be suitably

supported and maintained by the husband according to his means and station. If he fails or refuses to provide such support for her, the law authorizes her to purchase from others, on the credit of her husband, whatever is necessary for her maintenance and suitable to her station in life. There can be no diversity of opinion on this point, which is thoroughly well settled." If the law authorizes the wife, in case of the failure of the husband to provide for her, to purchase from others, and holds him responsible, is there any reason in law or morals why she could not use the money in her hands for the same purpose? Can it be said that the husband in such case may recover the money from the wife, and then in turn the merchant who furnishes her with the necessities recover from the husband? In *Livingston v. Superior Court*, 117 Cal. 633,¹ it was held that, under section 155 of the Civil Code, where a husband has no separate property, and there is no community property, and the husband is unable, by reason of infirmity, to support himself, an action would lie to compel the wife to support him out of her separate property. In that case *Galland v. Galland* is approved and followed, and the statutory liability of the husband and wife discussed. It thus appears beyond question that if the answer is true the plaintiff was liable for the support of the defendant. The action for money had and received lies to recover money to which plaintiff is entitled, and which in justice and equity the defendant ought to refund to the plaintiff, and which defendant cannot with a good conscience retain. *Bouvier's Law Dictionary*, under heading "Money Had and Received" and authorities cited; *Sacramento County v. Southern Pac. Co.*, 127 Cal. 217, 59 Pac. 568, 825. It was held in the latter case that the plaintiff could not recover money which had been paid to defendant in good faith but upon a void contract. That in equity and good conscience the plaintiff was not entitled to the money, although the defendant could not in law have recovered the money upon the illegal contract. The general principle is that in this kind of action the defendant may show any facts that entitle him to retain the money, either upon legal or equitable grounds. The right of the defendant need not necessarily be better than that of the plaintiff. If it is equal thereto, the defendant must prevail. *Walt's Actions & Defenses*, vol. 4, p. 511, and cases cited; *Boone on Code Pleading*, § 171. Our conclusion is that the defendant had the right to show by way of defense that she was the wife of the plaintiff; that plaintiff had deserted her, leaving her without means; that the money came lawfully into her possession, and was necessarily used by her for her support and maintenance. In such case equity and good conscience will not permit the plaintiff to recover.

The views herein expressed make it un-

necessary to pass upon other questions argued in the briefs.

The judgment and order are reversed.

We concur: HALL, J.; KERRIGAN, J.

5 Cal. App. 712

GAFFEY v. MANN. (Civ. 354.)

(Court of Appeal, First District, California, June 11, 1907. Rehearing Denied by Supreme Court, Aug. 8, 1907.)

1. COSTS—JUDGMENT AFTER APPEAL—NECESSITY FOR NOTICE.

Where plaintiff filed objections to defendant's cost bill filed after plaintiff dismissed a slander action, and the Court of Appeal reversed in part an order striking out all the items of the cost bill, and after the filing of the remittitur in the lower court defendant filed his memorandum of costs on appeal, after the time for plaintiff's objection thereto had expired, without objections filed, it was proper to enter judgment against plaintiff for defendant's costs in both courts, in his absence and without notice to him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 765.]

2. APPEAL—LAW OF THE CASE.

Where, after plaintiff dismissed a slander action, defendant appealed from an order striking out all the items of his cost bill, and the Court of Appeal determined that defendant was entitled to an item of \$100 for counsel fees, the determination became the law of the case on a subsequent appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4358.]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by W. V. Gaffey against Samuel Mann. Plaintiff appeals from a judgment against plaintiff upon the going down of remittitur of the Court of Appeal, reversing in part an order of the superior court, striking out all the items of a cost bill filed by defendant after the dismissal of the action. Affirmed.

Wyckoff & Gardner, for appellant. Chas. B. Younger, Jr., for respondent.

HALL, J. This is an appeal from a judgment entered against plaintiff upon the going down of the remittitur from this court, reversing in part an order of the superior court striking out all the items of a cost bill filed by defendant after the dismissal of an action for slander. *Gaffey v. Mann*, 84 Pac. 424, 3 Cal. App. —. In due time after the filing of the remittitur from this court in the lower court, the defendant filed his memorandum of costs on appeal, and thereafter, and after the expiration of the time for plaintiff to object or except thereto, and plaintiff having filed no objections thereto, the court, without notice to plaintiff and in his absence, entered judgment against plaintiff for the sum of \$100, as and for defendant's costs in said court, and the further sum of \$32, for his costs incurred on the former appeal.

Appellant now insists that this judgment must be reversed for the reason that it was

¹ 49 Pac. 536, 33 L. R. A. 175.

taken against him in his absence and without notice. But we do not think that this contention is sound. Plaintiff brought the action for slander, and thereafter dismissed it, and caused the clerk to enter a dismissal thereof after defendant had incurred costs in taking steps to procure a dismissal thereof. *Gaffey v. Mann*, supra. Thereupon defendant filed his cost bill, containing two items, to wit, \$2 for clerk's fees for his appearance, and \$100 for counsel fees. Plaintiff thereupon moved to strike out each and every item thereof upon various grounds, in which were presented questions of fact as to the necessity for incurring such costs, and the validity thereof as matter of law. The court granted his motion, but upon the appeal to this court the order was reversed so far as it struck out the item in defendant's cost bill of \$100 for counsel fees, upon the ground, as clearly appears from the opinion, that upon the facts and the law defendant was entitled to such costs. This left the cost bill intact as originally filed, save as to the item of \$2 for clerk's fees, and there was nothing to do but enter judgment accordingly for the costs thus allowed. Costs are but an incident to the judgment. In this case judgment of dismissal had been entered, which carried with it a right to defendant to recover costs. He filed his cost bill. Plaintiff filed his objections thereto, which having been passed upon by the trial court and this court, he has had his day in court, and is not entitled to be further heard as to the amount or validity of the costs. The judgment of dismissal, to which the costs are but incidental, was entered at appellant's request.

Plaintiff further urged at the oral argument that the statute allowing attorneys' fees in slander and libel cases is unconstitutional, and that for that reason the judgment should be reversed, and cites *Builders' Supply Depot v. O'Connor* (Cal.) 88 Pac. 982, in which it was held that the mechanic's lien law, so far as it allowed attorney's fees to a plaintiff was void. But the libel and slander law differs in several respects from the lien law. The slander and libel law allows attorney's fees to the prevailing party, whether he be plaintiff or defendant, while the lien law allows such costs only to the plaintiff. The lien law was passed after the adoption of the present Constitution, while the slander and libel act was passed before the adoption of the present Constitution. For these reasons the slander and libel act has been held constitutional in so far as it requires a plaintiff to give a bond for costs. *Smith v. McDermott*, 93 Cal. 421, 29 Pac. 34. But without passing upon the constitutionality of the slander and libel act in allowing attorneys' fees to the prevailing party, it is sufficient to say that the order made upon the former appeal has become the law of the case. It was then determined that defendant was

entitled to be allowed as a part of his costs \$100 for attorney fees, and this decision has become final. *Heinlen v. Martin*, 59 Cal. 182; *Donner v. Palmer*, 51 Cal. 637; *Russell v. Harris*, 44 Cal. 489.

Judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

5 Cal. App. 690

BEKINS v. DIETERLE et al. (Civ. 372.)

(Court of Appeal, Second District, California. June 5, 1907. Rehearing Denied by Supreme Court August 3, 1907.)

1. HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—PRESUMPTION—CONCLUSIVENESS.

The presumption created by Civ. Code, § 164, declaring that, where property is conveyed to a married woman, the presumption is that the title is thereby vested in her as her separate property, is not conclusive, and may be overcome by proof that the consideration therefor was paid out of community funds.

2. SAME—EVIDENCE AS TO OWNERSHIP—SUFFICIENCY.

Evidence held to justify a finding that property levied on was purchased with community funds, and hence to rebut the presumption created by Civ. Code, § 164, declaring that, where property is conveyed to a married woman, the presumption is that title is thereby vested in her as her separate property.

3. SAME—EARNINGS OF WIFE.

The services of the wife as "the man of the family" in the active management of her husband's business are a part of the earning power of the community, and the earnings due to her services constitute community property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 911.]

4. FRAUDULENT CONVEYANCES — EVIDENCE — SUFFICIENCY—FRAUDULENT INTENT.

Evidence that a husband, on the day a judgment was rendered against him, executed a deed of property valued at \$34,500 for an expressed consideration of \$10 to his wife, unknown to her, and that such property was all he owned, warranted a finding of his intent to defraud the judgment creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 894.]

5. SAME—VOID CONVEYANCE—EFFECT AS TO CREDITORS.

Where a conveyance is void under Civ. Code, § 3439, declaring every transfer of property, with intent to delay or defraud creditors, to be void against such creditors, a creditor may levy on and sell the property as if no conveyance had been made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 660.]

6. SAME.

Under Civ. Code, § 3439, declaring every transfer of property with intent to delay or defraud creditors to be void against such creditors, where the fraudulent intent is established, the conveyance is void, notwithstanding the debtor has other property sufficient to satisfy his creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 138, 159.]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Kate Bekins against Minnie Dieterle and another to enjoin the sale under execution of certain real estate, and to have

her title thereto quieted. From a judgment for defendants and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

See 91 Pac. 105.

J. Marion Brooks and F. B. Guthrie (Henry E. Wills, of counsel), for appellant. E. W. Freeman and A. D. Laughlin, for respondents.

SHAW, J. Appeal from judgment in favor of the defendants, and from an order denying plaintiff's motion for a new trial.

The appellant, Kate Bekins, is the wife of M. Bekins. On December 29, 1896, Minnie and William Dieterle commenced an action against M. Bekins to recover damages for the conversion of certain personal property alleged to have been delivered to him for storage in his warehouse, and which property he refused to redeliver to the plaintiffs in said suit on demand therefor. The judgment rendered in favor of M. Bekins on the first trial was reversed (*Dieterle v. Bekins*, 143 Cal. 683, 77 Pac. 604), and upon a second trial, had on December 23, 1904, judgment was rendered in favor of plaintiffs therein. Execution was issued and placed in the hands of the sheriff, who duly levied upon certain real estate as belonging to M. Bekins, the judgment debtor, and proceeded to advertise the same for sale. Whereupon Kate Bekins, the appellant, who claimed ownership of the property, instituted this action to enjoin the sheriff from selling the same and have her alleged title thereto quieted as against Minnie and William Dieterle. It appears that the real estate, which is of the value of \$34,500, was conveyed to M. Bekins on October 31, 1904, and stood in his name until December 23, 1904, when, for a stated consideration of \$10, he executed a deed therefor to his wife, Kate Bekins, and without other delivery to her filed the same for record at 1:40 p. m. of said day. The consideration paid for the property when conveyed to M. Bekins was \$34,500. This amount was paid by checks drawn upon money on deposit to the credit of Kate Bekins, who testified that she "drew it from the moneys of the Bekins Van & Storage Company." At the date of the conveyance from M. Bekins to his wife, he had no other property out of which the judgment could be made. During all of the times covered by these several transactions M. Bekins was engaged in the van and storage business, and Kate Bekins, in addition to caring for her household duties, assisted him in the active management and conduct of said business. At the date of her marriage appellant had only \$100, which, she says, was long ago expended. The business was incorporated subsequently to the date of the commencement of respondents' suit against M. Bekins, and the husband placed some of the stock in the name of appellant; the reason for his doing so being unknown to her. There was other testimony to show

that M. Bekins, after the commencement of suit by respondents, turned his property over to his wife when he was sick, and, as her attorney testified: "She has been the man of the family." The court found that the property levied on was community property; that the consideration for the purchase thereof, \$34,500, was paid out of community funds; that the deed dated December 23, 1904, whereby M. Bekins, in consideration of \$10, conveyed the property to his wife, Kate Bekins, was intended by M. Bekins to hinder, delay, and defraud his creditors, and especially the respondents herein; that at the time of making said conveyance M. Bekins had no other property out of which respondents' judgment could be made.

Appellant attacks all of these findings, asserting that they are not justified by the evidence. Section 162, Civ. Code, defines the separate property of the wife as being "all property owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues and profits therefrom." Section 163, Civ. Code, likewise defines the separate property of the husband. All other property than that designated in said sections 162 and 163, acquired after marriage "by either husband or wife, or both, is community property." Section 164, Civ. Code. As this last section stood prior to the amendment of 1889, property conveyed to the wife during coverture was presumed to be community property. *Morgan v. Lones*, 78 Cal. 58, 20 Pac. 248; *Davis v. Green*, 122 Cal. 364, 59 Pac. 9. As such it was under the control of the husband, and might be mortgaged by him or subjected to the payment of his debts, regardless of the fact that it stood of record in the name of the wife. *Davis v. Green*, supra; *Schuyler v. Broughton*, 70 Cal. 282, 11 Pac. 719. This presumption could be overcome by evidence that the consideration paid for the property was the separate funds of the wife. The amendment of 1889 changed this presumption by adding the following provision to section 164: "But whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." This presumption, like the one existing before the amendment, is not conclusive, but may be overcome by extrinsic evidence showing the consideration for the property to have been paid out of the community funds; and when such fact is established the property, notwithstanding it stands in the name of the wife, is subject to the control of the husband and is liable for the community debts. The presumption of a separate estate created in Kate Bekins by the conveyance from M. Bekins is overcome by the evidence, which clearly shows the property to have been purchased with community funds. She testifies: "I drew it [the \$34,500 paid for the lots] from the moneys of the Bekins Van & Storage Company."

"It was taken out of the business of the van and storage company." The consideration paid for the property did not represent the earnings of the wife, but of the community business. The fact that she, as the "man of the family," had active charge of the business did not affect its character as community property. Besides, her services and earning power were as much a part of the marital community capital as that of the husband. "The services of the wife are a part of the earning power of the community, and the earnings received for her services constitute community property as much as do the earnings received for the services of the husband." *Martin v. So. Pac. Co.*, 130 Cal. 285, 62 Pac. 515; *Smith v. Furnish*, 70 Cal. 424, 12 Pac. 392. The evidence justified the court in finding that the real estate levied on was community property.

The evidence in support of the finding that the conveyance was made with intent to defraud Minnie and William Dieterle is likewise sufficient. The uncontradicted facts are that judgment was rendered against M. Bekins on December 23, 1904, on the afternoon of which day he, unknown to his wife, voluntarily and without consideration therefor (other than \$10) executed and filed for record a deed which purported to convey property of the value of \$34,500, and which appellant testified was all the property he owned. Is not the inference from these facts irresistible that he intended to place the property beyond the reach of respondents' judgment? No rational mind could reach any other conclusion than that found by the court. *Judson v. Lyford*, 84 Cal. 505, 24 Pac. 286. Section 3439, Civ. Code, provides: "Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor." The court found that prior to the execution of the deed in question respondents were creditors of M. Bekins, and that the transfer of his property to his wife was made with the intent to hinder, delay, and defraud them in the collection of their claim. Under these findings, the conveyance was void as against respondents, and as to their judgment the title and ownership of the property remained in M. Bekins as fully as though no transfer had been attempted. "A void thing is as nothing." The deed was a nullity. "As against the fraudulent transferee, the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it

under execution." 1 Freeman on Executions, § 136. In *Bull v. Ford*, 66 Cal. 176, 4 Pac. 1175, the court, in discussing a transfer made with fraudulent intent, said: "The conveyance to defendant being void, as against Alvarado's creditors, the creditors were authorized to levy upon and sell the property as if no conveyance had ever been made by their debtor." *Judson v. Lyford*, supra; *First Nat. Bank v. Maxwell*, 123 Cal. 360, 55 Pac. 580, 69 Am. St. Rep. 64; *Hemenway v. Thaxter* (Cal. Sup.) 90 Pac. 116; *Bull v. Bray*, 89 Cal. 300, 26 Pac. 873, 13 L. R. A. 576.

The intent to defraud existing creditors being established, the question as to the debtor having other property becomes immaterial for the reason that the attempted transfer as to such creditors is void. "Indeed, it matters not, where personal intent to defraud is shown, that the fraudulent conveyance, if allowed to stand, would not harm any one, by reason of the fact that the debtor has other property ample in amount within the reach of his creditors." *Bigelow on Fraud*, vol. 2, p. 393. "A rich man may make a fraudulent deed as well as one who is insolvent." *Hager v. Shindler*, 29 Cal. 60. It therefore follows that the ruling of the court in permitting respondents to file an amendment to their answer pending trial, whereby they alleged the insolvency of M. Bekins, was at most harmless error. Adopting appellant's view of its importance, it was clearly within the discretion of the court and no abuse of discretion appears. In support of her contention that it must be shown that the debtor had no other property, not only at the time of the transfer, but at the time of the levy of execution thereon, appellant cites *Albertoli v. Branham*, 80 Cal. 631, 22 Pac. 404, 13 Am. St. Rep. 200, which seems to support her contention. The point involved there, however, was the sufficiency of the allegations of an answer which did not allege the transfer to have been made without consideration, nor that the debtor did not have other property sufficient to satisfy his debts. The learned judge who wrote that opinion made no reference to section 3439, Civ. Code. In our judgment, it is opposed to direct statutory provision contained in section 3439, Civ. Code, and contrary to later judicial expression of the Supreme Court wherein it is held, in substance (*First Nat. Bank v. Maxwell*, supra): If the fraudulent intent is found to exist, the conveyance is void, notwithstanding the debtor has other property ample in amount to satisfy his creditors.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

WHITNEY v. CLEVELAND.

(Supreme Court of Idaho. July 9, 1907.)

1. EVIDENCE—ADMISSIONS—OFFER TO COMPROMISE.

The rule is well established that an offer to compromise is not admissible in evidence, but that if an independent admission of a fact, such as the handwriting of a party, or that a certain item of an account, was correct, such independent admission may be introduced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 745.]

2. SAME—QUESTIONS FOR COURT.

Held, that an offer to compromise was improperly admitted in evidence, and further *held* that the offer to compromise was not proper rebuttal. The question whether in the offer to compromise a collateral or independent fact has been admitted by one of the parties is a question for the court to determine, and not a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1014.]

3. WITNESSES—IMPEACHMENT.

Impeaching questions should not be permitted, unless a proper foundation is laid therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1087, 1150.]

4. TRIAL—INSTRUCTIONS—PREPONDERANCE OF EVIDENCE.

Held, that the instructions properly define the term "preponderance of the evidence."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 703.]

(Syllabus by the Court.)

Appeal from District Court, Elmore County; Lyttleton Price, Judge.

Action by Fred E. Whitney against W. C. Cleveland. Judgment for plaintiff, and defendant appeals. Reversed, and new trial granted.

Perky & Blaine and L. B. Green, for appellant. W. C. Howle, for respondent.

SULLIVAN, J. This action was commenced in the probate court of Elmore county to recover for damages alleged to have been sustained by reason of the defendant herding and grazing his sheep on the land of plaintiff and within two miles of his residence, under what is known as the two-mile limit law. Judgment was rendered in favor of the plaintiff, and an appeal was taken by the appellant to the district court of said county, where the cause was tried de novo. Upon the trial of the case in the district court, the jury returned a verdict in favor of the respondent for \$125 and costs of suit. A motion for a new trial was overruled, and this appeal is from the judgment and the order overruling the motion for a new trial. The errors relied upon are the insufficiency of the evidence to justify the verdict, and in the admission and rejection of certain testimony, and in the giving of a certain instruction. One of the main contentions is that the evidence does not show that the sheep mentioned in the complaint belonged to the appellant.

We have examined all of the evidence con-

tained in the record, and it is shown that the sheep which it is alleged did the damage bore two brands. About five-sixths of them were branded "V. T.," and about one-sixth with a blotch or dot "U.," or a horseshoe dot brand. The latter brand is designated in the evidence as the horseshoe dot by some of the witnesses, and by others as the dot U. brand. It was admitted by the appellant in his testimony that his sheep bore those brands, but his evidence tended to show that his sheep were not on or near plaintiff's ranch, and for that reason could not have been the cause of the damage sustained by plaintiff. The plaintiff introduced no direct evidence as to the fact that appellant owned said sheep. He only showed that the brands on the sheep were the same brands used by appellant.

It appears from the record that the attorney for the respondent had some communication with the appellant in regard to the damage done by said sheep prior to the time this suit was brought, and that the appellant offered as a compromise to pay \$25 in full settlement of said matter, which offer was refused by respondent. On cross-examination of the appellant, he was asked the following question: "Q. You offered him \$25 for the damages suffered from your sheep, did you not?" Thereupon objection was interposed by counsel for appellant on the ground that that was not proper cross-examination and incompetent for any purpose, as it was an offer to compromise. The court thereupon stated as follows: "It is not competent to show that there was any damage sustained, but it would be directly in rebuttal of matters called out on cross-examination. The tendency of your testimony is to show that he had no sheep there. It would be competent to rebut that if nothing else"—and thereupon overruled the objection. The witness thereupon answered as follows: "I told him I would give him \$25 to make him a present, but I did not consider my sheep had done him any damage." The witness on re-direct examination testified that all he knew about the sheep having been there was what respondent's counsel had written him; that he had written him and threatened him with a suit. Witness further testified as follows: "I had not seen my men about it. My object was merely to save the trouble and expense of suit, regardless of any merits of the claim, on the theory that it was cheaper to give him a little something than to fight him in court. I never at any time admitted that my sheep had damaged him at all." Whereupon the court instructed the jury as follows: "You understand, gentlemen, in this controversy in regard to Mr. Cleveland's offer to pay \$25, that the court does not admit that for the purpose of showing that the plaintiff suffered damage by reason of any sheep being there, but it is admitted for the purpose of rebutting, if it does rebut, in your

estimation. Mr. Cleveland's testimony as to the whereabouts of his sheep during the period mentioned."

It is contended by counsel for appellant that the offer to pay \$25 was an unsuccessful offer to compromise, and under the well-established rules of law such offer cannot be legally admitted in evidence. The rule is well established that an offer made in an effort to compromise a cause of action cannot be legally admitted in evidence over the objection of the opposing party. 1 Ency. of Ev. 596; Chicago, B. & Q. R. Co. v. Roberts, 57 Pac. 1076, 26 Colo. 329; Seebree v. Smith, 2 Idaho (Hasb.) 359, 16 Pac. 915; Kroetch v. Emplre Mill Co., 9 Idaho, 283, 74 Pac. 868; 1 Greenleaf on Ev. § 192; Smith v. Satterlee, 29 N. E. 225, 130 N. Y. 677. It is stated in 1 Rice on Evidence, at page 435, as follows: "It is never the intention of the law to shut out the truth, but to repel any inference which may arise from a proposition made, not with a design to admit the existence of a fact, but merely to buy one's peace. If an admission, however, is made because it is a fact, the evidence to prove is competent, whatever motive may have prompted to the declaration. But if the party admits a particular item in an account, or any other fact, meaning to make the admission as being true, this is good evidence, although the object of the conversation was to compromise an existing controversy." And it is stated in West v. Smith, 101 U. S. 273, 25 L. Ed. 809, that the rule both in England and in the United States is that the offer will be presumed to have been made without prejudice, if it was plainly an offer of compromise. While it is true that the evidence on the part of appellant tended to show that the appellant's sheep were not the ones that did the damage, it is also true that the appellant did not admit, so far as shown by the record, in his conversation with respondent, in which this offer of compromise was made, that his sheep were ever on the appellant's ranch or did the damage. Appellant testified that all he knew about his sheep being there was what the attorney for the respondent had written him about it; that he had not seen his own men in regard to the matter; and that his object in offering \$25 was to save the trouble and expense of a suit, regardless of any merits of respondent's claim. If, during appellant's conversation with the respondent in regard to the compromise, he had admitted that his sheep had been upon the ranch of appellant, and thereafter denied that they were there, that admission might have been introduced in evidence under the well-established rules of law. From the record we have before us, that question as presented was one of law; that is, whether the offer to compromise contained the extrinsic statement of fact that the sheep were the sheep of appellant. Such statement should

have been permitted to go to the jury on the question of whether the sheep did belong to the appellant or not. That question of law should have been determined by the court before permitting that evidence to go to the jury. It is true the court instructed the jury that appellant's offer to pay \$25 was not admitted for the purpose of showing that plaintiff had suffered damage by reason of the sheep being there, but it was admitted for the purpose of rebutting appellant's testimony as to the whereabouts of his sheep during the period mentioned. This instruction was clearly erroneous, and it was the duty of the court to determine whether the offer of compromise was proper rebuttal or not, and not leave that question to the jury; or, in other words, whether it contained any matter of fact showing that the appellant admitted that his sheep were the ones that did the damage. If during that conversation the appellant had admitted that his sheep were the ones that were upon the ranch of the respondent, that fact might have been admitted; but, as he did not, so far as the record shows, it was error to admit said offer to compromise. And, as we view it, that instruction of the court only emphasized the matter of said compromise and assisted, in the minds of the jury, in helping out the very meager evidence upon the question of the ownership of the sheep. We do not believe from all of the evidence in the record that it appears from a preponderance thereof that said sheep were the sheep of the appellant, and it is easily perceived what effect an offer to compromise would have upon the minds of the jury under said state of facts. The action of the court in that regard was clearly erroneous. It seems to have been a question of the identity of the sheep that did the damage, and as to whether they belonged to the appellant.

Assignments of error Nos. 4, 5, 6, 7, 8, and 9 are based on the rulings of the court in sustaining respondent's objections to questions which were designed to impeach the respondent and one of his witnesses. As no proper foundation had been laid for such impeachment, it was not error for the court to sustain the objections to such questions.

It is contended that the court erred in giving its third instruction to the jury, for the reason that the element of preponderance of evidence was omitted from this instruction, as that instruction does not define what is meant by a "preponderance of the evidence." Instruction No. 7 clearly and fully defines that term, and there is nothing in that contention.

From the foregoing we arrive at the conclusion that the judgment must be reversed, and a new trial granted, and it is so ordered, with costs in favor of the appellant.

AILSHIE, C. J., concurs.

(76 Kan. 275)

CARTER v. ÆTNA LIFE INS. CO.

(Supreme Court of Kansas. July 5, 1907.)

1. INSURANCE — INDEMNITY POLICY — CONSTRUCTION.

A policy insuring an employer against loss from liability for injuries to employes of the assured, which contains the stipulation, "No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within sixty days from the date of such judgment and after a trial of the issue," is a contract of indemnity for the benefit of the assured, and there is no right of action thereon against the insurance company until the assured sustains a loss by the payment of a liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1298.]

2. JUDGMENT — CONCLUSIVENESS — PERSONS BOUND—PERSONS DEFENDING FOR ANOTHER.

The policy provided that, if an action was brought against the assured by an injured employe, the insurance company might defend the action in behalf of the assured, and in an action brought by an employe to recover damages, in which a judgment was rendered against the assured, the insurance company assumed to and did make a defense against the employe's claim. Held, that the employe could not maintain an action upon the judgment against the insurance company, and the fact that the insurance company made a defense against the employe's claim did not estop it from denying liability to the employe.

(Syllabus by the Court.)

Error from District Court, Sedgwick County; Thos. C. Wilson, Judge.

Action by C. W. Carter against the Ætna Life Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Adams & Adams, M. C. Freerks, and Geo. W. Freerks, for plaintiff in error. Stanley & Vermillion & Evans and E. G. Anderson, for defendant in error.

JOHNSTON, C. J. The principal question involved in this litigation is the meaning and effect of an employer's liability policy. It arises on a demurrer to the plaintiff's petition, in which it was averred that the Ætna Life Insurance Company issued a policy to the Wichita Bridge Company, agreeing to indemnify the bridge company "against loss from common-law or statutory liability for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered within the period of this policy by any employe or employes of the assured." In its provisions there were stipulations that in case of accidents to employes the assured should notify the insurance company, and, if an action for damages was brought against the assured for injuries to employes, the summons and other processes served upon it should be sent at once to the insurance company; that company to defend against the proceeding in the name of the assured. In the policy it was also provided that: "No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for

loss actually sustained and paid by him in satisfaction of a judgment within sixty days from the date of such judgment and after a trial of the issue." While the policy was in force, C. W. Carter, an employe of the bridge company, was injured, and within a few days he brought an action against that company to recover for the negligent injury. The insurance company was notified of the injury, and also of the commencement of the action, and it at once assumed control of the defense against the claim, and its attorneys tried the case in behalf of the bridge company; the result being a judgment in favor of Carter against the bridge company for \$1,000. While the action was pending, and before judgment was rendered, the bridge company was adjudged a bankrupt, and its assets were seized and administered in that proceeding, with the result that the bridge company is now insolvent and without assets of any kind. Carter did not participate in the bankruptcy proceedings, and he alleges that the answer and defense made by the insurance company prevented him from securing payment of his claim and sharing in the distribution of that estate. He therefore prayed that the insurance company should be adjudged to pay his judgment against the bridge company, and for the further sum of \$350 as attorney's fees expended in the prosecution of the action. The trial court rightly held that no cause of action was stated in his petition and gave judgment for the defendant.

The liability of the Insurance Company under the policy must be measured by its terms. It will be observed that the contract of the insurance company was with the bridge company, and not with the employes. The contract was indemnity against loss from liability, and not insurance against liability. In its general features, it provided for making good the loss suffered by the assured, or rather for reimbursing it to the extent of its loss. Until the assured had met with a loss, there was no occasion to pay indemnity; no reason to reimburse, until something had been paid by the assured. Aside from the fact that in its general characteristics the contract is one of indemnity, it contained the specific provision that no recovery could be had against the insurance company under the policy, unless the action was brought by the bridge company itself to reimburse it for the loss actually sustained and paid in satisfaction of a judgment. This provision leaves no doubt of the intention of the parties, which was that the insurance company was not required to pay anything, because of the policy, until losses had been paid by the assured in satisfaction of a judgment. It is a provision which the parties had a right to insert in their contract. The obligations of the policy did not extend beyond the two contracting parties. The bridge company, on one hand, was procuring indemnity to protect itself from loss, and the

insurance company, on the other, was undertaking to make good the losses which the bridge company should be compelled to pay; and, as an assurance that these losses should not be excessive, it reserved the right to go into court and resist the claims presented against the assured. Upon a similar contract, the Supreme Court of Maine decided that: "It does not inure to the benefit of the injured employé so that he can enforce payment of it in case the employer becomes insolvent and makes an assignment for creditors before he receives his judgment so that the judgment cannot be enforced, * * * especially where the contract provides that no action shall lie against the insurer as respects any loss under the policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue." See, also, *Allen v. Gilman, McNeil & Co.* (C. C.) 137 Fed. 136; *Cushman v. Fuel Co.*, 122 Iowa, 656, 98 N. W. 509; *Connolly v. Bolster*, 187 Mass. 269, 72 N. E. 981; *Allen v. Aetna Life Ins. Co.*, 145 Fed. 881, 76 C. C. A. 265; *Texas Short Line Railway Co. v. Waymire* (Tex. Civ. App.) 89 S. W. 452; *Bain v. Atkins*, 181 Mass. 240, 63 N. E. 414, 57 L. R. A. 791, 92 Am. St. Rep. 411; *Finley v. Casualty Co.*, 113 Tenn. 592, 83 S. W. 2; *Travelers' Insurance Co. v. Moses*, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. Rep. 663.

This case is quite unlike those based on policies agreeing to pay damages for which the assured may become liable. The distinction is well stated in one of the cases cited by plaintiff in these words: "The difference between a contract of indemnity and one to pay legal liabilities is that, upon the former, an action cannot be brought and a recovery had until the liability is discharged; whereas, upon the latter, the cause of action is complete when the liability attaches." *American, etc., Ins. Co. v. Fordyce*, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305. Most of the cases cited by plaintiff rest on contracts insuring against liability, some are affected to some extent by statutory provisions, and one (*Sanders v. Frankfort, etc., Ins. Co.*, 72 N. H. 485, 57 Atl. 655, 101 Am. St. Rep. 683), appears to be out of line with the current of authority.

The fact that the insurance company made the defense for the bridge company against plaintiff's claim for damages did not estop it from denying liability under its contract. The right to defend was specifically given by the contract, and this burden was assumed for the reason that the award to be made in the proceeding might ultimately be the measure of its own liability. To defend the action in behalf of the assured was in no sense an agreement to pay the plaintiff's judgment, and could not have misled the plaintiff. *Connolly v. Bolster*, supra.

Judgment affirmed. All the Justices concurring.

(76 Kan. 206)

EHRSAM et al. v. BROWN et al.

(Supreme Court of Kansas. July 5, 1907.)

1. SALES—IMPLIED WARRANTY.

Where a known, described, and specified article is sold by a dealer under a contract to be executed by delivery of the specified article, which is actually supplied to the buyer, there is no implied warranty that it shall answer the particular purpose intended by the buyer, although such purpose is communicated to the dealer beforehand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 774.]

2. SAME—LATENT DEFECTS.

Where a dealer contracts to deliver to a purchaser, at an agreed price, a known, described, and specified article manufactured generally for the trade, there is no implied warranty against latent defects of which the dealer has no knowledge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 765.]

3. SAME.

The defendant, owner of a flouring mill, gave a written order to plaintiffs for the purchase at an agreed price of certain machines for use in his mill, described and known as "Wolf Gyrotors," which order was accepted in writing, and the machines were shipped direct from the manufacturers to defendant. Plaintiffs were not manufacturers of the machines, but dealers. They knew the particular purpose for which the machines were ordered, but had no opportunity to inspect them until after delivery, and had no knowledge of latent defects. Held, that there was no implied warranty that the machines would answer the particular purpose for which they were purchased, and no implied warranty against latent defects in their construction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 772, 774.]

(Syllabus by the Court.)

Error from District Court, Logan County; J. H. Reeder, Judge.

Action by J. B. Ehrsam & Sons against Casper Brown, and on his death revived against Cordelia Brown and others. Judgment for defendants. Plaintiffs bring error. Reversed and remanded.

Hurd & Hurd, for plaintiffs in error. W. E. Saum, for defendants in error.

PORTER, J. By a contract in writing, Casper Brown purchased from J. B. Ehrsam & Sons for use in his flouring mill two Wolf gyrotors. The gyrotors were shipped direct from Wolf Bros., the manufacturers, at Chambersburg, Pa., to Brown, at Oakley, Kan. He received them, paid the freight charges from St. Louis to Oakley, and set them up in his flouring mill. A controversy arose over the quality of the machines, and he refused to pay the balance of the purchase price. The contract provided that the title to the machines should remain in the vendor until the purchase money was paid, and Ehrsam & Sons, having filed a mechanic's lien upon the mill property, brought this action against Casper Brown to foreclose the lien. Defendant filed his answer and cross-petition, alleging that the gyrotors were purchased upon an express warranty, as follows:

"That at the time of making said order, and in consideration of the promises and agreements on the part of this defendant, and as a further inducement for placing said order with plaintiff, said plaintiff promised and agreed with defendant that said machines would be constructed of good material, of first-class workmanship, supplied with necessary and suitable fixtures, and in all respects suited for the work intended." He alleged a breach of this warranty and asked damages resulting therefrom. On the trial, the jury found that an express warranty had been made, and awarded damages caused by unseasoned materials used in the construction of the machines, and gave a small judgment for plaintiffs. Proceedings in error in this court followed, with the result that the judgment was reversed and the cause remanded for a new trial. *Ehrsam v. Brown*, 64 Kan. 466, 67 Pac. 867. The contract of purchase, which consisted of the written order and letter of acceptance, is set out in full in the former opinion and need not be recited here. The former judgment was reversed for error in admitting parol evidence to show an express warranty; the contract being in writing and on its face complete. After the case was remanded to the district court, defendant filed an amended answer and counterclaim, and set up an implied, instead of an express, warranty. A second trial was had on the amended pleadings in April, 1902, in which the jury returned a verdict in favor of defendant for the sum of \$43.50, and made special findings. On motion of plaintiffs, the verdict and findings were set aside, a new trial ordered, and the cause continued. Thereafter, the defendant, Casper Brown, died, and the action was revived against his administratrix and heirs at law, who are defendants herein. At the April, 1905, term of the district court, the cause was submitted to the court on a stipulation, providing, in substance, that the court should determine which party was entitled to and give judgment upon the pleadings, the evidence introduced upon the second trial, the special findings and verdict of the jury, reserving to each party the benefit of all objections and exceptions made during the progress of the cause.

The findings of the jury referred to in the stipulation were numbered from 1 to 54, among which were the following: "Q. Did the plaintiff contract and agree with Casper Brown to furnish him two gyrators for use in his mill at Oakley, Kan.? A. Yes. Q. Did plaintiffs, at the time of making such sale, know that the machines were to be used for a special purpose in and about defendant's mill? A. Yes. Q. Did plaintiffs, or their representatives, at the time of making said sale or taking the order from the defendant, examine the mill property of the defendant, and know what would be required in the way of changes in and about said

mill, in order to install said gyrators in said mill? A. Yes. Q. Did the said defendant, Casper Brown, have an opportunity to inspect said machines at the time of giving his order therefor? A. No. Q. Did the defendant, Brown, rely upon the representations of the plaintiffs as to the character and quality of said machines and their fitness for use in his mill. A. Yes. Q. Were the plaintiffs familiar with the construction and character of the machine described as 'Wolf gyrators,' which they sold to the defendant? A. Yes. Q. Were the machines ordered by the defendant from the plaintiffs constructed of good material, of good workmanship, and well suited for the purpose intended? A. No. Q. If you answer the last question 'No,' state what the defects were. A. Defects caused by unseasoned lumber. Q. What was the actual value of the machines. A. \$375. Q. How much do you allow the defendant as general damages on account of plaintiffs failure to furnish the defendant with perfect machines? A. \$500. Q. How much damage do you allow the defendant on account of loss of profits on the usual product of his mill? A. \$200. Q. How much damage do you allow defendant for the injury to the grade of the flour referred to? A. \$76. Q. Did the plaintiffs manufacture said gyrators? A. They did not. Q. Did the plaintiffs, or either of them, see said gyrators before they were delivered to the defendant? A. No. Q. Where were said gyrators manufactured? A. Chambersburg, Pa. Q. Where was the plaintiff's place of business at the time of the sale and delivery of said gyrators? A. Enterprise, Kan. Q. When the gyrators were delivered to the defendant, did he examine them for the purpose of ascertaining the quality of material of which they were constructed? A. No. Q. How much, if anything, do you allow the defendants for damages, resulting directly or proximately from the use of unseasoned lumber in the manufacture of said gyrators? A. \$893.50. Q. When gyrators like those in controversy were put upon the market by the manufacturers, were they intended to be a complete machine ready to be attached by proper connections, and made a part of a flouring mill? A. Yes. Q. Leaving out all considerations of the quality of the machines, were said gyrators otherwise properly planned and constructed for the purposes for which they were sold? A. Yes. Q. At the time the plaintiffs sold the gyrators to the defendant, or at any time before the defendant commenced using said gyrators, did the plaintiffs, or either of them, know that said gyrators were made of green or unseasoned lumber? A. No. Q. Were said gyrators of the kind ordered by the defendant of the plaintiffs? A. No. Q. If you answer 'No' to the last question, state in what respect and wherein said gyrators failed to be of the kind ordered by the defendant from the plaintiffs. A. Because they were not per-

fect machines on account of being constructed of unseasoned lumber, rendering them unfit to perform the work perfectly, for which they were put in the mill."

Plaintiffs moved for judgment on the special findings. The court took the case under advisement, and at a subsequent term gave judgment for defendants against plaintiffs for the sum of \$43.50 in accordance with the verdict and findings. Plaintiffs bring the case here for review, and allege numerous errors. Many of these relate to rulings upon objections to the amended cross-petition filed after the cause was remanded, and to objections to the evidence introduced by defendants in support of the cross-demand. From the view we have taken of the case, its merits can be disposed of by considering the action of the trial court upon the motion for judgment on the findings.

It might be observed, in passing to the main question, that the jury beyond doubt allowed several items of alleged damages twice, and it is equally clear that their finding the value of the machines to be \$375, in the face of the express terms of the written contract fixing the purchase price at \$375, was without warrant of law. It is well settled that a purchaser of goods who seeks to recover damages for a breach of a warranty must affirm the contract in all its terms, and is bound by the contract price. He cannot retain the goods, and at the same time repudiate the contract. *Weybrick & Co. v. Harris*, 31 Kan. 92, 1 Pac. 271. Plaintiffs were entitled to a credit, to start with, of the \$375, the price and value fixed by the contract, from which should be deducted the freight charges of \$25 paid by defendants, and any damages resulting from a breach of any warranty which the contract expressed or the law implied. That there was no express warranty was settled by the former decision. The main question, therefore, is this: From the facts in this case, was there an implied warranty by plaintiff that the machines would do the work for which they were purchased? The doctrine of implied warranties in the sale of manufactured articles was stated and applied in *Lukens v. Freilund*, 27 Kan. 664, 51 Am. Rep. 429. The syllabus reads as follows: "While, when an article is ordered from a manufacturer to be by him manufactured for a specific and understood purpose, there is in some cases an implied warranty that the article when manufactured will be reasonably fit for the purpose intended, yet, when a purchase is made from him of a specific and completed article, he is to be regarded as a dealer, and his liability determined accordingly. *Fleld v. Klnnear*, 4 Kan. 476; *Bigger v. Bovard*, 20 Kan. 204; *Duncan v. Baker*, 21 Kan. 99." Justice Brewer, in the opinion, quotes in the following language from a well-recognized authority: "After quite a review of the authorities in *Smith's Leading Cases*, p. 251,

the author sums up the result thus: 'On the whole, therefore, it may be doubted whether there be any instance, in which a knowledge of the object for which a specific chattel is bought will raise an implied warranty that it is fit for that purpose, although a failure to acquaint the vendor with its unfitness may be evidence of fraud, and thus render the vendor liable in an action of tort.' " The same question was passed upon by this court in *Safe & Lock Co. v. Huston*, 55 Kan. 104, 39 Pac. 1035. It was there held that there was no implied warranty as to quality. The court said: "There is nothing in this case indicating that the safe purchased by the plaintiffs was manufactured especially for them, but the fair inference is that it was one of the kind of safes which the defendant manufactured for sale to whomsoever would buy." The doctrine of *Lukens v. Freilund*, supra, was expressly approved in *Kinkel v. Winne*, 67 Kan. 100, 72 Pac. 543, 62 L. R. A. 596, where the contract was for the sale and purchase of a fire insurance business, and it was sought to establish an implied warranty of the character and fitness of a certain register showing the expiration of policies. In the opinion, the following statement of the general rule is quoted from *Leake on Contracts* (2d Ed.) 404: "'If an order be given for the manufacture or supply of an article to satisfy a required purpose, that purpose, and not any specific article, being the essential matter of the contract, the seller is then bound, as a condition of the contract, to supply an article reasonably fit for the purpose, and is considered as warranting that it is so. If an order be given for a specific article of a recognized kind or description, * * * and the article is supplied, there is no warranty that it will answer the purpose described or supposed, although intended and expected to do so.' "

It is interesting in this connection to note that by statute in England no such warranty as is contended for in this case can arise by implication. The English sale of goods act upon this subject is as follows: "14. Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade-name there is no implied condition as to its fitness for any particular pur-

pose." The scope of this proviso is stated by Lord Russell, C. J., in the following language: "That obviously is intended to meet the case, not of the supply of what I may call for this purpose raw commodities or materials, but for the supply of manufactured articles—steam ploughs, or any form of invention which has a known name, and is bought and sold under its known name, patented or otherwise. *Gillespie Bros. & Co. v. Cheney, Egger & Co.*, 2 Q. B. 59, at 64." The common-law rules on the subject of implied conditions or warranties as to quality or fitness are referred to and the cases classified in *Jones v. Just*, L. R. 8 Q. B. 197, 37 L. J. Q. B. 89, where the particular warranty under consideration is spoken of in the following language: "Thirdly, where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described, and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer"—citing *Chanter v. Hopkins*, 4 M. & W. 399. The English statute on this subject is discussed and the leading cases under the statute which is declaratory of the common law are cited in *Benjamin on Sales* (5th Ed.) 622, 623, 635.

In *Davis Calyx Drill Co. v. Mallory*, 137 Fed. 332, 69 L. R. A. 973, 69 C. C. A. 662, there was a written contract for the purchase of a drill described in the manufacturers' catalogue. The purchaser relied upon assurances made before the contract was entered into to the effect that the drill would be suitable for drilling through certain strata of rock in Lucas county, Iowa, and sought to recover damages upon the theory that, because the manufacturer knew the special purpose for which the drill was purchased, there was an implied warranty that it would be suitable for such purpose. It was held: "An implied warranty that an article will be fit for a particular purpose may be inferred from a contract to make or furnish it to accomplish that specific purpose, because the accomplishment of the purpose is the essence of this contract. * * * But no implied warranty of such fitness arises out of a contract to make or supply a described and definite article, although the vendor knows that the vendee is purchasing it to accomplish the specific purpose, because the essence of this contract is the delivery of the specific article, and not the accomplishment of the purpose." So in *Seltz v. Brewers' Refrigerating Co.*, 141 U. S. 510, 2 Sup. Ct. 46, 85 L. Ed. 837, the manufacturer was informed that plaintiff desired to dispense with the use of ice in cooling his brewery; that, unless the proposed machine would cool 150,000 cubic feet of air to a certain degree, it would be of no value. The manufacturer assured him that the machine would answer the purpose, and plaintiff entered into the

written contract relying upon such representation. The contract was for the purchase of a certain, specific machine which failed to answer the purpose for which it was purchased. The Supreme Court held that there was neither an express nor an implied warranty that the machine would answer the purpose. As said in *Davis Calyx Drill Co. v. Mallory*, supra, "It is not the familiarity of the purchaser with the character and work of the machine ordered, but the identity of the thing described in the contract, which brings the latter within the rule" that there is no implied warranty of fitness where a known, definite, and described thing is purchased.

A recent case in point is *Lombard W. W. G. Co. v. Great Northern Paper Co.*, 63 Atl. 555, 101 Me. 114, 6 L. R. A. (N. S.) 180. There, as here, the written contract consisted of a proposal to purchase and an acceptance. The things purchased were automatic water-wheel governors, described as "four (4) of our type 'B' governors, and four (4) of our '23' balanced relief valves." It was contended that the governors were not adapted to the purpose intended, and that there was an implied warranty that they would be suitable for the purpose of defendants' plant. The court said in the opinion: "It would be sufficient to say that the existence of this implied warranty as part of the contract is negated by its explicit terms defining the guaranties of the plaintiff, by the fact that it contains express guaranties which by the legal construction exclude all others, and by the fact that the goods sold were articles such as the vendor in the ordinary course of his business manufactured for the general market. When a contract is in writing, an additional warranty, not expressed or implied by its terms, that the article is fit for the particular use, cannot be added by implication." (The italics are ours.) In addition to the foregoing, the following cases announce the same doctrine: *Cleveland Punch & Shear Works Co. v. Consumers' Carbon Co.*, 78 N. E. 1009, 75 Ohio St. 153; *Grand Avenue Hotel Co. v. Wharton*, 79 Fed. 43, 24 C. C. A. 441; *Storage Co. v. Woods & Zent*, 99 Mich. 269, 58 N. W. 320, 41 Am. St. Rep. 590; *Peoria Grape Sugar Co. v. Turney*, 175 Ill. 631, 51 N. E. 587; *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210; *Gossler v. Eagle Sugar Refinery*, 108 Mass. 331; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 53 N. W. 232, 41 Am. St. Rep. 33; *Goulds v. Brophy*, 42 Minn. 109, 43 N. W. 834, 6 L. R. A. 892; *Wheaton Roller-Mill Co. v. John T. Noye Mfg. Co.*, 66 Minn. 156, 68 N. W. 854; *Whitmore et al. v. South Boston Iron Company*, 2 Allen (Mass.) 52; *Ottawa Bottle & Flint-Glass Co. v. Gunther* (C. C.) 81 Fed. 208.

In 15 American & English Encyclopedia of Law, p. 1236, note 6, the case of *Smith v. McNair*, 19 Kan. 330, 27 Am. Rep. 117, is cit-

ed as holding generally that a dealer is liable to a purchaser of goods upon an implied warranty as to fitness and quality. There the vendor sold certain papers purporting on their face to be genuine school district bonds, which turned out to be forgeries. The vendor was held liable. The distinction between that case and this is that there the vendor did not deliver the thing purchased. In the opinion Chief Justice Horton stated the rule as follows: "The rule is that, if one person applies to another to purchase an article for a particular purpose, and the person so applied to sells him the article knowing that the purchaser relies upon his complying with his request, the law implies that the article is delivered with a warranty that it is the article called for." It will be readily seen that the case does not decide that there is an implied warranty on the part of the dealer that the thing sold will answer the purpose intended by the buyer, but that the implied warranty is that the thing called for by the contract of purchase shall be delivered.

Another case cited in the same note, where the vendor was a dealer, and it was held that there was an implied contract as to quality, is that of *Shaw v. Smith*, 45 Kan. 334, 25 Pac. 886, 11 L. R. A. 681. *Shaw & Co.* were dealers in flaxseed, and *Smith* entered into a contract with them by which they were to furnish flaxseed for him to sow and raise a crop from. The dealers were to purchase the crop from him upon certain terms stated in the contract. The dealers did not have the flaxseed at the time the contract was made. They afterwards furnished flaxseed which appeared to be good, and which both parties believed to be good. In fact it was worthless. It was held that there was an implied warranty that the seed should be sufficient for the purpose of sowing and raising a crop. It was said in the opinion: "The entire contract when made was executory, and it was to be executed and performed afterward, and to be performed in parts and at different times. The seller was first to furnish the seed, and he did so in about 10 days after the contract was made, and of course the seed was to be a kind of seed that would grow." This was necessarily implied from the fact that *Smith* was to sow it and raise a crop therefrom, which the vendor of the seed was to purchase upon certain terms and conditions mentioned in the contract. It will be observed that warranty of quality was one which the particular facts and circumstances of that case necessarily raised by implication. The vendor did not deliver the kind of seed necessarily contemplated by both parties when the contract was made. The contract was executory, and it is well settled that a different rule obtains where goods are sold and delivered upon an executed contract, as in the present case. 15 A. & E. Enc. of Law, 1239.

In *Mechem on Sales*, § 1349, the author says: "The implied warranty of fitness is

not to be extended to cases which lack the necessary conditions upon which it depends. The essence of the rule is that the contract is executory; that the particular article is not designated by the buyer; that only his need is known; that he does not undertake or is not able to determine what will best supply his need, and therefore necessarily leaves the seller to make the determination and take the risk; and if these elements are wanting, the rule does not apply."

At the time the machinery in this case was purchased, plaintiffs in error were engaged at *Enterprise, Kan.*, in the business of manufacturing and selling mill machinery. The machines in controversy were not manufactured by them, but were made by *Wolf Bros.* at *Chambersburg, Pa.*, and shipped direct to the purchaser from the manufacturers. Plaintiffs are dealers, and the findings are that they did not see the machines nor have an opportunity to do so until after they were in operation. There is a finding also that the machines turned out by the manufacturers and placed upon the market were complete in themselves and required only to be attached by suitable connections to be operated. It appears that the machines were described in the manufacturers' catalogue, and that 32 similar machines had been sold in *Kansas* and were in operation when *Casper Brown*, after corresponding with some of the owners of mills where the same machinery were in use, made his purchase. The contract relied upon by plaintiffs in error appears to be the same contract in every respect that it was when the case was here before. It was then held that the written contract comprised in the order and letter of acceptance could not be varied or extended by parol evidence to cover matters upon which the writings themselves were silent. It was said: "Nothing remained to complete the contract save the delivery of the machines in accordance with its terms. The terms of the contract, the extent of the obligation undertaken by the parties, are embodied in and limited to what is expressed in the writing, and, as no words of warranty are employed, it will be conclusively presumed that no warranty was intended or existed." This language had reference to an attempt to prove an express warranty by evidence of an oral, contemporaneous agreement. In the concluding paragraph of the opinion, Justice *Pollock*, speaking for the court, observed that numerous cases had been cited upon the law applicable to implied warranties, and that they were inapplicable to the case of an express warranty, and further remarked: "Had the defendant based his action for affirmative relief upon the existence of an implied warranty, and had the trial court submitted this theory of the case to the jury, the argument so made would have been applicable to such a case, but cannot be given weight here."

After the case was remanded, it was possibly assumed from the remark quoted that

the same warranty could be established by parol evidence by merely amending the answer so as to call the warranty an implied, instead of an express, one. But nothing in the former opinion warrants the assumption. It appears, however, from the record, that the testimony at the last differs but slightly from that introduced on the first trial. While defendants were not permitted in so many words to testify to an oral agreement as to quality and fitness, they were permitted to testify to conversations between plaintiffs and Casper Brown, and representations to him by them with respect to the quality and fitness of the machines to do the work his mill required, and their advice and suggestions to him in reference to making changes in the mill to accomplish certain results, all of which occurred before the written contract was made. Thus, by parol evidence, much of which was the same as on the first trial, defendants were permitted to establish the identical defense which the former decision held could not be made, and extended by such proof the obligations of the contract to cover matters upon which the contract is silent. That there is no such magic in words must be apparent. The case in this aspect presents many points of similarity to that of *Storage Co. v. Woods & Zent*, 99 Mich. 269, 58 N. W. 320, 41 Am. St. Rep. 599. The written contract in that case was for the sale and purchase of certain machinery for use in refrigeration, described as "our 20x40 refrigerator." The action was to recover the contract price, and the defense was an express warranty that the apparatus would preserve fresh meats from 30 to 50 days, and that it failed to do so. The court instructed the jury that the written contract could not be varied by parol evidence, and withdrew the defense of an express warranty, but gave an instruction that, if they found from the evidence that defendants purchased the apparatus for a special purpose made known to plaintiff, and relied upon the judgment and knowledge of plaintiff, and not on their own, then there was an implied warranty that the system furnished should be reasonably fit and suitable for that particular purpose. In the opinion the court says: "The effect of these instructions, taken in connection with the first mentioned, was to permit the jury to find that there was no express warranty, but that there was an implied one, based on the very evidence relied on to show the express warranty; in effect holding that, while parol evidence was inadmissible to show an express warranty, it might be received to establish an implied one. Implied warranties are not unknown, and they are by no means limited to parol contracts. Thus, there is ordinarily an implied warranty of title where there is a contract of sale of personal property. Again: 'If a thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that

purpose.' This principle, however, is limited to cases where a thing is ordered for a special purpose, and cannot be applied to cases where a special thing is ordered, although it be intended for a special purpose. 1 Parsons on Contracts, 587. * * * But it is a rule of general application that warranties, whether express or implied, can only issue from the contract itself, and it must be a legal deduction, and cannot depend upon extrinsic evidence, except as it may be necessary for the explanation of some latent ambiguity. * * * In the present case, the defendants contracted for the purchase and erection in their refrigerator of an apparatus patented by the plaintiff, and called the 'Mc-Cray Patent System of Refrigeration.' Beyond the name, there is nothing to show that it was anything in the nature of a refrigerating process. The contract does not show that it was designed to preserve meats, or that the defendants had anything to do with meats. It does not appear what use it was intended for, or that the plaintiff had any information upon the subject. No warranty can be implied from this that it would preserve meat for any particular length of time."

In the case at bar, the machines are described in the contract as "Wolf gyrators. 1 No. 6-20 sieve 4 reduction machine. 1 No. 6-30 sieve 6 reduction machine." It also appears that with the machines the manufacturer was to furnish sieves to change the granulation of flour from coarse to fine, and that the machines were to be installed in a flouring mill. The contract is silent as to any special purpose for which they were purchased, and since the contract was for the sale of a specific, definite article, manufactured and supplied to the trade generally by the manufacturers, there was no implied warranty that it would answer to or be suitable for a particular purpose. The following language from *Johnson v. Powers*, 3 Pac. 625, 65 Cal. 179, is quoted with approval in *Rogers v. Perrault*, 41 Kan. 385, 21 Pac. 287: "'If the contract between the vendor and vendee be reduced to writing, nothing which is not found in the writing, except that which is presumed by law from that which is written, can be considered as a part of the contract.'"

But it is claimed that the defects which rendered the machines unsuitable were latent defects caused by the use of unseasoned lumber in constructing them. The findings establish as facts that plaintiffs, who were dealers, and not the manufacturers, had no opportunity to see the machines until after they were delivered, and had no knowledge of the latent defects. There was no implied contract on the part of plaintiffs that the materials of which the machines were constructed should be sound. "Where the vendor is not the manufacturer, and the purchaser knows this fact, the former is not responsible for latent defects, in the absence

of proof of an express warranty or of fraud and deceit upon the part of the seller." 15 A. & E. Enc. of Law, 1236.

From these considerations, it is apparent that upon the findings plaintiffs were entitled to judgment establishing and foreclosing their lien for the amount of the purchase price of the machines less the amount paid for freight.

The cause will therefore be reversed and remanded for further proceedings in accordance with these views. All the Justices concurring.

(46 Wash. 667)

CANADIAN BANK OF COMMERCE v. BINGHAM.

(Supreme Court of Washington. Aug. 1, 1907.)

BANKS AND BANKING—PAYMENT OF FORGED CHECKS—RIGHTS AS BETWEEN BANKS.

A bank, which pays forged checks drawn on it to another bank, which has cashed the same, on subsequently discovering the forgery and demanding the money paid to the other bank before that bank has been placed in any worse position than it would have been, had the drawee refused payment when the checks were presented to it, may recover from such other bank the amount so paid it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 453.]

Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Action by the Canadian Bank of Commerce against C. E. Bingham, doing business as C. E. Bingham & Co., to recover money paid by plaintiff to defendant on forged checks. From a judgment for plaintiff, defendant appeals. Affirmed.

Smith & Brawley, for appellant. Million, Houser & Shrauger, for respondent.

ROOT, J. This case was before the court once heretofore, and may be found reported in 30 Wash. 484, 71 Pac. 43, 60 L. R. A. 955, to which reference is made for a more complete statement of the facts and for a discussion and determination of most of the legal propositions presented on the present appeal. At that time the action of the lower court in sustaining a demurrer to plaintiff's complaint was held erroneous, and the case was remanded for a trial. Upon the hearing it was established that one of the forged checks in question was presented to this appellant at his banking house at Sedro-Woolley, by some one whom none of the bank officers could recall, and cashed by appellant; the check being indorsed by the name of the payee, a person known to none of the officers of the bank, nor to the logging company, whose officers' names were upon the check, one genuine and one a forgery. The other checks involved were presented to this appellant at his bank in Sedro-Woolley, by various business men in said town, they having cashed the same or received them in payment for goods when presented in the course of business. At the close of the evidence

the trial court made findings and conclusions in favor of the plaintiff, and rendered judgment thereupon, from which this appeal is taken.

It is contended by appellant that the evidence shows no negligence whatever upon his part, and that the negligence of the respondent in accepting and cashing the checks when it had at hand the signatures of the logging company's officers, by an examination of which it would have detected a forgery, is sufficient to defeat respondent's action. It is urged that the statute, as well as the common law, required the respondent to know the signatures of its depositors, and that, having accepted and paid the checks, it cannot now recover the money. It seems to us that the holdings of the court when the case was here before are conclusive against the appellant at this time. These checks were forgeries. They never had any value. When the forger passed them, it was an act of fraud, and every one who advanced or paid money as a consideration for one of these checks did it as a result of deception, fraud, or mistake. Hence every one who handled one of these checks and received money in consideration thereof thereby received something for nothing. As a general proposition money so received cannot be withheld when demanded by the party who, by fraud, misrepresentation, or mistake, paid said money for something which he supposed to be of value, but which as a matter of fact and law was valueless. In the opinion handed down before the following appears: "Certainly the governing principle upon which the respondent [now appellant] is entitled to retain the appellant's money, if he is so entitled, is that by the action of the appellant he has been prevented from recovering the money out of which he had been defrauded by the forger before the appellant had taken any action in the premises; or, stated affirmatively, that he has been prejudiced by the action of the appellant in paying the check, instead of allowing it to go to protest. This is in harmony with the undisputed rule that a drawer or maker of a check, who is deceived by a forgery of his own signature, may recover the payment back, unless his mistake has placed an innocent holder of the paper in a worse position than he would have been in if the discovery of the forgery had been made on presentation, and with the rule that allows the maker of a note, who pays it over his own forged signature, to recover, from the person who received it, for money paid by mistake, unless his negligence has caused loss to an innocent purchaser. There are no arbitrary rules of law governing these cases, and none are contended for."

Under this ruling the respondent was entitled to recover, unless respondent's negligence caused a loss to this appellant. It is doubtless true that the respondent was guilty of negligence in not promptly discovering the

forgery and notifying this appellant. It is also quite evident that appellant, or whoever first cashed these forged checks, was guilty of some negligence in not having the party properly identified. But, laying aside the question of negligence as to appellant and those from whom he bought the checks, it does not appear from the pleadings and evidence in this case that the appellant suffered loss by reason of the delay or negligence of respondent. If the appellant had made a showing that at the time he was apprised of the forgery he was unable to collect the money which he had paid for said checks, but that he could have done so if respondent had promptly detected the forgery, as it should have done, he would doubtless have a defense to this action. But nothing of the kind appears. So far as this record shows, the appellant, when apprised of the forgery, could have recovered from each of the parties from whom he received the checks the amount of money paid therefor, or was in as good a position to have done so as he would have been, had the respondent immediately protested the checks and notified him of the forgery. We think the judgment of the trial court was in accord with the principles enunciated in the opinion of this court upon the former hearing.

The judgment is affirmed.

HADLEY, C. J., and FULLERTON and MOUNT, JJ., concur.

(46 Wash. 686)

MORRIS et ux. v. HEALY LUMBER CO.
et al.

(Supreme Court of Washington. Aug. 2, 1907.)

1. LANDLORD AND TENANT—LEASE—ABANDONMENT.

The failure to build a logging road or railroad under a lease of premises "for a logging road or railroad to be thereafter constructed" was not such an abandonment of the lease as to entitle lessors to re-enter before expiration of the term.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 366.]

2. SAME—TENANCY FOR INDEFINITE TERM.

A lease for one year, and so on from year to year, until the same should be terminated at the end of the first or any subsequent year by lessee giving one month's notice in writing to that effect, and providing that failure to pay rent should work a forfeiture thereof, was not a lease for an indefinite term, within Ballinger's Ann. Codes & St. § 4570.

3. SAME—LACK OF MUTUALITY.

A lease, under which lessee may at its option hold the premises indefinitely, or terminate it on one month's notice, and conferring no right on lessor to terminate the same while the rent should continue to be paid, is not thereby rendered void for lack of mutuality.

4. EVIDENCE—PAROL EVIDENCE—VARYING TERMS OF LEASE.

Parol evidence to show that a lease was made on a condition that would defeat it is inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1932.]

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by Shamgar Morris and another against the Healy Lumber Company and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Walter S. Fulton, for appellants. Brownell & Coleman, for respondents.

FULLERTON, J. The appellants brought this action against the respondents to procure a cancellation of a written lease and to recover the possession of certain lands held by the respondents under and by virtue of the lease. The facts necessary to an understanding of the controversy are, in substance, these: The appellants own certain lands situated in King county, described, according to the United States government surveys, as the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 9, and the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 10, all in township 25 N. of range 7 E. of the Willamette meridian. The respondent Healy Lumber Company owns land abutting upon the appellants' land on the north, east, and south. The land of the respondent is valuable chiefly for the timber standing upon it. Owing to the topography of the country in its vicinity, the lands of the respondent cannot be logged profitably without bringing the logs out through certain gulleys or ravines which extend diagonally across the appellants' land. In the year 1889, the respondent was engaged in logging the land lying north of the land of the appellants, and was bringing the logs out over a road extending diagonally across the two western 40-acre tracts above described, having theretofore entered into a written agreement with the appellants which granted it that right. In the year named, a dispute arose between the parties as to the extent of the rights conferred by the agreement, and an action was begun by the appellants against the respondent to have them judicially determined. This action was settled by the execution of the agreement out of which the action at bar arises. The latter agreement contained seven clauses, only two of which, however, are material to the present controversy. By the first clause, the appellants leased to the respondent for three years, "and no longer," the right to construct and operate a logging road through the two western 40-acre tracts, together with the right to use a small lake near the southern boundary of the land as a storage ground. By the third clause they leased to the respondent a strip of land 100 feet wide, being 50 feet on each side of a line theretofore surveyed through the two eastern 40-acre tracts, for a logging road or railroad to be thereafter constructed, and a tract of land in the northwest corner of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 10, sufficient in size for a logging camp, with the privilege of erecting buildings and other improvements thereon necessary

and convenient for the use of the respondent in conducting the logging business. The duration of the lease was prescribed in the following language: "To have and to hold said strip for a period of one year from the 24th day of October, 1889, and so on from year to year until the lease mentioned in this clause shall be terminated at the end of the first year or any subsequent year by the party of the second part [respondent] giving to the parties of the first part [appellants] one calendar month notice in writing; the party of the second part yielding and paying the yearly rent of fifteen dollars (\$15.00) on the 24th day of October of each and every year of said tenancy for said strip and the camping place hereinafter mentioned. Failure to pay said rent when the same falls due may be treated as a forfeiture of this lease by the parties of the first part." The roadway described in this clause of the lease was intended to connect with the roadway described in the first clause, at or near the place where the camp was located, and its situation is such that it cannot be used as an independent way, but must be used in connection with the road first described. The respondent, however, did not find it necessary to make use of the way during the life of the lease mentioned in the first clause, and no logging road or railroad was ever constructed over the way. It took possession of the camping place and erected a number of buildings thereon shortly after the lease was executed, using it in connection with its logging business conducted while the lease mentioned in first clause of the agreement was in existence. After that lease expired, it attempted to get it renewed by agreement, and failing in that it sought to procure a right of way under a statute attempting to confer on logging companies the right of eminent domain. The statute was held unconstitutional by the trial court, and the right to condemn denied; its judgment being affirmed by this court on appeal. *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 63 L. R. A. 820, 99 Am. St. Rep. 964. After this decision, the respondent was obliged to cease its operations, since it was unable to get its logs to market. It therefore sold all of its stock and equipment of a perishable nature, keeping only its permanent equipment, blacksmith tools, and the like. These it has since kept in the building, on the camp site, where the other named respondents have since resided. Prior to commencing this action, the appellants made an oral demand upon the respondent for possession of the premises described in the third clause of the lease, and, on its failure to surrender possession, brought this action for the purposes first stated. The trial court held that the facts did not justify a recovery, and entered judgment accordingly. This appeal is from that judgment.

The appellants' first contention is that there was an abandonment of this lease. But that there was no abandonment in fact

is at once apparent. The respondent is actually in possession, and has now all of the possession that was surrendered to it when the lease was executed. Did its failure to build either the logging road or railroad amount to an abandonment in law? It seems to us that it did not. There was no express agreement in the lease that it would build either of the roads. The lease merely lets the land to the respondent for that purpose, but does not obligate it to build. Hence it would seem that the mere failure of the lessee to do something it did not obligate itself to do could not be such an abandonment of the lease as to permit the lessor to re-enter before the expiration of the term. Doubtless, a failure on the part of the lessee to perform express stipulations contained in the lease may work a forfeiture where these stipulations are for the benefit of the estate or the profit of the lessor, but forfeitures are never favored, and will not be enforced, even in actions at law, unless the right is clear and the proofs evident. The lease in question here contains no express stipulations that have been violated by the lessee, and we must conclude that the lessor cannot declare the lease at an end on this ground.

The second contention is that the lease creates a tenancy at will, which could be terminated at any time by the lessor, and was so terminated by the oral notice to quit and the subsequent commencement of this action. But we cannot agree that this is the effect of the lease. In the first place, we think it may be doubted whether there is under the statutes of this state any such tenancy as a tenancy at will, at least, any such tenancy as was known by that name at the common law. The statute recognizes but four species of tenancies, namely, tenancies for a fixed time, tenancies from year to year, tenancies for an indefinite term, and tenancies by sufferance. *Ballinger's Ann. Codes & St. §§ 4568-4571*. The nearest approach to a tenancy at will in the tenancies here mentioned is the tenancy for an indefinite time; but, if the lease in question creates a tenancy for an indefinite time, it does not aid the appellants in this action. Such a tenancy can only be terminated by a written notice given 30 days or more preceding the end of some rent-paying period (*Id. § 4569*), and no such notice was given in this case. But we do not think the lease was a lease for an indefinite time in the sense used in the Code. By its terms it was to expire, if not sooner forfeited for the nonpayment of rent, when the lessee gave one calendar month's notice in writing to that effect at the end of the first year of the lease or any subsequent year. In other words, it bound the lessor as long as the lessee paid the rent, and bound the lessee until he gave the calendar month's notice in writing. It is argued that this construction of the lease avoids it, because it then lacks mutuality. But mutuality in this sense is not essential to a valid lease. In

this state there are no restrictions upon the right of alienation. A person owning land in fee may convey a fee, and, having power to convey a fee, may convey any interest in the land less than a fee. *Tischner v. Rutledge*, 35 Wash. 288, 77 Pac. 388. So, in this case, the appellants, having power to convey their whole estate by deed, had power to convey in the same manner any lesser estate therein.

Lastly, it is contended that the court erred in excluding evidence as to the consideration that actuated the appellants in entering into the lease. But such evidence was immaterial to any issue made by the pleadings. While it is permissible for certain purposes to show by parol what the actual consideration was upon which a deed is founded, it is never permitted where the purpose of the evidence is to annex a condition to the instrument not expressed in it. Here the purpose of the oral evidence was to show that the grant was made upon a condition that would defeat its operative effect, and for this purpose parol evidence is inadmissible. *Wright v. Stewart*, 19 Wash. 179, 52 Pac. 1020.

The judgment appealed from is affirmed.

HADLEY, C. J., and MOUNT, CROW, and ROOT, JJ., concur.

(46 Wash. 664)

CURTIS v. CURTIS et al.

(Supreme Court of Washington. Aug. 1, 1907.)

1. DIVORCE—CUSTODY OF CHILD—MODIFICATION OF DECREE—SUFFICIENCY OF SHOWING.

Where on divorce the custody of a minor child was awarded a third person, a showing made by the mother afterwards that through her improved health she was able to support and educate the child, and was a proper person to have its care and custody, was sufficient to warrant a modification of the decree by awarding the child to her; it being unnecessary to show that its welfare demanded a change in its custody.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 793, 794.]

2. SAME—MOTHER'S MORAL CHARACTER.

That long before marriage, and before her child's birth, and in her earlier years, the wife was immoral, does not establish her present unfitness to have the custody of her minor child on divorce; her past character being known to the husband when they married, and there being no showing of her improper conduct since.

3. SAME—CONSENT TO DECREE—CONCLUSIVENESS.

That in a divorce suit the wife stipulated a third person might have her minor child's custody did not estop her from afterwards seeking a modification of the decree.

Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Action by Rebecca Viola Curtis against Frank M. Curtis and another. Defendant and Clara Maltby appeal from a decree modifying a decree granting a divorce and the custody of a minor child to Maltby. Affirmed.

Hathaway & Alston, for appellants. J. X. Kennedy, for respondent.

FULLERTON, J. On May 24, 1906, in an action pending in the superior court of Snohomish county between the respondent and the appellant Frank M. Curtis for a divorce, the court entered a decree divorcing the parties and awarding the care and custody of their minor son, then of the age of 4½ years, to the appellant Clara Maltby, further decreeing that the appellant Curtis pay to Mrs. Maltby the sum of \$15 per month for the maintenance of the child. On October 23d thereafter, the respondent petitioned the court for a modification of the decree to the effect that the child be taken from the custody of Mrs. Maltby and awarded to her, alleging as grounds therefor that the appellant Maltby and her husband were then engaged in running a hotel at Marysville, Wash., connected with which was a saloon, which could be entered by a door opening therein from various parts of the hotel; that much drinking and carousing occurred in the saloon, which could be witnessed by the boy by merely opening one of the doors leading to the saloon; and, further, that the boy was permitted to mingle promiscuously with the guests of the hotel and the patrons of the saloon. She further alleged that at the time of the decree she was much broken in health, caused by the cruel treatment of her husband, and consented to the decree awarding the child to Mrs. Maltby without fully understanding the effect of the same, believing that it was but temporary, and that a hearing would be had before a final decree would be made relating to the permanent custody of the child. She also alleged that she was earning lucrative wages as a cook, and by doing domestic and laundry work in the town of Index, Wash., and was capable of caring for and educating the child. The appellants put in issue the allegations of the petition by answer, and a trial was had on the merits of the controversy. The trial court held that the respondent was entitled to the custody of the child and modified the decree accordingly.

The respondent offered no evidence whatever in support of her allegation that the appellant Maltby was subjecting the child to improper influences, nor did she show, or attempt to show, that the child was not receiving due and proper care. She confined her proofs to the allegation that she, herself, by reason of her change in health, was then able to support and educate the child, and was a proper and fit person to have its care and custody. It is the appellant's contention that this showing is not sufficient; that the respondent should have shown not only her own changed condition, but that the welfare of the child demanded a change in its custodian before the court was authorized to modify the original decree. But the rule is not so broad as this. It is true this court

said, in *Koontz v. Koontz*, 25 Wash. 336, 65 Pac. 546, that a decree of the superior court which determines the custody of infant children is conclusive upon the court which rendered the decree, and upon all other courts, in the absence of a material change in the condition and fitness of the parties, or the requirements for the welfare of the child; but it did not mean by this that both these conditions had to concur before a change in the decree could be made. While the welfare of the child is in all cases, where the court is clothed with power of its disposition, the primary consideration, yet it is not the policy of the law to take children away from their parents and give them to strangers merely because the strangers are better provided financially to rear and educate them than are the parents. Parents are their children's natural protectors. They have an interest in them that is not shaken by acts of disobedience or ingratitude, and because of this interest children under their parents' immediate care, even though their surroundings be humble and their opportunities narrow, are much more apt to grow up useful men and women than they are when reared by strangers, who do not have this natural affection for them. When, therefore, the parents are able to care for their children, it is the policy of the law to award their custody to them, rather than to the custody of strangers.

The appellants further urge, however, that the wife is unfit morally to have the custody of the child. But we do not think the evidence establishes this fact. The specific acts of immorality charged against her, even admitting that they are proven, occurred in her earlier years, long before her marriage to the appellant Curtis or the birth of the child, and were known, moreover, by him at the time of such marriage. Surely he should not be permitted to urge these as a reason for depriving her of her offspring. Nor do we think Mrs. Maltby can urge the matter. The mother's right to the child must depend on her present conduct, and we find nothing in the evidence that impugns her character for morality and decency occurring since her marriage with the appellant.

It is contended that, because the respondent stipulated in the divorce that the child should be awarded to Mrs. Maltby, she cannot now question the decree. We do not think, however, that this fact has any bearing upon her right to now seek its modification. A stipulation in an action ordinarily merely takes the place of evidence. It was so here, and the decree founded thereon no more estops the parties from seeking its modification than would a decree founded upon evidence of a different character.

The order appealed from is affirmed.

HADLEY, C. J., and CROW, MOUNT, and ROOT, JJ., concur.

PIPER v. PIPER.

(Supreme Court of Washington. Aug. 1, 1907.)

1. MARRIAGE—ANNULMENT—PROCESS — SERVICE BY PUBLICATION.

Pierce's Code, § 335, subd. 4 (Ballinger's Ann. Codes & St. § 4877), authorizing service of summons by publication on a nonresident defendant in an action for divorce, authorizes like service in an action for the annulment of a marriage.

2. STATUTES—ACTS RELATING TO MORE THAN ONE SUBJECT—DIVORCE AND ANNULMENT OF MARRIAGE.

Statutes classifying an action for the annulment of a marriage with an action for divorce are not in violation of the constitutional requirement that no bill shall embrace more than one subject, which shall be expressed in its title; the subject of the annulment of marriage being germane to that of divorce.

Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Dollie A. Piper against William E. Piper. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions.

Roche & Onstine, for appellant. R. M. Barnhart and Carroll A. Gordon, for respondent.

HADLEY, C. J. This is an action for the annulment of a marriage. The complaint alleges that the plaintiff and defendant were intermarried on the 29th day of November, 1890, and that prior to and at the time of the marriage defendant had a wife living, his marriage to whom was still in force and effect, undissolved by decree of divorce or otherwise. Affidavit in due form was filed, showing that the defendant is a nonresident of this state and that his residence is unknown to the plaintiff; his last known place of residence being stated. Service of publication summons was regularly made in the usual manner. No appearance was made by the defendant, and in due time a default was claimed against him. The plaintiff offered evidence in support of her complaint, when the deputy prosecuting attorney, who appeared in behalf of the state, objected to the hearing of any evidence on the ground that the action is one for the annulment of a marriage, and that service of summons by publication is not authorized in such a case. The court sustained the objection, and thereupon entered judgment dismissing the action. Plaintiff has appealed.

The sole question presented by the appeal is whether our statutes authorize service of summons by publication in an action of this character. Section 335, subd. 4, Pierce's Code (Ballinger's Ann. Codes & St. § 4877), authorizes service by publication upon a nonresident defendant "when the action is for divorce in the cases prescribed by law." Appellant argues that an action for the annulment of a marriage is in this state of the same nature as an action for divorce, and that it has always been treated by our Legislatures in the passage of statutes as in effect

the same. We believe this is true. In the territorial law of 1854 (Laws 1854, p. 405 et seq.) and again in the territorial law of 1862 (Laws 1862-63, p. 413 et seq.), suits for divorce and alimony and for the annulment of marriages are treated together in the same legislative acts. The same is true of section 2000 et seq. of the Code of 1881, and also of a subsequent act of the state Legislature found in Sess. Laws 1891, p. 42, c. 26. The legislative designations of the above statutes are as follows: "An act regulating divorces," "An act to regulate suits for divorce and alimony," "An act in relation to applications for divorce, amendatory of section 2000 * * * of the Code of 1881." Section 4632 of Pierce's Code (Ballinger's Ann. Codes & St. § 5718) provides that one must reside in this state for one year before applying for a divorce, and the same section makes the same provision with regard to suits for annulment of marriage. Section 4633 also provides that the court shall require proof in either a suit for divorce or for annulment, when there has been a failure to answer, or when the answer admits the allegations of the complaint. It thus appears that our Legislature has invariably treated actions for divorce and for the annulment of marriage as belonging to one general subject, and in conferring jurisdiction to grant divorces it has also been made to include the annulment of marriages.

No constitutional objection can well be urged against classifying the two actions together, for the reason that the subject of the annulment of marriage is germane to that of divorce, and the statutes are therefore not repugnant to the constitutional requirement that "no bill shall embrace more than one subject, and that shall be expressed in the title." That these two matters are often treated in statutes as of the same subject and as germane to each other is evident from the following: "The word 'divorce,' as now used, means a dissolution of the bonds of matrimony, although, as used in the statutes of many states, it includes both nullity and divorce. * * * The jurisdiction of court to annul marriages is usually conferred by statutes including both causes for annulment and causes for divorce, without attempt to distinguish one from the other. * * * The nullity suit, like a suit for divorce, is a proceeding to establish the status of the parties. Therefore the proceeding must be brought where the parties are domiciled. The law of domicile will be the same as in divorce proceedings." 19 Am. & Eng. Enc. of Law, pp. 1218, 1219. "A suit to declare a marriage null is held to be within the term 'divorce suit' in a statute of the sort we are considering." 2 Bishop on Marriage, Divorce, and Separation, § 786. The same author, at section 808 of said volume, says: "A statute creating a jurisdiction for 'divorce' carries with it suits for nullity—a doctrine before stated in another aspect." In view of the

not uncommon legislative policy above indicated, as well as in view of the express provisions of our statutes, we think it has been the evident intention of our Legislature to establish the same jurisdiction and practice for both divorce and annulment suits. It follows that there was authority to serve the summons by publication in this action.

The judgment is therefore reversed, and the cause remanded, with instructions to vacate the judgment of dismissal and proceed to hear the appellant's testimony.

FULLERTON, MOUNT, ROOT, and CROW, JJ., concur.

PIERCE et ux. v. PETTIT et al.

(Supreme Court of Washington. Aug. 1, 1907.)

1. APPEAL—PRESENTATION OF ERROR—EXCEPTIONS—NECESSITY.

Where no exceptions were taken to the court's findings of fact, they are not subject to review on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1536.]

2. VENDOR AND PURCHASER—RESCISSION BY PURCHASER—WAIVER.

Though, at the time vendees paid a part of the purchase price of land and received a memorandum receipt therefor, providing that if title as shown by an abstract to be furnished was not good, and could not be made good, then the agreement should be void, it was represented that vendor, who had but a contract of sale, was the owner, yet vendees, having learned that vendor had but a contract of sale before themselves subsequently entering into a contract of sale of the land and the owner being able, ready, and willing to convey, they were not thereby excused from performance of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 238, 268.]

Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by C. C. Pierce, Jr., and another, against Herman C. Pettit and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

McCafferty & Bell, for appellants. Shank & Smith, for respondents.

HADLEY, C. J. This is a suit to recover \$800, which was the sum paid by the plaintiffs as a part of the purchase price upon a contract to purchase real estate. The cause was tried by the court, and recovery was denied. Judgment was entered dismissing the action, and the plaintiffs have appealed.

Errors are assigned upon certain of the court's findings, and considerable discussion of the evidence in reference thereto is contained in appellants' brief. The record, however, discloses no exceptions to the findings, and they are therefore not reviewable here, as we have often held. Late expressions of the court in point may be found in the following cases: *Hoeschler v. Bascom* (Wash.) 87 Pac. 943, and *Bybee v. Bybee* (Wash.) 87 Pac. 1122.

It is further assigned that the conclusions of law and judgment as made by the court do not follow from the findings, and also that the findings are inconsistent with each other. The court found that Pettit & Son, on January 20, 1906, gave to appellants a written receipt for \$100, as a payment upon the purchase price; the writing also containing other data concerning the terms of the purchase. It stated the aggregate purchase price as \$6,600. Eight hundred dollars was to be paid in cash, and the balance in deferred payments. An abstract of title was to be furnished, and five days allowed for its examination. It was also stated that if the title was not good, and could not be made good, then the agreement should be void; but if found to be good, and not accepted by the purchaser, the earnest money should be forfeited. Time was made the essence of the agreement, and it was also stated that it was made subject to the owner's approval. It was also found that the property was listed for sale with Pettit & Son by the defendant Perry. The foregoing was found with reference to what took place on January 20th, and it was further found that on January 22d said Perry contracted to sell the property to the appellants, by a written contract of sale executed and delivered on that date; that the further sum of \$700 was then paid, completing the first payment of \$800. The terms of sale were set forth in the contract as in the memorandum of January 20th. The lots were owned by one William Pigott, at all times mentioned, and it was found that he was at all times ready, willing, and able to convey; that on January 15th Pigott authorized M. B. Crane & Co. to sell the property, which authorization continued until after the commencement of this action; that prior to the execution of the said contract from Perry to appellants, M. B. Crane & Co. executed their contract of sale to Perry, and the same was ratified by Pigott; that at the time the \$100 was paid and the memorandum receipt given, on January 20th the appellants understood, and it was so represented, that Perry was the owner; but that before the execution of the contract of January 22d, when the further payment of \$700 was made, appellants were apprised that Perry had only a contract to purchase from the owner. Appellants, having failed to make subsequent payments, claimed that the examination of the abstract disclosed that Perry was not the owner, that the title was not therefore good, and that appellants were for that reason released from further obligations and entitled to a return of the \$800 already paid. The same contention is made here. But it will be seen that the court found that appellants knew when they paid the \$700 that Perry was not the owner, and that he had only a contract of sale. Whatever may have been their understanding in the first instance, they learned the facts before they com - ted

the \$800 payment. We find no inconsistency in the findings. When the subsequent examination of the abstract disclosed that Perry was not the owner, it merely disclosed what appellants already knew, and what they knew when they completed their contract of purchase of January 22d. The disclosures of the abstract therefore furnished no excuse for not making the subsequent payments, since the court found that the owner was at all times ready, able, and willing to convey. Time having been made the essence of the contract, and it having been provided that payments made should be forfeited in default of making other payments, it follows that appellants are not entitled to recover the payment made, and that the judgment follows from the court's findings.

The judgment is affirmed.

FULLERTON, ROOT, and CROW, JJ., concur.

NATIONAL BANK OF COMMERCE v. JONES.

(Supreme Court of Oklahoma. June 25, 1907.)

1. CHATTEL MORTGAGES—LIEN—RECORDING.

Where the owner of chattels covered by a valid recorded mortgage removes the chattels without the knowledge or consent of the mortgagee to another county, it is not necessary for the mortgagee, in order to preserve the lien, to file the mortgage or a copy thereof for registry in the county to which the property is removed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 166.]

2. SAME—PRIORITIES—AGISTER'S LIEN.

The lien of a prior valid recorded chattel mortgage will take precedence over the subsequently acquired lien of a livery stable keeper or agister upon animals placed in his charge, unless such animals were delivered to such lienholder to be kept and cared for by him with the consent of the mortgagee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 235.]

3. CONSTITUTIONAL LAW—VESTED RIGHTS—OBLIGATION OF CONTRACTS.

An act of the Legislature, which postpones an existing valid mortgage lien and makes a subsequently created lien superior to the mortgage lien, is a law impairing vested property rights and impairing the obligations of a contract, and is void for conflict with the Constitution of the United States.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 181, 494.]

(Syllabus by the Court.)

Error from District Court, Pawnee County; before Justice Bayard T. Hainer.

Action by the National Bank of Commerce against Ben Jones. Judgment for defendant, and plaintiff brings error. Reversed.

Wrightsmen & Fulton and James B. Diggs, for plaintiff in error.

BURFORD, C. J. One I. S. Jones was a resident of Payne county, Okla., and there owned and kept one gray horse, valued at

§60. On December 6, 1900, he executed to the National Bank of Commerce at Stillwater a chattel mortgage upon said horse to secure the payment of the sum of \$59.50, due September 6, 1901, and bearing 12 per cent. interest after maturity. This mortgage was filed for record in the office of the register of deeds of Payne county on the same day it was executed. On October 6, 1901, the horse was left in the possession of the defendant Ben Jones, at Ralston, in Pawnee county, Okla., without the knowledge or consent of the mortgagee. Ben Jones was the keeper of a feed barn, and kept and fed the horse until the commencement of this action, at which time there was due him for feed and care of the horse, as found by the court, the sum of \$25. The mortgagee demanded possession of the horse in December, 1901, and Jones refused to deliver possession until the feed bill was paid. The mortgagee refused to pay this bill, and on December 10, 1901, began this action in replevin before the probate court of Pawnee county. The horse was taken on the writ of replevin and delivered to the plaintiff, who retains possession. On the trial in the probate court it was held that the mortgagee could not recover, and the horse was ordered returned to the defendant. Appeal was taken to the district court of Pawnee county, and the cause there tried to the court, and judgment rendered sustaining the lien of the defendant for feed and care for the sum of \$25, which the plaintiff was ordered to pay, or, on default in payment, to return the horse. This judgment was rendered upon the express holding by the trial court that the lien for feed and care was superior to the mortgage lien. The bank, the mortgagee, brings the case here for review, and the sole question for determination is: Which is the superior lien, that of the mortgage to the bank, or that for feed and care claimed by the liveryman?

It is said in the brief that the trial court held that the bank had lost its lien by a failure to have the mortgage filed for record in the office of the register of deeds of Pawnee county after the horse was removed from Payne county. Such is not the law. When the owner of the horse, who resided and kept the horse in Payne county, executed a mortgage upon the horse, and it was duly filed for record in such county, the mortgage lien became effective against all persons who subsequently dealt with the property, and a removal of the property by the mortgagor without the consent or connivance of the mortgagee would not affect the validity of the mortgage lien. It is said in Jones on Chattel Mortgages, § 260: "The removal of a mortgagor from the town or county in which he resided when the mortgage was executed, and where it was duly recorded, and the taking of the mortgaged property with him, does not invalidate the record of the mortgage, or necessitate the recording of it again in the town or county to which he

has removed. The object in requiring a record of the mortgage is to give publicity to it, and to provide a source of information common to all persons, so that they may determine, with some degree of facility, convenience, and certainty, the question of title to the property whenever they may be interested to know it, while at the same time it is not among the purposes of the recording acts to subject a bona fide mortgagee to the inconvenience of the constant vigilance and ceaseless watching which would be requisite to guard and secure his interests if he were obliged to record his mortgage in every town into which the mortgagor might see fit to remove with the property. If he were required to do this, his security would be well-nigh worthless; for before he could do this a creditor of the mortgagor might seize the property by process of law or the mortgagor himself might pass the title to it by way of sale to an innocent purchaser." And this rule is sustained by abundant authority. See, also, 6 Cyc. 1088, 1089, and authorities there cited.

The next contention is that the lien for feeding and caring for the horse is superior to that of the mortgage. The weight of authority is to the effect that a lien for feeding and caring for domestic animals is not superior to the lien created by a prior valid recorded mortgage. 1 Jones on Liens, § 691. It is also stated in 19 Am. & Eng. Enc. (2d Ed.) p. 438: "It is held by the overwhelming weight of authority that the lien of a prior valid recorded chattel mortgage will take precedence over the subsequently acquired lien of a livery stable keeper or agister upon animals placed in his charge, unless such animals were delivered to the livery stable keeper or agister to be kept and cared for by him with the consent of the mortgagee." The Supreme Court of Kansas has adopted a rule to the contrary in a number of cases, but the authorities generally are not in accord with the decisions of that court. But it is said that our statute changes the general rule, and that in this case the mortgage lien must be held inferior to the lien of the agister. This cannot be. The statute referred to was adopted February 28, 1901, almost three months after the mortgage had become a valid lien and the rights of the mortgagee completely vested. This statute (chapter 3, p. 43, Sess. Laws 1901) is as follows:

"Section 1. That any person or persons employed in feeding, grazing or herding any domestic animals, whether in pasture or otherwise, shall for the amount due for such feeding, grazing or herding have a lien on said animals."

"Sec. 3. All liens not to exceed in the aggregate twenty-five per cent. of the value of such animals against any domestic animal or animals for labor, grazing, herding or feeding, or for corn, feed, forage or hay, furnished the owner of such domestic animals

as herein provided and actually used for such purpose, shall be prior to all other liens thereon, and no recital or stipulation in any mortgage or other incumbrance on any cattle so fed shall be held to supersede or vitiate the lien here provided for."

The Constitution of the United States, which is the supreme and paramount law of the land and controlling upon all bodies, either legislative or judicial, within the territories, in article 1, § 10, provides: "No state shall pass any law impairing the obligation of contracts." And by the provisions of the organic act this provision of the Constitution, as well as all others not locally inapplicable, is put in force in this territory. Organic Act St. 1890, § 28. An act of the Legislature which seeks to impair the obligation of a contract, or to impair or destroy vested property rights, is unconstitutional and void. *Toledo Railroad Co. v. Hamilton*, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. Ed. 905; *Crowther v. Fidelity Ins. Co.*, 85 Fed. 43, 29 C. C. A. 1; *Yeatman v. King*, 2 N. D. 428, 51 N. W. 721, 33 Am. St. Rep. 797; *Kilpatrick v. Kansas City, etc., R. R. Co.*, 41 Am. St. Rep. 758, note; *Giles v. Stanton*, 85 Tex. 620; 1 *Jones on Liens*, § 701. These authorities lay down the doctrine that a mortgage lien constitutes a vested property right, and after it has attached the Legislature has no power to create a lien superior to the vested interest, or to provide that such vested lien shall be made inferior to a lien subsequently created; and we think this rule sound, and in harmony with reason and justice.

The judgment of the district court is reversed, at the costs of defendant in error, with directions to vacate and set aside the judgment in favor of the defendant and to enter judgment for the plaintiff that it was entitled to the possession of the horse at the time it commenced its action and for its costs. All the Justices concur, except HAINES, J., who tried the case below, not sitting.

FRANTZ et al. v. AUTRY.

(Supreme Court of Oklahoma. June 25, 1907.)

1. CONSTITUTIONAL LAW — CONSTITUTION — DEFINITION.

A "constitution" is the written instrument by which the fundamental powers of the government are established, limited, and defined, and by which those powers are distributed among the several departments for their safe and useful exercise for the benefit of the body politic.

2. SAME—CONSTITUTIONAL CONVENTION.

The constitutional convention is vested with the power and charged with the duty and responsibility of forming a Constitution and state government, and in the performance of such duties it exercises legislative powers and functions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 1.]

3. SAME—POWERS.

The convention has, and can exercise, plenary powers, subject to the limitations and restrictions that the Constitution shall be republican in form, that it shall not be repugnant

to the Constitution of the United States and the principles of the Declaration of Independence, that no distinction shall be made on account of race or color, and that the convention shall by ordinance irrevocable accept all the terms and conditions in the enabling act.

4. SAME—COUNTIES—CREATION.

The power vested in the convention to form a state government clearly implies the power to create and define all the counties within the limits of the proposed state, the only limitation upon the convention in this respect being that the Osage Indian Reservation shall remain a separate county until the lands therein are allotted in severalty, and until changed by the Legislature of the state.

5. COUNTIES—DEFINITION.

A "county" is one of the territorial divisions of the state created for public and political purposes connected with the administration of the state government.

6. CONSTITUTIONAL LAW — STATES — STATE OFFICERS.

Officers for a full state government, under the terms of the enabling act, include not only state officers whose powers and duties are co-extensive with the limits of the state, but includes all the officers provided for in the Constitution, from the highest to the lowest, whose duties are in any manner connected with the administration of the state government.

7. SAME—CONSTITUTION—SUBMISSION TO PEOPLE.

Congress, by the express terms of the enabling act, conferred the power and authority upon the convention to pass appropriate ordinances for submitting the Constitution to the people for ratification or rejection at an election to be held at a time fixed in said ordinance.

8. SAME—ORDINANCES.

An ordinance, as used in this act, means a law which is essential to carrying into effect merely the objects for which the convention was created. Such an ordinance, when once adopted by the convention, has the force and effect of law.

9. SAME—INJUNCTION—JURISDICTION — CONSTITUTIONAL CONVENTION.

A court of equity has no power or jurisdiction to restrain or enjoin the constitutional convention, its officers or delegates, from exercising any of the rights, powers, and obligations confided to it by Congress or the people; nor can the powers of the court be invoked to restrain or enjoin the submission of the Constitution, or any proposition contained therein, to a vote of the people in advance of its adoption and ratification by the people and its approval by the President of the United States, on the ground that the proposed Constitution, or any of its provisions, is unconstitutional, or that the convention acted in excess of its lawful powers.

10. SAME — LEGISLATIVE POWERS — DELEGATION TO EXECUTIVE—JUDICIAL REVIEW.

The Constitution of the United States guarantees to every state a republican form of government, and the power to determine whether the Constitution is republican in form is primarily a legislative power, and resides in Congress. But this power was delegated by Congress to the President of the United States, and such question is not subject to judicial cognizance.

Irwin, J., dissenting, and Burwell, J., dissenting in part.

(Syllabus by the Court.)

Error from District Court, Woods County; before Justice John L. Pancoast.

Action by G. E. Autry against Frank Frantz, Governor of Oklahoma, and others. Judgment for plaintiff, and defendants bring error. Reversed and dismissed.

On June 16, 1906, the Congress of the United States passed an act entitled "An act to enable the people of Oklahoma and of the Indian Territory to form a Constitution and state government and be admitted into the Union on an equal footing with the original states," etc. Act June 16, 1906, c. 3335, § 34 Stat. 267. Under and in conformity with the provisions of this act, members of the constitutional convention were elected, and the convention was duly organized; W. H. Murray being elected its president, and John M. Young its secretary. Thereupon the convention proceeded to the forming of a Constitution and state government, and an ordinance for the submission of the same to the qualified voters of the proposed state of Oklahoma for ratification or rejection, August 6, 1907, being the date fixed by said ordinance for the holding of such election, and which ordinance also provided for the election of all state, district, county, and township officers, including the members of the Legislature and five Representatives to Congress. It was also provided that within 20 days after the adoption of such Constitution and ordinance by the constitutional convention, which was done on April 22, 1907, the Governor of Oklahoma should issue a proclamation calling an election for the 6th day of August, 1907, in the manner prescribed by said ordinance; and that, if the Governor should fail or neglect to call such election, then the president of the constitutional convention was authorized to issue such proclamation. Woods and Woodward counties are organized and existing counties of the territory of Oklahoma, and have been such since the opening of the Cherokee Outlet to settlement in 1893; each of said counties having a full complement of county, township, and city officers. It is proposed by the constitutional convention, by one of the provisions of the Constitution, to divide the territory which has heretofore composed Woods county into three parts; a portion of the eastern part of said county being designated and established as Alfalfa county, a portion of the southern part as Major county, and the remainder of said county of Woods, together with several congressional townships taken from Woodward county, is designated as Woods county. This action of the convention provides for the establishment of two entirely new counties, to wit, Alfalfa and Major, which do not, at the present time, exist as counties in the territory of Oklahoma. By the terms and provisions of the election ordinance, three persons are named and appointed as county commissioners, and one person as county clerk, for each of said Alfalfa and Major counties. The counties are divided into municipal townships and commissioners' districts, to conform to such divisions in the other counties of Oklahoma, and it is further provided in said ordinance that: "Said county commissioners shall on or before the 8th day of June, A. D. 1907, di-

vide or designate the townships of their respective counties into election precincts and establish the boundaries of the same, and shall designate a polling place in each precinct, and appoint all necessary inspectors of election in the several precincts, whose duties shall be the same as inspectors of election under the laws of the territory of Oklahoma, and shall also perform all other duties required to be done or performed by the boards of county commissioners pertaining to elections under the laws of the territory of Oklahoma for elections therein, and shall perform all other duties or acts necessary to the conduct of said elections."

This action was commenced in the district court of Woods county by G. E. Autry, a taxpayer and member of the board of county commissioners of said county, against Frank Frantz, Governor of Oklahoma, and W. H. Murray, president of the constitutional convention, John M. Young, secretary thereof, and the other defendants as the said designated county commissioners and county clerks of the counties of Alfalfa and Major, to enjoin the said Frank Frantz, W. H. Murray, and John M. Young from issuing or publishing any proclamation in which said proclamation it is proposed to submit to the electors of the proposed state of Oklahoma, either as a part of the proposed Constitution or as a separate ordinance, any clause or provision dividing, or purporting to divide, Woods county, or changing or in any wise interfering with any township or precinct therein, and to enjoin and restrain the said C. I. Overstreet, C. H. Chowning, C. M. Delzell, M. R. Mansfield, Charles Bowman, J. C. Major, I. J. Corwin, and Charles B. Powell from in any wise interfering with or usurping, or attempting to usurp, any of the duties of the county commissioners or county clerk, or any or either of them, of the county of Woods, in or about the said proposed election or any of the preparations therefor, at or in any part of the territory of the county of Woods as now described and existing, and from in any wise acting, or attempting to act, in any capacity or to any extent in any election to be held in the said pretended counties of Alfalfa and Major, or either of them. In the absence of the district judge from the county, application was presented to the probate judge of Woods county, and a temporary order of injunction was granted as prayed for in the plaintiff's petition. Defendants in the court below, appellants here, interposed a demurrer to the petition, for and upon the grounds that the plaintiff had no legal capacity to sue; that the court had no jurisdiction of the subject-matter of the action; and that the petition did not state facts sufficient to constitute a cause of action. At the same time a motion to dissolve the temporary injunction was filed, for the reasons and upon the grounds above stated, and in addition thereto alleging that the defendants and each of them are only attempting to per-

form those acts and duties legally imposed upon them by the ordinance of the constitutional convention, and that the convention organized under the laws of Congress has legal power and authority to provide by ordinance for the performance of the duties which are imposed upon them. Upon the presentation and hearing of the demurrer and the motion to dissolve the temporary injunction, the court overruled the same, and held: That the plaintiff had the legal capacity, as a citizen and taxpayer, to maintain this action; that the constitutional convention had no powers conferred upon it, except powers as are expressly conferred upon it by the enabling act, and such powers as are incidentally necessary to carry into effect the objects and purposes of such act, and denied the power of the convention to divide Woods county, and create new counties thereof, and that the convention, in that respect, acted beyond its express or implied powers; and further held that the convention had no power to provide for the election of county or township officers at the time the Constitution is submitted to the voters of the proposed state of Oklahoma for their ratification or rejection.

The defendants thereupon filed a general denial, and the cause was submitted to the court on an agreed statement of facts, practically as above stated, and the court thereupon rendered the following final judgment in said cause: "Now, on this 8th day of May, 1907, the parties to the above-entitled cause appeared in open court, by their respective attorneys, and said cause was presented to the court upon the motion of the defendants to dissolve, vacate, and set aside the temporary injunction herein, and upon the demurrer to the plaintiff's petition. Said cause was duly argued and fully presented and by the court taken under advisement until the 13th day of May, 1907. Thereupon, on the 13th day of May, 1907, the parties all appeared by their respective counsel as heretofore, and the court, being duly advised in the premises, finds that the said motion to dissolve the temporary injunction should be overruled, and also that the demurrers presented to the plaintiff's petition should each be overruled; to each and all of which rulings the defendants, and each of them, duly excepted. Thereupon, by leave of court, the defendants filed their answer herein, and the plaintiff filed and presented his motion to strike out the second paragraph of said answer, which motion, being duly presented, was by the court overruled; to which the plaintiff excepted. Thereupon said cause was duly presented and submitted to the court for final determination and judgment upon the agreed statement of facts and the evidence offered, and upon such submission the court, after due consideration, finds all of the issues in favor of the plaintiff and against the defendants and each of them;

to which the defendants, and each of them, duly excepted. It is therefore by the court considered, ordered, and adjudged that the demurrers of the defendants and each of them separately be, and the same are hereby, overruled; to which the defendants, and each of them, duly except. It is further considered, ordered, and adjudged by the court that the motions of the defendants, and each of them separately, to vacate and set aside the temporary injunction heretofore granted be, and the same is by the court hereby, overruled; to which the defendants, and each of them, separately duly except. It is further by the court considered, ordered, and adjudged that the temporary injunction heretofore granted herein be, and the same is hereby, made perpetual, and that the defendants Frank Frantz, W. H. Murray, and John M. Young be, and they are hereby, enjoined and restrained from issuing or publishing any proclamation in or by which said proclamation it is proposed to submit to the electors of the proposed state of Oklahoma, either as a part of the proposed Constitution for said state of Oklahoma, or as a separate ordinance, any clause, provision, or proposition dividing, or pretending to divide, Woods county, in said territory of Oklahoma, or changing, or pretending to change, the lines and boundaries of the said county, or making, or purporting or pretending to make, or describe or bound any new county or counties out of any part of the present territory of the said Woods county, or changing or in any wise interfering with the said county or the lines thereof or any townships or precincts therein, or any or either of the lines of the said township or precincts; and enjoining and restraining the said C. I. Overstreet, C. H. Chowning, C. M. Delzell, M. R. Mansfield, Charles Bowman, J. C. Major, I. J. Corwin, and Charles B. Powell from in any wise interfering with any of the duties of the county commissioners or county clerk, or any or either thereof, of the said county of Woods, in or about the election proposed to be held in said county on the 6th day of August, 1907, and from in any wise interfering with the duties of the said county commissioners or county clerk of said county of Woods, as the same is now described and exists, in any of the preparations of any kind or character for said election, and enjoining and restraining them from acting, or attempting to act, in any capacity or to any extent in any election to be upheld in the pretended counties of Alfalfa or Major, or either thereof, and that the defendants pay the costs herein, taxed at ——— dollars; to all and each part of which the defendants, and each of them, duly except. Thereupon the defendants, and each of them separately, present their motion for a new trial of said cause, which motion is by the court, after due consideration, overruled; to which the defendants, and each of them, duly except.

Thereupon, on application of the defendants, and each of them, for good cause shown, the court extends the time for making and serving case-made herein, and the defendants are given ten days from this date in which to make and serve case-made for the Supreme Court, and the plaintiff is given three days after service of said case-made in which to suggest amendments thereto; said case-made to be settled on two days' notice in writing." And the defendants bring the case to this court for review of the said judgment.

A certified copy of the election ordinance, as incorporated in the record, is hereby made a part of this statement of facts, and is as follows, to wit:

Election Ordinance.

"An ordinance providing for an election at which the proposed Constitution for the proposed state of Oklahoma shall be submitted to the people thereof for ratification or rejection, and submitting separately to the people of the proposed state of Oklahoma the proposed prohibition article making substantially the terms of the enabling act uniformly applicable to the entire state for ratification or rejection, and for the election of certain state, district, county and township officers provided for by said proposed constitution, and for the election of members of the Legislature of said proposed state of Oklahoma, and five representatives to Congress.

"Be it ordained, by the convention assembled to form a Constitution and state government for the proposed state of Oklahoma:

"Section 1. That in compliance with an act of the Congress of the United States of America, entitled, 'An act to enable the people of Oklahoma and of the Indian Territory to form a Constitution and state government and be admitted into the Union on an equal footing with the original states; and to enable the people of New Mexico and of Arizona to form a Constitution and state government and be admitted into the Union on an equal footing with the original states,' approved June 16, 1906 [Act June 16, 1906, c. 3335, 34 Stat. 267], hereinafter mentioned and referred to as the enabling act, and by virtue thereof, an election is hereby called and shall be held on the sixth day of August, in the year of our Lord, one thousand nine hundred and seven, in all of the voting precincts at said time, in the proposed state of Oklahoma, for the purpose of submitting to the people thereof the question of the ratification or rejection of the Constitution framed and adopted by this convention for said proposed state of Oklahoma, and for the adoption or rejection of all questions therewith separately submitted, and at which election the qualified voters of said proposed state shall vote directly for or against the

proposed Constitution, and for or against any provisions separately submitted. Said election shall, in all respects, be held and conducted in the manner required by the laws of the territory of Oklahoma for elections therein, when not in conflict with the enabling act, and as supplemented by this ordinance, and the returns of said election shall be made to the Secretary of the territory of Oklahoma, who, with the Chief Justice thereof, and the senior judge of the United States Court of Appeals for the Indian Territory, shall canvass the same, and if a majority of the legal votes cast on that question shall be for the Constitution, the Governor of Oklahoma Territory and the judge senior in service of the United States Court of Appeals for the Indian Territory shall certify the result to the President of the United States, together with the statement of the votes cast thereon, and upon separate articles or propositions, and a copy of said Constitution, article, propositions, and ordinances, and in all respects comply with the provisions of said enabling act.

"Sec. 2. On the same day of the election for the ratification or rejection of said Constitution, there shall be held by the qualified voters for the proposed state, in accordance with the election laws of the territory of Oklahoma when not in conflict with the enabling act and as supplemented by this ordinance, an election for officers for a full state government, including all the elective state, district, county and township officers, provided for by the provisions of said Constitution, members of the Legislature and five representatives to Congress, and an election is hereby called for said day and for such purposes. The ballots used in voting for said officers shall be prepared, printed, furnished and distributed as required by the laws of the territory of Oklahoma for elections therein. The returns of said election shall be made as in this ordinance provided.

"In the counties of Beaver, Blaine, Caddo, Canadian, Cleveland, Comanche, Custer, Dewey, Garfield, Grant, Greer, Kay, Kingfisher, Kiowa, Lincoln, Logan, Noble, Oklahoma, Pawnee, Payne, Pottawatomie, Roger Mills, Washita, Woods and Woodward, as defined and described in said Constitution, said elections shall be held and conducted by the local authorities in their respective counties and voting precincts in the same manner as now required by the laws of the territory of Oklahoma for elections therein.

"In the counties of Beaver, Caddo, Comanche, Greer, Payne, Roger Mills, and Woodward, the local authorities in said respective counties, and the voting precincts therein, shall exercise their functions and perform their duties as such election officers only within the limits of said counties as defined and described in the Constitution.

"In the county of Noble, the local authorities, in the exercise of their functions and

the performance of their duties as election officers, shall exercise and extend the same to the limits of said county as defined by the Constitution.

"Sec. 3. In the counties of Adair, Alfalfa, Atoka, Beckham, Bryan, Carter, Cherokee, Choctaw, Cimarron, Coal, Craig, Creek, Delaware, Ellis, Garvin, Grady, Harper, Haskell, Hughes, Jackson, Jefferson, Johnston, Latimer, Le Flora, Love, Major, Marshall, Mayes, Murray, Muskogee, McClain, McCurtain, McIntosh, Nowata, Okfuskee, Okmulgee, Osage, Ottawa, Pittsburg, Pontotoc, Pushmataha, Rogers, Seminole, Sequayah, Stephens, Texas, Tillman, Tulsa, Wagoner, and Washington, the local officers and authorities provided for in this ordinance, shall exercise all the functions and perform all the duties within the limits of such counties, townships and voting precincts in the same manner as is now required by the laws of the territory of Oklahoma for elections therein.

"Sec. 4. That the counties hereinafter named be and they are hereby divided into the following described and numbered commissioner's districts and the following described and numbered or named municipal townships:

"Sec. 5. Any board of county commissioners or a majority of such board, shall have the power at any time prior to the first day of June, Anno Domini nineteen hundred and seven, to change the boundaries of any municipal township or commissioner's district, fixed by this ordinance, and it is especially provided that the boundaries of such township and commissioner's district, after August 6th, nineteen hundred and seven, may be changed in the manner as provided by the laws of the territory of Oklahoma for the changing of such boundaries; provided, such changes of boundary lines as to municipal townships and commissioner's districts, if made prior to June 1st, A. D. nineteen hundred and seven (and no change as to boundaries whatever shall be made during the time intervening between the first day of June, A. D. nineteen hundred and seven and the 6th day of August, A. D. nineteen hundred and seven) shall not operate to change any polling places or to destroy any voting precinct.

"Sec. 6. In each of the counties of Greer, Beaver, Woods, Woodward, and Comanche (and any other county in the proposed state similarly situated), as defined and described in this Constitution, on or before the sixth day of June, A. D. nineteen hundred and seven, the acting board of county commissioners therein or a majority thereof, shall subdivide such county or counties into commissioner's districts and townships, and fix election precincts, designate polling places, necessary for the purpose of the election herein provided for. And should such commissioners fail to comply with the provisions of this section by said date, Wm. H.

Murray, as president of this convention, shall within five days thereafter, appoint three qualified electors in each of such counties not more than two of whom shall belong to any one political party to divide such county or counties into commissioner's districts and townships, and fix election precincts, and designate polling places for such purposes.

"Sec. 7. Said county commissioners shall on or before the eighth day of June, A. D. 1907, divide or designate the townships of their respective counties into election precincts and establish the boundaries of the same, and shall designate a polling place in each precinct, and appoint all necessary inspectors of election in the several precincts, whose duties shall be the same as inspectors of election under the laws of the territory of Oklahoma, and shall also perform all other duties required to be done or performed by the boards of county commissioners pertaining to elections under the laws of the territory of Oklahoma for elections therein, and shall perform all other duties or acts necessary to the conduct of said election.

"Sec. 8. That the election laws of the territory of Oklahoma now in force, as far as applicable and not in conflict with the enabling act, including the penal laws of said territory relating to election and illegal voting, are hereby extended and put in force throughout the proposed state of Oklahoma until the Legislature of said proposed state shall otherwise provide, and until all persons offending against said laws in the elections aforesaid, shall have been dealt with in the manner therein provided, and the courts of said state shall have power to enforce said laws in the same manner as other criminal laws of said state.

"Sec. 9. On the Friday following the election provided for in this ordinance, the county clerk and the commissioners of each county of said proposed state, or a majority of said commissioners, shall meet at the office of said clerk at ten o'clock a. m., of said day, and shall proceed to canvass the several returns which have been made to that office and determine the persons who have received the greatest number of votes in the county for the several county, township, district and state officers, members of the Legislature and representatives to Congress, and such findings shall be reduced to writing and signed by said commissioners and attested by the clerk and shall be annexed to the abstract given for such officers. If any two or more persons have an equal number of votes for the same office and a higher number than any other person, the commissioners aforesaid shall proceed to determine by lot which of the two candidates shall be elected. As soon as the commissioners have determined the person who has received the highest number of votes for any office, the county clerk shall make out abstracts of the votes in the following manner: First, the

abstract of votes for state and district officers and members of the Legislature on one sheet; second, the abstract of votes for representative to Congress, on one sheet, and third, the abstract of votes for county and township officers on one sheet, and fourth, an abstract of the votes cast for or against the proposed constitution and for or against articles separately submitted, which abstracts being certified and signed by the county clerk shall be deposited in his office and certified copies of abstracts for state and district officers, members of the Legislature and representatives to Congress, shall be placed in separate envelopes, endorsed and directed to the Secretary of the territory of Oklahoma and forwarded immediately by mail. The failure of the clerk to affix his seal to any such certificate shall not invalidate the returns. And said commissioners of each county in said proposed state or a majority thereof shall, at said time and place, also proceed to canvass the returns which have been made to the office of the county clerk of the election held to ratify or reject the Constitution or any provision separately submitted, and reduce the result of said canvass to writing, which shall be signed by said commissioners and attested by the clerk, and the clerk shall make an abstract of the votes cast for or against the ratification of said proposed Constitution, on one sheet and for or against any provision separately submitted, on one sheet which abstract being signed and certified by the county clerk shall be deposited in his office and certified copies thereof, under his official seal, shall be placed in a separate envelope, endorsed and directed to the Secretary of Oklahoma, and forwarded immediately by mail.

"The said county clerk shall immediately make out in pursuance of the determination of said county commissioners, a certificate of election for any person receiving the highest number of votes for any office or in case of a tie who have been decided by lot, to have been elected and deliver the same to the person entitled thereto upon his making application therefor.

"The Governor of the territory of Oklahoma, the Secretary, the Auditor, Treasurer and Attorney General of said territory, or any three of them shall constitute the state canvassing board for the proposed state of Oklahoma. The Secretary of the territory of Oklahoma upon the receipt of the certified abstracts of the votes given in the several counties, directed to be sent to him, shall proceed to open the same and shall record the same in a suitable book to be kept for that purpose, and shall file and carefully preserve them in his office together with the original envelopes in which they were enclosed. If from any county no such abstract of votes shall have been received within ten days after the election aforesaid by the Secretary of the territory of Oklahoma, he shall

dispatch a special messenger to obtain a copy of the same from the county clerk of such county, and such clerk shall immediately on demand of said messenger make out and deliver to him the copy required, which copy of the abstract of votes aforesaid, the messenger shall deliver to the Secretary of the territory of Oklahoma without delay; the expense of said messenger to be paid by the county clerk failing to make such return.

"For the purpose of canvassing the result of the election the state board of canvassers for the proposed state of Oklahoma shall meet at the office of the Secretary of the territory of Oklahoma, within thirty days after said election, where they shall open the certified abstracts on file in the office of the Secretary of the territory of Oklahoma and proceed to examine and make statements of the whole number of votes given or cast at said election for state and district officers and members of the Legislature and representatives to Congress, which statement shall show the names of the persons to whom such votes shall have been given for each of the said officers and the whole number given to each, distinguishing the several districts and counties in which they were given. They shall certify said statements to be correct and shall subscribe their names thereto and shall determine what persons shall have been by the greatest number of votes duly elected to such offices, and shall endorse and subscribe on such statement a certificate of election and determination and deliver the same to the Secretary of the territory of Oklahoma.

"If any two or more persons have an equal number of votes for members of the Legislature or representatives to Congress or for any state or district office the said canvassing board shall proceed to determine by lot, in the presence of the candidates, which of the two candidates shall be elected. Reasonable notice shall be given to said candidates of the time when such elections shall be determined, and if such candidates, or either of them, fail to appear, in accordance with such notice, then the board of canvassers shall proceed to determine such election in the absence of the candidates.

"The Secretary of the territory of Oklahoma shall record in his office in a book to be kept by him for that purpose, each certified statement of determination as made by such board of canvassers, and shall without delay make out and transmit to each of the persons thereby declared to be elected, a certificate of his election certified by him under his seal of office, and he shall also forthwith cause a copy of such certified statement of determination to be published in a newspaper published at the capital.

"Sec. 10. The Secretary and Chief Justice of the territory of Oklahoma, and the senior judge of the United States Court of Appeals for the Indian Territory shall, with-

in thirty days after the election herein provided for, canvass the returns of said election to ratify or reject the Constitution or any provision separately submitted.

"Sec. 11. The canvass and returns for said election for the ratification or rejection of the Constitution, and propositions separately submitted, and for all officers authorized by the Constitution, except as otherwise provided in the enabling act and the supplementary provisions of this ordinance shall be made in accordance with the election laws of the territory of Oklahoma.

"Sec. 12. Whenever a vacancy occurs in the office of county commissioner provided for by this ordinance such vacancy shall be filled by appointment by the Governor of the territory of Oklahoma within three days from the date that he is notified of such vacancy, such notice to be given by the county clerk, and where the Governor fails to fill such vacancy within said time, said vacancy shall be filled by appointment by Wm. H. Murray as president of the constitutional convention; provided, however, that if the vacancy is caused by death or resignation, the person appointed to fill the vacancy shall be appointed from the same political party to which such officer belonged, and he shall serve as if he had been originally named by this ordinance.

"Sec. 13. Wherever a vacancy occurs in the office of county clerk, provided for in this ordinance, such vacancy shall be filled by appointment by the board of county commissioners, and where such board of commissioners fall or refuse for three days, to fill such vacancy, the same shall be filled by appointment by Wm. H. Murray as president of the constitutional convention; provided, however, if the vacancy is caused by death or resignation, the person appointed to fill the vacancy shall be appointed from the same political party to which such officer belonged, and he shall serve as if he had been originally named by this ordinance.

"Sec. 14. All officers appointed and provided for in this ordinance shall, before entering upon the discharge of their duties, take an oath or affirmation to support the Constitution and the laws of the United States, the terms of the enabling act, and of this ordinance, and to well and faithfully discharge the duties of their respective offices, and all inspectors, judges and clerks of said election shall take an oath or affirmation in conformity with and as required by the election laws of the territory of Oklahoma.

"Sec. 15. The Governor of the territory of Oklahoma and two qualified electors by him appointed, one from each of the two political parties that cast the largest number of votes in said proposed state in the election of delegates to the constitutional convention, shall constitute a board of election commissioners for the purpose of the election herein pro-

vided for. Such appointments shall be made at least thirty days previous to said elections, and if prior to that time the chairman of the central committee of the proposed state, of either of such parties, shall nominate in writing a member of his own party for said appointment, the Governor of the territory shall appoint such nominee. In case of the death, disability or refusal to serve of either appointee, the Governor of the territory shall notify the chairman of the central committee of such appointee's political party, and such chairman may, within three days thereafter, recommend a successor, who shall thereupon be appointed: Provided, that if such chairman shall fail to make recommendations of appointment within the time specified, the Governor of the territory of Oklahoma shall make such appointments of his own selection from such political party.

"It shall be the duty of said board to prepare and distribute the ballots, stamps and election supplies for the election of all officers for whom the qualified electors of the proposed state are entitled to vote, for representatives to Congress, and all members of the Legislature, and all officers provided by the Constitution for whom the voters of more than one county are entitled to vote, in compliance with the provisions of said Constitution and of the election laws of the territory of Oklahoma. Said board shall also prepare and distribute ballots, stamps and election supplies for the election for the ratification or rejection of the proposed Constitution and for or against any provisions separately submitted. The said board shall perform and exercise such other duties as may be prescribed by the election laws of the territory of Oklahoma and by this ordinance.

"In the event that the Governor of the territory of Oklahoma shall fail or refuse to act or perform the duties aforesaid, such duties shall be exercised and performed by Wm. H. Murray as president of the convention.

"Sec. 16. In each county in the proposed state, the county clerk and two persons by him appointed, one from each of the two political parties that cast the largest number of votes in said proposed state at the election of delegates to the constitutional convention, shall constitute county board of election commissioners. Said appointments shall be made in all respects as the appointments for the board of election commissioners hereinbefore provided for or required to be made by the Governor of the territory of Oklahoma, except that the privilege of nomination shall belong to the chairman of the county central committee of the two parties aforesaid.

"It shall be the duty of such board to prepare and distribute the ballots and election supplies for all officers to be voted for in such counties or who are to be voted for other than those who are to be voted for by all the electors of the proposed state, and

members of the Legislature and district officers as hereinbefore provided in compliance with the provisions of this ordinance, and said board shall perform such other duties as provided for by the election laws of the territory of Oklahoma, and by this ordinance.

"In the event any county clerk shall fail or refuse to perform or discharge any of the duties aforesaid, or be disqualified, the county commissioners shall appoint some one to act as county clerk in the performance of such duties.

"Sec. 17. In the event any of the county commissioners in any county of the proposed state shall fail or refuse or be disqualified to perform any of the duties required by this ordinance or the election laws of the territory of Oklahoma, the Governor of the territory shall appoint some one in his stead: Provided, that such appointment shall be made from the same political party as that to which such commissioner belonged.

"In the event the Governor of the territory of Oklahoma shall fail or refuse to take due action thereon, and to make such appointment within three days after he shall be notified of such failure or refusal or disqualification or disability, on the part of such commissioner, such appointment shall be made by Wm. H. Murray as president of this convention.

"Sec. 18. Nominations for all state, district, county and township offices may be made as provided for under the primary election laws of the territory of Oklahoma, and said election laws, in connection with election laws of the territory of Oklahoma, be and are as aforesaid hereby put in force and effect throughout the proposed state of Oklahoma: Provided, that in cities and towns of the Indian Territory and the Osage Indian reservation having a population of twenty-five hundred inhabitants or more as shown by any official census taken either under the auspices of the United States government or such municipal corporations, the qualified electors therein shall register up to the 18th day of May, A. D. 1907, in order to be entitled to vote therein at any primary election held on or after the 23d day of May, A. D. 1907, and prior to August sixth, A. D. 1907; and provided further, that any person having registered at the election of delegates to the constitutional convention, or any municipal election during 1907, shall not be required to further register in order to vote at such primary election or elections; and provided further, that any person who shall be prevented from registering by reason of sickness or necessary absence from such city or town, which fact may be shown as provided by the laws of Oklahoma Territory, or shall be prevented by the clerk or recorder of such city or town failing or refusing to register, then such elector shall be allowed to vote at such election.

"Sec. 19. The submission of the proposed constitution for the proposed state of Okla-

homa, and the separate provision, to the people of said proposed state, for ratification or rejection, shall be upon the same ballot in the following form:

"Shall the Constitution for the proposed state of Oklahoma be ratified?

☐ Yes.

☐ No.

"Shall the provision for state-wide prohibition be adopted?

☐ Yes.

☐ No.

"And ballots used in voting for or against the proposed Constitution, and for or against any provision separately submitted shall contain no other matters to be voted on at such election and shall be prepared, printed, furnished and distributed by the board of election commissioners for the proposed state as required by the laws of the territory of Oklahoma for elections therein, not in conflict with the provisions of the enabling act and as supplemented by this ordinance and shall when voted be deposited in ballot boxes separate from any others used at said election. Said election shall in all respects be held and conducted in the manner required by the laws of the territory of Oklahoma for elections therein when not in conflict with the provisions of the enabling act, and as supplemented by the provisions of this ordinance, and the returns thereof shall be made as provided by said enabling act as hereinbefore set out.

"Sec. 20. There shall be submitted separately and in the manner herein provided, the separate provision adopted by this convention and referred to as a separate provision for state-wide prohibition, at the same time and on the same ballot, at which said proposed Constitution is to be submitted for ratification or rejection, said proposition being as to whether or not the manufacture, sale, barter, giving away or otherwise furnishing intoxicating liquors shall be prohibited in the proposed state for a period of twenty-one years from the date of its admission into the Union, and thereafter until the people of the state shall otherwise provide by amendment of said Constitution and proper state legislation, said provision being in words and figures as follows, to wit:

"The manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within this state, or any part thereof, is prohibited for a period of twenty-one years from the date of the admission of this state into the Union, and thereafter until the people of the state shall otherwise provide by amendment of this Constitution and proper state legislation. Any person, individual or corporate, who shall manufacture, sell, bar-

ter, give away, or otherwise furnish any intoxicating liquor of any kind, including beer, ale and wine, contrary to the provisions of this section, or who shall, within this state, advertise for sale or solicit the purchase of any such liquors, or who shall ship or in any way convey such liquors from one place within this state to another place therein, except the conveyance of a lawful purchase as herein authorized, shall be punished, on conviction thereof, by fine not less than fifty dollars and by imprisonment not less than thirty days of each offense: Provided, that the Legislature may provide by law for one agency under the supervision of the state in each incorporated town of not less than two thousand population in this state; and if there be no incorporated town of two thousand population in any county in this state, such county shall be entitled to have one such agency, for the sale of such liquors for medicinal purposes; and for the sale, for industrial purposes, of alcohol which shall have been denaturalized by some process approved by the United States Commissioner of Internal Revenue; and for the sale of alcohol for scientific purposes to such scientific institutions, universities, and colleges as are authorized to procure the same free of tax under the laws of the United States; and for the sale of such liquors to any apothecary who shall have executed an approved bond, in a sum not less than one thousand dollars, conditioned that none of such liquors shall be used or disposed of for any purpose other than in the compounding of prescriptions or other medicines, the sale of which would not subject him to the payment of a special tax required of liquor dealers by the United States, and the payment of such special tax by any person within this state shall constitute prima facie evidence of his intention to violate the provisions of this section. No sale shall be made except upon the sworn statement of the applicant in writing setting forth the purpose for which the liquor is to be used, and no sale shall be made for medicinal purposes except sales to apothecaries as hereinabove provided unless such statement shall be accompanied by a bona fide prescription signed by a regular practicing physician, which prescription shall not be filled more than once. Each sale shall be duly registered, and the register thereof, together with the affidavits and prescriptions pertaining thereto shall be open to inspection by any officer or citizen of the state at all times during business hours. Any person who shall knowingly make a false affidavit for the purpose aforesaid shall be deemed guilty of perjury. Any physician who shall prescribe any such liquor, except for treatment of disease which after his own personal diagnosis he shall deem to require such treatment, shall, upon conviction thereof, be punished for each offense by fine of not less than two hundred dollars or by imprison-

ment for not less than thirty days, or by both such fine and imprisonment; and any person connected with any such agency who shall be convicted of making any sale or other disposition of liquor contrary to these provisions shall be punished by imprisonment of not less than one year and one day. Upon the admission of this state into the Union these provisions shall be immediately enforceable in the courts of this state; provided, that there shall be submitted separately at the same election at which this Constitution is submitted for ratification or rejection, and on the same ballot, the foregoing provision, entitled "Prohibition," on which ballot shall be printed:

"Shall the provision of state-wide prohibition be adopted?

☐ Yes.

☐ No.

"Shall the provision of state-wide prohibition be adopted?

☐ Yes.

☐ No.

"And, provided further, that if a majority of the votes cast for and against state-wide prohibition are for state-wide prohibition, then said provision entitled "Prohibition," shall be and form a part of this Constitution and be in full force and effect as such as provided therein; but if a majority of said votes shall be against state-wide prohibition, then the provisions of said article shall not form a part of this Constitution, and shall be null and void. If a majority of the votes cast for or against said provision are for state-wide prohibition, then said provision entitled "Prohibition," shall be and form a part of the proposed Constitution."

"Sec. 21. It shall be the duty of the Governor of the territory of Oklahoma, as such, within twenty days after the date of the adoption of this ordinance, to issue his proclamation giving public notice of the elections herein provided for, and to cause said proclamation to be published for a period of sixty days in some daily newspaper of general circulation within the proposed state of Oklahoma, and in the event of the failure or refusal or disqualification on the part of such Governor to act, such proclamation shall be issued and publication caused to be made by Wm. H. Murray as president of this convention, and if he shall fail or refuse or be disqualified from issuing such proclamation, the same shall be issued and caused to be published as aforesaid by John M. Young as secretary of this convention.

"Sec. 22. That the provisions of this ordinance shall apply to the elections to be held and to the officers to be elected on the 6th day of August in the year of our Lord, one thousand nine hundred and seven.

"Sec. 23. In the event the Governor of the territory of Oklahoma should fail or refuse to act as herein provided, and to appoint two qualified electors from each of the political parties that cast the largest number of votes in said proposed state in the election of delegates to the constitutional convention, to constitute a board of election commissioners for the purposes of the elections herein provided for or perform any other duties imposed by law or this ordinance upon him with respect to said elections, such duty shall be performed by Wm. H. Murray as president of this convention in the same manner as would devolve upon the Governor, and with the same powers as if he were then and there Governor of the territory of Oklahoma. And in the event said Wm. H. Murray, as president, should fail or refuse to perform such acts and duties as aforesaid such acts and duties shall be performed by John M. Young as secretary of this convention in the same manner and with the same powers as if he were then and there the Governor of said territory.

"Sec. 24. In the event there should be any county or counties in said proposed state as defined and described in the Constitution, where the same shall not have been divided into commissioner districts by July 6th, 1907, the commissioners for such county shall at said election be elected therefrom at large.

"Sec. 25. No voting precinct in this state shall be established so that it shall be divided by the boundary line of any municipal township, commissioner's district, county or congressional district.

"Sec. 26. Within ten days after the adoption of this ordinance or as soon thereafter as practicable, the county clerk and the county commissioners appointed herein shall meet at the county seat of their respective counties and subscribe the oath required by this ordinance and execute bond for the faithful performance of their duties in the penal sum of one thousand (\$1,000) dollars, which bond may be approved by any delegate to the constitutional convention residing in the county or by Wm. H. Murray, as president of this convention.

"Thereupon the board of county commissioners of each of said counties shall procure a suitable book in which oath and bond aforesaid and all the proceedings shall be entered.

"I hereby certify that the above and foregoing passed after third reading upon roll call, this 22d day of April, at 4:32 o'clock p. m., Anno Domini 1907.

"Attest: Wm. H. Murray,
"President of the Constitutional Convention.
"John McClain Young,
"Secretary of the Constitutional Convention."

W. A. Ledbetter, Dale & Bierer, and J. F. King, for plaintiffs in error. W. W. S. Snoddy and H. A. Noah (Horace Speed, of counsel), for defendant in error.

HAINER, J. (after stating the facts). In compliance with the power granted in the enabling act, the people of Oklahoma and Indian Territory elected 112 delegates, 57 of whom were elected from the territory of Oklahoma, and 55 of whom were elected from the Indian Territory. These delegates were invested with the power and charged with the duty and responsibility of forming a Constitution and state government for the proposed state of Oklahoma.

The fundamental rights and powers of the convention:

The first question for our consideration is: What is a constitutional convention, and what is the nature of its fundamental rights and powers?

It was contended by the plaintiff in the court below, defendant in error here, that the power and authority of the constitutional convention is derived solely from the powers granted in the enabling act, and that every power granted to the convention must be found and expressed therein, except such implied powers as may be necessary to carry into effect the express grant of power; that the power granted by the enabling act embraces no legislative grant, but confers only the power of a committee to adopt and propose fundamental propositions which upon ratification may become the fundamental law of the state. And this was the view of the trial court, and it is earnestly urged in this court by counsel for defendant in error as the true doctrine. In our opinion, this contention is clearly untenable, and cannot be sustained by the authorities. In a territory, the source of all power is Congress. But in the formation of a Constitution and state government the power emanates from the people. The delegates to the convention were not the agents or representatives of Congress, but they were the immediate agents and representatives of the people of the two territories. They derived their power and authority from the people in their sovereign capacity. And this is in harmony with the principles of the Declaration of Independence, which declares that "governments are instituted among men, deriving their just powers from the consent of the governed," and is in keeping with the doctrine announced by Lincoln when he uttered the immortal words, that this is "a government of the people, by the people, and for the people." In *Benner v. Porter*, 9 How. (U. S.) 242, 13 L. Ed. 119, the Supreme Court of the United States, in speaking of the source of power, with reference to the admission of the territory of Florida, said: "The convention being the fountain of all political power, from which flowed that which was embodied in the organic law, was, of course, competent to prescribe the laws and appoint the officers under the Constitution, by means whereof the government could be put into immediate operation." The convention, therefore, was

created by the direct action of the people, and in the discharge of its powers, duties, and obligations it performs one of the highest and most important acts of popular sovereignty. Nor is the contention well founded that the convention possesses no legislative powers, and that it acts in the mere capacity of a committee to adopt and propose fundamental propositions which are to be submitted to a vote of the people for ratification or rejection. The convention has and can exercise plenary powers subject to the limitations: (1) That the Constitution shall be republican in form; (2) that it shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence; (3) that no distinction shall be made on account of race or color; and (4) that the convention shall accept by ordinance irrevocable all the terms and conditions of the enabling act.

It is true that Congress has the power to impose conditions upon a territory, as conditions precedent to entitle it to admission as a state. Accordingly, Congress placed certain restrictions and limitations upon the convention, which it was required to incorporate into the Constitution, and to be ratified by the people. These limitations and restrictions, when ratified by the people, become a part of the fundamental law of the state. When, therefore, Congress authorized the people of Oklahoma and Indian Territory to form a Constitution and state government and be admitted into the Union on an equal footing with the original states, it meant that it should be admitted on equal terms with the original states. Hence the enabling act was not a limited or restricted grant, but it was an absolute grant, subject to the Constitution of the United States and the limitations and restrictions imposed in the enabling act as a condition precedent to such admission. In *Permoli v. First Municipality*, 3 How. (U. S.) 609, 11 L. Ed. 739, the Supreme Court of the United States had before it the construction of Act Cong. Feb. 20, 1811, c. 21, 2 Stat. 641, authorizing the people of the territory of Orleans to form a Constitution and state government, and in the course of the opinion the court said: "By Act April 8, 1812, c. 50, 2 Stat. 701, Louisiana was admitted according to the mode prescribed by the act of 1811. Congress declared it should be on the conditions and terms contained in the third section of that act, which should be considered, deemed, and taken as fundamental conditions and terms upon which the state was incorporated in the Union. All Congress intended, was to declare in advance to the people of the territory the fundamental principles their Constitution should contain. This was every way proper under the circumstances. The instrument having been duly formed, and presented, it was for the national legislature to judge whether it contained the proper principles, and to accept it if it did, or re-

ject it if it did not. Having accepted the Constitution and admitted the state, 'on an equal footing with the original states in all respects whatever,' in express terms, by the act of 1812, Congress was concluded from assuming that the instructions contained in the act of 1811 had not been complied with. No fundamental principles could be added by way of amendment, as this would have been making part of the state Constitution. If Congress could make it a part, it might, in the form of amendment, make it entire." In *Escanaba Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. 193, 27 L. Ed. 442, the Supreme Court of the United States, speaking by Mr. Justice Field, said: "Although Act April 18, 1818, c. 67, enabling the people of Illinois Territory to form a Constitution and state government, and the resolution of Congress of December 3, 1818, declaring the admission of the state into the Union, refer to the principles of the ordinance according to which the Constitution was to be formed, its provisions could not control the authority and powers of the state after her admission. Whatever the limitations upon her powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a state of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them." In *Ward v. Race Horse*, 163 U. S. 514, 16 Sup. Ct. 1080, 41 L. Ed. 244, which involved the interpretation of a provision of the enabling act of Wyoming, Mr. Justice White, after reviewing the authorities, said: "The enabling act declares that the state of Wyoming is admitted on equal terms with the other states, and this declaration, which is simply an expression of the general rule, which presupposes that states, when admitted into the Union, are endowed with powers and attributes equal in scope to those enjoyed by the states already admitted, repels any presumption that in this particular case Congress intended to admit the state of Wyoming with diminished governmental authority." From these decisions it will be observed that all Congress intended was to declare to the people of Oklahoma and Indian Territory the fundamental principles which should be incorporated in the proposed Constitution. And when the Constitution is formed, and a full state government provided, it should be submitted to the people for ratification or rejection, and when approved by the people it is to be submitted to the President of the United States, who is charged by Congress with the duty to determine whether the Constitution is republican in form, whether it is repugnant to the Constitution of the United States and the principles of the Declaration of Inde-

pendence, and whether the terms and conditions imposed in the enabling act have been complied with.

Judge Story, in his work on the Constitution (volume 1 [5th Ed.] § 338), declares: "The true view to be taken of our state Constitutions is that they are forms of government ordained and established by the people in their original sovereign capacity to promote their own happiness and permanently to secure their rights, property, independence, and common welfare." Judge Cooley, in his work on Constitutional Limitations, on page 68, in discussing the attributes and objects of a Constitution, says: "In considering state Constitutions, we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed. What is a Constitution, and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights. It is not the fountain of law, nor the incipient state of government. It is not the cause, but consequence, of personal and political freedom. It grants no rights to the people, but is the creature of their power, the instrument of their convenience."

In 1894, the state of New York had under consideration the revision of its state Constitution. One of the first questions that arose in the convention was the ascertainment of the rights and powers of the convention to pass upon the election and qualifications of one of its members. This question was referred to the judiciary committee, of which committee the Honorable Elihu Root, now Secretary of State, and one of the ablest lawyers and statesmen of this country, was chairman. In his report to the convention, he says: "The convention has been created by the direct action of the people and has been by them vested with the power and charged with the duty to revise and amend the organic law of the state. The function with which it is thus charged is a part of the highest and most solemn act of popular sovereignty, and in its performance the convention has and can have no superior but the people themselves. No court or legislative or executive officer has authority to interfere with the exercise of the powers or the performance of the duties which the people have enjoined upon this, their immediate agent." And, again, in stating the nature of a constitutional convention, he says: "A constitutional convention is a legislative body of the highest order. It proceeds by legislative methods. Its acts are legislative acts. Its function is not to execute or interpret laws, but to make them. That the consent of the general body of electors may be necessary to give effect to the

ordinances of the convention no more changes their legislative character than the requirement of the Governor's consent changes the nature of the action of the Senate and Assembly." And, again, in speaking of the importance of the independence of the convention, he uses this language: "It is far more important that a constitutional convention should possess these safeguards of its independence than it is for an ordinary Legislature, because the convention's acts are of a more momentous and lasting consequence, and because it has to pass upon the power, emoluments, and the very existence of the judicial and legislative officers who might otherwise interfere with it. The convention furnishes the only way by which the people can exercise their will, in respect of these officers, and their control over the convention would be wholly incompatible with the free exercise of that will." See Proceedings of the New York Constitutional Convention, 1894, pp. 79, 80.

Mr. Bryce, in his excellent work on the American Commonwealth (volume 1, p. 436), says: "A state Constitution is really nothing but a law made directly by the people voting at the polls upon a draft submitted to them. The people of a state, when they so vote, act as a primary and constituent assembly, just as if they were all summoned to meet in one place like the folk-motes of our Teutonic forefathers. It is only their numbers that prevents them from so meeting in one place, and oblige the vote to be taken in a variety of polling places. Hence the enactment of a Constitution is an exercise of direct popular sovereignty to which we find few parallels in modern Europe, though it was familiar enough to the republic of antiquity and has lasted until now in some of the cantons of Switzerland."

In *Goodrich v. Moore*, 2 Minn. 61 (Gil. 49), 72 Am. Dec. 74, the Supreme Court of Minnesota declared that a constitutional convention is the highest legislative assembly recognized in law, invested with the power of enacting or framing the supreme law of the state, and in the course of the opinion Mr. Justice Atwater, speaking for the court, said: "But even had the Legislature intended and attempted to claim and exercise the act of providing a printer for the constitutional convention, it would have been an unauthorized and unwarrantable interference with the rights of that body. The admission of such a right in the Legislature would place the convention under its entire control, leaving it without authority even to appoint or elect its own officers, or adopt measures for the transaction of its legitimate business. It would have less power than a town meeting, and be incompetent to perform the objects for which it convened. It would be absurd to suppose a constitutional convention had only such limited authority. It is the highest legislative assembly,

recognized in law, invested with the right of enacting or framing the supreme law of the state. It must have plenary power for this and over all the incidents thereof. The fact that the convention assembled by authority of the Legislature renders it in no respect inferior thereto.

In *Sproule v. Fredericks*, 11 South. 472, 69 Miss. 898, the Supreme Court of Mississippi, in discussing the powers of the convention, says: "It is the highest legislative body known to freemen in a representative government. It is supreme in its sphere. It wields the powers of sovereignty, specially delegated to it, for the purpose and the occasion, by the whole electoral body, for the good of the whole commonwealth. The sole limitation upon its powers is that no change in the form of government shall be done or attempted. The spirit of republicanism must breathe through every part of the framework, but the particular fashioning of the parts of this framework is confided to the wisdom, the faithfulness, and the patriotism of this great convocation, representing the people in their sovereignty. The theorizing of the political essayist and the legal doctrinaire, by which it is sought to be established that the expression of the will of the Legislature shall fetter and control the Constitution-making body, or, in the absence of such attempted legislative direction, which seeks to teach that the constitutional convention can only prepare the frame of a Constitution and recommend it to the people for adoption, will be found to degrade this sovereign body below the level of the lowest tribunal clothed with ordinary legislative powers."

In *Loomis v. Jackson*, 6 W. Va. 613, in discussing the powers of the constitutional convention, Judge Woods, speaking for the court, on page 708 of the opinion, said: "I have had no difficulty in reaching the following conclusions upon the constitutional questions presented in this specification, viz.: First, that a constitutional convention lawfully convened does not derive its powers from the Legislature, but from the people; second, that the powers of a constitutional convention are in the nature of sovereign powers; third, that the Legislature can neither limit nor restrict them in the exercise of these powers."

In the recent case of *Montana ex rel. Haire v. Rice*, 204 U. S. 291, 27 Sup. Ct. 281, 51 L. Ed. 490, which came up on appeal from the decision of the Supreme Court of Montana, it was held that: "In granting lands for educational purposes to Montana, section 17 of the enabling act of February 22, 1889 (25 Stat. 676, c. 180), to be held, appropriated, etc., in such manner as the Legislature of the state should provide, Congress intended to designate, and the act will be so construed, such Legislature as should be established by the Constitution to be adopted, and which

should act as a parliamentary body in subordination to that Constitution; and it did not give the management and disposal of such lands to the Legislature or its members independently of the methods and limitations prescribed by the Constitution of the state." The facts in this case were substantially as follows: By section 17 of the enabling act for Montana, grants were made to the state in the following terms: "To the State of Montana: For the establishment and maintenance of a school of mines, one hundred thousand acres; for state normal school, one hundred thousand acres; for agricultural colleges, in addition to the grant hereinbefore made for that purpose, fifty thousand acres; for the establishment of a state reform school, fifty thousand acres; for the establishment of a deaf and dumb asylum, fifty thousand acres; for public buildings at the capital of the state, in addition to the grant hereinbefore made for the purpose, one hundred and fifty thousand acres. * * * And the lands granted by this section shall be held, appropriated and disposed of exclusively for the purposes herein mentioned, in such manner as the Legislatures of the respective states may severally provide." The constitutional convention of Montana adopted an ordinance designated as Ordinance No. 1, entitled "Federal Relations," which ordained that "the state hereby accepts the several grants of land from the United States to the state of Montana, * * * upon the terms and conditions therein provided." An act of the legislative assembly of the state of Montana, approved February 2, 1905, authorized and directed the state board of land commissioners to sign and issue interest-bearing bonds to the amount of \$75,000, for the principal and interest of which the state of Montana should not be liable, and directed the State Treasurer to sell the bonds. Section 7 directed that: "The moneys derived from the sale of said bonds shall be used to erect, furnish and equip an addition to the present state normal school building at Dillon, Montana, and shall be paid out for such purpose by the State Treasurer upon vouchers approved by the executive board of the state normal school, and allowed and ordered paid by the state board of examiners." Section 12, art. 11, of the Constitution of the state of Montana, is as follows: "The funds of the state university and all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be prescribed by law, and shall be guaranteed by the state against loss or diversion. The interest of said invested funds, together with the rents from leased lands or properties, shall be devoted to the maintenance and perpetuation of these respective institutions."

It will thus be seen that by the terms of the enabling act it was provided that the

lands granted to the state were for the establishment and maintenance of a school of mines, and for a state normal school, etc., and that the lands thus granted should "be held, appropriated and disposed of" exclusively for the purposes therein named, and "in such manner as the Legislature of the state may provide." The Constitution expressly provided that "the interest of said invested funds, together with the rents from leased lands or properties, shall be devoted to the maintenance and perpetuation of these respective institutions." Notwithstanding the limitations placed upon these lands and funds by the state Constitution, The Legislature of the state of Montana authorized and directed the state board of land commissioners to issue bonds, the proceeds of which were to be used to erect, furnish, and equip an addition to a state normal school, upon the theory that the enabling act conferred such power upon the Legislature, regardless of the limitations placed upon it by the state Constitution. It was contended in that case, as it is here, that the provisions of the enabling act, in respect to the disposition of these lands and funds, controlled over the provisions contained in the Constitution. The Supreme Court of the United States denied this contention, and held that, in executing the authority intrusted to it by Congress, the Legislature must act in subordination to the state Constitution. Mr. Justice Moody, in delivering the opinion of the court, on pages 299, 300 of 204 U. S., page 284 of 27 Sup. Ct., 51 L. Ed. 490, uses the following language: "In support of it the plaintiff in error argues that the grant of all the land by the enabling act was by an ordinance accepted by the state 'upon the terms and conditions therein provided'; that the Legislature of the state was by the last clause of section 17 appointed as agent of the United States, with full power to dispose of the lands in any manner which it deemed fitting, provided only that the lands or their proceeds should be devoted to normal school purposes; and that therefore, in the execution of this agency, the Legislature was not and could not be restrained by the provisions of the state Constitution. It is vitally necessary to the conclusion reached by these arguments that the enabling act should be interpreted as constituting the Legislature, as a body of individuals, and not as a parliamentary body, the agent of the United States. But it is not susceptible of such an interpretation. It granted the lands to the state of Montana, and the title to them, when selected, vested in the grantee. In the same act the people of the territory, about to become a state, were authorized to choose delegates to a convention charged with the duty of forming a Constitution and state government. It was contemplated by Congress that the convention would create the Legislature, determine its place in the state government, its relations to the other governmental agencies, its methods of procedure,

and, in accordance with the universal practice of the states, limit its powers. It is not to be supposed that Congress intended that the authority conferred by section 17 of the enabling act upon the Legislature should be exercised by the mere ascertainment of its will, perhaps when not in stated session, or by a majority of the votes of the two houses, sitting together, or without the assent of the executive, or independently of the methods and limitations upon its powers prescribed by its creator. On the contrary, the natural inference is that Congress, in designating the Legislature as the agency to deal with the lands, intended such a Legislature as would be established by the Constitution of the state. It was to a Legislature whose powers were certain to be limited by the organic law, to a Legislature as a parliamentary body, acting within its lawful powers, and by parliamentary methods, and not to the collection of individuals, who for the time being might happen to be members of that body, that the authority over these lands was given by the Enabling act. It follows therefore that, in executing the authority intrusted to it by Congress, the Legislature must act in subordination to the state Constitution, and we think that in so holding the Supreme Court of the state committed no error."

But counsel for defendant in error rely upon the case of *Wells v. Bain*, 75 Pa. 39, 15 Am. Rep. 563, in support of their contention that the convention possesses only such powers as are expressly granted in the enabling act, and such implied or incidental powers as are necessary to carry into effect the express powers thus granted by Congress, and that, if the convention exceeds such powers, then the powers of the courts can be invoked to enjoin or restrain it from submitting such propositions in the Constitution or ordinance to a vote of the people. In this case, it appears that an act of the Legislature authorized, in pursuance of a vote of the people, the election of delegates to a convention to revise and amend the Constitution, and directed the convention to submit the proposed amendments to the voters of the state at such time and "in such manner as the convention shall prescribe," but also directed that the election to decide for or against the amendments "shall be conducted as the general elections of this commonwealth are now by law conducted." By the then existing election laws, the elections were conducted by inspectors. The convention, by an ordinance, appointed certain persons to have direction of the election on the amendments, to fill vacancies, to appoint judges and inspectors, etc. And it was there held that the part of the ordinance relating to the election was in conflict with the election laws enacted by the state Legislature, and was therefore void. But in this case there was no attempt to enjoin the submission of the Constitution, or any of its provisions, to a vote of the people;

nor was there any attempt to restrain or enjoin the convention, its officers or delegates, from discharging their functions. But the action was instituted after the convention had completed its labors, and it had for its object the sole purpose of enjoining that portion of the ordinance which attempted to create election officers which were unauthorized, and who were attempting to supplant or supersede the officers who were charged, as it was there contended and held, with the duty of conducting such election by virtue of an act of the Legislature, which provided for the election of delegates to amend and revise the Constitution. This decision seems to be in irreconcilable conflict with the decisions of the highest courts of the land. The convention was authorized by a direct vote of the people to revise and amend the state Constitution. The power of the convention to revise and amend the Constitution was not a delegated power derived from the Legislature, but it derived its power directly from the people. And in the performance of the powers and duties and obligations resting upon the convention it could have no superior but the people themselves. Manifestly, to hold otherwise would be to degrade the powers of the convention below the level of the lowest legislative or municipal body. Clearly, such are not the office, functions, and powers of the constitutional convention. This decision was severely criticised at the time by the ablest members of the bar of the state, and was repudiated by the constitutional convention of New York of 1894, which was composed of some of the greatest lawyers and most eminent statesmen of our times.

The courts have no power to restrain or enjoin the convention:

The convention being vested with legislative powers and functions, its acts and proceedings, in the performance of such duties, are not subject to judicial control or interference. The power of the courts to enjoin or restrain the convention, its officers or delegates, from exercising the rights, powers, and duties confided to them, must therefore be denied. Nor have the courts the power or jurisdiction to enjoin or restrain the submission of the Constitution or any proposition contained therein to a vote of the people. This conclusion, it seems to us, is self-evident. No case has been cited, and we are unable, by the most diligent research, to find a case, from the foundation of the government down to the present time, where any court has ever restrained or enjoined a constitutional convention, its officers or members; nor has any case been cited or found where the Constitution, or any of the propositions contained therein, was ever enjoined by any court prior to the time the Constitution was adopted. If, therefore, the convention, or its officers and delegates, could be enjoined by the courts from exercising legislative functions, such as the creating and de-

fining of counties in Oklahoma or Indian Territory, or of defining and describing the boundaries of the counties in the proposed state, and which in effect would divide or change the counties as they now exist in the territory of Oklahoma, and if this part of the Constitution could be restrained and enjoined from being submitted to a vote of the people, then we can perceive of no sound reason why any other portion of the Constitution could not be attacked in the courts and its constitutionality determined in advance of the submission of such question or proposition to the vote of the people. To concede the power of the courts to enjoin and restrain the convention in the exercise of its powers in incorporating any legislative matter that it may deem appropriate therein, on the ground that it is unconstitutional and void, in advance of the submission of the same to the people for ratification or rejection, and prior to the time that it is approved by the President, would, it seems to us, lead to interminable litigation, and the inevitable result would be to tie the hands of the convention and indefinitely postpone the submission of the Constitution, or any of its provisions, to a vote of the people. Fortunately, such is not the law. If the Constitution, or any of its provisions, is repugnant to the Constitution of the United States or any of the terms and conditions of the enabling act, these questions can be litigated and determined at the appropriate time. The moment the Constitution is ratified by the people, and approved by the President of the United States, then every section, clause, and provision therein becomes subject to judicial cognizance. That the courts will not interfere by injunction, or otherwise, with the exercise of legislative or political functions, is well settled by a long line of adjudicated cases, which we will review at some length, owing to the great importance of the questions involved in this case.

As early as 1831 this question was before the Supreme Court of the United States in a suit brought by the Cherokee Nation against the state of Georgia (5 Pet. [U. S.] 1, 8 L. Ed. 25). This was a bill in equity brought by the Cherokee Nation, praying an injunction to restrain the state of Georgia from the execution of certain laws of that state, which it was alleged would annihilate the Cherokee Nation as a political society, and seize for the use of Georgia the lands of the nation which had been assured to them by the United States, in solemn treaties repeatedly made and still in force. The opinion of the court in this case was delivered by Mr. Chief Justice Marshall, and in the course of the opinion, on page 18 of 5 Pet. (8 L. Ed. 25), the learned Chief Justice says: "A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a state from the forcible exercise of legislative power over a neighbor-

ing people, asserting their independence, their right to which the state denies. On several of the matters alleged in the bill, for example, on the laws making it criminal to exercise the usual powers of self-government in their own country, by the Cherokee Nation, this court cannot interpose; at least, in the form in which those matters are presented. That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be more doubtful. The mere question of right might, perhaps, be decided by this court, in a proper case, with proper parties. But the court is asked to do more than decide on the title. The bill required us to control the Legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question. If it be true that the Cherokee Nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future. The motion for an injunction is denied."

In the case of *State of Mississippi v. Johnson*, 4 Wall. 475, 18 L. Ed. 437, the Supreme Court of the United States was asked to restrain and enjoin Andrew Johnson, then President of the United States, and a citizen of Tennessee, from enforcing the Acts of Congress of March 2 and 23, 1867 (14 Stat. 428, c. 153, and 15 Stat. 2, c. 6), commonly known as the "Reconstruction Acts," on the ground that such acts were unconstitutional and void. Chief Justice Chase, speaking for the court, in the course of the opinion said: "Congress is the legislative department of the government. The President is the executive department. Neither can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance." And, again, he says: "It is true that a state may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties, and that no such bill ought to be received by us. * * * The motion for leave to file the bill is therefore denied."

In the case of *State of Georgia v. Stanton*, 6 Wall. 50, 18 L. Ed. 721, the Supreme Court of the United States had before it for decision a bill in equity, filed by the state of Georgia, seeking to enjoin the Secretary of War, and other officers who represented the executive authority of the United States, from carrying into execution certain acts of

Congress, on the ground that such execution would annul and totally abolish the existing state government of the state and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the state by depriving it of all the means and instrumentalities whereby its existence might, and otherwise would, be maintained. It was held that the bill called for a judgment upon a political question, and would therefore not be entertained by the court. Mr. Justice Nelson speaking for the court, on page 77 of 6 Wall. (18 L. Ed. 721), says: "That these matters, both as stated in the body of the bill, and in the prayers for relief, call for the judgment of the court upon political questions, and upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in judicial form, for the judgment of the court."

In *New Orleans Waterworks Company v. New Orleans*, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518, the Supreme Court of the United States had under consideration the question whether the court would enjoin and restrain a municipal council in the exercise of its powers as a legislative body, and it was there held that: "A court of equity cannot properly interfere with, or in advance restrain the discretion of a municipal body while it is in the exercise of powers that are legislative in their character." In the course of the opinion, Mr. Justice Harlan, speaking for the court, says: "If it be said that a final decree against the city, enjoining it from making such grants in the future, will control the future action of the city council of New Orleans, and will therefore tend to protect the plaintiff in its rights, our answer is that a court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character. It ought not to attempt to do indirectly what it could not do directly. In view of the adjudged cases, it cannot be doubted that the Legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted, have the force of laws passed by the Legislature of the state, and are to be respected by all. But the courts will pass the line that separates judicial from legislative authority if by any order or in any mode they assume to control the discretion with which municipal assemblies are invested, when deliberating upon the adoption or rejection of ordinances proposed for their adoption."

The passage of ordinances by such bodies are legislative acts which a court of equity will not enjoin. *Chicago v. Evans*, 24 Ill. 52, 57; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, 24 Am. Rep. 756; 1 Dillon on Mun. Corp. § 308, and notes; 2 High on Injunctions, § 1246. If an ordinance be passed and is invalid, the jurisdiction of the courts may then be invoked for the protection of private rights that may be violated by its enforcement. *Page's Case*, 34 Md. 558, 564; *Baltimore v. Radecke*, 49 Md. 217, 231, 33 Am. Rep. 239."

In *State ex rel. Rose v. Superior Court of Milwaukee County*, decided by the Supreme Court of Wisconsin February 27, 1900, and reported in 81 N. W. 1046, 105 Wis. 651, 48 L. R. A. 819, it was held that the passage of an ordinance of the city of Milwaukee was a legislative power, and that a court of equity had no jurisdiction to restrain the common council from passing the same. In this case the court had under consideration the validity of an ordinance which the common council of the city of Milwaukee attempted to enact. The action was instituted in the superior court of Milwaukee county, having for its object the restraining and enjoining of the common council from enacting the ordinance. The court granted the injunction as prayed for. Notwithstanding the injunction, the common council violated the orders of the court, and proceeded to enact the ordinance. The members were accordingly cited to appear before the court, to show cause why they should not be punished for contempt. Upon the hearing, a majority of the common council admitted to the trial court that they had severally violated the injunction order in question. The only excuse given for the violation was that the court was without jurisdiction to make the order. Therefore the sole legal question presented was whether the court had jurisdiction of the subject-matter. The trial court held that it had jurisdiction of the subject-matter of the action, and adjudged the common council guilty of contempt. Upon this order and judgment of the trial court, application was made to the Supreme Court for a peremptory writ of prohibition, to prohibit the execution of the judgment, and, upon a full hearing and consideration, the writ was awarded; the Supreme Court holding that the trial court was without jurisdiction of the subject-matter of the action. In the course of the opinion, Mr. Chief Justice Cassoday, speaking for the court, says: "The power so vested in the common council is, within the limits prescribed, a discretionary power, and we must hold that a court of equity has no jurisdiction to restrain the common council from exercising such discretion, especially at the suit of a private party. It is said that the amendment to the ordinance, as originally proposed, was not submitted to a committee, as required. It is enough to say

that a court of equity has no place in the chamber of the common council to supervise or superintend the proceedings of that body, while engaged in the exercise of legislative or discretionary functions. The common council of Milwaukee, like other legislative bodies and courts, is liable to commit errors which may be fatal to its action; but that does not take away its power to act."

In *Des Moines Gas Co. v. City of Des Moines*, 44 Iowa, 505, 24 Am. Rep. 756, it was said by the Supreme Court of Iowa, having this question under consideration: "The General Assembly is a co-ordinate branch of the state government, and so is the lawmaking power of public municipal corporations within the prescribed limits. It is no more competent for the judiciary to interfere with the legislative acts of the one than the other. But the unconstitutional acts of either may be annulled. Certainly the passage of an unconstitutional law by the General Assembly could not be enjoined. If so, under the pretense that any proposed law was of that character, the judiciary could arrest the wheels of legislation."

It is evident, then, from a consideration of the authorities, that the constitutional convention is a legislative body of the highest order, and that it cannot be interfered with by injunction in the exercise of its powers. This being true, the convention was given the power, and it was made its duty to do two things: (1) To form a Constitution; and (2) to form a state government.

The Constitution and state government:

First, let us briefly examine the difference between the federal and state governments. Judge Cooley, in his great work on Constitutional Limitations ([7th Ed.] p. 11), states this distinction as follows: "The government of the United States is one of enumerated powers; the national Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess. In this respect it differs from the Constitutions of the several states, which are not grants of powers to the states, but which apportion and impose restrictions upon the powers which the states inherently possess." Mr. Chief Justice Waite, in *United States v. Cruikshank*, 92 U. S. 549, 23 L. Ed. 588, states the true doctrine as follows: "The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers that are not granted to it by that instrument are reserved to the states or to the people. No rights can be acquired under the Constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the states." Chief Justice Marshall, in the celebrated case of

McCulloch v. Maryland, 4 Wheat. (U. S.) 409, 4 L. Ed. 579, in speaking of the division of sovereignty appertaining to the United States and to the states, declared: "Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it; and neither is sovereign, with respect to the objects committed to the other."

What, then, is a state Constitution, and what are its attributes? Judge Story, in his work on the Constitution (volume 1, § 339), says: "A Constitution is in fact a fundamental law or basis of government, and falls strictly within the definition of law as given by Mr. Justice Blackstone. It is a rule of action prescribed by the supreme power in a state, regulating the rights and duties of the whole community. It is a rule, as contradistinguished from a temporary or sudden order, permanent, uniform and universal." The late Justice Miller, of the Supreme Court of the United States, in his valuable work on the Constitution (page 70), says: "A Constitution, in the American sense of the word, is the written instrument by which the fundamental powers of government are established, limited, and defined, and by which those powers are distributed among the several departments for their safe and useful exercise for the benefit of the body politic." In *Vanhorne v. Dorrance*, 2 Dall. (U. S.) 306, Fed. Cas. No. 16,857, 1 L. Ed. 391, the court defines a constitution as follows: "What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed, it contains the permanent will of the people, and is the supreme law of the land. It is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it." In *Phoebe v. Jay* 1 Ill. (Breese) 268, 271, the Supreme Court of Illinois declared that: "The term 'Constitution,' as applied to government, is the form or government instituted by the people in their sovereign capacity, in which, first, the principal and fundamental laws are established. A Constitution is the supreme, permanent, and fixed will of the people in their original, unlimited, and sovereign capacity, and in it are determined the conditions, rights, and duties of every individual of the community." The Supreme Court of Indiana, in the case of *In re Denny*, 156 Ind. 104, 59 N. E. 359,¹ said: "In our system of government, a written Constitution is the highest expression of law. None other emanates directly from the sovereign people themselves. It is the deliberate and affirmative utterance of the sovereign majority." In *Taylor v. Governor*, 1 Ark. 27, it is said: "What is a Constitution? The Constitution of an

American state is the supreme, organized, and written will of the people acting in convention and assigning to the different departments of the government their respective powers. It may limit and control the action of these departments, or it may confer upon them any extent of power not incompatible with the federal compact. By an inspection and examination of all the Constitutions of our own country, they will be found to be nothing more than so many restrictions and limitations upon the departments of the government and the people." In 8 Cyc. 717, the doctrine is clearly stated as follows: "A state Constitution consists of a number of fundamental laws passed by, and alterable and repealable alone by, the people. It is superior to the will of the Legislature, the validity of whose acts is determined by its provisions"—citing with approval *Taylor v. Governor*, 1 Ark. 21, 27; *Lynn v. Polk*, 8 Lea (Tenn.) 121, 165; and *Bates v. Kimball*, 2 D. Chipm. (Vt.) 77, 84, where it is said: "When the people associate, and enter into compact for the purpose of establishing government, that compact, whatever may be its provisions, or in whatever language it may be written, is the Constitution of the state, revocable only by the people, or in the manner they prescribe." In short, the constitutional convention, subject to the Constitution of the United States, and the limitations and restrictions contained in the enabling act, had full power and authority to incorporate in the Constitution any provision which it deemed appropriate. But this does not mean, as it was stated by the learned trial court, that, if such power is conceded to the convention, it had "the power to repeal all laws, abolish all institutions, and displace all officers, from the highest to the very lowest." No such power was confided to the convention, nor has it exercised such powers. Clearly, to repeal existing laws of the territory, and to displace any existing officers, would be to act in direct opposition to the express provisions of section 6 of the enabling act, which provides: "And the said representatives, together with the Governor and other officers provided for in said Constitution, shall be elected on the same day of the election for the ratification or rejection of the Constitution; and until said officers are elected and qualified under the provisions of such Constitution and the said state is admitted into the Union, the territorial officers of Oklahoma Territory shall continue to discharge the duties of their respective offices in said territory." But the grant by Congress to form a Constitution and state government carries with it everything that is essential to effectuate its object. We are unable to perceive how a state government could be created, and officers for a full state government provided for, unless the convention had the power to fix and define the counties within the entire state, and to provide by ordinance for necessary temporary

¹ 51 L. R. A. 722.

election machinery, and for putting the state government into operation when the Constitution is ratified by the people and the President issues his proclamation admitting the state into the Union on an equal footing with the original states.

This leads us to the next question: What is a state government, within the purview of the enabling act?

The convention was not only authorized to form a Constitution, but it was expressly authorized and empowered to form a state government. It seems to us that the creation of counties and townships is absolutely essential and indispensable to the formation of a state government. In fact, counties and townships have been inseparable parts of every state government since the admission of the original 13 states into the Union. Indeed, such counties antedate the adoption of the federal Constitution, and it will be presumed that, when Congress authorized the people of Oklahoma and Indian Territory to form a Constitution and state government and be admitted into the Union on an equal footing with the original states, it intended that such a state government should be formed. No particular form of government was prescribed, and the only limitations thereon are that the Constitution and state government shall be republican in form, and not repugnant to the federal Constitution and the principles of the Declaration of Independence, etc. It is to be presumed that Congress knew the conditions existing in the Indian Territory, and knew that no counties had been formed or created therein, and that it was absolutely essential for the convention to create counties, and to provide the necessary machinery for holding the election for submitting the Constitution to a vote of the people. It also knew that the territory of Oklahoma contained organized counties, and that each county had a full complement of county officers, and that they were exercising their powers and duties as such under the laws of Oklahoma Territory, except the Osage Indian reservation, which was an unorganized county, and attached to Pawnee county, under the organic act, for judicial purposes. There was no inhibition placed upon the convention against creating and defining the counties in the proposed state, and the only inhibition placed upon the convention is that provided in section 21, with reference to the Osage Indian reservation, where it is declared: "That the constitutional convention may by ordinance provide for the election of officers for a full state government, including members of the Legislature and five representatives to Congress, and shall constitute the Osage Indian reservation a separate county, and provide that it shall remain a separate county until the lands in the Osage Indian reservation are allotted in severalty and until changed by the Legislature of Oklahoma." In the absence of any

express prohibition upon the convention, it had full and complete power to establish and define all the counties in the proposed state, as a necessary incident to the formation of a state government. The power to form a state government clearly implies the power to create and define every county within the limits of the new state; the only limitation upon the convention in this respect being that the Osage Indian reservation shall remain a separate county until the lands in the Osage reservation are allotted in severalty, and until changed by the Legislature of the state of Oklahoma. Manifestly, the territorial government and all the counties organized thereunder were intended to be for temporary purposes only, and to remain as such until the state government was created and organized. It is difficult to perceive how the convention could have organized a full state government without defining and fixing the boundaries of the counties throughout the entire state. In this connection, it must be borne in mind that the convention was not created for the purpose of forming a government for Oklahoma or Indian Territory; but they were charged with the power, duty, and responsibility of forming a state government for all the people of the proposed state of Oklahoma, and, in fixing the boundaries of the counties throughout the entire state, there were no limitations whatever placed upon the convention, except with reference to the Osage Indian reservation, as above stated. Accordingly, the convention did, by the terms and provisions of the Constitution, fix and define and name each of the counties of the proposed state, and designated the county seats therein, and also provided how the county lines might be changed, or the county seats removed. The wisdom, expediency, or propriety of such action is a question that was peculiarly confided to the convention, and is not the subject at this time of judicial cognizance.

That counties and townships are parts of a state government is so well settled by the adjudicated cases as to be no longer open to serious judicial controversy. In *Board of County Commissioners of Greer County v. Watson*, 7 Okl. 174, 54 Pac. 441, this court, speaking by Chief Justice Burford, defined a "county" as follows: "A county is an involuntary political and civil division of the territory, created by statute to aid in the administration of governmental affairs, and possessed of a portion of the sovereignty. All the powers with which it is intrusted are the powers of the sovereignty which created it, and all the duties with which it is charged are the duties of the sovereignty." In *Commissioners of Talbot County v. Queen Anne's County*, 50 Md. 245, it is said: "A county is one of the territorial divisions of the state created for public and political purposes connected with the administration of the state government." This language was quoted with approval by

the Supreme Court of the United States in *Washer v. Bullitt County*, 110 U. S. 562, 4 Sup. Ct. 249, 28 L. Ed. 249. In *Commissioners of Laramie County v. Commissioners of Albany County*, 92 U. S. 310, 23 L. Ed. 552, it was said by the Supreme Court of the United States: "Corporations of the kind are properly denominated public corporations, for the reason that they are but parts of the machinery employed to carry on the affairs of the state." And in the course of the opinion, on page 311 of 92 U. S. (23 L. Ed. 552), Mr. Justice Clifford, speaking for the court, said: "Institutions of the kind, whether called counties or towns, are the auxiliaries of the state in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the Legislature of the state, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatible with everything of the nature of compact. Instead of that, the constant practice is to divide large counties and towns, and to consolidate small ones, to meet the wishes of the residents, or to promote the public interests, as understood by those who control the action of the Legislature. Opposition is sometimes manifested, but it is everywhere acknowledged that the Legislature possesses the power to divide counties and towns at their pleasure, and to apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable. *School Society v. School Society*, 14 Conn. 469; *Bridge Co. v. East Hartford*, 16 Conn. 172; *Hampshire v. Franklin*, 16 Mass. 76; *North Hempstead v. Hempstead*, 2 Wend. (N. Y.) 109; *Montpelier v. East Montpelier*, 29 Vt. 20, 67 Am. Dec. 748; *Sill v. Corning*, 15 N. Y. 297; *People v. Draper*, 15 N. Y. 549; *Waring v. Mayor*, 24 Ala. 701; *Mayor v. State*, 15 Md. 376; *Ashby v. Wellington*, 8 Pick. (Mass.) 524; *Baptist Soc. v. Candia*, 2 N. H. 20; *Denton v. Jackson*, 2 Johns. Ch. (N. Y.) 320." In the case of *Eagle v. Beard*, 33 Ark. 497, it is said: "The political power is composed of representatives from counties. Through them justice is administered, the revenue collected, and the local police rendered effective. Neither the courts of justice, nor the executive of the state, can perform any important function, except in the tribunals, or through the offices of the counties." In *Woods v. Colfax County*, 10 Neb. 552, 7 N. W. 269, Chief Justice Maxwell, quoting from *Riddle v. Proprietors of Locks and Canals*, 7 Mass. 169, 5 Am. Dec. 35, says: "A county is a mere local subdivision of the state, created by it without the request or consent of the people residing therein. * * * County organization is created almost exclusively with a view to the policy of the state at large. * * * With scarcely an exception, all the powers and functions of the county organi-

zation have a direct and exclusive reference to the general policy of the state, and are in fact but a branch of the general administration of that policy." In *Commissioners of Hamilton County v. Mighels*, 7 Ohio St. 109, Justice Brinkerhoff says: "Counties are legal subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them." In *Ward v. County of Hartford*, 12 Conn. 406, Chief Justice Williams, speaking for the court, says: "The state is divided into counties for public purposes, and particularly for the more convenient administration of justice." In *Gooch v. Gregory*, 65 N. C. 143, the court says: "A county is a municipal corporation created by law for public and political purposes, and constitutes part of the government of the state." It follows that the convention had the undoubted right to define and fix the boundaries of every county in the proposed state, and to change existing counties, if they deemed it appropriate, and to define legislative and judicial districts, in order that a full state government might be put into operation, and to provide for the necessary machinery to submit the Constitution to a vote of the people for ratification or rejection.

The convention may provide for the election of state, county, and other officers provided for in the Constitution:

By section 21 of the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267) it is provided: "That the constitutional convention may by ordinance provide for the election of officers for a full state government, including members of the Legislature and five representatives to Congress." And by the last clause of section 6 of said act it is provided: "And the said representatives, together with the Governor and other officers provided for in said Constitution, shall be elected on the same day of the election for the ratification or rejection of the Constitution; and until said officers are elected and qualified under the provisions of such Constitution and the said state is admitted into the Union, the territorial officers of Oklahoma Territory shall continue to discharge the duties of their respective offices in said territory." It will thus be seen that Congress granted the power and authority to the convention to provide by ordinance for the election of officers for a full state government. What, then, is a full state government within the meaning of this act? In our opinion, officers for a full state government includes not only the state officers whose powers and duties are co-extensive with the limits of the state, but includes all the officers whose duties are in any manner connected with the administration of the state government. Hence we think the convention had the power to provide in the ordinance for the election of all the officers which were provided for in the

Constitution, from the highest to the lowest. It seems to us to hold otherwise would be to place a very strained and narrow interpretation upon the language used in the act, that the convention may by ordinance provide for the election of officers for a full state government. And since we have already decided that the counties and townships are necessary and indispensable parts of the state government, it must follow, as an inevitable conclusion, that the convention had the power to provide for the election of state, county, and other officers provided for in the Constitution.

The ordinance:

What is an "ordinance," and what are its objects?

Section 4 of the enabling act (Act June 13, 1906, c. 3335, 34 Stat. 267), provides: "That in case a Constitution and state government shall be formed in compliance with the provisions of this act the convention forming the same shall provide by ordinance for submitting said Constitution to the people of said proposed state for its ratification or rejection at an election to be held at a time fixed in said ordinance," etc. It will thus be seen that the enabling act provides that the convention "shall provide by ordinance for submitting said Constitution to the people," etc. The language here used is clear, specific, and mandatory in its terms. An ordinance, as used in this act, has the force and effect of a legislative enactment or law for the purposes therein named. Manifestly, it is a law which is essential to carrying into effect the objects for which the convention was created. Thus we speak of the famous ordinance of 1787, which created a government of that portion of the territory of the United States northwest of the Ohio river, and known as the "Northwest Territory." It will thus be seen that Congress conferred direct and express power and authority upon the convention to pass an appropriate ordinance to submit the Constitution to the people for its ratification or rejection, at an election at a time fixed in said ordinance, by the convention. Such an ordinance, when once adopted by the convention, has the force and effect of statute law.

The distinction between a Constitution and an ordinance is this: The Constitution is the permanent fundamental law of the state. It is of a stable and permanent character. As is appropriately said in *Vanhome v. Durrence*, 2 Dall. (U. S.) 308, Fed. Cas. No. 16,857, 1 L. Ed. 391: "The Constitution of a state is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events. Notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immovable, as a mountain amidst the strife of storms, or a rock in the ocean amidst the raging of the

waves." But, under the terms of the enabling act, it is prospective in its operation only; that is, it does not become operative until it is ratified by the people and approved by the President of the United States. On the other hand, an ordinance, as used in this act, refers to a merely temporary law; its object being to carry into effect the formation of the Constitution and fundamental law of the state, to provide a mode and means for an election of a full state government, including the members of the Legislature and five representatives to Congress, and becomes operative immediately upon its adoption. Section 1 of the election ordinance, adopted by the convention on April 22, 1907, provides as follows: "Said election shall, in all respects, be held and conducted in the manner required by the laws of the territory of Oklahoma for elections therein, when not in conflict with the enabling act, and as supplemented by this ordinance, and the returns of said election shall be made to the Secretary of the territory of Oklahoma, who, with the Chief Justice thereof, and the senior judge of the United States Court of Appeals for the Indian Territory, shall canvass the same, and if a majority of the legal votes cast on that question shall be for the Constitution, the Governor of Oklahoma Territory, and the judge senior in service of the United States Court of Appeals for the Indian Territory shall certify the result to the President of the United States, together with the statement of the votes cast thereon, and upon separate articles or propositions, and a copy of said Constitution, articles, propositions, and ordinances, and in all respects comply with the provisions of said enabling act." And section 8 of said ordinance provides: "That the election laws of the territory of Oklahoma now in force, as far as applicable and not in conflict with the enabling act, including the penal laws of said territory relating to election and illegal voting, are hereby extended and put in force throughout the proposed state of Oklahoma until the Legislature of said proposed state shall otherwise provide, and until all persons offending against said laws in the elections aforesaid, shall have been dealt with in the manner therein provided, and the courts of said state shall have power to enforce said laws in the same manner as other criminal laws of said state."

It will thus be seen that the convention, in its ordinance, expressly put in force the election laws of Oklahoma, as far as applicable and not in conflict with the enabling act, including the penal laws of said territory relating to election and illegal voting, and expressly provides that the courts of said state shall have power to enforce said laws in the same manner as other criminal laws of said state, until all persons offending against said laws shall have been dealt with in the manner therein provided. It seems to

us that it was clearly the duty of the convention, in its ordinance, to provide the necessary machinery for holding such election in all the newly created counties of the proposed state. The officers created in the new counties in the Indian Territory and Oklahoma Territory were merely for the temporary purpose of providing the necessary election machinery to carry into effect the objects of the convention. These officers are merely temporary, and they do not supersede or supplant any of the existing officers, who are charged with the power and duty under the election ordinance to carry into effect the duties devolving on them, and they possess and exercise no powers, except such as granted for the purpose of carrying into effect the provisions of the election ordinance. The manifest intention of the enabling act was that the convention should by ordinance make uniform and specific provisions throughout the proposed state for the holding of said election.

Is the Constitution republican in form?

But one question remains, and that is: Is the proposed Constitution republican in form?

Article 4, § 4, of the Constitution of the United States provides that: "The United States shall guaranty to every state in this Union a republican form of government." And section 3 of the enabling act provides that: "The Constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." This leads us to the inquiry: In whom is lodged the power and authority to decide when the government is republican in form?

In the case of *Luther v. Borden*, 7 How. 42, 12 L. Ed. 581, the Supreme Court of the United States, speaking by Chief Justice Taney, says: "The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guaranty to every state in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the Legislature or of the executive (when the Legislature cannot be convened) against domestic violence. Under this article of the Constitution it rests with Congress to decide what government is the established one in a state. For as the United States guaranty to each state a republican government, Congress must necessarily decide what government is established in the state before it can determine whether it is republican or not. And when the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is

binding on every other department of the government, and could not be questioned in a judicial tribunal." And in *Texas v. White*, 7 Wall. 730, 19 L. Ed. 227, the Supreme Court of the United States had occasion to reiterate this same doctrine, where it is said: "But, the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress. Under the fourth article of the Constitution, it rests with Congress to decide what government is the established one in a state. For, as the United States guaranty to each state a republican government, Congress must necessarily decide what government is established in the state, before it can determine whether it is republican or not."

By section 4 of the enabling act it is provided: "And if the Constitution and government of said proposed state are republican in form, and if the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States, within twenty days from the receipt of the certificate of the result of said election and the statement of the votes cast thereon and a copy of said Constitution, articles, propositions, and ordinances, to issue his proclamation announcing the result of said election; and thereupon the proposed state of Oklahoma shall be deemed admitted by Congress into the Union, under and by virtue of this act, on an equal footing with the original states." It will thus be seen that the power to determine whether the Constitution is republican in form is primarily a legislative power, and resides in Congress; but this power was delegated by Congress to the President, and this question is not the subject of judicial cognizance. We therefore hold that the constitutional convention has the power and authority to submit to the people of the proposed state of Oklahoma the provisions in the Constitution providing for the creation of the counties of Alfalfa and Major of territory formerly embraced in Woods county. That under the terms of the enabling act, authorizing and directing the convention to provide by ordinance for an election to submit the Constitution to a vote of the people for ratification or rejection, and for the election of officers for a full state government, the convention had the authority to create the necessary election machinery in these counties, in order that the Constitution might be submitted to a vote of the people, and that the ordinance providing for such election machinery in Alfalfa and Major counties is valid. It follows that the temporary injunction granted by the probate judge, restraining and enjoining the Governor of Oklahoma, and the president and secretary of the constitutional convention from issuing or publishing any proclamation in which it is sought to submit to the electors of the proposed state of Oklahoma, as a part of said Constitution, the creation of the counties of Major and Alfalfa, and which restrain-

ed and enjoined the officers provided for in the ordinance from exercising the powers and duties of election officers in said counties, was improvidently issued, and that the district court committed error in refusing to dissolve the injunction, and in overruling the demurrer to the petition, and in entering the decree making the temporary injunction perpetual.

The decree:

The judgment of the district court of Woods county is therefore reversed, and, in order that there may be no inconvenience or delay in carrying into effect the decree of this court, it is hereby ordered, considered, adjudged, and decreed that the judgment of the district court of Woods county be, and the same is hereby, vacated, set aside, and held for naught; and it is further ordered, considered, adjudged, and decreed that the injunction granted in said cause is hereby dissolved, vacated, set aside, and held for naught, and the said cause is hereby dismissed at the costs of the plaintiff.

PANCOAST, J., having tried the cause in the court below, not sitting. IRWIN, J., dissenting, and BURWELL, J., dissenting in part, and concurring in part.

BURFORD, C. J. While I concur in the conclusions reached and judgment announced in the opinion by Justice HAINER, I am unable to consent to some of the statements and reasons therein contained. In the decision of one of the cases involved in this general controversy in the district court of Logan county, I announced my views upon some of the questions involved in this cause; but, after more comprehensive argument by able and industrious counsel and more careful research and extensive investigation I am compelled to modify my views somewhat as to the powers and character of the constitutional convention.

It is said in the opinion of the court, and supported by the statements of some of the ablest text-writers and jurists, that "a constitutional convention is a legislative body of the highest order." In my judgment this proposition is incorrect, unsound, and unsupported by reason or logic, and the statement is contradicted by the definition given by its authors of the powers and procedure of a constitutional convention. The constitutional convention is *sul generis*. In the American form of republican government, sovereignty rests in the people, and is exercised through representatives. In forming a Constitution and state government, the people act through their representatives in the convention, but they do not delegate all their legislative power to the convention. They reserve unto themselves the power of final approval or disapproval. The convention formulates, proposes, and submits proposals for the frame of government and the fundamental laws. The people in their sovereign capacity enact

these propositions into law. The convention has no power to enact laws. It possesses no legislative powers except such as may be necessary to exercise in prescribing by ordinance the methods and procedure for obtaining the expression of the electors upon the ratification or rejection of the proposed Constitution, and for the election of the officers provided for in the Constitution. We have been taught by observation, experience and history to regard a legislative body as one having the power to enact laws, to legislate finally upon subjects within its sphere. A constitutional convention is not such a body. It is a representative, deliberative body, authorized by law. It derives its authority from Congress, and exercises the power resting in the people. It is legislative in character. It proceeds in a legislative manner, acts in a legislative capacity in the exercise of its powers in formulating and adopting propositions to be submitted for final action, but its powers to legislate are of such a limited and temporary character that it cannot correctly be said to be a legislative body. In the exercise of its powers it is supreme, and it is not within the jurisdiction of any court to interfere with or to control it. It is answerable only to the people whose trust it executes, and they to the Congress of the United States, which is the power of final determination upon all questions relating to the form of government and provisions contained in the Constitution. If the convention has framed a government which is not republican in form, has provided an apportionment which violates that spirit of justness and fairness which pervades the Declaration of Independence and Constitution of the United States, and denies to any portion of its territory or people equal rights under the law, or has disregarded the established principle of local self-government, then the appeal must be to the electors in the first instance, and to the President, to whom Congress has delegated its power in the premises, in the second instance. Such questions are political and governmental and do not come within judicial cognizance. The election ordinance being in the nature of a temporary law, and now in force, is a subject-matter of judicial cognizance. In the absence of any direction in the enabling act, I have no doubt but the convention possessed the inherent power to by ordinance provide for the submission of the Constitution to the electors for their action, and for the election of a full quota of state officers; but there is an express grant of power to that effect in the enabling act, and the question presented is: Has the convention exceeded its powers in this particular, and usurped the powers of the election officers provided by and acting under the laws of Oklahoma? Conceding that the adoption of the election laws of Oklahoma by the enabling act carries with it the election machinery existing under such law, it must also be conceded that it is the

duty of the convention to supply all defects in the operation of such machinery, and make the same, as supplemented by the convention, conserve the purposes of the entire proposed state. I find nothing in the election ordinance submitted by the pleadings in this case which in my judgment transgresses the powers of the convention, and upon this proposition I am in full accord with the opinion prepared by Mr. Justice HAINER. Other questions have been argued in the several cases involving the questions here under consideration, by the determination of the court that the questions of what subjects, their nature or extent, may be by the convention proposed for approval or disapproval, is not one of judicial cognizance, disposes of all questions relating to the contents of the proposed Constitution.

BURWELL, J. (dissenting). A majority of my Brethren have declared what shall (for a time at least) be the law of this case; but, as I entertain some views at variance with those expressed in the majority opinion, it is perhaps due the parties to the action, as well as the public (for all who live in either of the territories are interested in the result of this case) to know the reasons that have impelled me to withhold my full concurrence in the judgment of the court. In every controversy, personal or legal, there are two sides; but, in the very nature of things, on each issue one must be right and the other wrong, and while experience has shown that, in the greater number of cases, perhaps the majority have been right, sometimes truth has been revealed to the few. And notwithstanding the respect I have for the opinions of my Brethren who have concurred in the decision of the court, my own convictions have told me that the law on one vital point is with the party who commenced this action, and that he is entitled to some relief.

The science of government is a profound subject, which requires years of study and observation to master. In a republic nothing is as important as the Constitution or organic law. Equally important is the organic law of a state. As to what should be in the Constitution of Oklahoma to best protect the interests of her citizens, afford equal opportunities to earn a livelihood, and promote happiness, are questions which the constitutional convention must determine, subject to the approval of the voters of the proposed state; and this court cannot, with due regard to its powers, express thereon any opinion. But under the organic act of Oklahoma, which is and will remain in force until supplanted by a state Constitution or repealed by Congress, the Supreme and district courts of the territory are granted jurisdiction and power to redress all wrongs committed against the Constitution or laws of the United States, or of the territory, affecting persons or property. The constitutional convention was convened by authority of the

United States, and, where it is charged that they have exceeded their authority, the courts may on proper application take jurisdiction, determine the issues, and render any rightful judgment therein. At the very threshold of this litigation, the bold assertion is made that the convention has exceeded its powers and divided counties already organized in Oklahoma, and that it has provided for the election, not only of state officers including delegates to Congress and members of the Legislature, but also for the election of all officers, state, county, and township. In this country, with its diversified interests, with its people from all sections of the nation who have brought with them the policies and ideas of the lawmakers of their own state, with the struggle for personal and political supremacy, it would be indeed difficult to form a Constitution that would satisfy all. Therefore, when counties are divided and new ones formed under conditions calculated perhaps to increase the taxation of the individual, I am not surprised that he should ask relief from the impending burdens; but, whether the division of counties may increase or diminish the taxes of the citizen will not influence in any degree the judgment of this court, unless the convention has exceeded its authority and usurped powers not necessarily implied or expressly conferred.

The only way in which the charge can be correctly decided is by investigating: First, the provisions of the enabling act, the Constitution of the United States, and the Declaration of Independence; and second, ascertaining what powers a constitutional convention has incidental to the forming of a Constitution—in other words, what are its implied powers. It is to the enabling act that both parties point with apparent confidence as supporting the position taken; but, after a careful study of this important congressional authority, I am forced to the conclusion that both have in some particulars misapprehended the meaning of that act. In the first place, those who represent the convention assert that the making of counties or providing for their creation and organization are necessary to the framework of a state, and therefore properly and necessarily the work of the convention, and that in establishing boundary lines in the Indian Territory, and in dividing the counties already established by Congress in Oklahoma and creating new counties therefrom, the convention followed in the footprints of precedents; while the appellee contends that these acts were expressly forbidden by Congress. In support of his position the appellee points to the fact that the counties in Oklahoma divided by the convention have been established by Congress, and are organized and officered under the laws of Oklahoma, and that the latter part of section 21 of the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 277) provides: "And all laws in force in the territory of Oklahoma at the time of the admission of said

state into the Union shall be in force throughout said state except as modified or changed by this act or by the Constitution of the state, and the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States." Surely no lawyer will contend that the provisions of the Constitution can become effective until Oklahoma is formally admitted into the Union. Until that time, its penalties cannot be enforced; its guaranties cannot protect the citizen in the enjoyment of life, liberty, or property. The convention is acting for the future state, and not for the territories. It cannot divide the counties of the territory of Oklahoma, but it may declare not only how many counties may be created, but also what territory shall form the counties of the state; and that part of section 21 of the enabling act which provides that the laws of Oklahoma shall be in force throughout the state, except as modified by the Constitution, etc., of the state, made clear the intention of the lawmakers. "Except as modified by the Constitution of the state" is the language of Congress, and the instrument proposed to be submitted to the people for ratification is not yet a Constitution. In fact, it may never be. The voters must first adopt it, and then it must be approved by the President before life is breathed into it. Its terms do not become operative by degrees. It is and will be void of life until the President issues his proclamation. When this is done the entire Constitution, each and all of its provisions, eo instante, spring into life, and from that time on it becomes the ruling power of the state. Until then the offices created by it do not exist. The powers conferred and limitations imposed therein have no binding force, and the counties described in the Constitution are but a part of the written specifications of the architects who have drawn the plans for statehood. And as the architect may propose plans for the building, even so may these agents of the people employed by the government propose plans for the building of the state. Congress has placed certain restrictions in the enabling act. The Constitution of the United States contains other rules that must be followed. Likewise due regard must be observed for the principle of the Declaration of Independence. But, subject to these limitations, the power exists to put into the Constitution or leave out of it that which the judgment of the convention and the people may approve or reject.

The contention, therefore, that the convention cannot legislate under the views herein expressed, must be determined, if at all, as a controversy presenting a subject void of real merit, so far as legal rights are concerned, because such provisions have no force until the state is admitted into the Union, and after that they are binding upon all. Whether the making of counties is a proper subject for the Constitution to deal with, or

should be referred to the legislative branch of the state government, it is unnecessary to decide. Personally, however (and I am speaking only for myself), I have no doubt but that the making of counties by the convention or by the Legislature is a matter of judgment, and involves no question of power, unless the Constitution as adopted inhibits the Legislature from dealing with that subject. But, be this as it may, the action of the convention in dividing the counties in question is an act which does not affect the territorial government, but the government of the state, and if the people are entitled to self-government—that is, adopt a state Constitution and code of laws—they and their representatives should be left free to evolve their own system and form a state government to their own liking, within the limitations stated. If it were necessary to support these views by precedents, no difficulty would be experienced in finding them, and I may refer to some of the adjudicated cases later; but before considering them I wish to assert that Congress, instead of prohibiting the convention from fixing county boundaries, and creating new counties for the future state, have expressly recognized the right of the convention to do so. Now, as has been urged by appellee, these counties were created by Congress and officered under the provisions of the territorial laws. Did Congress in the enabling act provide that the laws of the United States and the laws of Oklahoma should continue in force in the state of Oklahoma? Oh, no. It did, however, attempt to carry along a complete system of laws and continue the territorial officers in power until supplanted by laws enacted by the state and officers elected by its voters, or duly appointed as the Constitution or laws might provide. The general government provided against contingencies which otherwise might have left the citizen and property exposed to the dangers incident to lack of law. Therefore the enabling act provided that: "All laws in force in the territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state, except as modified or changed by this act or by the Constitution of the state."

What laws shall govern the state when first admitted? The laws of Oklahoma. The laws of Oklahoma as they now exist? No, but the laws of Oklahoma as modified or changed by the enabling act and the Constitution of the state. This language clearly not only confers the right, but anticipates that changes in those laws may be deemed expedient. Let us now notice what is to become of the laws of the United States other than the enabling act. Congress has said in this same section of the enabling act, and as a part of the section referred to above (let us observe the clause again): "All laws in force in the territory of Oklahoma

at the time of the admission of said state into the Union shall be in force throughout said state, except as modified or changed by this act or by the Constitution of the state and the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States." It will be observed that Congress did not continue in force generally the laws of the United States applicable to Oklahoma and Indian Territory, nor does Congress say that the laws of Oklahoma shall be in force in the state of Oklahoma, except as modified by the enabling act and the Constitution of the state and the laws of Congress. The exception refers to the enabling act and the Constitution of the state, and then in a subsequent clause, but connected with that which precedes it, Congress said, not as an exception, but as a positive declaration: "And all the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States." From this provision it is evident that Congress intended that the laws of the United States enacted for the organization and government of these territories should not continue in force, and that those laws which deal with subjects that would be a proper subject of congressional legislation in a state, and those only, are continued in force, and even those are to have the same force and effect within said state as elsewhere within the United States.

This act is a complete surrender of governmental control over these territories, upon a compliance with its terms and conditions, except that control exercised over the other states of the Union, and this is in keeping with the law applicable to such conditions as declared in the books. In 8 Cyc. p. 750, subd. "e," I find the following language: "Upon the succession of a territory to statehood and the adoption of a Constitution by its people that has received the approval of Congress, all Constitutions and ordinances framed by the federal authorities for the purpose of the territorial government become suspended, giving full force and effect to the new state Constitution so adopted." Attention is also called to section 13 of the enabling act, which contains the following language: "And that the laws in force in the territory of Oklahoma, as far as applicable, shall extend over and apply to said state until changed by the Legislature thereof." The trial court quotes this language as an inhibition against the power of the Convention to create counties in Oklahoma for the state government, or to provide for the election or appointment of county officers for the same. As the justice who tried this case below is a member of this court and by reason of having presided at such trial will not participate in its consideration here, it is probably due his position that the rea-

sons by him assigned for his judgment be answered by the justices called upon to review. This I gladly do, in so far as they conflict with my own opinions, consistent with the space which may reasonably be taken in an opinion of this kind. The trial court, following up the language last quoted by way of argument for his position, states as follows: "It should be borne in mind also that Woods county owes her existence to the same power and authority from which the existence of the convention is derived. The same power which created the convention years before created this county. The law by which this county was created is still in force. The act providing for the formation of a state government, neither by express nor implied terms repeals the act under which this county (Woods county) was formed. How can it then be said that the Congress of the United States gave to the constitutional convention the implied power to divide any county? There is no express provision therefor in the act. There is no necessity for so doing. No better government will be formed thereby. No interests will be better protected. Large and various individual interests have been established, and great confusion would exist by such division." And, again, the trial court, referring to the clause quoted from section 13 of the enabling act, says: "It will be borne in mind that this provision of the enabling act does not provide that the laws of the territory extend over the state only as far as applicable. But the laws of the territory are in operation when the constitutional convention is formed, and remain in operation while the constitutional convention is in session. They remain in full force and operation after the convention is adjourned. Nay, still more, they remain in full force and operation so far as applicable in the whole state after the state government has been formed, and until the state Legislature changes the same. This is a conclusive answer to some of the questions contended for." From a casual reading of the clause of the enabling act referred to, and the language of Mr. Justice Pancoast in deciding the case below, the mind might readily assent to the views above expressed by him; but having started from a false premise—that is, from a misconception of the meaning of the statute quoted, and possibly being inclined to the theory adopted in declaring the law—an erroneous conclusion was reached, as I am sure must be conceded upon full consideration of all of the section of the enabling act from which the clause quoted was taken. However, before proceeding to further inquiry regarding this section, and without elaborating thereon, I wish to refer to the language used by the trial court, and must insist that the courts cannot supervise or review the acts of the convention which pertain to necessity or policy so long as it does not exceed its

power, and even then the courts will only grant relief in certain circumstances. Congress has authorized the convention to prepare a Constitution, and it is not for the courts to say that there is no necessity for dividing counties, or that no better government can be formed thereby, or that no interest will be better protected. Within the powers conferred or implied, the convention may submit to the people its own ideas without let or hindrance.

The language used in section 13 of the enabling act to the effect that the "law in force in the territory of Oklahoma, as far as applicable, shall extend over and apply to said state until changed by the Legislature thereof," has no reference to the general laws of Oklahoma as they exist at the present time, or as they shall exist after statehood is effected. That part of the enabling act which continues in force the general laws of Oklahoma after the organization of the state is the latter part of section 21, which I have already considered, and expressly says that the laws of Oklahoma shall be in force through the state, except as modified or changed by the enabling act or the Constitution of the state. The language used in this section is positive, and from its provisions the courts of the state can determine and declare what the law is. Not so with section 13. The language of this section is as follows: "And that the laws in force in the territory of Oklahoma, as far as applicable, shall extend over and apply to said state until changed by the Legislature thereof." The laws of Oklahoma, as far as applicable, shall extend over and apply to the state. Who shall determine what laws are applicable to the state? If this clause of section 13 is given the interpretation placed upon it by the trial court, and as contended for by counsel for appellee, then it is in conflict with section 21, which says that the laws of Oklahoma shall be in force throughout the state, except as modified or changed by the enabling act or the Constitution of the state. Such an interpretation would reflect upon the intelligence of Congress, and attribute to both branches of that body a carelessness in the use of language which I am not willing to concede. It is impossible to cut out a subordinate clause of a single sentence, disconnect it not only from the sentence of which it forms a part, but from the entire subject in relation to which it was used, and determine exactly what the speaker or writer had in mind, and the meaning intended to be conveyed. Therefore, in construing this language relied upon as prohibiting this constitutional convention from doing any act which may conflict with existing law, I insist that it be read in connection with the whole of section 13. When so read, its meaning is incapable of misunderstanding.

Section 13 deals with one subject, and

with one subject alone. It divides the state of Oklahoma into two judicial districts, designating the Indian Territory as the Eastern district, and Oklahoma as the Western. It provides the places where the circuit and district courts shall be held in these respective districts. It attaches these districts to the Eighth judicial circuit. It provides for the appointment of clerks of courts, and other court officers, and defines their respective duties. It declares that the Circuit and District Courts for each of said districts, and the judges thereof, respectively, shall possess the same power and jurisdiction, and perform the same duties required to be performed by the other Circuit and District Courts and judges of the United States, and shall be governed by the same laws and regulations; that the marshal, district attorney, clerk of each of the Circuit and District Courts of said districts, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powers and perform the duties lawfully required to be performed by similar officers in other districts of the United States, and shall, for the services they may perform, receive the fees and compensation now allowed by law to officers performing similar services for the United States in other districts of the United States; and then follows the clause relied upon by the appellee: "and that the laws in force in the territory of Oklahoma, as far as applicable, shall extend over and apply to said state until changed by the Legislature thereof." Congress, when it used the language just quoted, was dealing with the courts of the United States. It had just defined their jurisdiction and provided for all of those other officers necessary to the administration of those courts, and by this clause a system of procedure was adopted for the government of the United States Circuit and District Courts, until the present procedure of Oklahoma should be changed by the Legislature of the state. Congress had reason to believe that the general laws of Oklahoma would be changed by the Constitution of the state, and it was familiar with the enabling act, which it was then considering, and of which these provisions are a part. The enabling act did not (and Congress in the light of all precedents could hardly anticipate that the constitutional convention would) deal with mere matters of procedure in the courts. However, the unexpected occurred, at least in one instance. But the fact that the convention changed the generally accepted procedure in indirect contempt cases in no way changes my mind as to what Congress anticipated, meant, and intended by this latter part of section 13. The United States, having no uniform procedure for its courts, has deemed it expedient to put in force in the courts of the United States the procedure of the respective states in which such courts are located; and, to comply with this usual

custom, the laws of Oklahoma, as far as applicable, are extended over and made to apply to the state.

Section 914 of the Revised Statutes of the United States (2d Ed. 1878) [U. S. Comp. St. 1901, p. 684], provides: "The practice, pleading, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform as near as may be to the practice, pleading and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding." I also quote the following sections from the United States statutes, referred to above:

"Sec. 915. In common law causes in the Circuit and District Courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such Circuit and District Courts may, from time to time, by general rules, adopt such state laws as may be enforced in the states where they are held in relation to attachments and other process: Provided, that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the parties seeking such attachment or other remedy.

"Sec. 916. The party recovering a judgment in any common-law cause in any Circuit or District Court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such Circuit or District Courts; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be enforced in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

"Sec. 856. The fees of district attorneys, clerks, marshals, and commissioners, in cases where the United States are liable to pay the same shall be paid on settling their accounts at the treasury.

"Sec. 857. The fees and compensation of the officers and persons hereinbefore mentioned, except those which are directed to be paid out of the treasury, shall be recovered in like manner as the fees of the officers of the states respectively for like services are recovered."

From these and other sections of the United States statutes, and the connection in which the language under consideration was used, it is clear that Congress was dealing with the laws of Oklahoma in section 13 of the enabling act only in so far as they might furnish a rule of procedure or be binding

upon the courts of the United States located within the state of Oklahoma. And it is for the courts of the United States to say how far these laws are applicable in matters pertaining to persons and property which may come before them. Section 13, like the Constitution of the state, has no life and force until the President issues his proclamation; there being no Circuit or District Courts of the United States established within the purview of the act in either of these territories, and doubtless will not be until we are granted statehood. I have considered that part of section 21 of the enabling act which refers to the Osage Indian Reservation, and requires that it constitute a separate county. The language used in reference to this matter, while a limitation on the convention, in that it prevented it from making more than one county out of that reservation, not only recognizes the right of the convention to deal with the subject of counties, but in this particular instance required it to do so.

Being of the opinion that the convention has the right to divide the proposed state into counties, we are confronted with the question of the election of county officers to administer the affairs of such counties upon the admission of the state into the Union. The right to do so at the election at which the Constitution is to be voted upon is vigorously asserted on the one side, and strenuously denied on the other. In this, as in the other questions involved in the case, no useful purpose can be subserved by long quotations from other decisions, which in the very nature of things can have but little bearing upon the interpretation of the enabling act. As will be seen from investigation, different courses have been pursued by different states, under practically the same conditions. I have examined the decisions cited by counsel on the respective sides and believe I understand what those courts have decided, as well as the contention of the attorneys; but, with due respect to all concerned, I am compelled under the law to approve that theory or interpretation of these laws which appeals to my own reason, and reject those which my conception of the application of legal principles suggest that I exclude. Therefore, believing that a careful study of the enabling act itself will be most likely to lead to a correct understanding of its provision, I turn to it and find therein sufficient to inspire confidence in the conclusion that county officers may be elected at this first election. In section four of the enabling act it is provided: "That in case a Constitution and state government shall be formed," etc., "the convention shall provide by ordinance for submitting it to the people." Then section 6, after dividing the state into congressional districts, ends with the paragraph: "And the said representatives, together with the Governor and other officers provided for in said Constitution, shall be elected on the

same day of the election for the ratification or rejection of the Constitution; and until said officers are elected and qualified under the provisions of such Constitution and the said state is admitted into the Union, the territorial officers of Oklahoma Territory shall continue to discharge the duties of their respective offices in said territory." I cannot conceive of language that would more clearly express authority to elect county officers, if the Constitution provides for county officers. Is there anything in the enabling act that limits the Constitution as to the kind, character, number, or dignity of the officers which it may provide for in the Constitution, except as to Governor, Secretary of State, and members of the Legislature? Not being limited by the enabling act, the convention, in forming a state government, not only has the right, but it was its duty, to provide in the Constitution for state officers, county officers (for county organization has come to be regarded as necessary in administering the affairs of a state), and such other officers as would be required for the convenience of the public and the administration of the law. The Constitution having provided for specific officers, Congress has plainly said, in the section referred to, that "the Governor and other officers provided for in the Constitution shall be elected on the same day of the election for the ratification or rejection of the Constitution."

Turning to sections 1 and 2 of article 17 of the proposed Constitution, I find the following provisions:

"Section 1. Each county in this state, now or hereafter organized, shall be a body politic and corporate.

"Sec. 2. There are hereby created, subject to change by the Legislature, in and for each organized county of this state, the offices of judge of the county court, county attorney, clerk of the district court, county clerk, sheriff, county treasurer, register of deeds, county surveyor, superintendent of public instruction, three county commissioners, and such municipal township officers as are now provided for under the laws of the territory of Oklahoma, except as in this Constitution provided."

These officers are provided in the Constitution, and Congress has commanded that they "shall be elected on the same day of the election for the ratification or rejection of the Constitution"; and, if the people failed to elect all of the officers provided for in the Constitution, they would, to the extent of such omission, fail to comply with the act of Congress.

But it is said that the latter part of this same section authorized the territorial officers to continue in office in the state until their successors are elected and qualified under the state laws, and that the language used amounts to a prohibition of election for such officers when the Constitution is adopted.

This conception is not only erroneous, but no reasonable ground exists for such an interpretation. Congress did not intend to impose the officers selected, either by appointment or election under the laws of the United States or under its supervision, upon the people of the state, who, after the admission of the state, would have a right to make their own selection. It not only did not intend to do so, but it probably would not have the power to do so. When Oklahoma becomes a state (not after the first election after the adoption of the Constitution, but from the very instant the President issues his proclamation), it has the undisturbed right to administer its own internal affairs, and dictate its own officers. Congress has clearly recognized these rights of the future state; but it is necessary to read the entire paragraph together: "And said representatives, together with the Governor and other officers provided for in said Constitution, shall be elected on the same day of the election for the ratification or rejection of the Constitution; and until said officers are elected and qualified under the provisions of such Constitution, and the said state is admitted into the Union, the territorial officers of Oklahoma Territory shall continue to discharge the duties of their respective offices in said territory." Now let us consider this language for a moment: First, the officers provided for in the Constitution must be elected on the same day of the election for the ratification or rejection of the Constitution; second, until those state officers are elected and qualified, and the state admitted into the Union, the territorial officers shall continue to discharge the duties of their respective offices in said territory. Congress, by the provisions of the section under consideration, contemplated a complete surrender and turning over to the state and its officers every thing to which it or they would be entitled as a state fully admitted and standing on the same footing as the other states. These observations, however, I perceive will not satisfy the appellee or his counsel as one other section of the enabling act which pertains to state officers has not been considered. I refer to section 21, which, so far as affects this subject, provides as follows: "Sec. 21. That the constitutional convention may by ordinance provide for the election of officers for a full state government, including members of the Legislature and five representatives to Congress, and shall constitute the Osage Indian Reservation a separate county, and provide that it shall remain a separate county until the lands in the Osage Indian Reservation are allotted in severalty and until changed by the Legislature of Oklahoma, * * * and shall provide rules and regulations and define the manner of conducting the first election for officers in said county. Such state government shall remain in abeyance until the state shall be admitted into the

Union and the election for state officers held, as provided for in this act." The section then provides for the election of Senators, etc., and then adds: "And the officers of the state government formed in pursuance of said Constitution, as provided for by said constitutional convention, shall proceed to exercise all the functions of such state officers."

There is no conflict between this section and section 6, which I have just considered. While section 6 expressly provides that all officers provided for in the Constitution shall be elected when the Constitution is voted on, it must be remembered that, while the convention can create an office by the terms of the Constitution, as said before, the Constitution has no binding force until the state is admitted into the Union. Therefore Congress conferred upon the constitutional convention the powers to provide for the election of these officers by ordinance. And an ordinance passed pursuant to the terms of this section, by the representatives of the people of the proposed state in convention duly assembled, within the limitations imposed, has from its passage, for the purposes intended, full life, force, and virtue. Mr. Jameson, in his work on Constitutional Conventions (4th Ed.) p. 98, c. 103, says: "Besides schedules, there are appended to many Constitutions acts adopted by Constitutions called 'ordinances.' Not all ordinances, however, are so appended, or have any direct relation to the Constitution. They are in their nature resolutions of the bodies adopting them, but taking the name 'ordinances' to distinguish them from the similar acts of legislative bodies, denominated 'resolutions,' which may be adopted by Houses severally or jointly. Within the scope of the powers of the convention, ordinances may be valid and effectual according to their terms and purpose. If they are employed to provide for temporary emergencies of the convention, and do not transcend the limits of its powers as defined or employed in the act calling it, they are valid."

The ordinance referred to is authorized by Congress, and is the act of the people of the proposed state, through their representatives, and is binding upon the people of the state; hence, the state. This ordinance is the authority for the election. But for what must the ordinance provide? The enabling act says, "for the election of officers for a full state government," and the officers necessary for a full state government are all of the officers provided for in the Constitution. The word "full" is defined as "containing or having all that can or all that should be admitted; having no empty or vacant space; filled." And this is the sense in which the word was used in section 21. There should not be left out a single officer high or low. Each and all provided for in the Constitution should be elected when the Constitu-

tion is submitted to the people. But, says the appellee, the section also provides that "said state government shall remain in abeyance until the state shall be admitted into the Union, and the election for state officers held as provided for in this act." The only election for state officers provided for in this act (the enabling act) is the election at which the Constitution shall be submitted for ratification or rejection. Therefore the language, "until the state is admitted into the Union, and the election for state officers held," must be interpreted as describing two events which are expected to happen in the future, and the one intended to occur second in point of time, first described. Any other interpretation of this language would defer the election of all state officers until after the adoption of the Constitution, which would be in direct conflict with another section of the enabling act. The fallacy of the contention that county officers are not to be elected when the Constitution is voted upon, to my mind, is so apparent that, under all of the provisions of the enabling act, it would seem that further discussion is unnecessary. First, after the assembling of the constitutional convention and complying with the preliminary requirements of the enabling act, is the duty of forming a Constitution and state government; next, the submission of the Constitution to the people for ratification or rejection, and on the same day the election of all officers provided for in the Constitution; then the action of the President approving, if it conforms to the act of Congress, and the issuing of his proclamation admitting the state into the Union; and, finally, in the language of the latter part of section 21 of the enabling act: "And the officers of the state government formed in pursuance of said Constitution, as provided by said constitutional convention, shall proceed to exercise all the functions of such state officers."

This brings us to a consideration of the powers of the constitutional convention to provide election officers to hold the elections in the new counties of Alfalfa and Major. These counties were created out of a portion of the county of Woods, and to that part of Woods county remaining was added certain townships cut off from Woodward county, and the name Woods county given to it. Both Woods county and Woodward county are organized counties in the territory of Oklahoma. In considering this feature of this case, the fact that Alfalfa and Major counties are located within Oklahoma Territory, and that they are merely creatures of the constitutional convention, and never had any legal existence prior to its convening, should be borne in mind. A majority of my Brethren, speaking through Mr. Justice HAINER, have defined their position upon this point, declaring as the law a rule which is, in my opinion, neither justified from the

necessities of the case nor supported by the enabling act or other statutes of Congress or the territory of Oklahoma. Gladly would I surrender any pride of opinion which I may have in my own personal views of the law of this branch of the controversy, if I were able to reconcile the declarations of the majority opinion with the plain and positive act of Congress; but, after full consideration, I am forced to reject them as an unwarranted approval of an unauthorized usurpation of authority which is by implication as positively prohibited by Congress as though it had so declared in express words. I fully appreciate the years of earnest effort expended by the people of Oklahoma in obtaining permission from Congress to adopt a Constitution and form a state government. Nor am I unmindful of the public insistence for an opportunity to elect their own officers and have their interests represented in Congress by agents with full power to vote. But important and sacred as are these privileges, they must be brought about pursuant to existing laws, and not in disregard thereof. I do not challenge good faith on the part of the convention or of those who drafted the ordinance in question, but, taking it as written, I consider its provisions not as a matter of choice, but as a public duty, required to be performed under the law. A majority of my Brethren have said, by their votes, that the election ordinance is within the authority conferred by the enabling act. Coming from the highest court of the territory, the decision will doubtless inspire confidence, in the members of the convention and the people generally, regarding the authority to enact the same. But with a full realization of the consequences which may follow upon the pursuance of a course in holding these elections in conflict with the provisions of the enabling act, and entertaining views in conflict with the judgment of the majority of the court, my own conception of justice compels me to at least declare those views, even though they have been rejected by my Brethren as not the law, and may be disregarded by the parties to the action.

In section 3 of the election ordinance adopted by the constitutional convention, it is provided: "In the counties of Adair, Alfalfa [then naming other counties, including Major], the local officers and authorities provided for in the ordinance, shall exercise all the functions and perform all the duties within the limits of such counties, townships and voting precincts in the same manner as is now required by the laws of the territory of Oklahoma for elections therein." In connection with section 3, we will refer briefly to certain of the other provisions found in the ordinance. Section 2 declares that the election of the officers shall be held in accordance with the election laws of the territory of Oklahoma when not in conflict with the enabling act and as supplemented by the

ordinance; that in the counties of Beaver, Caddo, Comanche, Greer, Payne, Roger Mills, and Woodward, the local authorities in said respective counties, and the voting precincts therein, shall exercise their functions and perform their duties as such election officers only within the limits of said counties as defined and described in the Constitution; that in the county of Noble the local authorities, in the exercise of their functions and the performance of their duties as election officers, shall exercise and extend the same to the limits of said county as defined by the Constitution. Section 6 provides that in each of the counties of Greer, Beaver, Woods, Woodward, and Comanche (and any other county in the proposed state similarly situated), as defined and described in the Constitution, on or before the sixth day of June, A. D. 1907, the acting board of county commissioners therein, or a majority thereof, shall subdivide such county or counties into commissioners' districts and townships, and fix election precincts, and designate polling places necessary for the purpose of the election. And then the section provides that, if the commissioners fail to comply with the provisions of the section by a date named, then William H. Murray, as president of the convention, shall appoint three qualified electors in each of such counties to divide such counties into commissioners' districts and townships, and fix election precincts, and designate polling places. Other sections provide that in the event of vacancies in certain county offices they shall be filled by appointment by the Governor; and in the event that he falls or refuses to make such appointment or appointments, they shall be made by William H. Murray, president of the convention. All of these provisions were enacted under the alleged power granted by Congress authorizing the constitutional convention to provide by ordinance for the election of officers for a full state government, and for submitting the Constitution to the people of the proposed state for ratification or rejection.

I shall not stop at this time to quote the laws of Oklahoma pertaining to elections, or the manner in which the officers of the territory, from the highest to the lowest, are appointed or elected. It is sufficient to state, as is universally known, that Oklahoma was organized as a territory in 1890. Since then it has had an election law, which, with the modifications and changes made from time to time by the territorial Legislature, is as complete and satisfactory as will be found in any state. Congress but a short time ago had occasion to examine its provisions, by reason of a contest before that body over the election of a territorial delegate. Anticipating these very elections as a necessary step in securing statehood, it is fair to assume that the members of the lower House, as well as the Senators, familiarized them-

selves with our entire law and system of elections. Its provisions having appealed to them as fair and sufficient, as a part of the enabling act it positively declared: "That the election laws of the territory of Oklahoma now in force, as far as applicable and not in conflict with this act, including the penal laws of said territory of Oklahoma relating to elections and illegal voting, are hereby extended to and put in force in said territory until the Legislature of said proposed state shall otherwise provide, and until all persons offending against said laws in the election aforesaid shall have been dealt with in the manner therein provided." This language authorizes no change or modification, by the constitutional convention, of the election laws of the territory of Oklahoma, in so far as their application, within Oklahoma Territory, is concerned. The words "as far as applicable and not inconsistent with this act" refer to the application of the election laws in the Indian Territory. Taking into consideration the plain implication of the language used, the quotation above means that the election laws of the territory of Oklahoma, now in force, shall continue in force in Oklahoma Territory until the Legislature of the proposed state shall change them, and that these same election laws of the territory of Oklahoma, as far as applicable and not inconsistent with this act (the enabling act), are hereby extended to and put in force in said Indian Territory until the Legislature of said proposed state shall otherwise provide. Congress was familiar with conditions in Oklahoma, and declared that for the purposes of these elections they should continue. Congress considered these laws applicable and fully adapted to meet the conditions. No exception was made as to the territory of Oklahoma, save in one instance, which I shall notice later. The continuing in force of these election laws of Oklahoma within this territory not only continued the laws themselves, but also continued all of the machinery and officers of every kind and character provided for in these laws of Oklahoma, except as those laws might possibly be in conflict with the enabling act. This view is so fundamental that reasoning to support it appears unnecessary. However, I find the rule very clearly stated by Chief Justice Burford in a decision by him announced in one of these election cases, wherein he presided in the trial court. *Haines v. Murray et al.*, 91 Pac. 240, and other cases, in the district court of Logan county. The Chief Justice, referring to the language above, said: "I think it cannot be seriously questioned that in adopting the (election) laws of Oklahoma that they adopted with them whatever machinery existed under that law. The law creates certain officers, election officers," etc.

The exception to which I referred a moment ago, with reference to the election laws in Oklahoma, is that part of section 21 of

the enabling act, which provides: "That the constitutional convention may by ordinance provide for the election of officers for a full state government, * * * and shall constitute the Osage Indian Reservation a separate county * * * and shall provide rules and regulations and define the manner of conducting the first election for officers in said county." It will be observed from this language that even in this Indian reservation Congress, having declared that the election laws of Oklahoma shall continue in force therein, limited the constitutional convention in providing "rules and regulations and defining the manner of conducting the first election" for officers. As to what Congress meant by the language "rules and regulations and define the manner of conducting the first election," I shall not here express any opinion; but this language used with reference to this unorganized reservation must be limited to it alone, and neither it nor any other language used in the enabling act can be construed to mean a grant of authority for removing public officers elected by the people, or appointed by the proper authority. I have said heretofore that the constitutional convention has the right and power to divide the future state into counties, even though such division may not conform to the county lines as now established in the territory of Oklahoma. And that it also has the right to elect a full complement of officers for each county at the election for the ratification or rejection of the Constitution, and I have also tried to make it plain that these proposed counties can have no existence, in law, and cannot be recognized as political subdivisions of the state, having a present existence so as to oust the officers duly elected or appointed, under the laws of the territory of Oklahoma, from the discharge of any duty imposed by those laws; for not only are the election laws of Oklahoma continued in force until changed by the Legislature of the future state, but the enabling act itself in positive terms provides: "That until said state is admitted into the Union, the territorial officers of Oklahoma Territory shall continue to discharge the duties of their respective offices in said territory." These counties proposed by the constitutional convention, whose boundaries are fixed by the Constitution to be submitted to the people, are simply counties in futuro, and the officers provided for in the Constitution can exercise no official duty until after the admission of the state. The election at which the Constitution is to be submitted for ratification or rejection, and at which there shall be elected officers for a full state government, is to be, under the terms of the enabling act, conducted in the usual way under the laws of the territory of Oklahoma; and the constitutional convention cannot confer upon these election officers any powers which they do not now enjoy, or take from them any they now possess. Nor can the convention

limit the exercise of the powers of these county officers within a proposed county composed of less territory than that for which they were elected, or extend their jurisdiction beyond the lines of the county as now organized, in which their duties under the territorial laws are to be discharged, and for which they were chosen.

It is argued, and with some force, that the election laws of the territory of Oklahoma, as they now exist, are not exactly applicable to the conditions in the new counties, as they are proposed to be organized in the state. This may be. And it is possible that the convention, as a necessary incident to electing the officers in these new counties, may have to provide by ordinance to meet the conditions there existing; but, whatever ordinance is passed by the convention, it must be in aid of the law as it now exists, and not in conflict therewith or destructive thereof. Nor has the convention the power to take away from the present election officers in Oklahoma the right to hold these elections, and confer the power to perform their duties on others. The fact that the forming of new counties may present some embarrassment in the holding of the election is a matter of regret, but it is no excuse or justification for ignoring the law. Whatever difficulties are presented by reason of the forming of these new counties are the result of the acts of the convention itself, and for which Congress is in no way responsible. The convention should seek for plans under which it may submit its propositions to the voters under the laws as they exist, and not to make the laws conform to the conditions which it is sought to bring about as a result of the election. Congress authorized the forming of a Constitution. It not only authorized the election of the state officers, but required them to be elected at the election at which the Constitution is submitted to the people. It, within certain limitations, has left the convention free to make the kind of a Constitution it might desire, and to create as few or as many offices as it deemed expedient, but has in effect named the officers of the territory as the agents to discharge this important duty, and made the laws of the territory the rule of conduct.

The election officers of Woods county, as now organized under the territorial laws, should conduct the election within that county, in that part composing Alfalfa county, and in that part composing Major county, as well as in that portion which in the future state will constitute a part of Woods county. Their jurisdiction is in the whole of Woods county as now organized, and no more. These men are still in office. They have not been removed. Nor has their county yet been changed. Should statehood fail, the county organization would continue under the territorial government as before. By virtue of what right can the jurisdiction of these officers, in such a contingency, be temporarily

suspended, except as to a small part of the county, and then restored if the Constitution should not carry? And again, why should the convention confine the jurisdiction of these county election officers to that part of Woods county, Okla., that will form a part of Woods county in the state, without regard to whether the officer lives in that part that will be Alfalfa, Major, or Woods? Counsel should not forget that these election officers are holding these elections under the provisions of the enabling act as officers of the territory of Oklahoma, for the people of this territory, bound by the oaths prescribed by its laws. And if the convention can remove the county election officers from a part of a county as now organized, it can remove them from exercising any act in connection with the holding of the election in any part of the county for which they have been elected, and extend these same methods to every county in the state, and even take away from the Governor and the Secretary of the territory the power to perform the duties enjoined upon them. The Supreme Court of Pennsylvania and other states have held that this cannot be done. The constitutional convention of Pennsylvania, assembled by virtue of authority of the Legislature, by ordinance appointed five commissioners of election for the city of Philadelphia. An election law was then in force and applicable to that city. The Supreme Court of that state, in positive language, held, in the case of *Wells v. Bain*, 75 Pa. 39, 15 Am. Rep. 563, that the convention could not prevent the regular election officers from holding such election. The court said: "Now we come to the sixth section [Act 1872 (P. L. 55)], which begins a different subject: 'The election to decide for or against the adoption of the new Constitution, or specific amendments, shall be conducted as the general elections of this commonwealth are now by law conducted.' Thus the Legislature said to the convention in these three sections: 'You shall have power to propose your work in three forms. You shall have power to determine the time and the manner in which these propositions shall be submitted. But the election by the citizens shall be conducted as the law itself directs as to general elections.' The sixth section, as to how the election on the propositions submitted shall be conducted is mandatory, and is so for the best of reasons—It is the only legally authorized means of taking the sense of the people upon adoption of the amendments which can bind the whole people. In this way only can a majority of voters, who are not a majority of the people, bind them as the body politic or state. The Legislature intended that the election should be conducted by known officers legally elected, and should be governed by a known system of laws with which the people are familiar, and thereby that they should both know and respect the authority under which the election should be held. No implication can

be drawn from the word 'manner' to contradict the plain and positive enactment that the election shall be conducted according to the laws governing general elections. It would violate the plainest rules for the interpretation of statutes to make the merest inference stand higher than an intent expressed in distinct language. It is therefore clear to our minds that the ordinance relating to the election in the city of Philadelphia is flatly opposed to the act of 1872, and is therefore illegal and void. The prospective validation in the thirty-second section of the schedule only betrays the doubt the convention itself had of the validity of the ordinance in this respect."

Counsel, by way of argument, have referred to the conditions in the Indian Territory, and the necessity of recognizing the counties, as fixed and described in the Constitution, for the purpose of holding the elections there, and by reason of that condition, and the conditions brought about on the Oklahoma side on account of the making of new counties, the right to recognize all counties as described in the Constitution is claimed. The counties in the Indian Territory may be recognized, if at all, for the purpose of these elections merely. They are not yet counties, but districts for the holding of the elections. And even as to these counties I find that the election ordinance neither creates them counties nor districts for the purposes of the election, but simply refers to them as the counties of —, naming them. Indian Territory, however, is not situated like Oklahoma. The language of the enabling act is "the election laws now in force." That is, as they then existed, and not as they may be changed by the Legislature of the territory, or as the counties may be cut up by the constitutional convention, but as they exist now, with all of the legal officers provided in the statute, or their successor elected thereunder. The election laws "now in force" are to be used by the people of the territory to hold a territorial election to determine if they will adopt a Constitution which has been prepared by a constitutional convention for a state to be composed of both Oklahoma and Indian Territory, and Congress has said that these same laws "now in force," as far as applicable, shall be extended to and put in force in the Indian Territory. This provision, for the purposes of elections, subjected the Indian Territory to the laws of Oklahoma, with the advantages and difficulties its provisions might grant or impose. And Congress recognizes these elections as elections under existing government, for (has) it provided that the penal laws of the territory of Oklahoma relating to elections and illegal voting, shall be put in force in the Indian Territory, and that the United States courts of the Indian Territory shall have the same power to enforce the laws so adopted? No, but the

laws of Oklahoma, extended to and put in force in the Indian Territory, as have the courts of the territory of Oklahoma. If the laws are violated in holding these elections, is it a crime against the laws of the territory of Oklahoma, or the future state? To the lawyer the question answers itself. Such crimes must be prosecuted under the election laws of the territory of Oklahoma as they now exist, and the state courts. If they acquire jurisdiction of such crimes at all, it will be by virtue of succession under the enabling act, as the laws of the future state cannot be broken before they are enacted and put in force. The convention cannot legislate regarding the election laws of Oklahoma any more than it can regarding criminal procedure for its courts. It certainly cannot divide the counties of Oklahoma, giving to the proposed counties present existence for any purpose, which right at least a part of my Brethren who have concurred in the majority opinion denied the Legislature of the territory. The convention cannot justify its conduct in seeking to interfere with the present officers, even on the ground of necessity, for it brought about whatever inharmony exists.

To justify the policy sought to be followed in Woods county regarding the county election officers, in excluding them from exercising their jurisdiction in that portion of the county from which Alfalfa and Major counties are proposed to be created for the future state, reason and justice must give way to desire; and, to hold the ordinance as valid, in my opinion the law of the nation must be subordinated to the will of a temporary agency created by Congress as a convenience in transforming a territorial to a state government. The convention has not only sought to limit the powers of these officers, but by the language used have imputed lack of confidence in their fidelity in the discharge of a future duty, by declaring that, if they fail or refuse to perform any of the acts enjoined upon them by law, others should be appointed in their place. In certain instances they are to be made by the Governor, and, if he should fail or refuse to make these appointments, then they are to be made by a member of their own body. The convention has no more power to appoint another to perform an official duty enjoined upon the Governor by the territorial laws regarding elections, even though he refuse to discharge it, than they have to authorize another to approve the Constitution and issue the proclamation should the President fail or refuse to do so. These different officers belong to different political parties, and are representatives of our best citizenship, and a residence of 16 years in the territory of Oklahoma has not brought to my attention an instance of an election officer refusing to perform any duty enjoined upon him as such, except when the duty to per-

form the act was uncertain, or in controversy, and he declined in order that a judicial determination might be had upon the conditions presented. Wherever any officer in Oklahoma fails to do his duty, he may be removed from office, or compelled to perform it. But this power of removal, or power to compel performance of official acts, is independent of the convention, and, not being the source of such power, it cannot delegate the same to one of its members, or any one else.

And, again, it is a well-known fact that the ordinance as it now exists is not the ordinance as originally passed by the convention. It reassembled and enacted a new ordinance. By upholding the present ordinance, this court has necessarily recognized that the convention had a right to do so. This right having been approved by this court, if the convention desires, may it not reassemble again and divide even all of the other counties of Oklahoma Territory, put into office those of its own selection, and remove those holding under the existing government, even though they have done no wrong and are willing to continue to discharge their official duties with faithfulness and integrity? I was deeply impressed by counsel (as well as the briefs) in the presentation of the theory that the limitations in the enabling act upon the powers of the future state, once the state is admitted, will not be binding upon it, even though the convention has declared by ordinance irrevocable to accept the terms of this act of Congress. Still I do not perceive that this doctrine has any bearing under the present conditions, in the adoption of a Constitution, except that whatever terms Congress has imposed I assume a declaration, at least, of intention to comply with them will be required. But whatever may be the intention regarding the policy of the future state, those things which are required as conditions precedent to admission, and the means by which they are to be effected, should conform substantially to the requirements of the enabling act.

The courts of the territory of Oklahoma cannot have anything to say about a Constitution of the state, or as to what it shall contain, as its provisions affect the state government, and do not apply to territorial conditions. It will create its own courts to interpret its own laws. But as Congress (having the power to admit states) has prescribed the procedure to be followed in bringing about the change from a territory to statehood, and all of the laws applicable thereto are either laws of the United States or of the territory of Oklahoma, the courts of the territory have the jurisdiction to determine if any of the persons or officers are exceeding their lawful powers, or interfering with the rights of others. The convention itself is a creature of law, whose powers are fixed by law, and, while the convention may make its own Constitution, the

courts have the power to require those whose duty it is to submit it to the people, and to conduct the election of the first officers for the state, to perform these duties as the law directs. And although it has been argued that no one can interfere in these matters except the President, and that he can only determine if the Constitution and state government are republican in form, the enabling act itself imposes upon that high officer the further duty of determining as to whether or not the provisions of the enabling act have been complied with; and one of the requirements of the act of Congress is that the election laws of Oklahoma, now in force, be respected and its provisions carried out in voting upon the Constitution and in electing the officers for the state, through the election officers named in such election law, acting unmolested within their respective jurisdictions. And when these provisions are violated in a way that invades the rights of others, either private or official, and under circumstances which may even jeopardize the approval of the Constitution itself, the courts should, on proper application, interfere. This authority is vested in the courts for the safety and protection of the rights of the citizens, and the protection of the public officers in the discharge of the duties enjoined upon them, whether those injuries have been inflicted or are threatened in the future, while the President, under the authority conferred, must wait until the elections have been held and the Constitution finally submitted to him. The laws should be so construed as to protect existing rights, and deny the advantage of present or threatened wrongs, for justice cannot always be subserved by denying the advantages of a wrongful act.

The plaintiff in this case, as commissioner of Woods county, under the law, has important duties to perform in connection with these elections. He has shown by his bill that the defendants threaten to and will interfere with him in the discharge of these duties. Under the record as I view the law, there being no controversy about the intention to do the acts complained of, I believe the plaintiff is entitled to an order enjoining the defendants (plaintiffs in error) from in any way interfering with him as a public officer in the discharge of those duties imposed upon him under the election laws of Oklahoma. I shall not prolong my discussion of this case by reviewing authorities showing that the court will enjoin an unlawful interference with a public officer in the discharge of the duties of his office. The appellee's right to relief, to the extent indicated, is clear, and the court should be quick to prevent the threatened wrong. Every one will concede that insubstantial irregularities in these elections should be overlooked. But the extreme advantages that might be taken under the decision of the court are so great that

the present election officers may be removed at will, and the positive act of Congress, continuing in force the laws of Oklahoma at the time of the passage of the enabling act, with impunity ignored. It is not sufficient to say that it will not be presumed that a public officer will abuse the authority conferred. The mere fact that he can, under powers granted, lawfully destroy the rights of others, should he choose to do so, and no agency can interfere, is sufficient cause for alarm. The ordinance of the convention can no more restrict the jurisdiction of appellee in this case, in the exercise of his duties in the county of Woods, as now organized, to a small portion thereof, than it can affect the jurisdiction of the judge of the district court and compel him to recognize the counties of Alfalfa and Major in the administration of his office. The office of the judge was created by Congress, and Congress, by declaring that the election laws in force should control these elections, made the jurisdiction of the latter, in the exercise of his duties regarding these elections, as sacred as the former in administering the laws.

My examination of the election ordinance has convinced me that the convention did not proceed upon the theory that any of the election officers, even in the counties that have not been divided, would act in these elections by virtue of their present offices, but that the ordinance named them as a matter of convenience, reserving the right to remove should they fail or refuse to act. No lawyer representing the appellants has asserted that the convention has such power. If the convention proceeded upon the assumption that it had the power to appoint all of these officers, then the greater the reason for the interpretation of the law for which I contend. I do not contend that the courts have the authority to enjoin the convention from the performance of any act with reference to submitting to the people propositions separately, or as a part of the Constitution as a whole, or from passing any ordinance; but whenever the officers of the convention, or others acting under authority claimed to have been conferred by such body, interfere, or threaten to interfere, with the officers of the territory of Oklahoma in the discharge of official duties enjoined upon them by the enabling act in relation to the submission of such Constitution to the people, that is in relation to the election, for its adoption or rejection, and the election of the first officers for the state, which are to be selected at the same election, the courts may restrain said wrongful acts and protect the territorial officers in the undisturbed discharge of said duty.

The defense that the interference complained of is too remote is not urged, but, on the contrary, the parties to the action have requested a determination of the rights of

the respective parties, under the facts stated in the petition, and I have considered the case with a view of settling the law applicable to the facts pleaded. The parties to the case have presented it as though the threatened interference complained of were imminent, and I have given my views of the law accordingly. I have refrained from expressing any opinion as to the course authorized to be pursued by the convention regarding the Osage reservation. That reservation is not directly involved in this case. Nor have I attempted to discuss the powers of the convention pertaining to the Indian Territory. In that part of the proposed state are courts clothed with powers equal with those possessed by this court, and propriety forbids an unnecessary declaration of the law upon a state of facts which is not before this court in this case, and in which, if any controversy should arise at all, it would most likely arise in the jurisdiction of the courts of the Indian Territory. My reference to these two sections of the proposed state have been such, and such only, as appeared to me necessary to make clear my position in the case before us. The right of franchise is a most sacred right, and the law is universal that only those duly authorized can conduct elections. If my view of the law is correct, the most serious complications might arise by reason of the course that is being pursued, and the results of the election changed.

The court, in the present case, has not been slow to assert its own power and jurisdiction, and I believe that the rights of the election officers of the organized counties of Oklahoma are equally as sacred, that they are threatened with an unlawful usurpation of their powers, and that the court should afford its protection. But notwithstanding my own personal views as to the rights of the appellee, as herein expressed, a majority of my Brethren have denied the plaintiff any relief. Their decision has become the rule and guide of conduct, and with a full realization of the wrongs that might be committed under the powers thus approved, but hoping that only good may flow from a wise and just exercise of the same, I accept it as the law, charged with the duty of respecting and enforcing it, as the only safety of the state and the nation is in full, free, and complete submission to the law when by the proper authorities so declared.

IRWIN, J. (dissenting). As I am unable to concur in the views expressed by a majority of this court, I think it is proper that I give some of my reasons for differing from the views expressed by my associates. The decision of this case turns entirely upon two legal propositions: First, did the constitutional convention have power and authority to divide Woods county? Second, is

the election ordinance provided by that convention a valid and legal exercise of authority, and is the same binding upon the people of the two territories?

In determining the first of these propositions, it should be constantly borne in mind that there are recognized by our law two distinct classes of constitutional conventions: The one, known and designated as revolutionary—that is, where the people meet in their sovereign capacity, and by themselves, or their representatives, form a Constitution and government, where no government at the time existed. In such cases, the only limitation of the authority of such a convention would be those principles of natural justice and the rules of civil society which the wisdom of the past had dictated, and the general customs of mankind so long established as to become recognized as legal precedents. The other class is a constitutional convention which is called into being by a legislative enactment, by which enactment its authority is granted, and the limitations upon its acts fixed. Of such a class is the constitutional convention under consideration in this case. It owes its origin to the passage of the enabling act. It derives its authority solely from the act of Congress defining its powers and providing for its creation. In determining the duties imposed and the powers granted to this convention, we must look to the precedents and the judicial decisions applicable to conventions of this class, rather than to that of the revolutionary class; the latter not being applicable to this class of conventions, and consequently of but very little assistance to us. This convention owes its existence to the act of Congress known as the enabling act. This is its charter of authority, to which we must look to determine whether the convention has certain powers and authority. The legislative intent of Congress is clearly set forth in the enabling act, and by that, the action of the constitutional convention must be measured and circumscribed. The people of these two territories were not meeting in their sovereign capacity for the purpose of forming a state government where no government had heretofore existed, or to adopt a Constitution without the restrictions or limitations of any superior or higher form of government, but rather they were petitioning a government already established for the privilege of becoming a part of that government already organized. The terms and conditions of our admission as a part of that government were not to be dictated by the people of these two territories, but rather by the representatives in Congress of the people of the United States. The terms and conditions of our admission were clearly set forth by Congress in the enabling act. The constitutional convention being the representative agents of the people of the territory of Oklahoma when in convention assembled, were the creation of

the enabling act, and whenever any act of the constitutional convention is called in question, or their authority doubted, we must look to the enabling act, and examine its terms and provisions to determine the question of authority or power. In order to clearly understand the scope of the legislative will, it is necessary to constantly bear in mind the object that Congress had in view, and the condition with which the legislative enactment was to deal. The express provision of this enabling act was that the constitutional convention was authorized to form a Constitution and state government for the new state. If the authority to divide Woods county is given in express terms anywhere in this enabling act, it must be in this provision: "To form a Constitution and state government for the new state." Unless it can be found in this provision, then it does not exist in express terms, and we must look for it among the necessarily incidental powers conferred upon the constitutional convention by the enabling act, for in these two classes of power is expressed all the power and authority granted by Congress to that convention. Any authority exercised by this convention must be found either in the express terms of the enabling act, or must be found in the necessity for their existence in order to carry out the power expressly given by Congress to the constitutional convention. The constitutional convention was called upon by Congress to perform a certain, specific, express mission. That was to change the territorial form of government, which had heretofore existed in these two territories, and form such government into a state government. They were called upon to change the form of government, not to change the map, unless such a change in the map became a necessary incident to the formation of a state government from these two territorial governments. At the time of the passage of this enabling act, county, township, school, municipal, city, and village governments existed in a large portion of these two territories, had been heretofore created by an act of Congress, and had been recognized by Congress since the time of the adoption of the territorial form of government. As a necessary incident to such organized government, there were certain vested duties, rights, and obligations attached. We do not believe it was the purpose of Congress to unnecessarily overthrow this government and annul and set aside these vested rights, but rather it was the intention of Congress that the change of government, if possible, should be accomplished without affecting or disturbing these vested rights. Any act of the constitutional convention which can be classed as purely a legislative act must find its authority in the enabling act. At best, the constitutional convention could only be classed as a very limited legislative body, limited within the prescribed

boundaries provided by the enabling act. I hardly think it can be seriously contended that the language of the enabling act, "to form a Constitution and state government for the new state," would be broad enough to authorize an arbitrary wiping out and obliterating of county lines, and the cutting up and dividing of counties already established by the acts of Congress. "To form a Constitution and state government" would only mean to do such acts as were necessary to accomplish this purpose; that is, they would be delegated authority to do such acts as were necessary in order to form a Constitution and state government. Now, unless it can be said that a state government could not be formed without the dividing of Woods county by the constitutional convention, then this provision, "to form a Constitution and state government," would not confer upon the constitutional convention power to arbitrarily divide Woods county. It would hardly seem reasonable that the Congress of the United States would vest a subject of such vital importance to the particular localities affected, in the hands of a constitutional convention which was chosen for a particular purpose, and for a limited time—a body from whose action there was no appeal, and for an abuse of the discretion there was no remedy, a body over which neither the President, Governor, nor anybody else had any particular vetoing power as to their action in dividing counties—and to allow that body to arbitrarily divide such counties as in its individual judgment might be deemed advisable, to submit that question to a vote of people who, being remote from, were not intimately or particularly interested in the subject, and put it beyond the power of the vitally interested persons to help themselves, when such an action was not absolutely necessary for the purpose of establishing or forming a state government. It can be readily seen that in the division of Woods county the people most vitally interested would be the people of Woods county. And, note the manner of submitting this question of division to the people. It is submitted, as is proposed, at the same time the Constitution of the state is submitted, and submitted to a vote of all the people, and, even if every man, woman, and child in Woods county should register their vote against it, it would probably make no difference in the result. Thus all the interests of the people of Woods county, all their vested rights, duties, and obligations as a county, are set aside, changed, and disposed of without their consent, and without any power to help themselves. This, it seems to me, was unnecessary, and was foreign to the purpose of Congress.

In this connection, it might be argued that it was expedient to divide Woods county, that the county was too large, and that the best interests of the people of the new state

would be served by making two or three counties out of Woods; but it seems to me it can hardly be said that it is necessary in order to form a state government. It could hardly be said that a government could not be formed leaving Woods county as it was established by act of Congress. The most that can be said is that it would be more expedient, in forming a state government, to divide Woods county. But, it would seem that, even with this view of the case, it would seem reasonable for Congress to leave that to the Legislature of the new state when organized, under the restrictions, limitations, and checks provided by law, and that the question of the division of Woods county would more properly and justly be submitted by the Legislature of the state of Oklahoma, to the citizens, residents, and taxpayers of Woods county, than to make the rights and interests of Woods county depend upon the vote of the people of the Eastern part of the Indian Territory, a people who have no intimate personal interest in that question. Another very strong reason why I think that Congress did not intend that the constitutional convention should unnecessarily disturb county boundaries, or change the lines of counties already established, is that I find, in section 21 of the enabling act, that Congress expressly provides that the Osage Indian Reservation shall constitute a separate county, and provides that the constitutional convention shall so provide by ordinance. Section 21 provides that: "The constitutional convention may by ordinance provide * * * and shall constitute the Osage Indian Reservation a separate county, and provide that it shall remain a separate county until the lands in the Osage Indian Reservation are allotted in severalty, and until changed by the Legislature of the state of Oklahoma." Now, if the contention of the majority of this court is sound, and it was the express intention of the Congress of the United States that the constitutional convention should have power to divide and organize counties at will, to establish county lines and county boundaries wherever they saw fit, and that this authority was given in express terms by the language used in the enabling act, "to form a Constitution and state government for the new state," then why should Congress, in this section 21 of the same act, make express provision that the constitutional convention should have power to make and organize the Osage Indian Reservation into a separate county? It does not seem that Congress would do a useless thing or use useless language, or language that did not mean anything. What possible meaning could the language used in section 21 of the enabling act, authorizing the constitutional convention to make the Osage Indian Reservation a separate county, have, providing the enabling act in the language, "to form a Constitution and state government for the new state"

granted and conferred the power to the convention to change county lines and county boundaries whenever they saw fit? If they had that general power, would it not extend with equal force to the Osage Indian reservation as well as to any other part of Oklahoma? I cannot conceive any reasonable purpose that the Congress of the United States would have for using the language used in section 21 of the enabling act, providing the granting of power to change and locate county lines is as contended for by the majority of this court; but rather I think it argues that the Congress of the United States never intended that county lines should be changed, county boundaries established, or counties organized, except where such establishing and organization of counties and changing the county lines were necessary in order to form a state government for the new state. It is not necessary that in this opinion I express any judgment as to whether in the unorganized part of the Indian Territory the constitutional convention had or had not power to organize the counties. For the purpose of this opinion, it might be conceded that they had that power, because the organization of counties out of unorganized territory was necessary in order to make a complete state government, but it certainly seems that, where the county lines are already established, the county in existence, the county officers in the discharge of their duty, and all of the machinery of the county government in force and in active operation, no absolute necessity can exist for the changing of these county lines, or the cutting up of these counties into separate counties in order to form a state government, and unless it can be said that a state Constitution could not be formed, and a state government could not be organized, without the dividing of Woods county, then there is no express authority contained in the enabling act authorizing such action on the part of the constitutional convention.

It might be contended that the provisions of section 21 of the enabling act, authorizing the convention to constitute the Osage Indian reservation one county, and preserving the same as such until all lands have been allotted, and until changed by the Legislature, is recognizing the right of the convention to organize counties; but it should at the same time be remembered that the Osage Indian reservation is unorganized territory, and is attached to another county for judicial purposes. It has no existence as a county, and depends for its power to discharge its functions as a county upon its being attached to another county. No rights are vested, and no obligations are incurred by reason of the establishment of county boundaries therein, and it might reasonably be argued that as a county is a necessary component part of a state, and as no county here exist-

ed, it was necessary to form a county in order to form a state government; but this argument would not apply to Woods county, where the county was already formed and in existence. If the power to divide Woods county is given by express terms in the enabling act, then it applies to all parts of the two territories, organized as well as unorganized territory; and, when this is once conceded, there is no limitation to the exercise of the power, and the matter is left entirely to the will of the convention. If the power exists, it is an unqualified, unlimited power, and only circumscribed by the Constitution of the United States. Congress reserved to itself no power or authority over the acts of the convention, except that it requires that the Constitution, when formed and adopted, shall be submitted to the President, and the only power or authority he has in the premises is to determine: First, that it is republican in form; and, second, that it is not repugnant to the Constitution of the United States and the principles of the Declaration of Independence. The Constitution might be so worded and so formed as to comply with all these requirements, regardless of whether Woods county was left as one, or divided into many, and, under the provisions of the enabling act, it would not be the duty of the President to inquire into the power of the constitutional convention in dividing or refusing to divide counties. His only duty would be to see to it that it complies with the Constitution of the United States and the Declaration of Independence, and, being republican in form, would meet the requirements of the enabling act. Remember that in this case the sole contention is, not that the constitutional convention have not complied with the terms of the enabling act, but that they have done more, have gone beyond the terms of the enabling act, and done things unauthorized by the act. And, if this contention can be maintained, there is no doubt as to the duty of the court to restrain such action. But, if the courts do not act, then there is no power of restraint upon this convention given. If it is true, as contended for in the majority opinion, that this convention has unlimited power to divide at will the counties established and in operation in Oklahoma Territory, and that from the exercise of this power the courts have no jurisdiction to interfere, suppose that if for any reason, political expediency, or for any other reason, the constitutional convention should conceive the idea that Oklahoma county and Logan county should be changed or divided, and suppose they should ordain that a line should be drawn defining the boundaries of Oklahoma county so that Oklahoma City should be placed one half in Cleveland county, and leave the other half in Oklahoma county, and so as to put one half of the capitol city of

Guthrie in Kingfisher county, and the other half in Oklahoma county, and thus entirely obliterate from the map the county of Logan. Would it be contended by any one that this was an exercise of authority legally vested in the constitutional convention by the words of the enabling act, "to form a Constitution and state government for the new state"? It might be said that this is a very extreme case, and one which would not be likely to occur. Concede this. Is it not one which is within the power vested within the constitutional convention by the enabling act, if the construction of the majority opinion of this court is a correct statement of the law? Is there any different rule that would apply to Logan county, or to any other organized county in this territory, than that which would apply to Day county, and is this not what has been done by the constitutional convention in the case of Day county? It seems to me this would be an exercise of authority more arbitrary than has ever been recognized in any body since the organization of this country, a power greater than that possessed by Congress themselves, and a power which the czar of Russia in his palmy days would never have arrogated to himself, and one which in my judgment the Congress of the United States never intended to be vested in any man or set of men. Now the writer of this opinion might subject himself to the criticism of being called an extremist, but is it not within the power vested in the constitutional convention by the enabling act as construed by this court? The illustration used is used only for the purpose of showing the extremes to which the doctrine laid down by this court in the majority opinion might be carried. But it may be argued that an exercise of authority as arbitrary as this, and such a division so manifestly unjust, would not be approved by the people of these two territories when submitted to them, but in this connection it should be borne in mind that this proposition of the division of counties is to be submitted with and as an integral part of the Constitution itself. No provision is made whereby a vote can be taken upon this proposition separate from that on the Constitution, but, before the people could express their disapproval of such a county division, they would be driven to the necessity of voting against the Constitution, and defeat the very purpose for which this constitutional convention was organized. There is no way pointed out by which this county division, however absurd it may seem to be, or how unjust it may be, can be defeated at the polls without defeating the Constitution itself. And, if the opinion of this court is correct, that this court has no power to restrain the constitutional convention in the exercise of authority in dividing counties, and the enabling act only places it within the power of the President

to determine whether the Constitution as formed is republican in form, and not repugnant to the Constitution of the United States and the principles of the Declaration of Independence, where would there be any relief against such arbitrary action on the part of the constitutional convention? It has never been the policy of our law to vest arbitrary power in any body without surrounding and safeguarding it by limitations and checks. No Legislature has ever been authorized to act without a veto power, or some check or restraint being placed on them by the act of their creation. But, under the view taken of the power of this constitutional convention, here is the only body known to the law that had unlimited, unqualified, and unquestionable power—a creature greater than its creator, a stream higher than its source, and a power which recognizes no rights and no authority save and except its own sovereign will, and that body authorized to formulate fundamental principles, establish government, and make laws for a million and a half of the most enlightened and intelligent people on the earth. It seems to me that courts should proceed with great caution and hesitation before announcing a doctrine so far reaching in its effects, and so sweeping in its results.

But it is argued by counsel for plaintiffs in error that the division of counties and the location of county lines complained of is not permanent, but are only propositions to be submitted to the people for their ratification, and that therefore no great harm can be done, no rights endangered, and no hardships suffered by any one, because the will of the people, when expressed at the ballot box, is a sufficient safeguard to protect the rights of all. This is no doubt true as a general proposition, and the writer of this opinion has no doubt that the honest expression of the people of these two territories would be a sufficient safeguard to protect the rights of all if this matter could be submitted to them in such a way as to get their honest judgment. But we must bear in mind the manner in which the action of the constitutional convention in dividing organized counties is to be submitted to the people of the state of Oklahoma for their ratification or rejection. It is not submitted in the same manner that the question of prohibition is submitted, as a separate proposition, to be voted on independently by the people; but it is incorporated in and becomes an integral part of the Constitution itself, and is only submitted to the people for their approval or rejection as a part of the Constitution. Every voter who votes upon this question is compelled to either express his approval of the action of the convention in dividing the organized counties, or vote against the Constitution. There is no way provided whereby any elector can express his honest senti-

ments on the question of dividing or not dividing these counties without sacrificing his right to express his preference for the Constitution. Would any person insist that, where a matter of his own personal rights were involved, the submitting of the question to the people for their approval in this manner would be an honest way of getting the fair, unbiased, unprejudiced expression of the people on the question? By this manner of submission, every man who desires state government, and who desires that this country have the benefit of statehood, must vote for the ratification and approval of the acts of the convention in dividing these counties, or he must lose his vote in favor of statehood. No matter what his convictions may be as to the right or wrong of this county division, and no matter what his sense of justice may be, if he desires to vote for statehood, he must at the same time express his approval of the action of the constitutional convention in dividing these counties, whether such action meets his approval or not, and I submit that this manner of submitting the question is not one likely to secure a fair, unbiased, and unprejudiced expression of the people on the question. It is submitting the question of the division of counties and the establishing of county lines to a people who from their remote residence from the divided counties have not that vital personal interest that the immediate residents of the county have, and, at the same time that the question is submitted to them, it is submitted to them under duress, because they are compelled to vote in a certain way on the question, or lose the boon of statehood. When we view it in this light, it certainly can have but little weight in determining the legislative intent as to this subject, as under such a submission the opponent of the county division would stand about as much show as the proverbial snowball in hades, or a Republican candidate for office in the state of Texas.

Another reason suggests itself to the mind of the writer of this opinion why the Congress of the United States did not intend by the enabling act to grant the power, either directly, or by necessary implication, to the constitutional convention to divide counties, or change boundaries of county lines in counties already established in the territory of Oklahoma, is that, by section 6 of the enabling act, it is provided: "That until the next general census, or until otherwise provided by law, the said state of Oklahoma shall be entitled to five Representatives in the House of Representatives of the United States, to be elected from the following described districts, the boundaries of which shall remain the same until the next general census. * * *" Then follows an enumeration of the different counties and recording districts in the Indian Territory which shall respectively constitute the different congres-

sional districts. Now, it seems that the provision that the limits and boundaries of the congressional districts thus established by Congress shall not be changed until the next general census makes the legislative intent perfectly clear that Congress did not intend that any legislation should be had or any authority exercised by the constitutional convention which should in any way change the boundaries of these congressional districts. If it can be shown that the proposed county division now under consideration does have the effect of changing the boundaries of any of the congressional districts thus established by Congress, I think it will be established beyond controversy that such division of counties was not within the legislative intent of Congress. Section 6 provides that district No. 2 shall comprise the counties of Oklahoma, Canadian, Blaine, Caddo, Custer, Day, Dewey, Woodward, Woods, and Beaver. Now it is fair to presume that, in making this distribution of counties into the congressional districts, Congress intended that the boundaries should be in accordance with the counties as then existing, and the boundaries of counties as then established. By the division of counties proposed by the constitutional convention, one tier of townships on the east side of the southern portion of Caddo county is taken off from Caddo county, and made a part of Grady county. Grady county, before the division of counties, was a part of the Chickasaw Nation, known as "Recording District No. 19," and as such, in the enabling act, formed a part of the Fifth congressional district. Now, the effect of this division would be to change the boundary line of the second congressional district, as established by Congress, and place the boundary line where the same touches Caddo county, one tier of townships to the west, and would move the boundary line of the Fifth congressional district, where the same intersects Caddo county, on the west line of the Nineteenth recording district of the Chickasaw Nation, one tier of townships to the west, thus changing the boundary lines of both the Second and Fifth congressional districts to this extent. By the enabling act, district No. 5 shall comprise the counties of Greer, Roger Mills, Kiowa, Washita, Comanche, Cleveland, and Pottawatomie, and the territory comprising recording districts numbered 17, 18, 19, and 20, in the Chickasaw Nation, Ind. T. By the terms of the enabling act, Day county is a part of the Second congressional district, and Roger Mills county forms a part of the Fifth congressional district. By the division and readjustment of counties proposed by the constitutional convention, Day county is entirely obliterated from the map of Oklahoma. The southern portion of Day county is attached to Roger Mills county, and the balance of the county, or the northern por-

tion, is made into Ellis county. By the apportionment made by Congress fixing the boundaries of the Fifth congressional district, the north line of that district, where the same borders on Roger Mills county, would be on the line of Roger Mills county as it existed at the time of the passage of the enabling act, and before the division of counties. After the division of counties, a portion of Day county was placed into and became a part of Roger Mills county, thus taking a portion of Day county, to wit, the southern part of Day county which was originally in the Second congressional district, and placing it in the Fifth congressional district as a part of Roger Mills county, thus materially changing the northern boundary of the Fifth congressional district, and the southern boundary of the Second congressional district, where the same intersects Day and Roger Mills counties, and moving the same further north, thus taking a portion of Day county out of the Second district and placing it in the Fifth, therefore necessarily making the line of the Second and Fifth districts at a different place than where it was located by the act of Congress. A tracing out of the changes made by the division of counties as proposed by the constitutional convention will show that in many other instances the boundary lines of the congressional districts as established by Congress must of necessity be changed.

There is only one theory on which this readjustment of counties can be considered which will avoid the conclusion that the readjustment would change the boundaries of the congressional districts, and that is, if the readjustment of counties and the placing of additional territory in one county and taking it from another county in another congressional district might not change the congressional district, so far as this added territory was concerned. That is, the territory so added and so subtracted might be attached to the county and made a part of the county for all purposes except congressional, and it might be argued that, although it is a part of another county, it still remains a part of the same congressional district, and that the boundary lines of the congressional districts would not be changed. But this solution of the problem would lead to very serious political complications, as it would require not only a special ballot box for this territory so added, but it would also require a special ballot, and a separate count of the ballots by the election commissioners, as under the system of voting generally in use throughout the United States, in preparing the ballot, all of the names of the candidates, national, congressional, state, and county, are placed upon one ballot, and are distributed by the county clerks of the various counties to the different election precincts in the county. In this added territory, as, for instance, in Grady coun-

ty, if the election officers of the election precincts in this added territory should apply to the county clerk of Grady county for the ballots to be used in a general election, the ballots would not contain the correct names of the candidates for Congress, but would contain the correct names of the candidates for the other offices, state and county. If application should be made for these ballots by the election officers of this added territory to the county clerk of Caddo county, then it would contain the correct names of the candidates for Congress, but would not contain the correct names of the county officers, and it would also seem that the returns for Congressmen would have to be made by the election officers in this added territory in Grady county to the election commissioners in Caddo county, and the returns on the election of the other officers would have to be made to the proper officers in Grady county. This would present the embarrassing predicament of having the electors of this added territory voting for state and county officers in Grady county, and voting for members of Congress in Caddo county. It will be readily seen that this would lead to endless confusion, and would make many unfortunate and embarrassing complications, and it would hardly seem that the Congress of the United States intended to so form the enabling act, and so grant authority under it as to lead to this result. We have the right to presume that Congress legislated on this subject with a full knowledge of the conditions, and that they made the enabling act with a full understanding and appreciation of all the results that might necessarily flow from it. The purpose of citing this illustration is not to show the fact that it is impossible to harmonize the conditions, but for the purpose of showing the improbability of Congress intending any such result, and to show the probable legislative intent of Congress in the matter.

Now, I have given this subject careful consideration, much study, and much thought, and I am unable to arrive at any other different conclusion than that the redivision and readjustment of counties and boundary lines as proposed by the constitutional convention must, of necessity, if acted upon by the people, and recognized as a law, change the boundaries of the Fifth congressional district established by Congress, and must be an express violation of the express direction of Congress, which in plain terms indicated the legislative intent that the boundaries shall remain the same until the next general census. This being true, I cannot believe that it was ever the intention of Congress to put into the enabling act an express prohibition against the changing of the lines of the congressional districts established by Congress, and then, by the same document, put into the hands of the constitutional convention the unlimited power to do a thing which would

directly contradict that express prohibition. Hence, I am forced to the conclusion that Congress never intended to give the constitutional convention this power. If my conclusions upon this proposition are correct, then in my judgment it entirely disposes of the other proposition; that is, that the constitutional convention had no right by its election ordinance to appoint county officers in the new counties, and clothe them with authority to act as such. My conclusions are that a constitutional convention, such as the one under consideration, has only such powers as are expressly granted to it by the act of Congress known as the enabling act, and such powers as are necessary to carry into effect the powers expressly granted to it by Congress; that neither under the express powers granted, nor the implied powers incident thereto, has the convention any power or authority to determine the boundaries of existing organized counties in the territory of Oklahoma, or to divide such counties, or to create new counties, and, particularly, they have not the lawful authority to divide Woods county, and, by both express and implied limitations under the law, power and authority was withheld from the convention to interfere in any manner with the existing organized counties in the territory of Oklahoma; that a constitutional convention created and convened under an enabling act is composed of delegates who are simply agents appointed by the electors to propose a Constitution and state government for the proposed state, and the enabling act is the warrant of attorney under which the convention is authorized to act, and all matters beyond the scope of the agency, as limited by such warrant of attorney, are ultra vires; that this constitutional convention has no power or authority to create or appoint any officer or officers for any county, township, municipality, or precinct in any part or portion of the organized county of Woods, to take effect prior to the ratification of the proposed Constitution by the electors, and the issuing of the proclamation by the President, and it has no power or authority to create any county, township, municipality, or precinct, or to interfere with or displace any officer or officers of such townships, municipalities, or precincts in the organized county of Woods, or any part of it, in the exercise of their lawful and legitimate duties as such officers in it, or until the expiration of the term of the existing officers now exercising the duties of the same in Woods county. I take it that the division of counties, and the location of boundary lines of counties, as well as the establishing of county seats in counties, comes within the purview of what is known as ordinary legislation, and that, before the constitutional convention can indulge in any such legislation, they must be able to show a warrant of authority in the enabling act which called them into existence; that, if

they cannot find the authority for such legislation in the express terms of the enabling act, or in the necessarily implied powers conferred upon them by the enabling act, then they do not possess such powers; that they are not the representatives of the people in the sense that they exercise in any degree the sovereignty of the people; that they are not a revolutionary convention, but they are a convention called into existence, organized, regulated, and limited by legislative enactment, and are bound by the terms of the enabling act, which is the only charter of their authority.

Mr. Jameson, in his excellent work on Constitutional Conventions (section 371), uses this language: " * * * On the other hand, no fact is better established than that, beyond the province thus specially set apart for them, neither conventions, nor the bodies of electors, have any legislative power. They can neither of them pass any law comprised within the sphere of ordinary legislation." In the footnote to the same section, the author remarks: "The debates of our conventions are full of disavowals of a right on the part of those bodies to pass ordinary laws. In a few cases, however, it must be admitted that right has been claimed as a part of a general claim of all sovereign powers. It has never been practically asserted, however, except in a few doubtful cases, which will be considered hereafter." In section 421, the same author says: " * * * The reasoning of those who assert for the convention a general power of legislation is, in its last analysis, that by which is vindicated the doctrine of convention sovereignty, of which in its general form a refutation has already been attempted."

In *Ex parte Birmingham & A. R. Co. (Ala.)* 42 South 120, quoting from *Woods' Appeal*, 75 Pa. 59, it is said: "A convention has no inherent rights. It exercises powers only. Delegated power defines itself. To be delegated, it must come in some adopted manner to convey it by some defined means. This adopted manner, therefore, becomes the measure of the power conferred. The right of the people is absolute in the language of the bill of rights, 'to alter, reform, or abolish their government in such manner as they may think proper.'" And on the following page (121 of 42 South.) quoting from the same case: "The Legislature may not confer powers by law inconsistent with the rights, safety, and liberties of the people, because no consent to do this can be implied; but they may pass limitations in favor of the essential rights of the people. If the authority of the people passes to the convention outside of the law, the people are left without the means of self-protection, except by revolution. Then the singular spectacle is presented of the absolute sovereignty of the people being vested in a body of agents without any known means of transmission

or limitation." And on page 122 of 42 South., citing from *McDaniel's Case*, 2 Hill's Law (S. C.) 270: "An ordinance is produced to us passed by a certain number of individuals assembled in Columbia. This gives it no authority as an act of the people. But we are told they were elected by the people. This, however, is not enough. To what purpose were they elected by the people? To represent their sovereignty. But was it to represent their sovereignty to every purpose, or was it for some specific purpose? To this no other answer can be given than the act of the Legislature under which the convention was assembled. Certainly the people may, if they will, elect delegates for a particular purpose, without conferring on them all their authority. The Supreme Court judges of Massachusetts, in 6 Cush. 574, 575, in discussing this question, said: 'Upon the first question, considering that the Constitution has vested no authority in the Legislature in its ordinary action to provide by law for submitting to the people the expediency of calling a convention of delegates for the purpose of revising or altering the Constitution of the Commonwealth, it is difficult to give an opinion upon the question, what would be the powers of a convention, if called? If, however, the people should, by the terms of their vote, decide to call a convention of delegates to consider the expediency of altering the Constitution in some particular part thereof, we are of opinion that such delegates would derive their whole authority and commission from such vote; and upon the general principles governing the delegation of power and authority they would have no right, under such vote, to act upon any proposed amendments in other parts of the Constitution not so specified.'" And on page 122 of 42 South., quoting from *Bragg v. Tuffe*, 49 Ark. 560, 561, 6 S. W. 160, it is said: "The first question that suggests itself is: What right had the convention—a body consisting of but a single chamber—to enter upon the domain of general legislation? For the raising of revenue, the providing of ways and means to meet the expenses of administering the government, and the prescribing of the funds in which taxes are to be paid, are legislative functions, not of a fundamental character. But by the Constitution of 1836, and by all other Constitutions that have ever been in force in this state, the legislative power has been confined to a General Assembly, consisting of a Senate and House of Representatives. The Governor also has always had a voice in legislation, a limited power in vetoing measures which did not meet his approval. Now, a convention called, for instance, to frame a new Constitution, has no inherent right to legislate about matters of detail. All of the powers that it possesses are such as have been delegated to it, either by express grant or necessary im-

plication. But we are of opinion that, when a convention is called to frame a Constitution which is to be submitted to a popular vote for adoption, it cannot pass ordinances and give them validity without submitting them to the people for ratification as a part of the Constitution. The delegates to such a convention are but agents of the people, and are restricted to the exercise of the powers conferred upon them by the law which authorizes their election and assemblage." And, in the same case (*Ex parte Birmingham & A. R. Co.*, supra) it is said: "The act so clearly defined the purpose for which the convention should be held that we have every reason to conclude that the Legislature did not, for a moment, anticipate that the convention would undertake to indulge in local legislation relating to Shelby and St. Clair counties."

In *Jameson on Const. Con.* § 420, is this language: "Does an analogous rule prevail in relation to the convention, the framer of the fundamental law? Or, may it, by virtue of some transcendent power, inherent in it, or of well-established custom or precedent, overleap all bounds interposed to limit its competence, and take upon itself the function of legislation in general?"

And in section 421: "This question will be examined upon both of the grounds indicated in their order, namely: First, upon that of inherent power; and, secondly, upon that of custom or precedence. First, the reasoning of those who assert for the convention a general power of legislation is, in its last analysis, that by which is vindicated the doctrine of conventional sovereignty, of which, in its general form, a refutation has already been attempted. The particular argument in this connection is that the business of a convention is extraordinary, beyond the competence of either of the recognized ordinary agencies of the sovereign. That that body receives its commission from the same source as do these agencies, and therefore, on the whole, is entitled to outrank them all. That, although as a prudent precaution against dissatisfaction or cavil, it is doubtless better for a convention to forego the exercise of extreme rights and submit its works to the judgment of the people, yet it is not true that it lacks power directly and definitively to enact the supreme law of the land. That, if this be conceded, it needs only to analyze the general power thus described into its constituents to find the power in question. That the fundamental conception of the business of a convention is that it takes to pieces, or, as it is sometimes expressed, tramples under its feet, the existing Constitution of a state, and out of the old materials, or out of old and new together, erects a structure to fill its place. That, with the Constitution, falls, of course, the government of the state. That, starting thus, potentially at least, according to its own will,

with a clean slate, to deny to the body possessing such omnipotence the power of legislation, would be to deny that the greater includes the less. That, if it can enact the fundamental law, why not also the ordinary statute law, of which the nature, it is true, is somewhat dissimilar, but whose importance is vastly inferior. That a convention is competent, by constitutional provision, to abolish all existing agencies of government, and to fill their places with others constructed on different principles. Is it then conceivable, it is asked, that it cannot do directly what it can do indirectly, or that the right to exercise so exalted a prerogative is conditioned upon its exercise in a particular mode? That, as a matter of fact, the convention through its relations to the several departments of the government, as in turn their destroyer and their creator, can exercise at will the functions of each of them. That, being a virtual assemblage of the people, it wields all the powers which the people themselves would possess, were it in the nature of things possible for them to act directly. Hence that, within the bounds fixed by its own discretion, a convention may make laws or may interpret or execute them."

And in section 422 the same author says: "To this argument, the following considerations constitute in my judgment a complete answer: If the safety of the people is the supreme law, of which there is no doubt, and which I affirm, the maxim involves both a grant of power and a limitation of power. It is a grant of power, inasmuch as it authorizes and requires all public functionaries to protect and defend the people at whatever cost. To do it, however, by adhering: First, to the letter; and, secondly, to the spirit of their instructions, that is, of the Constitution and laws; and, thirdly, to the principles on which the social edifice is bottomed. When the letter of the law is silent, or its spirit doubtful, the principles indicated are the only chart by which official conduct can be regulated, and are the first in validity and sacredness, since they are the sum of the letter and spirit of positive law, as well as that unwritten law which presided at the genesis of the social state, anterior to all positive law. Hence it is plainly the duty of such functionaries always to conform to those principles, since a disregard of them involves, in substance, a violation of the letter and spirit of the positive law, and at length the ruin of the commonwealth. Do what necessity requires, and ask for indemnity for technical breaches of law, is the rule of practical conduct dictated by the maxim under consideration"—citing *Rice v. Foster*, 4 Har. (Del.) 479. "As a limitation of powers, the same maxim is of extensive application. In cases of doubtful construction of constitutional provisions, or in which there are no express provisions determining grants of power, it is the most important touch-

stone in our whole system. Starting with the postulate of representative republican institutions, the two following propositions must be accepted: First, that whatever manifestly endangers the safety of these institutions must be forborne, though authorized by an express grant of power; and, secondly, that no act whatever must be done or tolerated in the absence of such a grant, of which the tendency or still more the direct effect would be to endanger them. In the case last supposed, no power to do the act could be implied, under any circumstances whatever, no matter how clearly it might seem, for the time, to be expedient.

"Sec. 423. Now, in the light of these principles, is the exercise by a convention of legislative or other governmental powers, in addition to those clearly belonging to it, to be considered as within its competence, as a constitutional body? Is such an assumption of power one which threatens no danger to the commonwealth? By the theory of those who accord to it such powers, as soon as the convention is assembled, the control of the existing government is at an end; the Constitution lies torn into fragments under its feet; and, while the work of restoration is in progress, that body alone constitutes the state, gathering into its single hands the reins ordinarily held by the four great systems of agencies constituting the government to whose functions it succeeds. If this be so, what but its own sense of justice is to restrain such a body from running riot as did the thirty tyrants at Athens? The jurists of the Illinois convention, of 1862, as we have seen, affirmed that the act under which such a body assembles is no longer binding, when once it has become organized. If, at that moment, it has also cast upon it, by virtue of its great commission, all governmental powers, how easy to extend the scope and the period of the exercise of those powers under the plea that expediency demands it. The expedient is the appropriate domain of a Legislature. If, at the moment of organization, a convention is endowed with legislative powers, it may be deemed expedient to subvert the system of guaranty by which our liberties are assured to us, and at the same time to withhold from the popular vote the constitutional provisions by which the change is to be effected. Such a consummation would be not merely possible; it would be probable. And clearly, the possibility of its occurring with an appearance of rightfulness is enough to stamp as dangerous that theory of conventional powers from which it must flow. In the science of politics, it is an important point gained to have settled the limit where normal action ends and revolution begins. To have done that is practically, in most cases, to have rendered revolution impossible. The result is that a convention cannot assume legislative powers. The safety of the people, which is

the supreme law, forbids it. Even if we suppose the body expressly empowered by the Legislature to exercise such powers, the right so to do must be denied, because the same supreme law places an absolute interdict on such a grant. It is beyond the power of a Legislature to delegate any such authority.

"Sec. 424. To these general considerations, tending to discredit the claim of conventions to legislative powers, must be added the decisive circumstance that our Constitutions, as well state as federal, have vested all the power of ordinary legislation the people have chosen to grant at all, in our Legislatures. The construction put upon these provisions of our Constitution by the courts is that the grant is exclusive, and that the power can neither be delegated by the Legislatures, nor exercised by the people, not even by the whole people.

"Sec. 425. Were additional arguments needed to demonstrate that a convention has no power of ordinary legislation, reference might be made to the fact that the possession of such a power would be extremely inconvenient, on account of the necessarily temporary and experimental character of such legislation, on the one hand, and the difficulty of effecting changes in the enactments of conventions, on the other. Every ordinance or constitutional provision passed by a convention assumes a form nearly as rigid as that of the Median laws. They can be repealed only in the formal way in which they were enacted. It would be impossible to administer with any success any government so crippled in its legislative arm. The result would inevitably be that laws would be constantly disregarded, or that conventions would become so necessary and frequent that they would ultimately supplant our Legislatures."

I have not indulged in as extensive a citation of authorities as the subject under discussion would warrant, for the reason that in my judgment the conclusions reached are logical deductions which can be drawn from the enabling act itself, when we interpret the same in the light of all the surroundings and conditions which existed at the time the same was passed, bearing in mind the object to be attained, and the result to be accomplished. This is a question of very grave importance to the people of these two territories. One which is important, not only in the present, but of vast importance to the future. It is one which reaches the vital interests of the state to be formed from the virgin soil of these great territories. It is one the importance of which should raise it above personal or partisan feeling; one in the discussion of which party politics and personal interests should have no place, and no weight; one in which the people require at the hands of the courts their honest, unbiased judgment, uninfluenced and unham-

pered by any thing other than a careful and candid consideration of the law as it exists, and an honest expression of opinion, and it is only the vast importance of the subject which induced me to file this dissenting opinion. I have briefly given my views of the subject as they occur to me, that they may be made matters of record showing my reasons, or some of my reasons, for differing with the conclusion reached by a majority of this court, and, while I entertain the highest regard for the attainments and legal ability of the members of this court, and have the greatest respect for their legal opinions, I am constrained to dissent from the views expressed by them in this case.

WALCK v. MURRAY et al.

(Supreme Court of Oklahoma. June 25, 1907..)

CONSTITUTIONAL LAW—INJUNCTION — JURISDICTION—CONSTITUTIONAL CONVENTION.

A court of equity has no power or jurisdiction to restrain or enjoin the constitutional convention, its officers or delegates, from exercising any of the rights, powers, and obligations confided to it by Congress or the people; nor can the powers of the court be invoked to restrain or enjoin the submission of the Constitution, or any proposition contained therein, to a vote of the people, in advance of its adoption and ratification by the people, and its approval by the President of the United States, on the ground that the Constitution, or any of its provisions, is unconstitutional, or that the convention acted in excess of its lawful powers.

Irwin and Pancoast, JJ., dissenting.

(Syllabus by the Court.)

Suit by G. F. Walck against W. H. Murray and others. Dismissed.

Horace Speed, for plaintiff. J. F. King, for defendants.

HAINER, J. This is an original action, brought by G. F. Walck against W. H. Murray, president of the constitutional convention, John M. Young, its secretary, Frank Frantz, Governor of Oklahoma Territory, and Charles H. Fillson, Secretary of Oklahoma Territory. The material averments in the petition are as follows: That the plaintiff is a citizen, taxpayer, and qualified elector of Day county, Okl. T. That the constitutional convention has inserted in the proposed Constitution for the state of Oklahoma several provisions which are repugnant to the Constitution of the United States and the principles of the Declaration of Independence, and in violation of the terms and conditions of the enabling act, and that the Constitution is not republican in form. That Day county, named by the enabling act as one of the counties to be and remain in the Second congressional district until the next national census, is eliminated, and its territory is divided between Roger Mills county and a new county called Ellis county, formed by said

proposed Constitution of the remainder of said Day county and a part of Woodward county. That the proposed Constitution further contains provisions dividing Greer county into three counties, called Greer, Jackson, and Beckham, etc. It is further alleged that the legislative apportionment is not fair, just, or equal, but that the same is intentionally and grossly unequal, unjust, and unfair, and is not made with reference to the population or the qualified electors of the proposed districts, and is not based on the population of the proposed legislative districts. That the defendants will, unless restrained, issue said proclamation and proceed by the usual methods in the case of election, and which may result in the ratification of the unlawful provisions aforesaid, contained in said proposed Constitution. That the petitioner is remediless at common law and except under the procedure in the courts of chancery. Wherefore the plaintiff prays that this court grant an injunction, restraining and enjoining the defendants, and each of them, from issuing a proclamation or calling an election, or doing any other act towards an election to ratify or reject or act upon the said Constitution containing said provisions, or any of them, and upon the final hearing that the temporary injunction be made perpetual.

The same questions are involved in this case as were determined by this court in the case of Frank Frantz et al. v. G. E. Autry, 91 Pac. 193, and upon that authority the plaintiff's cause of action must be dismissed for want of jurisdiction.

IRWIN and PANCOAST, JJ., dissenting.

(18 Okl. 710)

McCOLLISTER v. MURRAY et al.

(Supreme Court of Oklahoma. June 25, 1907.)

Action by J. O. McCollister against W. H. Murray and others. Dismissed.

Horace Speed and Virgil M. Hobbs, for plaintiff.

HAINER, J. This is an original action, brought by J. O. McCollister against W. H. Murray, president of the constitutional convention, John M. Young, its secretary, Frank Frantz, Governor of Oklahoma Territory, and Chas. H. Filson, Secretary of Oklahoma Territory, alleging substantially the same matters as were set forth in the case of G. F. Walck v. W. H. Murray et al. (No. 2,145) 91 Pac. 238, and asks for the same relief.

Upon the authority of Frank Frantz et al. v. G. E. Autry, 91 Pac. 193, the relief prayed for must be denied, and the plaintiff's cause of action is dismissed, for want of jurisdiction.

IRWIN and PANCOAST, JJ., dissenting.

(18 Okl. 707)

BOARD OF COM'RS OF GREER COUNTY
ex rel. THACKER, County Attorney, v.
CONSTITUTIONAL DELEGATE CON-
VENTION OF OKLAHOMA TERRITORY
et al.

(Supreme Court of Oklahoma. June 25, 1907.)

CONSTITUTIONAL LAW—INJUNCTION — JURIS-
DICTION—CONSTITUTIONAL CONVENTION.

A court of equity has no power or jurisdiction to restrain or enjoin the constitutional convention, its officers or delegates, from exercising any of the rights, powers, and obligations confided to it by Congress or the people; nor can the powers of the court be invoked to restrain or enjoin the submission of the Constitution or any proposition contained therein, to a vote of the people, in advance of its adoption and ratification by the people, and its approval by the President of the United States, on the ground that the proposed Constitution or any of its provisions is unconstitutional, or that the convention acted in excess of its powers.

Irwin and Pancoast, JJ., dissenting.

(Syllabus by the Court.)

Error from District Court, Logan County; before Justice John H. Burford.

Action by the board of county commissioners of Greer county, on the relation of Charles M. Thacker, county attorney, against the Constitutional Delegate Convention of Oklahoma Territory and Indian Territory and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Arthur B. Garrett, Andrew M. Stewart, and Horace Speed, for plaintiff in error. J. F. King, W. A. Ledbetter, and R. L. Williams, for defendants in error.

HAINER, J. This was an action brought in the district court of Logan county, by the board of county commissioners of Greer county, on the relation of Charles M. Thacker, county attorney of said county, against the constitutional delegate convention of Oklahoma Territory and Indian Territory, William H. Murray, president, and others, constituting all the delegates to said convention; the object of the suit being to perpetually restrain and enjoin the convention, its officers and delegates, and all persons acting through or under them, from submitting, as a part of the Constitution of the proposed state of Oklahoma, to the electorate of Oklahoma Territory and Indian Territory, a certain proposition or provision which would in effect divide Greer county into three distinct parts, and thereby change the county lines, and take a large part of its original territory therefrom, and create two other distinct counties within what was formerly the boundaries of Greer county, and as it now exists, and has existed since it was established as an organized county in Oklahoma by act of Congress of May 4, 1896. The convention, its delegates and officers, were further asked to be restrained and enjoined from editing, enrolling, or authenticating as a part of the Constitution any such

provision, and prohibiting it and its agents from submitting to the electors of Oklahoma any provision which, by its terms, divides Greer county, or changes its boundaries. Upon the hearing, the court below declined to grant an injunction, and from this order the plaintiff, Greer county, appeals.

It is contended that the division of Greer county is invalid and in violation of the enabling act and of the act of Congress creating Greer county; that it deprives the county of its lawful territory and inhabitants, increases the taxes, depreciates the value of the remaining property, and is an irreparable injury. The same questions were involved and fully considered in the case of *Frank Frantz et al. v. G. E. Autry* (decided at this term of the court) 91 Pac. 193, where this court held that: "A court of equity has no power or jurisdiction to restrain or enjoin the constitutional convention, its officers or delegates, from exercising any of the rights, powers, and obligations confided to it by Congress or the people; nor can the powers of the court be invoked to restrain or enjoin the submission of the Constitution, or any proposition contained therein, to a vote of the people, in advance of its adoption and ratification by the people and its approval by the President of the United States, on the ground that the Constitution, or any of its provisions, is unconstitutional, or that the convention acted in excess of its powers." And it was also decided in that case that: "The power vested in the convention to form a state government clearly implies the power to create and define all the counties within the limits of the proposed state; the only limitation upon the convention in this respect

being that the Osage Indian reservation shall remain as a separate county until the lands therein are allotted in severalty, and until changed by the Legislature of the state."

Hence, that case is decisive of the points involved here, and upon that authority, and the cases therein cited, the judgment of the court below must be affirmed.

BURFORD, C. J., having tried the cause in the court below, not sitting. IRWIN and PANCOAST, JJ., dissenting.

HAINES v. MURRAY et al.

(Supreme Court of Oklahoma. June 25, 1907.)

Error from District Court, Logan County; before Justice John H. Burford.

Action by E. A. Haines for himself and others similarly situated against E. H. Murray and others. Judgment for defendants, and plaintiff brings error. Affirmed.

W. W. S. Snoddy, H. A. Noah, and Horace Speed, for plaintiff in error. J. F. King, for defendants in error.

HAINER, J. The same questions are involved in this case as were decided by this court in the case of *Frank Frantz et al. v. G. E. Autry* (No. 2,154) 91 Pac. 193, and upon the authority of that case, and the cases cited therein, the judgment of the district court of Logan county is affirmed.

BURFORD, C. J., having tried the cause in the court below, not sitting. IRWIN and PANCOAST, JJ., dissenting.

STATE ex rel. PAGETT et al. v. SUPERIOR COURT FOR PIERCE COUNTY et al.

(Supreme Court of Washington. Aug. 5, 1907.)

1. HIGHWAYS—LAYING OUT—PROCEEDINGS—COLLATERAL ATTACK.

Ballinger's Ann. Codes & St. § 3772, in relation to the establishment of county roads, provides that an application for the establishment of a road shall be by petition, signed by at least 10 householders of the county. Section 3775, Ballinger's Supp., provides that if the board of county commissioners shall be satisfied, among other things, that at least 10 of the petitioners are householders, viewers shall be appointed, etc. *Held* that, after the commissioners have passed favorably on the petition, their determination cannot be collaterally attacked on the ground that the petition was not signed by a sufficient number of householders.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 168.]

2. SAME—NOTICE TO PROPERTY OWNERS.

Ballinger's Ann. Codes & St. §§ 3774-3779, in relation to the laying out of county roads, were so amended by Sess. Laws 1901, c. 96, p. 200, as to provide that the county surveyor should perform all the duties previously required of viewers; but the amendatory statute failed to amend sections 3871 and 3872, which provide for the giving of notice to landowners and proceedings by the county commissioners on the report of the viewers. *Held*, that a service of notice on property owners of a hearing on the petition and report of the surveyor is sufficient; such construction being necessary to preserve the effectiveness of the statute.

Certiorari to Superior Court, Pierce County.

Proceedings by the state, on the relation of C. C. Pagett, and others, for a writ of review to correct the judgment and order of the superior court for Pierce county in determining that certain property was subject to use for a county road. On final hearing, after certification of the record and proceedings pursuant to the writ. Affirmed, and stay of proceedings vacated.

See 8^o Pac. 178.

Titlow & Huffer, for relators. H. G. Rowland and F. Campbell, for respondents.

CROW, J. On March 31, 1905, a petition and bond were filed with the commissioners of Pierce county for laying out and establishing a county road, to be known as the "Julius Gulch Road." Such proceedings were had that Pierce county afterwards filed in the superior court a petition to condemn for said road certain land belonging to C. C. Pagett, Mabel Pagett, and Bridget Duffy, the relators herein; and the superior court, after taking evidence, adjudged that the purpose for which the land was sought to be condemned was a public use. Thereupon the relators applied to this court for a writ of review. Upon notice the county appeared interposed objections, and resisted the application, contending that the relators had an adequate remedy by appeal. In a written opinion (89 Pac. 179) we granted the writ, returnable May 1, 1907. A transcript of the record and proceedings having been fully

certified to this court, the same is now before us on final hearing.

It appears that the original petition for the establishment of the road upon its face purported to be signed by 10 householders; that it complied in all respects with the requirements of section 3773, Ballinger's Ann. Codes & St. (section 7822, Pierce's Code); that it was accompanied by a bond executed in due and legal form; that it was referred to the county surveyor, who filed his report; that the relators failed to file any written waiver of damages or claim for damages; that personal service of notice of hearing was made on the relators; that the commissioners ordered the road to be established; that a tender of damages was made to each of the relators, which they failed to accept; and that condemnation proceedings were ordered. The relators, in their assignments of error, have directed our attention to certain alleged irregularities which they insist render all proceedings before the county commissioners null and void. Although these alleged irregularities are regarded by us as immaterial, some of them will be hereinafter discussed. The relators have, in fact, presented many assignments of error which it will be unnecessary for us to consider by reason of our views on the jurisdictional questions raised. The substance of their contention seems to be that in this action we are authorized to fully review all proceedings had before the county commissioners preliminary to their orders establishing the road and directing condemnation. The primary purpose of the writ issued herein is to enable us to review the order of the superior court adjudging that the purpose for which the relators' land is sought to be taken is a public use, and not to review the acts of the county commissioners. While it is true that statutes delegating the right of eminent domain are to be strictly construed as in derogation of private rights, we do not think that in a proceeding of this character, instituted for the sole purpose of reviewing an order adjudging a public use, we can be called upon to critically examine or review all the preliminary proceedings had before the board of county commissioners. The commissioners had, under the statute, jurisdiction of the subject-matter of establishing the road. As shown by the record, and by the filing of a proper petition and bond approved by them, and service of process thereon, they also acquired jurisdiction of the persons and property of the relators. As it further appears that damages have been tendered to the relators, which they have declined to accept, that the commissioners have established the road, and that they have directed condemnation, no further inquiry can be here made into the preliminary road proceedings. All these facts having been pleaded and shown, nothing more can be required.

The relators nevertheless contend that the

trial court erred in refusing them permission to show that some of the signers of the road petition were not householders, as required by section 3772, Ballinger's Ann. Codes & St. (section 7821, Pierce's Code), and insist that they were entitled to attack the sufficiency of the petition in that regard, and the jurisdiction of the county commissioners. In support of this position they cite *Mulligan v. Smith*, 59 Cal. 206, afterwards cited and followed in *Zeigler v. Hopkins*, 117 U. S. 683, 6 Sup. Ct. 919, 29 L. Ed. 1019. From the opinion in *Mulligan v. Smith* it affirmatively appears that the statute did not authorize the mayor to enter into any investigation of the frontage represented by the petition, or to adjudicate its sufficiency. Our statute (section 3775, Ballinger's Supp.; section 7824, Pierce's Code) confers upon boards of county commissioners such judicial authority. They are authorized to consider and pass upon the sufficiency of the petition and bond. The records introduced in evidence show that the commissioners affirmatively determined and found that the petition was signed by at least 10 householders of the county residing in the vicinity of the road, and that it was accompanied by a bond approved by the board. Such finding cannot be attacked in this collateral proceeding. It shows jurisdiction in the commissioners. In *re Grove Street*, 61 Cal. 438; *Humboldt County v. Dinsmore*, 75 Cal. 604, 17 Pac. 710; *Hill v. Board of Supervisors*, 95 Cal. 239, 30 Pac. 385; *People v. Reclamation District*, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085; *Lingo v. Burford*, 112 Mo. 149, 20 S. W. 459; *Belk v. Hamilton*, 130 Mo. 292, 32 S. W. 656; *Scotten v. City of Detroit*, 106 Mich. 564, 64 N. W. 579; *Porter v. Stout*, 73 Ind. 3; *Ryder v. Horsting*, 130 Ind. 104, 29 N. E. 567, 16 L. R. A. 186; *C. & A. Ry. Co. v. Sutton*, 130 Ind. 405, 30 N. E. 291; *Longfellow v. Quimby*, 29 Me. 196, 48 Am. Dec. 525; *McClelland v. Miller*, 28 Ohio St. 488. The above authorities also establish the doctrine that, when jurisdiction has once been acquired under a proper petition and notice, the subsequent proceedings, being presumed regular, cannot be collaterally attacked. The trial court committed no error in rejecting the evidence offered for the purpose of showing that the petitioners were not householders.

Sections 3774 to 3779, inclusive, Ballinger's Ann. Codes & St., being sections 4 to 9, inclusive, of chapter 50, pp. 83-85, Sess. Laws 1895, were amended by chapter 96, p. 200, Sess. Laws 1901. A comparison of the amended with the original sections will show that the principal change consisted in providing that the county surveyor should perform all the duties theretofore required of viewers. It is apparent from the amended act of 1901 that the Legislature intended to dispense with the appointment of viewers. It, however, failed to amend sections 3871 and 3872, Ballinger's Ann. Codes & St., being sections

11 and 12 of the act of 1895, and such sections still provide for the giving of notice, and for further proceedings by the county commissioners, on the report of the viewers. But the previous section (Ballinger's Ann. Codes & St. § 3775), providing for the appointment of viewers, having been repealed, no such appointment is now authorized. The county surveyor discharged all duties formerly required of the viewers, and made his report in due and legal form. As the relators had not waived damages, the commissioners caused notice to be personally served upon them that at a time stated the board would take up for hearing the surveyor's report on the petition, together with the petition. As section 3781 requires such notice to be given upon the report of the viewers, the relators contend the notice given was insufficient and conferred no jurisdiction over them or their property. In their brief they insist that it is impossible for the county under the present statutes to condemn any right of way for a county road, that the exact procedure provided by the statutes must be followed, and that no valid notice of hearing on the petition and the surveyor's report can now be given to owners who have not waived damages. We understand this to be the vital point upon which the relators rely for a reversal herein. In substance they contend (1) that no viewers are authorized; (2) that notice must only be given on the report of viewers; (3) that, there being no such report for want of viewers, therefore (4) no valid notice conferring jurisdiction can be served. The amendments of 1901 indicate a legislative intent that the county surveyor shall perform all duties formerly delegated to viewers. The mere oversight or inadvertence of the Legislature in failing to amend sections 3781 and 3782 did not result in a complete annihilation of the road law, so that no condemnation could be had of lands belonging to owners who refused to waive damages. It was not the intention of the Legislature by the act of 1901 to place it within the power of owners to prevent the establishment of a road by their mere refusal to waive damages. It is our duty to so construe the amended law as to preserve it and carry out the legislative intent. We therefore hold that the county commissioners acted with lawful authority when they served notices upon the relators of a hearing upon the petition and the report of the surveyor. As the law now stands, the word "viewers," wherever it occurs, either in the statute or the road proceedings, must be interpreted as referring to the county surveyor. Such a construction is necessary to preserve the vitality and effectiveness of the entire statute and carry out the legislative intent. We hold the notice and its service on the relators to have been valid, to have conferred jurisdiction, and to have been properly admitted in evidence.

This holding effectually disposes of all

other assignments of error presented by the relators. We will, however, allude to their contention that the preliminary proceedings of the commissioners are void, for the reason that it does not affirmatively appear that they by order declared the amount of damages awarded to relators, or that they ordered the amount of such damages to be set apart in the treasury out of the proper fund to be paid to the relators, or that they determined the amount of damages which in their judgment should be tendered to the relators. Damages were actually tendered by the commissioners, and were refused by the relators. This being true, we cannot in this collateral proceeding review the action of the county commissioners in the matter of awarding or ascertaining damages. Such review, if had at all, must be obtained by some direct procedure. All jurisdictional matters were pleaded and shown in the superior court. The only question it was called upon to decide was whether the proposed use of the relators' land was public. As it appears that the land is to be appropriated for a county road, it necessarily follows that the only judgment which the superior court could have rendered was the one entered. The appropriation of private property for a highway is necessarily for a public use. *State ex rel. Schroeder v. Superior Court*, 29 Wash. 1, 69 Pac. 366; *State ex rel. Thomas v. Superior Court*, 85 Pac. 256, 42 Wash. 521.

We fail to find that the honorable trial judge has committed any prejudicial error. The judgment is affirmed, and the stay of proceedings heretofore granted by this court will be vacated upon the filing of this opinion.

ROOT, FULLERTON, and MOUNT, JJ.,
concur.

WHITE v. McSORLEY et ux.

(Supreme Court of Washington. Aug. 5, 1907.)

1. QUIETING TITLE — PERSONS ENTITLED TO RELIEF.

Under the express provisions of Ballinger's Ann. Codes & St. § 5500, a person having a valid subsisting interest in real property and the right of possession thereto may recover the same by action and have judgment quieting his title.

2. SAME—PRIMA FACIE CASE.

Where, in an action to quiet title, it appears that plaintiff is the holder of the record legal title and has the right of possession, he is entitled to a judgment quieting his title, unless defendant avoids the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 91.]

3. VENDOR AND PURCHASER—RIGHTS OF PURCHASER—AS TO THIRD PERSONS.

One who purchases a lot for value without notice of an agreement between his vendor and another, whereby the lot was only conveyed to his vendor to secure payment of a debt, acquires absolute title in fee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 583, 584, 591.]

4. EXECUTION — SALE ON EXECUTION — TITLE OF PURCHASER.

A creditor, acquiring title to his debtor's real property by attachment and sale on execution, acquires no greater interest therein than that of his debtor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 747.]

Appeal from Superior Court, King County; Geo. E. Morris, Judge.

Action by Martin White against Hugh McSorley and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

Willett & Willett, for appellants. Aust & Terhune, for respondent.

MOUNT, J. This action was brought by the respondent to quiet title to lots 15 and 17 of block 72, Gilman Park addition to Seattle, now Ballard. The answer of McSorley and wife alleged title in themselves. At the trial of the case the court found that the title was in the plaintiff, and made findings to that effect, and entered a decree quieting title in the plaintiff. The defendants have appealed.

The undisputed facts show that on May 31, 1901, the title to lot 15 was in S. D. Crockett and wife. On that day Crockett and wife executed a deed of the lot to Maggie Donald. This deed was placed in escrow, to be delivered upon the payment of \$300 in monthly payments. Mrs. Donald made one or two payments, and then arranged with one Jacob Reichold to complete the payments for her. This was done, and after Mr. Reichold had made the payments the escrow deed was delivered to him. After the payments were all made there was due Mr. Reichold from Maggie Donald the sum of \$300, which she was unable to pay. She and her husband thereupon, on July 8, 1902, deeded the lot to Mr. Reichold, with the verbal understanding that, if the amount due him was not paid within one year, he was to sell the lot and, after deducting the amount due him, with interest, he was to deliver the balance, if any, to Mrs. Donald. Nothing thereafter was paid to Reichold, and on August 7, 1903, Reichold sold and conveyed the lot by warranty deed to respondent for the sum of \$358. In the meantime, on March 27, 1903, the appellants began an action against Thomas Donald and wife, and attached the lot, which was afterwards sold on execution and bid in by the appellants. As to lot 17, the facts are that prior to July 21, 1902, the title stood in the heirs and devisees of Albert Nelson, deceased. On that day those heirs and devisees conveyed the lot to M. A. Emery, who on the same day agreed to sell the lot to Maggie Donald, and some money was paid on the sale; but the money was within a short time afterwards returned, and the sale was not completed. Thereafter, in March, 1905, M. A. Emery and her husband sold and conveyed the lot to the respondent. In the meantime, on March 27, 1903, this lot was attached and sold in the same action and manner

as lot 15, as stated above. There are other facts in the case, but they tend only to show that the Donalds had parted with all claim to the lots prior to the levy of the attachment named. With the view we have taken of the case, such facts need not be stated, as they tend only to confuse the principal issue. The appellants claim through the attachment and execution sale above stated.

It will be readily seen that the Donalds had no record title to the lots at the time of the attachments. It is argued by appellants, as against the judgment to quiet title in the respondent, that the deed of lot 15 from the Donalds to Reichold and the deed of lot 17 to M. A. Emery were security for debts and therefore mortgages, and that in this state a mortgage is a mere lien and does not pass title. It is no doubt true that a mortgage in form is a mere lien in this state and does not pass title. But the statute provides, at section 5500, Ballinger's Ann. Codes & St., that any person having a valid subsisting interest in real property and a right to the possession thereof may recover the same by action and may have judgment in such action quieting plaintiff's title. Under this section a person holding the legal title to the real estate, with the right of possession, may maintain an action to quiet his title. In this case there is no dispute that the legal record title is in the plaintiff, and there is apparently no dispute that plaintiff is entitled to possession, the lots being vacant, provided his record title is valid. The appellants claimed in the answer that the title was conveyed to the respondent without consideration and in fraud of the appellants. There was no evidence to support the allegations of fraud. Appellants now claim under the evidence that the deed of lot 15 from the Donalds to Reichold and the deed to Emery were mere mortgages to secure a debt. In either case, where it appears or was admitted that the plaintiff was the holder of the record legal title and entitled to the possession, it then devolved upon the defendants to avoid that title in some way, and plaintiff was entitled to a judgment quieting his title, unless the defendants overcame that title by showing the same was fraudulent or in some other way avoiding it. The evidence undoubtedly shows that as to lot 15 the conveyance from the Donalds to Reichold, while absolute in form, was as to those two parties a mortgage with the power of sale in the grantee. The plaintiff purchased for value and in good faith, without notice of the agreement existing between the Donalds and Reichold. He therefore took an absolute title in fee. He knew of the attachment and sale thereon, and that the appellants were claiming some interest in the lots; but that interest was the interest of the Donalds alone, which interest, after sale by Reichold, was a mere right to whatever difference there was between the amount of the debt and the selling price. The evidence shows that the respondent was not actually

informed of that interest, but was informed that the claim of the appellants amounted to nothing. At any rate, the appellants, when they sold the interest of the Donalds at execution sale and became the purchasers, acquired no greater interest in the lots than the Donalds had at that time (*Lee v. Wrixon*, 37 Wash. 47, 79 Pac. 489, and authorities there cited), which was merely the right to redeem, or, in case of sale by Reichold, the right to an accounting for the balance due after the debt was paid. The appellants could, therefore, no more maintain an action to quiet title in themselves than the Donalds could have done, had the attachment and execution sale not taken place. It is not and cannot reasonably be claimed that the Donalds could maintain such an action against the respondent. As to lot 17 it does not appear that the Donalds had any claim whatever to that lot at the time of the attachment sale, and therefore appellants acquired no interest therein.

Appellants claim, further, that they have paid some taxes and street assessments against the property, and that they should be reimbursed therefor. They made no claim for such items in their answer, and no issue was made thereon at the trial. There is some rather indefinite evidence to the effect that appellants paid certain amounts for street assessments. There is not enough evidence of such facts, however, to warrant a reversal of the case on that account. No doubt the respondent should reimburse the appellants for assessments paid; but, inasmuch as that issue was not raised by the pleadings or at the trial, and as the same may still be enforced as a lien against the lots, we shall make no order thereon.

The judgment appealed from is therefore affirmed.

HADLEY, C. J., and FULLERTON, CROW, and ROOT, JJ., concur.

NORTHERN PAC. RY. CO. v. CITY OF SEATTLE.

(Supreme Court of Washington. Aug. 1, 1907.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENTS—RAILROAD RIGHT OF WAY.

Under Ballinger's Ann. Codes & St. § 739, subs. 10, 13, and the charter of the city of Seattle, giving the city council power to determine what property will be benefited by a street improvement, and to assess it therefor, its determination by assessment of a railroad right of way abutting on the street is conclusive that it is benefited.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Objections by the Northern Pacific Railway Company to an assessment of its property for street improvements by the city of Seattle were overruled by the city council and on appeal by the superior court, and from

the order of the court affirming the assessment the company appeals. Affirmed.

Carroll B. Graves, for appellant. Scott Calhoun and O. B. Thorgrimson, for respondent.

CROW, J. The city of Seattle, by Ordinance 12,185, created local district 1,059 for the improvement of Wallingford avenue and other streets, by constructing sidewalks, and directed that a special assessment be levied against the property therein to pay the cost thereof. The district consisted of all real estate to the depth of 120 feet abutting on each side of the streets improved. An assessment roll was prepared, filed, and notice given, in due form. Written objections made by the Northern Pacific Railway Company were overruled by the city council, and upon appeal were again overruled by the superior court of King county. From the order of the superior court confirming the assessment, the Northern Pacific Railway Company has appealed.

The assessment was made upon all abutting property according to frontage. The trial court found that the appellant has an abutting right of way, varying from 60 to 100 feet in width, which has been assessed; that it was acquired as a right of way, and is not used for any other purpose; that, with the exception of a single track located thereon, it is vacant and unimproved; that the assessment levied is in proportion to the assessments on other lands in the district; that the appellant's land is within the limits of the city of Seattle, close to the north shore of Lake Union, in a vicinity now being used for the operation of mills and manufacturing plants; that said land is suitable for the purpose of building side tracks and spurs to reach the different mills and manufacturing plants which are now, or may hereafter be, built in such locality; that only a small portion of such right of way is used and occupied by the railroad track; and that the land will be benefited and its market value increased by the improvement. These findings are sustained by the record. The ordinance creating the district, and directing an assessment upon all abutting property according to frontage, was a legislative determination by the city council that all abutting property within such district will be benefited. With perhaps occasional exceptions involving fraudulent or arbitrary action, such legislative determination does not become the subject of review by the courts, but is final. *Smith v. Mayor, etc., of Worcester*, 182 Mass. 232, 65 N. E. 40, 59 L. Ed. 728; *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661; *Chicago, etc., R. R. Co. v. City of Joliet*, 153 Ill. 649, 39 N. E. 1077; *C. & N. W. Ry. Co. v. Elmhurst*, 165 Ill. 148, 46 N. E. 437; *People ex rel. Scott v. Pitt*, 169 N. Y. 521, 62 N. E. 662, 53 L. R. A. 372; *I. C. R. R. Co. v. People*, 170 Ill. 224, 48 N. E. 215.

In *Prior v. Construction Company*, 170 Mo.

439, 451, 71 S. W. 203, 208, the court said: " * * * The question of whether the plaintiff's lots would or would not be benefited by the construction of this sewer is a legislative, and not a judicial, question, and the municipal Legislature adjudged that they would be benefited and fixed the ratio of such benefit, when it established the joint sewer district, and as there is no question of fraud or oppression of the municipal assembly in so passing such ordinance (even if such allegation would convert the question into a judicial one, as to which it is not necessary now to decide), such judgment of the assembly is conclusive." In *Lightner v. City of Peoria*, 150 Ill. 81, 87, 37 N. E. 69, 71, it is said: "As already seen, the imposition of the tax is, of itself, a determination by the legislative authority of the city that the benefits to the contiguous property will be as great as the burden imposed. There is necessarily vested in the city council a large discretion in determining the extent of the improvement, what shall be included within it, and the nature and character of it. By the statute they are expressly authorized to determine that the improvement shall be made and paid for by special taxation of contiguous property, and, unless there has been a clear abuse of the power and discretion conferred upon the city council, courts are powerless to interfere." Judge Cooley, in his work on *Taxation* (3d Ed.) vol. 2, at page 1208, says: "It has been repeatedly decided that the legislative act of assigning districts for special taxation on the basis of benefits cannot be attacked on the ground of error in judgment regarding the special benefits, and defeated by satisfying a court that no special and peculiar benefits are received. If the Legislature has fixed the district, and laid the tax for the reason that, in the opinion of the legislative body, such district is peculiarly benefited, its action must in general be deemed conclusive." In his work on *Constitutional Limitations*, at page 729 et seq., Judge Cooley says: "On the other hand, and on the like reasoning, it has been held equally competent to make the street a taxing district, and assess the expense of the improvement upon the lots in proportion to the frontage. Here also is apportionment by a rule which approximates to what is just, but which, like any other rule that can be applied, is only an approximation to absolute equality. But if, in the opinion of the Legislature, it is the proper rule to apply to any particular case, the courts must enforce it."

The appellant contends that the land held and used by it as a right of way cannot be assessed for local street improvements; that a special assessment can only be levied when a special benefit produced by the improvement inures to the property assessed; that, unless it can be affirmatively shown that some special benefit does result, no assess-

ment can be imposed; that the strip of land used solely as right of way for railway trains is not benefited by the improvement of an abutting street; that the public use to which the land is exclusively devoted is not thereby rendered more valuable; that trains can pass and repass as well without as with the improvement; that appellant only occupies its land as a right of way, not owning the fee, and that its easement is not subject to special assessment. Although the appellant may not hold the fee-simple title, there is no reasonable or immediate probability that it will abandon the land. Its use will doubtless be perpetual. Appellant is therefore for all practical purposes the substantial owner. The fee, subject to its use and easement, is of but little value, if any. Except for appellant's occupancy, no suggestion would be made that the land was not benefited by the improvement, or that it would not be subject to the assessment. The particular use of the land cannot affect its liability to assessment. Abutting property cannot be relieved from the burden of a street assessment simply because its owner has seen fit to devote it to a use which may not be specially benefited by the local improvement. The benefit is presumed to inure, not to such present use, but to the property itself, affecting its value. Appellant cites the following authorities to show that its right of way cannot be subjected to special local assessments: *Village of River Forest v. Chicago & N. W. Co.*, 64 N. E. 364, 197 Ill. 344; *N. Y. & N. H. R. R. Co. v. City of New Haven*, 42 Conn. 279, 19 Am. Rep. 534; *City of Philadelphia v. Philadelphia, etc., R. Co.*, 33 Pa. 41; *Junction R. Co. v. City of Philadelphia*, 88 Pa. 424; *City of Boston v. Boston & A. R. Co.*, 49 N. E. 95, 170 Mass. 95; *Detroit, G. H. & M. Ry. Co. v. City of Grand Rapids*, 63 N. W. 1007, 106 Mich. 13, 28 L. R. A. 793, 58 Am. St. Rep. 466; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 62 N. W. 417, 89 Wis. 506, 28 L. R. A. 249; *Borough of Mount Pleasant v. B. & O. R. Co.*, 20 Atl. 1052, 138 Pa. 365, 11 L. R. A. 520; *City of Alleghany v. Western Penn. R. Co.*, 21 Atl. 763, 138 Pa. 375; *Naugatuck R. Co. v. City of Waterbury*, 61 Atl. 474, 78 Conn. 193. While these cases seem to be in point, there is a sharp conflict of authority on this question. We think the best-considered cases and the weight of modern authority, from which citations are hereinafter made, are opposed to appellant's contention. No citation of authority is necessary in support of the fundamental principle that the right of a municipality to levy special assessments depends on statutory enactment, and that it has no existence unless there be a valid statute conferring it. It is also elementary that the whole theory of special assessment is based on the doctrine that the property against which it is levied derives some special benefit from the local improvement. The appellant makes no contention that the assessment was not

levied by regular statutory procedure, that it was not made proportionately on all lands in the district, or that any statute expressly exempts its right of way. Its position seems to be that, having shown the exclusive use of the land for a right of way, it must be conclusively presumed that it has not been benefited by the improvement, and therefore cannot be assessed at all. In other words, it does not question the amount of the assessment levied, but the validity of any assessment. This position cannot be sustained. After the proper legislative authority (in this case the city council) has by ordinance established a local improvement district, which includes all abutting property, and has directed an assessment according to frontage, the presumption is that all abutting property within such district is benefited by the improvement without regard to the use to which it may be applied.

Subdivisions 10 and 13 of section 739, Ballinger's Ann. Codes & St. (section 3732, Pierce), expressly grant to councils of cities of the first class legislative authority to provide for local improvements, to determine that they may be made at the expense of abutting property, and to levy assessments therefor on benefited property. The same powers are granted by subdivisions 10 and 13 of section 18, art. 4, of the Charter of the City of Seattle. Subdivision 3, § 11, art. 8, of the City Charter, authorizes the establishment by ordinance of a local improvement district which shall embrace all property benefited by the improvement, and further provides that: "Unless otherwise provided in such ordinance such district shall include all the property between the termini of said improvement, abutting upon, adjacent or proximate to the street, lane, alley, place or square proposed to be improved to a distance back from the marginal line thereof one hundred twenty (120) feet, and all property included within said limits of such local improvement district shall be considered and held to have a frontage upon such improvement, and shall be the property specially benefited by such local improvement, and shall be the property assessed to pay the cost and expense thereof, or such proportion thereof as may be chargeable against the property specially benefited by such improvement, which cost and expense shall be assessed upon all of said property so benefited, in proportion to the frontage thereof upon such improvement." This provision confers on the council legislative authority to determine what property will be benefited. In this case the council have by ordinance determined that all property abutting on the improvement to a distance of 120 feet from the line thereof, which includes the appellant's right of way, has been benefited, and has directed that the assessment be made thereon in proportion to frontage. This method of making assessments according to frontage has been held valid and constitutional by the great weight of modern au-

thority. Elliott on Roads & Streets (2d Ed.) § 559; 2 Cooley on Taxation (3d Ed.) pp. 1217, 1218, and cases cited; French v. Barber Asphalt Paving Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; Webster v. Fargo, 181 U. S. 394, 21 Sup. Ct. 623, 45 L. Ed. 912; Sheley v. Detroit, 45 Mich. 431, 8 N. W. 52; Hackworth v. Ottumwa, 114 Iowa, 467, 87 N. W. 424; Harrisburg v. McPherran, 200 Pa. 343, 49 Atl. 988; Parsons v. District of Columbia, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943; King v. Portland, 63 Pac. 2, 38 Or. 402, 55 L. R. A. 812; King v. Portland, 184 U. S. 61, 22 Sup. Ct. 290, 46 L. Ed. 431. This court, in the case of McNamee v. Tacoma, 24 Wash. 501, 64 Pac. 791, where a reassessment had been made on the front-foot basis, held such a method of assessment to be proper, and having distinguished Norwood v. Baker, 172 U. S. 209, 19 Sup. Ct. 187, 43 L. Ed. 443, substantially as it was afterwards distinguished in French v. Barber Asphalt Company, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879, and later cases by the Supreme Court of the United States, reversed the judgment of the superior court, which had held the statute allowing an assessment according to frontage to be unconstitutional. In Sheley v. Detroit, supra, Mr. Justice Cooley said: "We might fill pages with the names of cases decided in other states which have sustained assessments for improving streets, though the apportionment of the cost was made on the same basis as the one before us. If anything can be regarded as settled in municipal law in this country, the power of the Legislature to permit such assessments and to direct an apportionment of the cost of frontage should by this time be considered as no longer open to controversy. Writers on constitutional law, on municipal law, and on the law of taxation have collected the cases, and have recognized the principle as settled. * * *"

As above stated, however, the theory of the appellant is that the judgment of the superior court confirming the assessment is erroneous, for the reason that, according to its contention, neither the statute nor the city charter contemplates that its lands, which are at present used exclusively as a right of way, shall be assessed; that an assessment can be upheld only on the theory of benefits conferred equal to the assessment imposed; and that in its very nature its right of way cannot receive any such benefit. We have heretofore mentioned the cases cited by appellant in support of this contention. There are, however, numerous authorities announcing the contrary doctrine which we now approve, holding that the right of way of a railroad is liable to special assessments for local improvements. This rule should certainly be adopted in this case, as our statutes and the charter of the city of Seattle confer such broad legislative authority upon the city council to determine what lands shall be included in the district as benefited by the im-

provement. 2 Cooley on Taxation (3d Ed.) p. 1234; Louisville, etc., Co. v. Barber Asphalt Paving Co., 76 S. W. 1097, 116 Ky. 856; City of Ludlow v. Trustees, etc., 78 Ky. 357; Northern Indiana R. R. Co. v. Connelly, 10 Ohio St. 160; L. & N. R. Co. v. Barber Asphalt Paving Co., 197 U. S. 430, 25 Sup. Ct. 466, 49 L. Ed. 819; Chicago & Alton R. R. Co. v. City of Joliet, 153 Ill. 649, 39 N. E. 1077; C. & N. W. Ry. Co. v. Elmhurst, 165 Ill. 148, 46 N. E. 437; I. C. R. R. Co. v. The People, 170 Ill. 224, 48 N. E. 215; Pittsburgh, etc., Ry. Co. v. Hays, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597, 17 Ind. App. 261; Peru & Indianapolis R. R. Co. v. Hanna, 68 Ind. 562; Rich v. City of Chicago, 38 N. E. 255, 152 Ill. 18; Indianapolis & V. R. Co. v. Capital Paving, etc., Co., 54 N. E. 1076, 24 Ind. App. 114; State v. City of Passaic, 23 Atl. 945, 54 N. J. Law, 340; State v. Robert P. Lewis Co., 82 Minn. 402, 85 N. W. 207, 86 N. W. 611, 53 L. R. A. 421 (on rehearing). In City of New Whatcom v. Bellingham Bay, etc., R. R. Co., 16 Wash. 137, 47 Pac. 237, we held that it was not within our province to say that a railroad right of way could, under no circumstances, be benefited by a street improvement, and sustained a special assessment on such right of way. We cannot express our views more clearly on this question than by quoting at length from the language of Mr. Justice Peck, in Northern Indiana Railway Company v. Connelly, supra: "If railroad tracks are taxable for general purposes, it is difficult to perceive why they should not be subject also to special taxes or assessments. The company, to advance its own interests, has seen fit to appropriate to its use ground within the corporate limits of the city of Toledo, and over which that city had the power of making assessments to defray the expense of local improvements, and why should not the company be held to have taken it cum onere? A citizen would scarcely claim exemption, because he had devoted his lot to uses which the improvement could not in any way advance, and we see no good reason why a railroad company should be permitted to do so. The company has the exclusive right to the possession, so long as it is used for the road, and if the road was exempt from taxation for general purposes, it would by no means follow that it was not liable for such special assessments. See In re City of New York, 11 Johns. (N. Y.) 77, where church sites, which, by the laws of New York, were exempt from taxation, were held to be liable for such assessments. But it is said that assessments, as distinguished from general taxation, rest solely upon the idea of equivalents, a compensation proportioned to the special benefits derived from the improvement, and that in the case at bar the railroad company is not, and in the nature of things cannot be, in any degree, benefited by the improvement. It is quite true that the right to impose such special taxes is based upon a presumed equiva-

lent; but it by no means follows that there must be in fact such full equivalent in every instance, or that its absence will render the assessment invalid. The rule of apportionment, whether by the front foot or a percentage upon the assessed valuation, must be uniform, affecting all the owners and all the property abutting on the street alike." In *Louisville, etc., R. R. Co. v. Barber Asphalt Paving Company*, 197 U. S. 430, 25 Sup. Ct. 468, 49 L. Ed. 819, the first syllabus reads as follows: "In determining whether an improvement does, or does not, benefit property within the assessment district, the land should be considered simply in its general relations and apart from its particular use at the time; and an assessment, otherwise legal, for grading, paving, and curbing an adjoining street, is not void under the fourteenth amendment because the lot is not benefited by the improvement owing to its present particular use." In *City of Ludlow v. Trustees*, supra, the Court of Appeals of Kentucky said: "While assessments of this character, as distinguished from general taxation, rest upon the basis of benefits or presumable benefits to the property assessed, it is not essential to their validity that actual enhancement in value, or other benefit to the owner, shall be shown. The passage of the ordinance by the city council, under the power granted in the charter, is conclusive of the propriety of the improvement, and of the question of benefit to the owners of abutting property. *Northern Indiana R. R. Co. v. Connelly*, 10 Ohio St. 164. Absolute equality in the distribution of such burdens cannot be attained. An approximation to equality is all that is possible, but in reaching this point the present or prospective use of the property cannot enter into the calculation."

It might possibly be suggested that, in many of the cases here cited, the attacks made on the validity of special assessments were collateral, while in this instance the attack is direct. It is true that this hearing is on written objections to the proposed assessment. The objections which may be presented and adjudicated in a proceeding of this character do not extend to or question the right of the city council in the exercise of its legislative authority to determine that appellant's land is benefited and shall be included in the assessment district; but the appellant has the right to question by such objections all matters of procedure and the equality of the assessments made. In *People ex rel. Scott v. Pitt*, supra, the Court of Appeals of New York, in passing on a statute of that state quite similar to the statutory and charter provisions here involved, said: "The provisions of the charter did not deny to the relator the right to a judicial hearing before the assessment became conclusive upon him,

and so far as that right is secured to the citizen by the Constitution or any principle of law in proceedings for imposing a tax or assessment, it was not disregarded or violated by the statute in question. The relator was, by the terms of the act, entitled to a hearing and had a hearing before the local authorities upon every question to which the right applied. He had the right to show that the proceedings for the construction of the sewer were not initiated or conducted as required by the statute. He had the right to show that his property was so situated that he could not use the sewer for drainage purposes. He had the right to show that he owned no property on the line of the street, or, if he did, that the width was erroneously estimated. He had the right to a hearing upon every question relating to the validity or amount of the assessment except the principle or rule of apportionment, and that was prescribed by the Legislature in the exercise of its discretion, and he had no more right to a hearing upon that question after the statute was enacted than he had to a hearing upon the question whether his property should be assessed at all." The determination of the city council that the appellant's land is benefited and should be included in the local improvement district and assessed is final under any showing made in this case.

The appellant further contends that, even if it should be held that its right of way will receive some special benefit from the improvement, the assessment should not be made, as no lien can be enforced therefor. It insists there is no law in this state nor any provision in the statute for special assessments, which permits the road and right of way of a public service corporation to be broken up or sold in fragments, and the exercise of its franchise to be destroyed by piecemeal foreclosures and sales. The right and power to levy a special assessment upon the appellant's right of way is not in any way dependent upon the question as to whether a valid and enforceable lien can be created against its property. *Troy & Lansingburg R. R. Co. v. Kane*, 9 Hun (N. Y.) 506. We do not understand that either the collection of the assessment, or the enforcement of any lien, is now before us for consideration. In this proceeding we cannot be called upon to anticipate and determine the validity of any method the city of Seattle may adopt for the collection of the assessment. It will be ample time for us to pass upon that question when it is directly presented.

The judgment is affirmed.

HADLEY, C. J., and DUNBAR and ROOT, JJ., concur.

ERICKSON v. F. McLELLAN & CO.

(Supreme Court of Washington. Aug. 1, 1907.)

CONTRACTS—ACTION FOR BREACH—PLEADING—REPLY—DEPARTURE.

A complaint alleged that plaintiff contracted with defendant to do certain work in improving a street, and that the contract had been performed. The contract was attached as an exhibit, and provided that the work should be done on a day specified, and that for each day's delay a certain sum should be paid. The answer admitted performance, but alleged that it was not completed within the time given. The reply admitted that the work was not completed within the time set, but alleged that the contract had been changed so as to include additional work; that plaintiff was delayed by failure of defendant to erect a bulkhead, and that the modification of the contract and failure of defendant amounted to a waiver of the time limit. *Held*, that the allegations of the reply were not a departure from those of the complaint; there being no desertion of the cause of action.

Appeal from Superior Court, King County; Geo. E. Morris, Judge.

Action by C. J. Erickson against F. McLellan & Co. From a judgment for plaintiff, defendant appeals. Affirmed.

Plles, Howe & Farrell and Dallas V. Halverstadt, for appellant. Shank & Smith, for respondent.

PER CURIAM. The respondent brought this action against the appellant to recover the sum of \$1,542.90. In his complaint he alleged, in substance, that he had entered into a contract with the appellant by the terms of which he agreed to do certain work in improving a public street in the city of Seattle, which the appellant was under contract with the city to do; the work consisting of certain grubbing and clearing, and excavating and filling, the first to be paid for in a lump sum, and the other at so much per cubic yard. Alleging, further, that he had fully performed all of the terms and conditions of the contract on his part to be performed. The written contract sued on was attached to the complaint as an exhibit, and contained a condition to the effect that the respondent should have 11 months from June 1, 1904, within which to fully complete the work required under the contract, and that for each and every day that the work should remain unfinished after the required time he would pay \$10 as liquidated damages. A certain further sum was claimed also for extra work. The appellant in its answer admitted the execution of the contract mentioned in the complaint, and the doing of this work as therein alleged, but denied that there was any balance due, and especially denied that the appellant had performed the contract according to its terms, or that he was entitled to anything for extra work. For an affirmative defense it set out the clause in the contract requiring the work to be completed within a given time, and alleged that the respondent did not complete the

work within the given time, nor for more than 130 days thereafter. It also alleged that it had furnished the respondent with certain materials and labor which had not been paid or accounted for; further alleging that the amount due for liquidated damages and for the value of the labor and materials exceeded the respondent's demand, and prayed that the respondent's action be dismissed. The respondent filed a reply to the affirmative defense, in which he admitted that he had not completed the work within the time prescribed in the contract, but alleged that the contract had been changed so as to include further and additional work, and for the finishing of which no time limit was fixed; also, that he was further delayed by the failure of the appellant to erect a certain bulkhead which was necessary to be erected before the work he had contracted to do could be completed; and that the subsequent change in the contract and the failure of the appellant to erect the bulkhead amounted to a waiver of the time limit prescribed in the written contract. On the issues thus made, the case went to trial before the court without a jury. During the course of the trial, the respondent offered evidence tending to show an oral modification of the contract sued on in the respects set out in the reply, and that the appellant had delayed the completion of the work by its failure to erect the bulkhead. To this evidence the appellant objected, but its objection was overruled. At the conclusion of the evidence, the court found in favor of the respondent for practically the amount sought to be recovered. Judgment was entered upon the findings, and this appeal taken therefrom.

The appellant assigns error upon the ruling of the court admitting evidence of the facts pleaded in the reply, contending that the reply was a departure from the allegations of the complaint, and hence not permissible in this state under the ruling of *Distler v. Dabney*, 3 Wash. St. 200, 28 Pac. 335, and other cases maintaining the same doctrine. In the case cited it was held that a plaintiff could not set up one cause of action in his complaint, and after answer abandon that cause of action and set up an entirely new one in his reply. To the same effect is *Osten v. Winehill*, 10 Wash. 333, 38 Pac. 1123, where it was also held that the question could be raised by objecting to the admission of evidence and moving for a nonsuit. But the case at bar does not fall within the rule of either of these cases. A departure in pleading takes place when, in a subsequent pleading, a party deserts the ground taken in his last antecedent pleading and resorts to another. Here there was no desertion of the cause of action set out in the complaint. The respondent was still compelled, in order to recover, to prove the principal allegations of his complaint, and the most that can be said against the pleading is that the entire cause of action is not

set out in the complaint. But to set out a part of the cause of action in the complaint and the balance in the reply is not a departure in pleading, however defective the pleading may otherwise be. Neither is it the proper remedy for such a defect to go to trial and object to the introduction of evidence. The pleading should be moved against, so that the pleader may have an opportunity to correct it without the delay and expense of taking a nonsuit and commencing his action over again. It seems to us now that such a practice would have been more in consonance with the spirit of the Code, had it been adopted in the cases above cited; but, since we hold the case at bar does not fall within them, it is unnecessary to announce a modification of the rule. We will not, however, extend the doctrine to other cases.

As no other error is assigned, it follows that the judgment appealed from must be affirmed.

It is so ordered.

STATE v. KATON.

(Supreme Court of Washington. Aug. 2, 1907.)

1. RAPE—EVIDENCE—SUFFICIENCY.

Evidence examined, and *held* to support a conviction for the rape of a female under the age of consent notwithstanding the impeachment of prosecutrix by her own conduct and admissions and by the testimony of other witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Rape, § 76.]

2. WITNESSES—CROSS-EXAMINATION.

Where, on a trial for rape, witness denied that she accompanied prosecutrix and defendant to the lodging house where the rape was committed as testified by prosecutrix, and professed only slight acquaintance with her, she was properly permitted to be cross-examined as to whether she had not written prosecutrix asking her to meet herself and defendant at a place named, and whether she had not attempted to persuade prosecutrix to leave the city with her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 931, 935, 936.]

3. CRIMINAL LAW—APPEAL — PRESENTATION OF ERROR—EXCEPTION—SUFFICIENCY.

A general exception to an entire paragraph of a charge containing several distinct propositions, each of which, with possibly one exception, is free from error, is not available.

Root, J., dissenting in part.

Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Llin Katon was convicted for the rape of a female under the age of consent, and he appeals. Affirmed.

W. H. Abel, for appellant. E. E. Boner, for the State.

FULLERTON, J. The appellant, Katon, was accused by the prosecuting attorney of Chehalis county of the crime of rape, committed on the person of one Ruby Shannon, a female child of the age of 14 years. He pleaded not guilty to the charge, and on the issue thus raised a trial was had before a jury, which resulted in a verdict of guilty.

From the judgment pronounced upon the verdict, he appeals.

It is first contended that the evidence was insufficient to justify the verdict. This contention is not based on the claim that there was a want of evidence tending to show the guilt of the appellant, but the claim is that the prosecuting witness, on whose evidence the state was compelled to rely to maintain its case, was so far impeached by her own conduct and admissions, and by the testimony of other witnesses, that the court should hold as a matter of law that her evidence was insufficient to maintain a conviction. The witness on her direct examination testified to acts which unquestionably showed the appellant's guilt, but on cross-examination she admitted that she had stated to certain persons named that the appellant had not had sexual intercourse with her, and was not the father of her child, and that she had only the day before, on the trial of another person for the same offense, sworn, in answer to questions put to her by the defense, that the appellant had never had sexual intercourse with her, and was innocent of any offense toward her. The only explanation she gave of her conduct in this respect was that she had promised the appellant to shield him in case any accusation should be made against him. The direct evidence tending to support her was the testimony of two persons who saw her in company with the appellant on the evening preceding the night she says the appellant had intercourse with her. The indirect evidence was somewhat more to the point. This consisted of admissions made by the appellant's witnesses and the appellant himself, and his unsuccessful attempt to prove that he was elsewhere at the time the prosecutrix testified he was with her. But, of course, to the overt act there was no direct evidence on the part of the state, save that of the prosecutrix herself. But notwithstanding this fact we do not think there is here any question of law for the court. While a conviction of the crime of perjury disqualifies a witness in this state in the absence of a reversal or pardon, no other disqualification of this sort exists. *State v. Pearson*, 37 Wash. 405, 79 Pac. 985. Any person, despite his character or previous conduct, may be a witness, although his character or conduct may be shown to affect his credibility. The witness therefore being a lawful one, it is not the province of this court to weigh her testimony. The jury do that in the first instance, and the trial court afterwards, when the evidence is challenged; but, when both the jury and the trial court say that the evidence is sufficient, the question is ordinarily concluded. An appellate court which admittedly deals with only questions of law cannot weigh conflicting evidence without usurping its functions.

The appellant called as a witness one Mrs. Cole. This person, the prosecutrix tes-

tified, accompanied the prosecutrix and the appellant to the lodging house where the crime charged against the appellant was committed. The witness denied the statement of the prosecutrix, and professed only a slight acquaintance with her. On cross-examination she was asked, and over the objection of the appellant was compelled to answer, whether or not she had written a letter to the prosecutrix asking her to meet the witness and Katon at the Aberdeen Cemetery, and whether or not she had attempted to persuade the prosecutrix to leave Aberdeen with her. The first question she answered in the affirmative, and the second negatively. The ruling of the court is assigned as error on the authority of the case of *State v. Belknap* (Wash.) 87 Pac. 934. But that case is not authority for the contention here made. The questions put to the witness in the case at bar were pertinent to the inquiry. They tended to show the intimacy of the witness with the prosecutrix, that the witness had sought to bring the prosecutrix and the appellant together, and tended in some degree to corroborate the prosecutrix's evidence. In the case cited the questions held objectionable were wholly foreign to any issue in the case, and tended only to the degradation of the witnesses, without in any way aiding the jury. But cross-examination, to be permissible, need not always bear directly on the question at issue. The witness may be examined on matters foreign to the issue, when it reasonably tends to affect his or her credibility. For example, in *State v. Coella*, 3 Wash. 99, 28 Pac. 28, it was held error to refuse to permit a woman witness to be asked whether she was not a prostitute. The question what is and what is not an abuse of the privilege admits of no general answer. Each case must largely depend upon the circumstances which surround it, relegating the question in a large measure to the discretion of the trial court, to be reviewed only for an abuse of that discretion. In this instance, we have no hesitancy in saying the discretion was not abused.

The cross-examination of witnesses Millete and Hollingsworth was also proper. The questions complained of tended to discredit their positive statement made while testifying in chief, and as such were admissible even under the most strict application of the rule contended for by the appellant.

The part of the charge of the court complained of is not properly before us for review. The exception was a general exception to an entire paragraph containing several distinct propositions, each of which, with possibly one exception, was free from error. Such an exception, we have repeatedly held, is insufficient to bring the objectionable portion of the charge into this court for review, since it does not call the attention of the trial court to the particular part of the charge that is deemed erroneous. *Galla-*

more v. Olympia, 34 Wash. 379, 75 Pac. 978, and cases there cited.

The judgment is affirmed.

HADLEY, C. J., and MOUNT and CROW, JJ., concur.

ROOT, J. I dissent. I do not think the law justifies sending a man to the penitentiary upon the testimony of a woman, who, upon oath, confesses to being unchaste and a perjurer concerning the very subject-matter in question. Aside from that of the prosecuting witness, there is no evidence of defendant's guilt. At the trial she testified that he was the father of her child. On the very day before, on the trial of another man for that identical offense, she testified that this defendant had never had sexual intercourse with her and was not the father of her child. A few weeks before, she had sworn that one W. was the father of her child. She also admitted upon the trial of defendant that she had told a lady friend with whom she was living that defendant was innocent. She admitted that she had been sexually intimate with at least one other man. She mentioned three persons besides the defendant as being present and knowing of her going to a room in a Hoquiam lodging house with defendant, where she says the offense occurred. Every one of these three, as well as the defendant himself, positively disputes her. She also admitted that, at the preliminary examination, she had sworn that she and another girl and defendant and another man had all four occupied the same room. Upon this trial she swore that this was not true, but that she and defendant were alone in a room all night sleeping together. Nobody corroborated her except as to one circumstance. Her sister and her sister's husband testified to seeing her and defendant walking along the street in Aberdeen toward Hoquiam. This brother-in-law, who so corroborated her, was one of the men whom she upon a former occasion had sworn to be the father of her child. He was tried and acquitted of the offense. He said he had never seen this defendant before that night; that he was about a block away; that it was "rather dark," being about 9:30 in the evening; that he thought it was about the 1st of April, but did not know how he fixed the time. His wife fixed the time as 6 p. m. It was about three miles from Hoquiam. She had never seen defendant before. This evidence is far from convincing, and, even if true, would have little bearing upon the question of defendant's guilt. Seeing two girls and two men in a town on a street that, if followed, would lead to another town three or four miles distant, is not very positive evidence that one of the men committed rape on one of the girls in the other town that night. The baby was shown to the jury. It had blue eyes. The eyes of

defendant are brown, and those of the mother black. The prosecuting witness also admitted saying, a few hours before the trial, that, if she did not swear against defendant, her father would kick her out of the house. In explanation of her former testimony (that defendant was innocent), she said she had promised to shield him. She gave no reason as to why she should shield him, instead of her brother-in-law. She admitted that defendant had offered her no inducement. Said she met him by chance on the street after her baby was born, and after a former charge against him had been dismissed, and promised (at a time when no charge was pending) to shield him.

It is urged that, the jury having found the defendant guilty, and the trial court having refused a new trial, this court should not review the question. I do not think we can escape responsibility so easily. Subdivision 6 of section 6965, Ballinger's Ann. Codes & St., gives as a ground for granting a new trial the following: "When the verdict is contrary to law and evidence." This means that somebody must pass upon the question of whether the jury has returned a verdict "contrary to law and evidence." This duty devolves first upon the trial judge. If he denies the motion, his ruling can be assigned as error upon appeal. That assignment of error must then be examined by this court. It becomes our duty to say whether the ruling was error or not. To do so, we must examine and pass upon the evidence. The statute leaves us no other course. To be sure this court should be slow to reverse the action of a trial court in denying a new trial because of alleged insufficiency of evidence, and especially where the trial judge is of the ability and character of him who presided at this trial. But where this court is clearly convinced that the verdict is, in the language of the statute, "contrary to law and evidence," it is the duty of the court to set aside the verdict, thereby correcting the error of the trial court in not so doing. Above and beyond all technical considerations is the paramount and inflexible demand of our jurisprudence that every defendant shall be entitled to a fair trial and be convicted of crime only upon evidence showing his guilt beyond a reasonable doubt. How any court can say that this evidence shows this defendant to be guilty beyond any reasonable doubt, or hold that any jury might properly have so found, is more than I can understand.

The statute making it a felony for a man to have illicit sexual intercourse with a girl under 18 is a good law. It was intended to protect innocent, inexperienced, imprudent girls. It was not enacted for the benefit of "streetwalkers," nor as an encouragement to blackmailers. Every conviction like the one before us is calculated to bring this law into disrepute. A noted judge once said that rape was a hard charge to prove, and a much harder one to disprove. The latter portion

of this observation becomes especially pertinent if a conviction is to be sustained upon such testimony of a confessed perjurer as we find here. Few things militate against a good law more than an unjust, unreasonable, and offensive enforcement thereof in a manner whereby its spirit and purpose are sacrificed to its letter or form. Such a proceeding tends to discredit the statute and to defeat its usefulness and legitimate objects.

I think the law and justice demand a reversal of the judgment in this case.

FORSTER et al. v. RAZNIK et al. (HOLLAND BANK, Intervener).

(Supreme Court of Washington. Aug. 2, 1907.)

1. MUNICIPAL CORPORATIONS—STREETS—OBSTRUCTION—INJUNCTION—ESTOPPEL.

A strip of land, alleged to have been dedicated as an alley, was never used as such at any time, and defendants and their predecessors in interest for more than 20 years were in actual, open, and notorious possession of the same under color of title and claim of ownership. During this time it was assessed annually for taxes, with possibly one or two exceptions, and such taxes were paid, as were also special assessments levied against it, and a permanent building was erected thereon, all of which was without objection from plaintiffs or their predecessors in interest who were adjoining landowners. The city council at one time adopted a resolution reciting that, whereas there was some controversy concerning the matter, they thereby disclaimed all right to the same as a public alley, and, though subsequently assuming a different attitude, it did not open or use the strip as an alley. Held that, though mere adverse possession was insufficient to acquire title to a public alley, yet plaintiffs were estopped to question defendants' right to occupy the strip of land and to maintain an action to enjoin them from obstructing the same.

2. INJUNCTION—PARTIES—HIGHWAYS—OBSTRUCTION.

A mortgagee of a strip of land alleged to have been dedicated as an alley is a proper party, though possibly not a necessary one, to an action to enjoin the obstruction of the same.

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by Minnie C. Forster and another against Hannah Raznik and others, in which the Holland Bank intervened. From a judgment for defendants, plaintiffs appeal. Affirmed.

Merritt, Oswald & Merritt, for appellants. Post, Avery & Higgins, for respondent Holland Bank. Robertson & Rosenhaupt, for respondents Hannah Raznik and others.

ROOT, J. This is an action to enjoin respondents, except the Holland Bank, intervener, from obstructing a strip of land claimed by appellants to be an alley, in the city of Spokane. The Holland Bank, claiming to have a mortgage covering said parcel of land, was permitted to intervene. The trial court found that this portion of land had been, in effect, originally dedicated as an alley, but that the appellants were estopped from maintaining this action. Where-

upon a judgment of dismissal was entered, from which this appeal is prosecuted.

The parcel of land involved is $14\frac{1}{4}$ feet wide, and lies between, or marks the boundary of, two additions to said city, and is treated as an alley it would connect Riverside and Sprague avenues. It was the contention of respondents that this parcel of land was never intended as an alley or public way by those who platted the additions mentioned. They further contend that, even if it be held to have been dedicated as an alley when the plats were filed, nevertheless these appellants and their predecessors in interest have been guilty of such laches as to estop them from maintaining this action. The appellants, as owners of a lot abutting upon said parcel of ground, claim an easement therein and thereover as a public alley, and urge that the defense of respondents is in effect a claim of title by adverse possession, which cannot be asserted in and to a public street or alley, and rely especially in support of their contention upon *West Seattle v. West Seattle, etc., Co.*, 38 Wash. 359, 80 Pac. 549, and *Rapp v. Stratton*, 41 Wash. 263, 83 Pac. 182. It appears that this strip of land was by the makers of the plat of one of these additions, some years after the filing of said plat, conveyed, or attempted to be conveyed, to Frank H. Graves, by warranty deed, in October, 1885, and after various mesne conveyances a deed thereof was made, by one of his successors in interest, to the respondents Raznik. The ground appears never to have been used at any time as an alley. In 1887 the city council of Spokane adopted a resolution reciting that, whereas there was some controversy concerning the matter, they were of the opinion that the city had no vested right in said ground, and thereby disclaimed all rights to the same as a public alley or highway. Subsequently the city appears to have assumed a different attitude, although it did not open or use the strip as an alley. It has been assessed annually, with possibly one or two exceptions, since 1885, by or for the city, and the taxes were always paid. Special assessments were also levied against it by the city for the improvement of Riverside avenue, Bernard street, and Sprague avenue; some of these having the effect of lessening the amount assessed upon appellants' property abutting thereupon. A building was erected thereon in 1887, and a permanent building in 1897. The defendants Raznik and their predecessors appear to have been for more than 20 years last past in the actual, open, and notorious possession under color of title and claim of ownership. Neither appellants nor their ancestors are shown to have objected to this possession, or to have made any protest against the improvement or occupation of said strip of land by said defendants and their grantors. There was evidence that, when these defendants constructed the permanent building re-

ferred to, the west wall thereof was connected with the east wall of a building owned by these appellants or their predecessor in interest, by consent.

We think the judgment of the trial court was correct. As said by appellants, this court has decided that mere adverse possession is not sufficient to acquire title to an alley or public street. But in one of the cases referred to, that of *West Seattle v. West Seattle, etc., Co.*, the court said: "We hold, on both principle and authority, that a municipality is not barred of its right to remove an obstruction from a public street by mere lapse of time. Some other element of estoppel must enter into the case. Mere lapse of time and the payment of personal taxes on the improvements are here relied on. These are insufficient." It would seem that this language clearly implies that a case might arise where an element of estoppel would prevent the occupant of an alley or street from being disturbed, and such is undoubtedly the law. In *Northern Pacific Ry. Co. v. Ely*, 25 Wash. 384, 65 Pac. 555, 54 L. R. A. 526, 87 Am. St. Rep. 766, it was said: "If the doctrine of estoppel can ever be invoked, it seems to us that it should be invoked in this case against the appellant. In any event, the question of protecting the rights of the government is not one which can be raised by the appellant. * * * The appellant should not be allowed to escape the consequences of its own wrongful acts, and reap a fraudulent benefit, by pleading the rights of the government. Indeed, our government is presumably founded upon equitable principles, not in theory alone, but in practice, and the citizen has a right to expect equitable treatment, even at the hands of the government; and it has been held that in good conscience the government is frequently estopped from asserting rights which would destroy the equitable rights of the citizen." The court cited *State ex rel. Attorney General v. Janesville Water Power Co.*, 92 Wis. 496, 66 N. W. 512, 82 L. R. A. 391, and *Commonwealth ex rel. Attorney General v. Bala & B. M. Turnpike Co.*, 153 Pa. 47, 25 Atl. 1105, in the latter of which cases it was said, in substance, that the question involved was not one under the statute of limitations, but of laches, which might be imputed to the state as well as to an individual—that while time did not run as against the state, yet the lapse of time, together with other elements, might work an estoppel, even as against the sovereign. In the case of *Spokane Street Railway Co. v. Spokane Falls*, 6 Wash. 521, 33 Pac. 1072, a case where a street railway, not having authority under its franchise so to do, had taken possession of, used, and made valuable improvements in certain streets, and occupied the same in the operation of its road for over two years, this court said: "A municipal corporation should not be permitted

to stand by and see large amounts of money invested in enterprises of this sort by persons who act under the mistaken view that they have legal authority. In this case the appellant had authority by ordinance to lay down a street railroad upon a number of streets. It mistook its rights and placed a part of its track in a place not designated in the ordinance. Technically, it had no right to put its track where it did, but * * * the municipal officers * * * knew that the track was being laid on Division street, and no objection was made. * * * The general rule would, of course, be that franchises of this kind could not be acquired except by the action of the corporation, which must be taken by ordinance, but the statute in question does not prohibit the courts from declaring an estoppel against the city in other matters in the same manner that they would as against private persons." In the case of *State ex rel. Grinsfelder v. Street Railway Co.*, 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515, 67 Am. St. Rep. 739, where a street railroad company had occupied certain streets in which it had operated its railway line for several years without a grant, privilege, or franchise from the city or county, it was stated that the city could not object to the further occupation of said streets by said company.

It is urged by the appellants that the occupation of this strip of land was an obstruction in a public alley, and consequently a nuisance and a constantly recurring nuisance, by reason of which respondents could gain no property rights whatever. If there had been no question as to the dedication of the strip of land, and it had been conceded at all times that the same was a public alley, there would be more force in this argument; but it appears that these defendants and their grantors had for many years regarded and treated it as if it were not an alley, and as if it had never been dedicated; and the action of the city council, whether valid or otherwise, in disclaiming any rights to the land as an alley, would tend to confirm them in the belief that it was their property, and not that of the public; and the silence of appellants and their predecessors in interest, while this parcel of land was being built upon, occupied, and used for so many years, would seem to be a strong indication that they had acquiesced in the belief that the strip was not a public alley. It would probably serve no good purpose to analyze the evidence in detail. We think, from a consideration of all of the evidence and admitted facts in the case, that the appellants ought not to be heard to question the right of defendants to occupy the strip of land involved herein.

As to the right of the Holland Bank to intervene, we think it was a proper, although possibly not a necessary, party. We see no error in the action of the trial court in permitting the bank to intervene.

The judgment of the superior court is affirmed.

FULLERTON, CROW, and MOUNT, JJ., concur.

O'CONNELL v. MARVIN et al.

(Supreme Court of Washington. Aug. 5, 1907.)

PRINCIPAL AND AGENT — AGENCY DISTINGUISHED FROM OTHER RELATIONS.

Plaintiff purchased real property from another for his accommodation, giving him the privilege of reselling it at a net price to plaintiff. Plaintiff's vendor listed the property with defendants, real estate agents, who found a prospective purchaser and received as earnest money two drafts payable to themselves. Plaintiff, though willing to sell on the terms proposed, declined to execute a contract of sale unless a larger sum than was tendered him was paid as earnest money, whereupon the larger draft was indorsed to him by defendants; the sum tendered having equaled the amount of the other. *Held*, that defendants were not agents of plaintiff, and hence their act in indorsing the draft was not plaintiff's act, and, the same having been dishonored, they were liable on their indorsement.

Appeal from Superior Court, King County; Boyd J. Tollman, Judge.

Action by William L. O'Connell against Charles E. Marvin and others, doing business as Charles E. Marvin & Sons Company. From a judgment for plaintiff, defendants appeal. Affirmed.

M'Bride, Stratton & Dalton, for appellants. Samuel Morrison, for respondent.

PER CURIAM. This is an action upon a bank draft. The draft in question was taken by the appellants in part payment of the purchase price of certain real property owned by the respondent, and which the appellants, who are real estate agents, held for sale. It appears from the record that in 1904 the property was owned by one Cummings. Cummings at that time was in need of money, and the respondent purchased the property of him at an agreed price for his accommodation, and at the same time gave Cummings the privilege of reselling it at a net price to the respondent of a fixed sum, agreeing to give him all that he could obtain for the property over and above the sum so fixed. Cummings listed the property with the appellants. In October, 1905, the appellants found a prospective purchaser in one A. J. Palmour, and received as earnest of the prospective sale his draft on Molson's Bank of Port Arthur, Ontario, for \$100, and his draft on A. V. Palmour of the same place for \$400; the latter draft being the draft in suit. Cummings was notified of the prospective sale by the appellants, and he in turn approached the respondent and asked him to enter into a written contract agreeing to sell the property on payment of the

purchase price on or before November 1, 1905, tendering him at the same time the appellants' check for \$100. The respondent told Cummings that he was willing to sell on the terms proposed, but did not want to tie up the property until November 1st for such a small sum, and unless a larger sum as earnest money could be paid he would not sign the contract. Cummings thereupon told him to call at the appellants' offices the next morning, when he thought the matter could be arranged. The respondent did call as requested, and after some negotiation the appellants agreed to indorse and turn over to him the \$400 draft. The contract was thereupon signed and the draft delivered to the respondent. The respondent presented the draft to his banker, when it was discovered that it had not been indorsed by the appellants. He returned with it shortly thereafter to them, received their indorsement, and had it forwarded for collection. The drawee failed to honor the draft, and it was returned to the respondent, who thereupon called upon the appellants to make good their indorsement, and on their refusing to do so instituted this action.

The contract of sale above mentioned was as follows:

"Seattle, Wash., Oct. 3, '05.

"Received from Chas. E. Marvin & Sons Co., for account of a client, four hundred dollars, as surety deposit payment made by them on purchase made by their client of seventeen (17) acres of land near the mouth of the Duwamish river and known as the 'E. M. Tatterson tract' and particularly described as follows: Beginning at a point on the west line thereof, distant 21.38 rods south of the north line thereof; thence east 125.46 rods, more or less, to a point distant 24.54 rods from the east line of said southwest quarter; thence south 14° 22' east, 17.60 rods; thence south 39° east, 5.39 rods, to a point distant 16.75 rods west from the east line of said southwest quarter; thence west 133.25 rods, more or less, to the west line of said southwest quarter; thence north, along said west line, 21.37 rods, to the place of beginning. The purchase price of this property is thirty-seven hundred (\$3,700) dollars to me, with a condition that any margin which you secure in selling this property above thirty-seven hundred dollars shall be the total brokerage allowed you for selling the property.

"Payments: Four hundred (\$400) Dft. the receipt of which is hereinabove acknowledged and thirty-three hundred dollars (\$3,300) payable on or before November 1st, 1905; the object of the extension being to enable you to have the time till November 1st, 1905, to fully close up the deal if necessary. If not closed by this time the four hundred (\$400) shall be forfeited, with the condition, if the title is not satisfactory and complete to your attorney, I will return the four hundred

dollars (400) received this day. Deed to be made as ordered.

"W. L. O'Connell.

"Witness: M. J. Cummings."

The appellants contend that they are not liable on their indorsement for the reason that they were the respondent's agents, authorized by him to sell the property, and that when they did sell it and took the draft from the purchaser they took it as the respondent's property, and their indorsement was nothing more than a means of transferring the legal title to the respondent, being necessary because the draft was payable to them; and they cite cases maintaining the rule that an agent who takes negotiable paper in his own name and indorses the same to his principal is not liable thereon, unless it is expressly agreed or intended that he shall assume a personal liability. But we think this rule has no application here. The appellants were in no sense the agents of the respondent. They were not empowered to make contracts for him or in his name, nor did they bear to him any fiduciary relation whatever. On the contrary, they dealt with him at arm's length, and owed him only that duty that every man owes to another with whom he contracts, namely, to deal honestly and not overreach his co-contractor by fraud or deceit. The appellants' act, therefore, in indorsing the check, was not the act of the respondent. Did they indorse it, then, for the purpose of obligating themselves upon it? We think there can be no dispute upon this question. The indorsement was without limitation of any kind, and the draft was delivered as a payment to the respondent under a contract entered into between him and the appellants, to be returned by him only on condition that the title he had to the land, when called upon to make a deed, was not satisfactory to the appellant's attorney. There was no forfeiture under this condition. The draft, therefore, became the absolute property of the respondent, and he had the right to enforce it against the indorsers, as well as against the drawer.

The judgment is affirmed.

CITY OF SEATTLE v. PUGET SOUND
IMP. CO.

(Supreme Court of Washington. Aug. 5, 1907.)

INDEMNITY — NEGLIGENCE — RECOVERY
AGAINST CITY—RECOVERY OVER BY CITY.

Where the owner of premises abutting on a street placed trap-doors in the sidewalk, and owing to the unsafe condition of the doors a pedestrian sustained injuries for which he recovered from the city, it was entitled to recover over against the owner of the premises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indemnity, §§ 30, 31.]

Appeal from Superior Court, King County; Geo. E. Morris, Judge.

Action by the city of Seattle against the Puget Sound Improvement Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Bausman & Kelleher, Peters & Powell, and R. P. Oldham, for appellant. Scott Calhoun and Elmer E. Todd, for respondent.

MOUNT, J. This action was brought by the respondent to recover over from the appellant the amount of a judgment for personal injuries recovered by C. S. Smith against the city, and paid by the city. The case was tried to the court without a jury, and a judgment was rendered against the appellant. The appellant alleges that the court erred in overruling a demurrer to the complaint and in making certain findings of fact.

The material allegations of the complaint are as follows: "That Second avenue is now and was at all times herein mentioned a public street in said city of Seattle, being one of the principal streets in said city and a common thoroughfare, and as such much used by the public; that at all times herein mentioned said defendant was the owner of lots 1 and 4, in block 6, of the plat of the town (now city) of Seattle, as laid off by C. D. Boren and A. A. Denny, in the county of King, state of Washington; that at all times herein mentioned there was situated on said lot a four-story brick building, known as the 'Boston Block,' and under the sidewalk on Second avenue in front of said lots, particularly in front of that store building in said block known as 'No. 722 Second Avenue,' in said city, said defendant maintained an area way, and at or near said store building in said sidewalk maintained a trap-door down into said area way and cellar, beneath said sidewalk; that on the night of the 19th of October, 1901, and for many months prior thereto, the defendant had negligently and carelessly maintained said trap-door in said sidewalk as aforesaid; that said trap-door, which was made of iron, was unlawfully and dangerously raised above the surface of the adjoining sidewalk for a height of from two to three inches; that said opening in the sidewalk was covered as aforesaid by iron trap-doors, which met over the middle of said opening; that at said point of meeting one of said iron doors projects above the other, and said iron doors had become on the surface worn smooth, and at all times were slippery and dangerous to life, and to travelers using the same in walking over said sidewalk in the ordinary and usual manner; that said defendant carelessly and negligently failed to place any danger signals as a warning around or about said defective place in said street and sidewalk and said obstruction thereon contained; that on the night of said 19th of October, 1901, one Christina D. Smith, while lawfully traveling along said Second avenue, at or near No. 722 Second

avenue, stumbled on said iron doors, and, the same then and there being slippery, stumbled, slipped, and fell, and was thereby thrown on said iron doors on said sidewalk and ground, and therefrom she sustained great and severe injuries." Then follow allegations of the extent of the injuries to Mrs. Smith; that she duly presented her claim to the city for damages; "that thereafter, to wit, on or about the 11th day of February, 1902, said Christina D. Smith and Lee Smith, her husband, instituted an action in the superior court of King county, Wash., to recover damages against the city of Seattle on account of said injuries so received as aforesaid, which cause is numbered 34,982 in the files of said court; that said city of Seattle duly defended against said action, and issues were joined therein, and a trial was had upon said issues in said court on January 29, 1903, resulting in a verdict in favor of said Christina D. Smith and her husband in the sum of \$7,633; that said city of Seattle duly filed its motion for a new trial, which said motion was denied by the court, and judgment entered upon said verdict in the sum of \$7,633 and costs against said city; that from said judgment the city of Seattle duly appealed to the Supreme Court of the state of Washington, and thereafter the Supreme Court of the state of Washington affirmed said judgment of the superior court, with costs; that thereafter, on the 23d day of December, 1903, the remittitur from the Supreme Court affirming said judgment was filed in the office of the clerk of said superior court, and final judgment was entered against said city of Seattle for \$7,633 and costs, amounting to \$180.15; that on said 23d day of December, 1903, the city of Seattle was forced to and did pay said judgment, with interest and costs amounting in the aggregate to \$8,151.91; that in addition thereto said city of Seattle was forced to and did expend as necessary expense in defending said suit and in prosecuting said appeal the sum of \$500." Then follows an allegation of notice to the appellant to defend the suit.

Upon the sufficiency of this complaint the appellant argues that the complaint shows that the appellant and the city were joint tort-feasors, and, since there can be no indemnity by one joint tort-feasor against another, there can be no recovery in this case. But, as we read the allegations of the complaint, we find nothing in it to justify the conclusion that the city and the appellant were joint tort-feasors. The allegations are that the defendant maintained an area way beneath the sidewalk and trap-doors in the sidewalk; that the trap-doors were carelessly and negligently maintained by defendant, and were unlawfully and dangerously raised above the surface of the sidewalk two or three inches; that said doors were worn smooth and slippery, and were danger-

ous; and that defendant failed to protect against such dangers. These allegations are that the negligence was of the defendant, not of the city. It is true that it is the duty of the city to keep its streets reasonably safe, and if the trap-doors had been placed in the sidewalk by the city, for the benefit of the city, it would alone be liable. But, where the trap-doors were placed in the sidewalk by the defendant for its sole use and benefit, it was the duty of the defendant to properly and safely place and maintain them. The defendant's negligence in regard thereto would be construed as the city's negligence with reference to third persons who might be injured thereon, because of the duty of the city to keep the streets reasonably safe. But, while the city would be liable to third persons on account of an injury occasioned thereby, it would not be a joint tort-feasor with the defendant, because the acts of negligence are the wrongful acts of the defendant alone. The great weight of authority seems to hold that there can be a recovery over by a municipality where a street is rendered unsafe by the wrongful use of another, and where damages are recovered against the municipality therefor. The rule is stated as follows in 2 Dillon on Municipal Corporations (4th Ed.) § 1035; "If a municipal corporation be held liable for damages sustained in consequence of the unsafe condition of the sidewalks or streets, it has a remedy over against the person by whose wrongful act or conduct the sidewalk or street was rendered unsafe, unless the corporation was itself a wrongdoer, as between itself and the author of the nuisance. * * *"

In *Chicago v. Robbins*, 2 Black (U. S.) 418, 17 L. Ed. 298, the Supreme Court of the United States said: "It is well settled that a municipal corporation, having the exclusive care and control of the streets, is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that might prove dangerous; and if this plain duty is neglected, and any one is injured, it is liable for the damages sustained. The corporation has, however, a remedy over against the party that is in fault, and has so used the streets as to produce the injury, unless it was also a wrongdoer." See, also, *Robbins v. Chicago*, 4 Wall. (U. S.) 657, 18 L. Ed. 427; *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 16 Sup. Ct. 564, and note to this case in 40 L. Ed. 712. In *McNaughton v. Elkhart*, 85 Ind. 384, the court said: "It is well settled that when a town or city has been compelled to pay damages on account of excavations and obstructions in its streets, wrongfully made, or lawfully made and negligently left in a dangerous condition, it has a right of action over against the author or authors of the nuisance for the amount so

paid, and that, if properly notified of the action, such person or persons are bound and concluded by the judgment recovered against the corporation, as to all questions adjudicated in such action." In *Milford v. Holbrook*, 9 Allen (Mass.) 17, 85 Am. Dec. 735, where the town of Milford was compelled to pay a judgment on account of injuries received by one Day through the falling of an awning, the court, in sustaining a judgment over in favor of the town against the person maintaining the awning, said: "The plaintiffs were not in pari delicto with the defendant, and therefore the principle that one joint wrongdoer cannot have contribution against another has no pertinency. The only fault or negligence which could be imputed to the town, on the facts shown, was a failure to remedy the nuisance which the defendant has caused. This is no bar to their claim for indemnity." In *Canandaigua v. Foster*, 156 N. Y. 354, 50 N. E. 971, 41 L. R. A. 554, 66 Am. St. Rep. 575, a judgment over in favor of the town was sustained. The Court of Appeals of New York said: "But whoever, even by due permission, cuts a hole in the sidewalk for the benefit of his adjoining property, must use reasonable care to protect the public from danger on account thereof. Reasonable care requires that he should provide a proper covering, inspect it from time to time, and repair it when necessary, as otherwise passers-by, for whose benefit the sidewalk is maintained, may be injured." Measured by these rules the complaint was sufficient.

Appellant also contends that the court erred in finding that the appellant maintained the trap-doors and area way beneath the sidewalk, and that appellant had control thereof. It is admitted that the appellant owned the building, and that the area way and trap-doors were placed in the sidewalk exclusively for the benefit of the building. Under these circumstances it became the duty of the appellant to maintain the trap-doors reasonably safe for passers-by. The evidence conclusively shows that the building was at all times under the control of the appellant. It is true the appellant leased offices and storerooms therein to different tenants; but the control of the building and its maintenance, and the actual possession of a part of the building, were in the appellant personally at all times. Under these circumstances appellant would be liable. As relating to both these points, the rule is well stated in *Canandaigua v. Foster*, supra, as follows: "While the owner cannot be held liable in this action for failing to repair the entire sidewalk in front of his premises, was he properly held liable for failing to keep in repair the grate itself, which was his own structure? This depends upon the duty that he assumed when he cut a hole in the sidewalk and covered it with the

grate. That duty included proper construction in the first place, and reasonable care on the part of the owner to keep the grate in repair thereafter, as long as he continued in possession. The duty sprang from the necessity of having safe sidewalks, and, as the necessity is continuous, so is the duty. Upon no other ground can the construction of a grate in a sidewalk, which is an interference with a public highway, be justified, even when permission is duly granted. Upon the transfer of the entire interest and possession to another, as the duty runs with the land, it would be cast upon the grantee. So a lessee of the entire premises and possession thereof by the tenant would doubtless throw the burden upon the latter. *Shearman & Redfield on Negligence* (5th Ed.) §§ 710, 713. The conveyance of an undivided interest, however, would not have that effect, and the demise of a part of the premises should not. The obligation goes with the land, and cannot be discharged by a partial alienation of the land at least unless the alienation, if for a fixed term, carries with it the exclusive possession of the premises for that term. Entire possession by a tenant from foundation to roof doubtless involves the duty of keeping a grate in front of the premises in repair, which otherwise rests on the owner of the fee. But whoever, even by due permission, cuts a hole in the sidewalk for the benefit of his adjoining property, must use reasonable care to protect the public from danger on account thereof. Reasonable care requires that he should provide a proper covering, inspect it from time to time, and repair it when necessary, as otherwise passers-by, for whose benefit the sidewalk is maintained, may be injured. If he parts with the premises, or parts with the possession thereof for a period, the burden falls on his successor in title or possession. If he transfers either title or possession in part only, he does not escape the burden. The implied duty assumed when the hole was cut and the grate placed over it requires reasonable precaution on the part of the owner to protect the public as long as he remains the owner and is in possession of any part of the building on the abutting land. He cannot cast the burden of maintenance on the public, any more than he could have cast upon them the burden of original construction; for the grate is wholly for the benefit of his property. Nor can he relieve himself of the duty without parting with the entire possession of the property benefited; for the safety of the public requires that the owner, as long as he is in possession of any part of the property, should be compelled to keep his structure in the sidewalk in suitable condition for use as a part of the sidewalk. As the duty is imposed by law for the public safety, its extent is measured by what-

ever public safety requires. Anything less than the alienation of the entire property, either permanently, as by deed, or temporarily, as by lease, would leave the public without adequate protection. A person injured by a defective grate should not be subject to the hazard of ascertaining the precise relation existing between the owner and one of his tenants with reference to the control of the grate; but a simple rule, resting upon ownership and possession, in whole or in part, of the adjacent structure, is required by sound public policy." See, also, *Chicago v. Robbins*, 2 Black (U. S.) 418, 17 L. Ed. 298; *Milford v. Holbrook*, *supra*; *Port Jervis v. First National Bank*, 96 N. Y. 530.

We find no error in the record. The judgment is therefore affirmed.

HADLEY, C. J., and FULLERTON, CROW, and ROOT, JJ., concur.

ROBINSON et al. v. BLOOD et al. (L. A. 1807.)

(Supreme Court of California. July 12, 1907.)

1. JUDGMENT—BY DEFAULT—COLLATERAL ATTACK—WANT OF JURISDICTION.

Where, in an action by a judgment creditor of a corporation to subject to his judgment the amount due from a stockholder on his stock subscription, it appeared that the complaint in which the judgment was rendered sufficiently stated a cause of action to give jurisdiction of the subject-matter, that the summons was served on the president of the corporation, and that default and judgment were duly entered, the judgment was not to be *held* void because of want of jurisdiction.

2. CORPORATIONS—EMPLOYMENT OF ATTORNEY—VALIDITY—PRESUMPTIONS.

The president of a corporation, under an authority given at a meeting of the directors, employed an attorney to defend a suit brought against the corporation. The resolution authorizing the employment was regularly entered in the minutes of the corporation, which recited that the meeting was called by the president. *Held*, that a presumption that due notice was given to the directors was raised, rendering the employment valid, in the absence of evidence to the contrary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1300.]

3. SAME—DE FACTO OFFICERS.

A director of a corporation, who has ceased to be a stockholder, may continue to act as a de facto director, and his acts are not void as to third persons.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1241, 1242.]

4. SAME—TERMINATION OF CORPORATE EXISTENCE.

Civ. Code, § 358, as amended in 1901, provides that, where a corporation after its organization shall lose its property and shall fail for two years to elect officers and transact its business, its corporate powers shall cease. A corporation was engaged in defending a foreclosure suit on its property, which was the only business it had. The last act in the defense was had within 30 days after October 12, 1901. The attorney conducting the defense sued the corporation for its services in August, 1903, and recovered judgment in September. The corporation did not lose all of its property until June

28, 1903, at which time its right of redemption under the sale in the foreclosure suit expired. *Held*, that the corporation was in existence at the commencement of the suit and at the rendition of a judgment against it for the attorney's fees, rendering the judgment valid.

5. SAME — STOCKHOLDER'S LIABILITY — ENFORCEMENT.

The right of a judgment creditor of a corporation to pursue the stockholders thereof to compel payment of the judgment is not defeated by the subsequent termination of the corporation by reason of Civ. Code, § 358, as amended in 1901, providing that, where a corporation shall dispose of all of its property and shall fail for two years to elect officers and transact its business, its corporate powers shall cease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 892.]

6. SAME—CORPORATE EXISTENCE.

Civ. Code, § 358, as amended in 1901, provides that the incorporation of a corporation claiming in good faith to be a corporation and doing business as such shall not be inquired into collaterally in any private suit to which it may be a party, and where a company claiming in good faith to be incorporated has been doing business for 10 consecutive years as a corporation no such inquiry shall be made by any person. A corporation was organized in 1887, and it claimed in good faith to be a corporation and did business as such until 1901. Thereafter a creditor obtained judgment against it and sought to pursue a stockholder to compel payment of the judgment. *Held*, that the stockholder could not question the existence of the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 77.]

In Bank. Appeal from Superior Court, Santa Barbara County; Felix W. Ewing, Judge.

Action by Martha A. Robinson and another against James A. Blood and another. From a judgment for plaintiffs, defendant James A. Blood appeals. Affirmed.

W. S. Day, for appellant. Richards & Carrier, for respondents.

SHAW, J. This is an action by the plaintiffs, as judgment creditors of La Serena Land & Water Company, a corporation, against James A. Blood, a stockholder of the corporation, in the nature of a creditors' bill, to subject to the payment of the plaintiffs' judgment the amount due from Blood to the corporation upon his subscription to the capital stock thereof. Judgment was entered in the court below against Blood, from which he appeals.

The defenses set up by Blood are that the previous judgment in favor of the plaintiffs against the corporation is void, both for lack of jurisdiction and because of fraud and collusion between plaintiffs and the president of the corporation in obtaining it; that the corporation, at the time the former suit was begun, and for a long time prior thereto, had ceased to have a legal existence; and that plaintiffs' cause of action is barred by the statute of limitations. The evidence is contained in a bill of exceptions printed in the record. The judgment against the corporation is not void upon its face. The complaint therein sufficiently states a cause of

action to give the court jurisdiction of the subject-matter. The summons was duly served on the president of the corporation, and the default and judgment were duly entered. No irregularity appears on the face of the record.

On the question of fraud in procuring the judgment, the findings are against the defendant, and they are sufficiently supported by the evidence. The corporation was sued by Blood, the present defendant, to foreclose a mortgage he held against all of its property. McNulta, the assignor of plaintiffs, was employed as an attorney to defend the action for a stipulated fee. The contract with McNulta on behalf of the corporation was made by Barker, its president, in pursuance of an authority given him in that behalf at a special meeting of the directors. The suit of the plaintiffs was for the fees of McNulta for his services in defending the foreclosure suit. The services were performed by him in accordance with his agreement, and there is nothing in the evidence which indicates fraud, bad faith, or collusion on his part. It is urged that the directors were not given notice of the special meeting at which Barker was authorized to employ McNulta. Conceding, for the purposes of this case, that his would be a good defense, either to the present action or to the action against the corporation to recover the attorney's fees, it is sufficient to say that the resolution authorizing the contract with McNulta was regularly entered in the minutes of the corporation, which recite that the meeting was called by the president, and that this raises a presumption that due notice was given thereof. *Granger v. O. E. M. & M. Co.*, 59 Cal. 681; *Balfour-Guthrie Co. v. Woodworth*, 124 Cal. 172, 56 Pac. 891. The evidence given does not, as a matter of law, overcome this presumption. The court below gave credit to the presumption as against the testimony. We cannot interfere with its decision upon this conflict.

The evidence that one of the directors had ceased to be a stockholder at the time of this meeting did not prevent his continuing to act as a de facto director, nor make such action void as to third persons. *San Jose Sav. Bank v. Sierra Lumber Co.*, 63 Cal. 179.

The claim that the action was barred by the statute of limitations is not urged, and it is not supported by the evidence.

The principal defense appears to be the claim that the corporation had ceased to exist before McNulta began or performed the services, and never thereafter became a legal corporation. This claim is founded upon that part of section 358 of the Civil Code, as amended in 1901, which reads as follows: "If a corporation does not organize and commence the transaction of its business, or the construction of its works, within one year from the date of its incorporation, or if, after its organization and commencement of its business, it shall lose or dispose of all of

its property, and shall fail for a period of two years to elect officers, and transact, in regular order, the business of said corporation, its corporate powers shall cease." The claim is unfounded. Before the amendment of 1901, the part of the section corresponding to the above was as follows: "If a corporation does not organize and commence the transaction of its business, or the construction of its works, within one year from the date of its incorporation, its corporate powers cease." There was no failure to organize the corporation, or to begin the transaction of its business, within the year after its incorporation. The corporation, therefore, has had a legal existence from the time of its incorporation until the present time, unless it ceased to exist after the amendment of 1901, under the provisions of that amendment.

The action against the corporation to recover the attorney's fees was begun on August 22, 1903. The corporation did not lose all of its property until June 28, 1903, at which time its right of redemption under the sale in the foreclosure suit expired. The conditions on which the corporate powers would cease, under the part of the amendment above quoted, did not occur until after the latter date, at all events. The corporation was engaged in defending the foreclosure suit upon its property, which appears to have been the only business it had. While so engaged it cannot be said that it was failing to transact its business in regular order. The last act in this defense was the filing of a petition for rehearing in the Supreme Court, within 30 days after October 12, 1901. Consequently there was not, either at the time the action for attorney's fees was begun or on September 2, 1903, when the judgment therein was rendered, a failure for 2 years to transact the business of the corporation. The subsequent expiration of the 2-year period could not affect the right of the judgment creditors to pursue the stockholders to compel payment of the judgment.

Another sufficient ground for holding that the corporation still has a corporate existence is found in the terms of the concluding clause of section 358, as amended in 1901. This clause is not included in the part above quoted. It is as follows: "The due incorporation of any company claiming in good faith to be a corporation under this part, and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such de facto corporation may be a party; but such inquiry may be had at the suit of the state on information of the Attorney General; provided, however, as to any company claiming in good faith to be, and which has been doing business for ten consecutive years as a corporation, no such inquiry shall be made either by the state or by any person whatsoever." This corporation was organized in 1887, and, so far as appears,

it claimed in good faith to be a corporation and did business as such from that time until the passage of this amendment in 1901. Under this clause no inquiry as to its corporate powers can be made in this action. Furthermore, immediately after the part of the section first above quoted occurs this clause, "and the said corporation may be dissolved at the instance of any creditor of the said corporation, at the suit of the state, on the information of the Attorney General." In *San Diego Gas Co. v. Frame*, 137 Cal. 441, 70 Pac. 295, under a law similar in all respects to this part of section 358, it was held that the corporation continues to exist until, in a suit for that purpose, its corporate franchise is declared forfeited.

This disposes of all the points presented by the appellant in support of his appeal.

The judgment is affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; ANGELLOTTI, J.

5 Cal. App. 719
VAN HORN v. VAN HORN. (Civ. 347.)

(Court of Appeal, First District, California.
June 13, 1907. Rehearing Denied by Supreme Court August 12, 1907.)

1. DIVORCE—EVIDENCE—WIFE'S CHARACTER.

Under Code Civ. Proc. § 2053, providing evidence of the good character of a party is not admissible in a civil action, until his character has been impeached, or the issue involves it, in a divorce action against a wife for adultery, evidence as to her good character was properly excluded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 365, 372.]

2. SAME—CO-RESPONDENT'S CHARACTER.

Under Code Civ. Proc. § 2053, providing evidence of a witness' good character is not admissible until the character has been impeached, etc., where, in a divorce action against a wife for adultery, the co-respondent was not a party, and had not been impeached as a witness under section 2051, authorizing impeachment, evidence as to the excellence of his character was properly rejected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 365, 372, 374.]

3. SAME.

Though the custody of a minor child was involved in a divorce action against the wife for adultery, it was not error to exclude evidence as to her good character; the minor being a boy 15 years old, the wife having been adjudged guilty of adultery, and the disposition of the minor being within the sound discretion of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 365, 372, 374.]

4. APPEAL — REVIEW — EXCLUSION OF EVIDENCE—(GROUNDS).

The trial court's ruling in rejecting evidence will be upheld on appeal, if correct, whether the ground upon which it was based was stated in the objection or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3406.]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Divorce action by Ross H. Van Horn against Marion V. Van Horn. Defendant appeals from a judgment awarding plaintiff an interlocutory decree of divorce, and from an order denying a motion for new trial. Affirmed.

Alfred B. Weller, for appellant. Johnson & Shaw, for respondent.

KERRIGAN, J. Appeal by defendant from a judgment, awarding plaintiff an interlocutory decree of divorce, and from an order denying defendant's motion for a new trial.

The complaint alleges that the appellant committed adultery with one Adolph Knopf, and prays for a judgment of divorce, and that the whole of the community property and the custody of the two minor children be awarded to the respondent. During the pendency of the action one of the children reached majority. The action was tried, and an interlocutory decree was entered awarding respondent a divorce and the custody of the remaining minor child. The question of the property rights was reserved.

Among the assigned errors was the action of the trial court in refusing to permit appellant to introduce evidence of the good character of herself and the co-respondent. The general rule is that in civil actions evidence of character of neither party thereto is admissible. 5 Am. & Eng. Ency. of Law, pp. 861, 862; 1 Wigmore on Ev. § 64. There are exceptions to this rule. In actions for slander and libel, character is necessarily put in issue, as injury to character is the gist of such actions. 5 Am. & Eng. Ency. of Law, p. 865. There are a few other exceptions, and by some authorities different conclusions are reached as to whether the charge of adultery in an action for divorce is one of the exceptions. In this state, however, the question is controlled by section 2053, Code Civ. Proc., which reads: "Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character." By the allegation of adultery appellant's character was not put in issue, and evidence concerning it, under this section, was properly excluded. The co-respondent was not a party to the action, nor had he, as a witness, been impeached (section 2051, Code Civ. Proc.), so evidence of the excellence of his character was properly rejected (section 2053, Code Civ. Proc.; *People v. Bush*, 65 Cal. 134, 3 Pac. 500, concurring opinion).

In this connection it is further contended by appellant that the custody of the minor children was involved, and for this reason testimony of the character of the appellant was admissible. The disposition of minors, in a proceeding of this kind, is always one within the control, and subject to the sound

legal discretion of the trial court. The court may modify its decree as to their custody at any time. Section 138, Civ. Code; *Crater v. Crater*, 135 Cal. 685, 67 Pac. 1049. "Its jurisdiction does not depend upon specific allegations as to the fitness of the respective parties, or their ability or willingness to care for their offspring, nor upon a specific prayer for the custody." *Ex parte Gordon*, 95 Cal. 377, 30 Pac. 561. In matters of this kind much must be left to the sound discretion of the court in accepting or rejecting evidence. We can readily conceive of instances in which the excluded evidence might very properly be admitted. In this case, however, the minor being a boy now about 15 years of age, and the appellant having been adjudged guilty of adultery, we think the contention has but little merit.

Appellant complains that the objections to the excluded evidence just considered, and to at least one other question, were too general, and not directed to defects now urged. The ruling of the trial court in rejecting evidence will be upheld on appeal, if correct, whether the ground upon which it is based was stated in the objection or not. *Davey v. Southern Pac. Co.*, 116 Cal. 325, 48 Pac. 117.

This disposes of all the grounds urged for reversal which merit consideration.

No error appearing in the record, the judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J

5 Cal. App. 736

MONTIJO et al. v. ROBERT SHERER & CO. et al. (Civ. 359.)

(Court of Appeal, Second District, California. June 18, 1907. Rehearing Denied by Supreme Court August 17, 1907.)

1. JUDGMENT—VACATION—NEGLIGENCE OF PARTY.

On a motion by one of the defendants in an action for forcible entry to set aside a default judgment against him, on the ground of excusable neglect, etc., it appeared that the moving party was a laborer in the employ of his co-defendants, and as such entered on the premises, and that on being served with process he called his employer's attention to the matter and was informed that a defense would be made for him. *Held*, that he had a right to rely upon such statement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 280.]

2. SAME—DISCRETION OF COURT.

On a motion to set aside a default judgment on the ground of excusable neglect, etc., the discretion of the court should be exercised liberally with a view to a trial on the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 265.]

3. SAME—AFFIDAVITS.

On a motion to set aside a default judgment on the ground of excusable neglect, etc., a verified answer denying all the material allegations of the complaint is sufficient in lieu of an affidavit of merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 315.]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Manuel Montijo and others against Robert Sherer and others. Appeal by plaintiffs from an order setting aside a default and granting leave to answer to defendant, Mark Ryan. Affirmed.

Hugh J. Crawford and Wm. Crawford, for appellants. Bicknell, Gibson, Trask, Dunn & Crutcher (Edward E. Bacon, of counsel), for respondent.

TAGGART, J. Appeal from an order setting aside default and granting leave to answer.

Defendant Ryan was an employé of Robert Sherer & Co. and was joined with the members of that copartnership in an action for damages for forcible entry upon premises, of which plaintiffs allege themselves to have been the owners and in the actual possession, at the time of such entry, to wit, on February 2, 1906, and to and until February 14, 1906, and at divers times between said dates. Ryan was served with summons February 20, 1906, and the members of Sherer & Co. served on February 21st and 23d, respectively. Sherer & Co. answered, but Ryan failed to do so, and on March 5, 1906, the default of Ryan for not answering was regularly entered, and thereafter, on March 13, 1906, judgment was taken against him as prayed for in the complaint, to wit, for the sum of \$1,500 (the same to be trebled) and for costs. On March, 17, 1906, he served notice on plaintiffs' attorney of his intention to move the court to set aside the said default and to permit him to answer the complaint filed in the action. The motion was noticed to be made on the records and files in said action and the affidavits of himself and attorney and his verified answer to the complaint, a copy of which was served with the notice. The grounds specified were that "said defendant failed to answer in time through inadvertence, mistake, and excusable neglect."

Appellants claim the order granting the motion was error for two reasons: (1) The grounds of the motion are stated conjunctively in the notice and both affidavits filed, and the showing made fails to support the conjoined reasons of inadvertence, mistake, and excusable neglect; (2) the affidavit of merits is insufficient.

The affidavits are not to be construed with the strictness applied to a pleading in matters of form, and if they show facts to justify the action of the court on the ground of inadvertence, mistake, or excusable neglect, it will be sufficient. By the affidavits and verified answer the following facts are made to appear: That the Los Angeles Interurban Railway Company was the owner and in the peaceable possession of the premises described in plaintiffs' complaint at the time of the alleged entry thereon by defendants, or, at

least, that Ryan so believed. That Ryan was a laborer in the employ of his codefendants and it was in such employment he went upon said lands. That upon being served he called the attention of his employers to the service of summons upon him and was told by them that he need not bother about the matter, as the suit would be taken care of by the Los Angeles Interurban Railway Company. That he relied upon such statement and filed no answer. Under the circumstances, he had a right to rely upon the statement that the corporation whom he believed to be the real party in interest would protect him. The showing by the affidavit of Attorney Crutcher as to the reasons why he did not answer for defendant Ryan before his appearance to make the motion we do not think material.

The "records and files" upon which the motion was also based are not before us, but it does appear from the affidavit of Albert Crutcher that an answer had been filed on behalf of the defendants Sherer & Co. This was a circumstance that the court should have, and no doubt did, consider in the exercise of its discretion in the matter. That there were other pleadings before the court raising the same issues of fact as those which the defendant in default asked to have tried in his behalf might well and properly have influenced the court in case of doubt. It was authorized to examine them for the purpose of determining the motion. *Lakeshore Co. v. Modoc Co.*, 108 Cal. 263, 41 Pac. 472. The discretion of the court in vacating the default and setting aside the judgment thereon appears to have been liberally exercised with a view to the trial of the case on its merits. This was in accordance with the universal rule. *Merchants' Co. v. Los Angeles Co.*, 128 Cal. 621, 61 Pac. 277.

Neither of the affidavits filed contains a showing that alone would be sufficient as an affidavit of merits, but the verified answer denies every material allegation of the complaint. This has been held sufficient too often by the Supreme Court to be considered an open question. *Fulweller v. Mining Co.*, 83 Cal. 129, 23 Pac. 65; *Merchants' Co. v. Los Angeles Co.*, supra; *Melde v. Reynolds*, 129 Cal. 314, 61 Pac. 932.

Order appealed from affirmed.

We concur: ALLEN, P. J.; SHAW, J.

5 Cal. App. 754
STIMSON MILL CO. v. NOIAN et al. BERG et al. v. SAME. TILDEN v. SAME. FRICK-FLEMING HARDWARE CO. et al. v. SAME. (Civ. 355.)

(Court of Appeal, Second District, California. June 19, 1907. Rehearing Denied by Supreme Court Aug. 17, 1907.)

1. MECHANICS' LIENS—CONTRACT FOR IMPROVEMENT—STATUTORY PROVISIONS—TIME OF FILING.

Under Code Civ. Proc. § 1183, providing that, when the price for a building exceeds

\$1,000, the contract shall be in writing subscribed by the parties thereto and shall, before the work is commenced, be filed with the county recorder, otherwise it shall be void as to the parties, and the labor and materials furnished by the persons other than the contractor shall be deemed to have been done or furnished at the personal instance of the owner, and they shall have a lien for the value thereof, where work was commenced on a building under an oral agreement for an amount exceeding \$1,000, and subsequently a written contract embodying the terms of the oral agreement was signed and filed, the contract was void, and the laborers and materialmen were entitled to a lien on the property for the full value of the labor or material furnished.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 289.]

2. SAME—TIME OF FINAL PAYMENT.

Code Civ. Proc. § 1184, provides that, where the contract price for a building exceeds \$1,000, it shall in the contract be made payable in installments, etc., provided that at least 25 per cent. of the price shall be made payable at least 35 days after the completion of the contract; that as to all liens except that of the contractor the contract price shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim, in favor of the reputed owner against the contractor; and that, if the contract does not conform substantially to the provisions of the section, labor and materials furnished by persons other than the contractor shall be deemed to have been done or furnished at the request of the person letting the contract, and they shall have a lien for the full value thereof. A building contract exceeding \$1,000 provided that the final payment should be made when the building was completed and receipts in full were shown to the owner, but did not provide for payment within 35 days from completion of the building. The contractor abandoned the contract, and nearly all the unpaid balance was consumed in completing the building. *Held*, that the laborers and materialmen were entitled to a lien for the full value of their services of material furnished.

3. SAME—EFFECT—PRIORITIES.

The constitutional provision, which gives to mechanics, materialmen, and laborers of every class a lien upon the property upon which they have bestowed labor or furnished material, places all such parties in the same class, and the Legislature cannot give preference to one performing labor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 336-339.]

4. SAME—ENFORCEMENT—ATTORNEY'S FEE.

In an action to enforce a mechanic's lien, an allowance of attorneys' fees to a claimant is erroneous.

5. CONSTITUTIONAL LAW — DUE PROCESS OF LAW—MECHANICS' LIENS.

If Const. art. 20, § 15, providing for a mechanic's lien, were subordinate to article 1, § 1, thereof, in relation to the inalienable right to acquire, possess, and protect property, and to article 1, § 13, thereof, prohibiting depriving owners of property without due process of law, it would not affect the validity of Code Civ. Proc. §§ 1183, 1184, relating to contracts for the construction of buildings and to mechanics' liens, since the lien is primarily upon the building which the laborers or materialmen have contributed to, and, the owner having made the building a part of the realty, the whole becomes charged with the lien.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 940.]

6. SAME—RIGHT TO CONTRACT.

Code Civ. Proc. §§ 1183, 1184, providing the terms of valid contracts for more than \$1,000 for the construction of improvements on

land and for mechanics' liens thereon, are not unconstitutional as limiting the right to contract, since Const. art. 20, § 15, provides for a lien which without the statutes would be for the full value of the labor or material furnished, and the statutes merely curtail the liability under certain conditions.

7. SAME—DUE PROCESS OF LAW.

Code Civ. Proc. §§ 1183, 1184, relating to contracts for the construction of improvements and mechanics' liens thereon, do not take property without due process of law, since the owner makes his contract with the Constitution and laws in mind, and they form part of his contract, and they do not increase the contract price, since their effect is to protect the contractor when he honestly discharges his obligations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 940.]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Actions by the Stimson Mill Company, a corporation, against M. J. Nolan and others; by C. G. Berg and others against M. J. Nolan and others, in which N. S. Wakefield and L. N. Wise were cross-complainants; by J. F. Tilden against M. J. Nolan and others, and by the Frick-Fleming Hardware Company and others against M. J. Nolan and others. From an adverse judgment, the Stimson Mill Company, L. N. Wise, J. F. Tilden, and the Frick-Fleming Hardware Company appeal. Reversed and remanded.

Borden & Carhart, W. C. Batcheller, A. L. & J. E. Stephens, and Charles L. Batcheller, for appellants. F. B. Guthrie, E. A. Meserve, Frank James, W. C. Petchner, and Scarborough & Bowen, for respondents.

ALLEN, P. J. Appeal from a judgment of the superior court of Los Angeles county.

It appears from the record that on or before June 22, 1903, defendant Nolan, the owner of the premises involved, and one Culver, a contractor, had concluded oral negotiations through which Culver had agreed to furnish materials and construct a house on said premises for the consideration of \$3,100. That on said last-named date Culver, with Nolan's consent, commenced the work of such construction, and certain lien claimants delivered upon the premises the brick necessary for the foundation, while others delivered upon the premises the lumber necessary for the construction. Thereafter, on June 26th, Nolan and Culver entered into a written contract for the construction of a house, which was in all respects the same as the oral agreement. In this written contract the construction price of \$3,100 was made payable in four equal installments, of which three were to be paid during the construction, and the last "when the house was completed and receipts in full shown to the owner." After this contract had been executed, and such contract and an accompanying bond filed in the recorder's office, other lien claimants furnished materials and performed labor upon said

building. The aggregate value of all materials and labor furnished by all claimants, on October 26, 1903, amounted to \$1,770. On this date the contractor abandoned the work. The court finds that on and before the abandonment the value of the work and materials furnished under the contract upon the house, estimated as nearly as may be by the standard of the whole contract price here involved, amounted to \$2,520, and that the contractor had been previously paid by the owner \$2,325, leaving a balance of \$195 due, which the court found was the whole amount due from the owner to the contractor. The whole amount of expenditure required upon the part of the owner to complete the building is not made to appear. It appears that there was unpaid to the lien claimants on the 26th of October, 1903, on account of the materials furnished and labor performed by them, the aggregate sum of \$1,062.94. It further appears that the building was completed December 1, 1903, and that thereafter and within due time all of these claimants duly perfected their liens. Various suits were instituted by these claimants upon their liens, all of which were consolidated and heard in this action. Upon the trial, the court found the contract between Nolan and Culver a valid one as to all parties furnishing materials or performing labor after its filing, but inoperative as to those who furnished labor and materials before such filing; and, further, that the omission to reserve 25 per cent. of the contract price 35 days after completion did not invalidate the contract. Judgment was accordingly rendered in favor of the lien claimants who furnished labor and materials after the filing of the contract to the full extent of their claims; that Wakefield, one of the claimants, being a laborer, and his claim being for labor, had preference and priority over the other claimants who furnished materials after the filing of the contract, and that claim, amounting to \$144.25, with costs for filing the lien and attorney's fees, was adjudged a preferred claim and the full amount thereof ordered paid, which payment exhausted all the money so found in the hands of the owner, and accordingly no relief was granted any of the remaining claimants.

The judgment of the trial court is erroneous for several reasons: First, because the court erred in holding the contract between the owner and contractor valid as affecting the rights of lien claimants. Section 1183, Code Civ. Proc., provides: "All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars, and shall be subscribed by the parties thereto, and the said contract, or a memorandum thereof, setting forth * * * the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be

due and payable, shall, before the work is commenced, be filed in the office of the county recorder of the county or city and county, where the property is situated; * * * otherwise they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case, the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." No surreptitious commencement of work is involved. Hence we have a deliberate violation of the provisions of this section, the effect of which is declared by the statute. To hold such a contract valid, under the circumstances of this case, is to ignore the plain provisions of a statute. The contract being void, those entitled to liens under the Constitution are unrestricted in their rights to have a lien for the full value of materials and labor furnished. *Laidlaw v. Marye*, 133 Cal. 174, 65 Pac. 391.

Again, section 1184, Code Civ. Proc., provides: "No part of the contract price shall, by the terms of any such contract, be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work, but the contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work, or on the completion of specified portions of the work, or on the completion of the whole work; provided, that at least twenty-five per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract. * * * In case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof." In this contract so executed and filed after the commencement of the work there is an entire omission to provide for the final payment of 25 per cent. 35 days after completion, which is intended for the benefit of lien claimants, and the mere statement in the contract, inserted for the benefit of the contractor, that the owner might pay the whole amount when receipts were produced, cannot be construed as a substantial compliance with the statute, or even an attempt in that direction. The whole contract price was made payable upon completion, and the last payment was treated by all parties to the contract as the completion payment; for the amount of such payment was depleted by the expenses of completion made necessary by abandonment. In *Hampton v. Christensen*, 84 Pac. 203, 148

Cal. 729, Mr. Justice Henshaw, speaking for the court, says: "Whatever may be said of other payments, this amount of money (35-day payment) cannot lawfully be depleted or reduced to the injury of any such claimant"—that out of the completion payment the necessary cost to the owner on completion, in case of abandonment, must be taken. "If such completion payment be more than exhausted by the demands of the owner, * * * the excess of such demand cannot be carried over and made a charge against the 25 per cent. final payment, to the injury of any lien claimant thereon. * * * This final payment is the only fund which the Legislature has sequestered to meet the demand of the lien claimants. To permit this (its depletion) would be to deprive them of their constitutional right to a lien." The court erred in refusing to award a lien for the full value of the material and labor to those who bestowed the same after the contract was filed.

The court erred in awarding Wakefield preference over other lien claimants furnishing materials and performing labor. The constitutional provision which gives to mechanics, materialmen, artisans, and laborers of every class a lien upon the property upon which they have bestowed labor or furnished materials, places such parties in the same class. Their equality is established by the Constitution and cannot be impaired or destroyed by the Legislature. *Milwaukee v. Nofziger Bros. L. Co.* (Cal.) 90 Pac. 114. The allowance of an attorney's fee to the various claimants is also erroneous. *Builders' Supply Depot v. O'Connor* (Cal.) 88 Pac. 982.

Respondent Nolan, in a supplemental brief, contends for the validity of the contract and urges in support thereof that section 15, art. 20, of our state Constitution, which guarantees to every laborer and materialman a lien upon a structure for the value of labor bestowed or materials furnished in its construction, is subordinate to section 1, art. 1, of the same Constitution, which declares that "all men are by nature free and independent, and have certain inalienable rights, among which are those of * * * acquiring, possessing and protecting property"; and that it is subordinate, also, to section 13, art. 1, which declares that "no person shall be deprived of life, liberty or property without due process of law."

Respondent properly insists that the inalienable right to acquire and possess property includes the right of contracting with reference thereto. Were we to concede the subordinate character of section 15, still we are unable to appreciate the conflict, one with the other, which is suggested by respondent. The constitutional lien to the laborer and materialman is given upon the structure as the principal thing. *Humboldt Lumber Co. v. Crisp*, 148 Cal. 686, 81 Pac. 80, 106 Am. St. Rep. 75. The right to declare

such lien is based upon the theory that the materialman and laborer produce the thing upon which the lien is declared. *Tuttle v. Montford*, 7 Cal. 359. In *Jones v. Hotel Company*, 80 C. C. A. 108, 86 Fed. 370, it is said by the court, in relation to statutes creating similar rights of lien: "But the validity of the statutes need not be rested upon mere authority. They find sanction in the dictates of natural justice, and most often administer an equity which has recognition under every system of law. That principle is that every one who by his labor or materials has contributed to the preservation or enhancement of the property of another thereby acquires a right to compensation." It is no infringement upon an existing right of property to require one who has procured another to create a structure to pay for the work and materials involved in such creation. When the owner of land makes such structure a part of the land previously owned by him, it is not inequitable or destructive of his rights to say that, having by his own act made this labor and material of another an inseparable portion of his land, the lien upon the building should extend to the land necessary for its use. Having made the building a part of his land, it became as such charged with the lien upon the structure. *Linck v. Melkeljohn*, 2 Cal. App. 508, 84 Pac. 309.

It is next contended that sections 1183 and 1184, Code Civ. Proc., which provide the terms of valid contracts as affecting those in excess of \$1,000, are unconstitutional as an attempt to circumscribe the right of private contract within the usual pursuits of business, and are an unreasonable restriction upon the owner of his rights in regard to its use and upon his power to make contracts concerning the same; this contention being based largely upon the decisions of our own Supreme Court in *Stimson Mill Co. v. Braun*, 136 Cal. 123, 68 Pac. 481, 57 L. R. A. 726, 89 Am. St. Rep. 116, and *Gibbs v. Tally*, 133 Cal. 373, 65 Pac. 970.¹ We do not accept either of these decisions as determinative of the questions here involved. Assuming, as we do, the validity of section 15, art. 20, of the Constitution, which guarantees the lien, we find that this constitutional right of the laborer and materialman extends to the full value of all labor and materials bestowed or furnished; and, without legislation, such value is the measure of recovery. The Legislature has seen fit, under the authority given it by the Constitution, to provide by the sections complained of certain conditions, upon the observance of which the constitutional measure of lien and recovery is restricted to the sum specified in the contract between the owner and contractor. There is no attempt to enlarge the rights of lien claimants under any circumstances, for under the sections mentioned, where a valid contract is made, the value of the thing furnished meas-

¹ 60 L. R. A. 515.

ures the extent to which any claim can be found. The effect, therefore, of these sections is not to impair any existing right of the owner, but, in effect, to confer a right not previously existing by which his liability may, under certain circumstances, be curtailed. The owner's liberty of action in relation to this property is not invaded by the statute. He need not employ an intermediary to erect his building; but, if he does the law ingrafts upon his act certain consequences. *Henry v. Evans*, 10 S. W. 872, 97 Mo. 47, 3 L. R. A. 332. There is no taking of property without due process of law. The contract by the owner is made voluntarily and with the Constitution and laws in mind, and they form part of such contract, and he must be taken to have consented to the effect of such enactments. That similar rights are not conferred by the sections upon those who make improvements of nominal value and under \$1,000 is a matter of which respondent cannot complain. *Ramish v. Hartwell*, 126 Cal. 451, 58 Pac. 920. Nor can it be said that this statute can have the effect to increase the necessary cost of the structure simply because the contractor who bids thereon does so under provisions of the law which require reasonable restrictions as to the time and manner of his payment, for this same law insures to him a lien for his contract price which he otherwise would not have. Hence it would be unreasonable to say that because of such a statute a contractor is injured when the only effect thereof can be to afford him security, when he honestly discharges the obligations imposed upon him by its terms.

Judgment reversed, and cause remanded for further proceedings in accordance herewith.

We concur: SHAW, J.; TAGGART, J.

5 Cal. App. 715
CAYFORD v. METROPOLITAN LIFE INS. CO. (Civ. 272.)

(Court of Appeal, First District, California. June 13, 1907. Rehearing Denied by Supreme Court August 12, 1907.)

1. INSURANCE—LIFE INSURANCE—STIPULATIONS—PAYMENTS OF PREMIUMS IN ARREARS.

A stipulation in a life policy that no premiums in arrears shall be received, except by agreement in writing signed by either the president, vice president, secretary, or actuary of the insurer whose authority will not be delegated, is valid.

2. SAME—CONTRACT OF INSURANCE—KNOWLEDGE OF INSURED.

An insured in a life policy is charged with knowledge of the stipulations therein.

3. SAME—NONPAYMENT OF PREMIUMS—WAIVER.

A life policy stipulated that no premiums in arrears should be received except by agreement signed by either of designated officers of the insurer. An agent with authority to collect premiums called to collect the premium on a policy two days before it fell due. On being informed by the beneficiary that payment could

not be made, he stated that he would call on a date after the premium became due. On that day he again called, and the beneficiary, not having all the money, asked him to call later in the same day, when she expected to have it all; but he replied that he would call again four days later. Before he called again, the insured died. The agent had the insurer's premium receipt containing no limitation with respect to its validity if delivered after the due date. The beneficiary did not know that fact. No knowledge of the extensions of time to pay the premium was brought home to the insurer. *Held*, that the insurer did not waive a forfeiture of the policy for nonpayment of the premium when due.

4. SAME—AGENT—AUTHORITY TO COLLECT PREMIUMS—AUTHORITY TO EXTEND TIME FOR PAYMENT OF PREMIUMS.

An agent of an insurer, with authority to collect premiums, has no authority to extend the time for the payment of premiums or to waive a forfeiture resulting from nonpayment.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Hannah Cayford against the Metropolitan Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

Page, McCutchen & Knight, for appellant. L. A. Redman and Van Ness & Redman, for respondent.

KERRIGAN, J. This is an action brought to recover upon a policy of life insurance. The jury returned a verdict for the plaintiff, upon which judgment was entered. The defendant's motion for a new trial was denied, and from the judgment and order denying its motion for a new trial the defendant prosecutes this appeal.

This case has once been before the Supreme Court upon an appeal taken from an order sustaining a demurrer. 144 Cal. 763, 78 Pac. 258.

The policy in question was issued on the life of Richard N. Cayford, plaintiff's husband, payable to plaintiff as beneficiary. It was issued March 20, 1902, and called for the payment of a semiannual premium on the 20th of March and September in each year. The policy provided that the failure to pay any premium when due would render the policy void. The second semiannual premium fell due September 20, 1902, and was not paid. On October 5, 1902, the insured died. The testimony disclosed that J. N. Pittman had solicited the insurance, and had collected the first premium. On the 18th of September, two days before the second premium fell due, he called to collect this premium. Mrs. Cayford told him that they were not prepared to pay it. Pittman said that that would be all right; that he would call again on October 4th. On that day he accordingly called and saw Mrs. Cayford. She said she did not then have all the money, and asked him to call later in the afternoon, when she expected to have it; but he replied that he would call again on the 8th of the month. On the 5th of October the in-

sured died. Pittman had with him on his visits of September 18th and October 4th the company's premium receipt for the second annual premium, executed as therein required by both the secretary of the company and its superintendent. One of the provisions of the policy declares: "The contract between the parties hereto is completely set forth in this policy and the application therefor taken together, and none of its terms can be varied or modified, nor any forfeiture waived or premiums in arrears received except by agreement in writing signed by either the president, vice-president, secretary or actuary, whose authority for this purpose will not be delegated; no other person has or will be given any authority."

Respondent claims that the events just narrated bring this case within the doctrine laid down in the case of Knarston v. Manhattan Life Ins. Co., 124 Cal. 74, 56 Pac. 773, and *Id.*, 140 Cal. 57, 73 Pac. 740. In that case a certain premium became due November 15, 1895. On that day and the next day the general manager of the company sent its collector to the insured to collect the premium. It was not paid. Through the efforts of one Gilmore, representing Knarston, the insured, two extensions of time within which to make payment were granted by the general manager. Within the extended time Knarston was killed in a railroad accident. The policy contained the usual forfeiture clause. The Supreme Court, in the two appeals in that case, held that an attempt by the company to collect a premium after default is a waiver of the forfeiture which might have otherwise been claimed; that, where the insured died while the company was still trying to collect the premium, the policy would be treated as still in force. The decision turned expressly on the fact that the waiver was the act of a general agent of the insurance company, and that the insured had no notice of any limitation on his authority.

There is no doubt that this case, as claimed by the respondent, would be within the doctrine of the Knarston Case if the acts of Pittman were the acts of the company. Counsel for the respondent argues that the possession of the receipt after its due date by Pittman, the collector of the company, implied the power to deliver it after that date; that there appeared on the face of the receipt no limitation of its validity if delivered after the due date of the premium; that accordingly, if it had been in fact delivered by Pittman, though after the due date, his act would have been the act of the company, and the forfeiture would have been waived. We cannot agree with this view. Mrs. Cayford did not know that Pittman had the premium receipt, and she knew nothing of its contents. No knowledge of the extensions of time to pay the premium, granted by Pittman to the insured, was brought home to the company. The limitation, in the conditions of the policy, on the authority of subordinate

agents to waive forfeitures, or collect overdue premiums is valid. *Shuggart v. Lymcoming Fire Ins. Co.*, 55 Cal. 408; *Enos v. Sun Ins. Co.*, 67 Cal. 621, 8 Pac. 379; *Westerfeld v. New York Life Ins. Co.*, 129 Cal. 68, 77, 58 Pac. 92, 61 Pac. 667. The assured knew of this provision, or what is the same thing, is charged with knowledge of it. *Westerfeld v. New York Life Ins. Co.*, *supra*. Under the circumstances of this case, it cannot be held that the company waived the forfeiture caused by the failure to pay the premium when due. Authority to collect premiums does not imply authority to extend the time for the payment of such premiums, or to waive a forfeiture resulting from nonpayment. *Bryan v. National Life Ins. Ass'n*, 21 R. I. 149, 42 Atl. 513; *Mutual Life Ins. Co. v. Abbey*, 88 S. W. 950, 76 Ark. 328; *Metropolitan Life Ins. Co. v. McGrath*, 52 N. J. Law, 358, 19 Atl. 386.

In the case of *Iowa Life Ins. Co. v. Lewis*, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. Ed. 204, the policy contained a clause similar to the one referred to in the policy in this case, restricting the power of the agents of the company in the matter of waiving forfeitures. In that case it was claimed that, conceding the validity of such a clause, the clause itself had nevertheless been waived by the company. A premium note had been placed in the hands of an agent for collection. He had extended the time for its payment, and it was allowed to remain in his hands after maturity. It was held, nevertheless, that his act was unauthorized, and that the company was not estopped from relying on the forfeiture.

In the case of *Bank of Commerce v. New York Life Ins. Co.*, 54 S. E. 643, 125 Ga. 552, it was held that the acceptance of money by a collecting agent upon an overdue premium note did not bind the company as a waiver of the forfeiture resulting from nonpayment of the note at maturity.

The following cases tend more or less to support the conclusion we have reached in this case: *Collins v. Metropolitan Life Ins. Co.*, 32 Mont. 329, 80 Pac. 609, 108 Am. St. Rep. 578; *Fidelity Mut. Life Ass'n v. Busell*, 86 S. W. 814, 75 Ark. 25.

The judgment and order are reversed.

We concur: COOPER, P. J.; HALL, J.

RICHARDS v. OGDEN STEAM LAUNDRY.

(Supreme Court of Utah. July 18, 1907.)

1. MASTER AND SERVANT—ACTION FOR INJURIES — EVIDENCE — SUFFICIENCY — NEGLIGENCE OF MASTER.

Evidence, in an action by an employé whose hand was drawn into a mangle used in a laundry and injured, held insufficient to establish the employer's negligence, in that it failed to warn the employé of the condition of the machinery, to instruct her as to the manner and

method of covering the mangle, and notify her of the dangers connected therewith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 972.]

2. SAME—ASSUMPTION OF RISK.

Evidence, in an action by an employé whose hand was drawn into a mangle used in a laundry and injured, *held* to show that the employé's injuries were due to dangers the risks of which were assumed by her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 981-986.]

Appeal from District Court, Second District; before Justice J. A. Howell.

Action by Mabel Richards, by her guardian ad litem, against the Ogden Steam Laundry. From a judgment for plaintiff, defendant appeals. Reversed and remanded for a new trial.

C. S. Varian, for appellant. J. D. Skeen and C. C. Richards, for respondent.

STRAUP, J. This is an action brought to recover damages for personal injury. The defendant was engaged in the laundry business. The plaintiff, 17 years of age, was in its employ. It was alleged in the complaint that it was her duty to feed a mangle and to cover it when it became soiled; that a certain lever which controlled the mangle became loose, worn, and out of repair, and the jar of the machinery and the weight of the lever started the mangle in motion without warning; that the defendant neglected to warn her of the condition of the machinery; that covering the mangle required skill not possessed by plaintiff, and because of her lack of knowledge and experience she was not capable of performing such work safely, all of which was known to the defendant, nevertheless, it imposed such duty upon her, without instructing her as to the method of performing the work or warning her of the dangers connected therewith; and while she was covering the mangle "the lever without notice slipped into gear, and plaintiff's right hand was suddenly drawn into the mangle," scalding, burning, and mashing her fingers. The defendant in its answer admitted that plaintiff's duty consisted of feeding and operating the mangle, but denied that her employment required her to cover the mangle, or that any such duty was imposed upon her, or exacted of her; and alleged that the defendant had been informed that such work was the duty of the foreman; that she was not to attempt it herself, but to notify the foreman when the mangle needed covering; that the plaintiff, in violation of such instructions, attempted to cover the mangle with the assistance of a co-employé, and while doing so the machinery, at the direction of plaintiff, was put in motion by the co-employé, and, after it started, plaintiff's fingers caught in the covering and were drawn into the mangle. Defendant denied all acts of negligence charged against it, and further pleaded contributory negligence and assumption of risk on the part of the plain-

tiff. A trial before the court and jury resulted in a verdict in plaintiff's favor. The defendant, on appeal, urges that the court below erred: (1) In refusing its request to direct a verdict; (2) in giving certain instructions; (3) in overruling defendant's motion for a new trial based on insufficiency of evidence, and that the verdict was contrary to law; and (4) in excluding certain testimony.

We think the court erred with respect to the rulings presented by assignments 1 and 3. The other assignments we need not notice. It is not alleged in the complaint that the defendant was guilty of negligence in suffering and permitting the lever to become and remain loose and out of repair, nor that it was guilty of negligence which caused the machinery to be started of its own motion. The alleged acts of negligence consisted in the defendant's failure to warn the plaintiff of the condition of the machinery, to instruct her as to the manner and method of covering the mangle, and to notify her of the dangers connected therewith. For eight months prior to her injury the plaintiff was in the defendant's service engaged in feeding the mangle. Though but 17 years of age, yet she was an experienced and skillful feeder. The starting of the machinery of its own motion without warning, claimed to be due to the loose condition of the lever, was something which occurred, as testified to by plaintiff herself, almost every day during the period of her employment. She further testified, which necessarily must be known to every one, that if her fingers were brought too near the cylinder and steam chest they were liable to be caught and injured. While it may be said that the evidence does not show whether the plaintiff did or did not know that the lever was loose or worn, yet the evidence shows that she operated the lever daily by means of which the belts were shifted from one pulley to another, and that she knew that such shifting caused the mangle to start or stop. The fact that the mangle, when stopped by means of the lever, would start without warning and without human agency, and that it did so start every day for a period of eight months, was well known to her, as appears from her own testimony, and that the dangers arising therefrom were fully appreciated by her. Though it had been shown that the lever was loose or out of repair, and for that reason the belts were liable to be shifted and the mangle started after it had been stopped, and though the defendant had informed plaintiff of such facts, still she would not have been made aware of any danger not known to her, nor of any condition exposing her to danger not fully appreciated by her. She well knew the essential and ultimate fact that, when the mangle was stopped by means of the lever, it was liable to start at any time, and fully appreciated all the ut-

tending dangers arising from such starting. This is not a case where complaint had been made of some defect, and where the master promised to repair, and directed the use or operation of the instrumentality to be continued. Plaintiff here testified that she reported "the condition of the machine" three or four days before the accident to the foreman, but that he "never said anything." Furthermore, the evidence does not show that the lever was loose, or worn, or out of repair. Plaintiff offered no evidence in support of such allegations. Plaintiff testified that she did not know how the machine started; her co-employé, her sister, that neither she nor any other person touched the lever; and another witness, that the mangle had the habit of starting itself by the sudden jerking of the lever. The evidence on behalf of the defendant showed that the machine was in good condition, but that when stopped for 15 or 20 minutes it would slowly start, due to the shifting of the belts on the pulleys caused by the jar of the building and the shaft, occasioned through the operation of other machinery. But this is far from proving the alleged condition of the lever, and with respect to which it is alleged the defendant was negligent in not informing the plaintiff.

The evidence is likewise insufficient to show negligence on the part of the defendant in its failure to instruct the plaintiff as to the manner and method of covering the mangle. Covering the mangle means the placing of a padding around the cylinder, and a sheet around the padding. This is done to protect and keep clean the clothes fed through the mangle. The sheet became soiled and required changing about twice a week. Plaintiff testified that her duties were feeding the mangle. It is not made to appear that covering the mangle was any part of her duties, nor that such work was required of her. When asked by her counsel whether the foreman told her whether she or some one else was to do it, the plaintiff answered in the negative. On behalf of the defendant, it was shown that the plaintiff was expressly informed that, when the mangle needed covering she was to notify the foreman or washman. On the day in question the clothes "ran soiled," when the plaintiff, according to her own testimony, notified the washman. He told her that he could not help it, and that he was busy. She then informed the foreman, but, according to her testimony, he paid no attention to her. She then voluntarily, without any direction or request from any one, undertook, with the aid of her sister, a co-employé, to remove the soiled sheet and to place a clean one around the roller. While doing so she was injured. There is also evidence showing that the plaintiff several times assisted the foreman in doing such work. At other times other girls assisted the foreman. Sometimes the plaintiff and her sister did it themselves,

as did also other mangle feeders, in the presence of the foreman, who made no objection to their doing it. We think this evidence lacks the required proof that covering the mangle was a part of plaintiff's duties. Furthermore, the evidence does not show that the plaintiff attempted to do the work in an improper or unsafe manner. It does not appear that, if the plaintiff had been instructed, she could have performed the work more skillfully or safely than she did, or that she thereby would have been enabled to avoid dangers not known to her. So far as is made to appear, she knew the proper manner of performing the work, pursued the usual and ordinary method of doing it, and realized and appreciated all the attending dangers.

Upon the whole case we are clearly of the opinion that the evidence is insufficient to establish the negligence alleged in the complaint; and that the evidence conclusively shows that the injury to plaintiff was due to dangers the risks of which were assumed by her.

The judgment of the court below is therefore reversed, and the cause remanded for a new trial. Costs to appellant.

MCCARTY, P. J., and FRICK, J., concur.

HUNT v. MONROE.

(Supreme Court of Utah. June 27, 1907.)

1. DIVORCE—SUPPORT OF CHILDREN—ACTION ON FOREIGN DECREE—PARTIES.

Though a divorce decree directed that plaintiff husband should pay to a third person for the use and benefit of the minor children a certain sum per month until each of the children should become of the age of 18 years, yet such third person was without right to maintain an action to recover the same; the right of action therefor being in defendant wife.

2. PLEADING—DEMURRER—GROUNDS — WANT OF LEGAL CAPACITY TO SUE.

Want of legal capacity to sue, as used in Rev. St. 1898, § 2902, declaring the same to be a ground of demurrer, means as a general rule a want of capacity to appear in court and maintain an action, regardless of in whom is vested the right of action.

3. SAME—COMPLAINT—REAL PARTY IN INTEREST—METHOD OF OBJECTION.

Where a complaint shows on its face that the right to maintain the action is not in plaintiff, but in another, such defect may be reached by demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 426.]

4. EVIDENCE—JUDICIAL NOTICE—LAWS OF ANOTHER STATE.

It is the safer rule to require proof of laws of another state relative to the validity and effect of judgments in that state, and not to take judicial notice thereof, under Rev. St. 1898, § 3374, defining matters of which judicial notice may be taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 51.]

5. DIVORCE — FOREIGN DECREE — CONSTITUTIONAL LAW.

Though an action on a decree for alimony or maintenance rendered in one state may be

maintained in another state, if the amount payable is fixed and presently due, yet a decree for alimony or maintenance becoming due in the future and payable in installments is not a final decree enforceable in another state, within Const. U. S., requiring full faith and credit to be given in each state to the judicial proceedings of every other state, until the court which rendered it fixes the specific amount due, either in some proper proceeding in the original action or by an independent action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 827½.]

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Action by Herbert L. Hunt against Charles H. Monroe on a foreign decree for maintenance rendered in a divorce suit. From a judgment for plaintiff, defendant appeals. Reversed, with directions to sustain the demurrer to the complaint.

W. W. Little and M. E. Wilson, for appellant. Goodwin & Van Pelt, for respondent.

FRICK, J. The plaintiff, respondent in this court, filed his complaint in the district court of Salt Lake county, in which the following facts are alleged: "That at all the times hereinafter mentioned the district court, city and county of Denver, Second judicial district, in and for the state of Colorado, was a court of general jurisdiction, duly created and organized by the laws of that state. That prior to the 27th day of August, 1902, an action for divorce had been duly commenced by Charles H. Monroe (the defendant herein) against one Mary L. Monroe in said court by the personal service of process on the defendant, and thereafter said defendant duly appeared in said cause by her attorney. That thereafter, and on the 27th day of August, 1902, both said parties appeared in open court, and such proceedings were then and there had that a judgment and decree was duly given and made by said court in favor of the plaintiff, dissolving the bonds of matrimony between the said plaintiff, Charles H. Monroe, and the defendant, Mary L. Monroe, and granting to said defendant, Mary L. Monroe, the sole care and custody of the two minor children of said parties, to wit, Edward T. Monroe, aged 12 years, and Mary C. Monroe, aged 15 years. That in and by the terms of said judgment and decree it was further adjudged and decreed that the said plaintiff, Charles H. Monroe, pay to the plaintiff herein, Herbert L. Hunt, for the use and benefit of said minor children, the sum of \$10 each per month, payable each and every month, from the date of said decree until each of said children should become of the age of 18 years. That there became due and payable to said plaintiff, for the use and benefit of said minor Mary C. Monroe, prior to becoming 18 years of age on the 11th day of November, 1904, the full sum of two hundred and sixty-five dollars (\$265.00), no part of which has been paid, except the sum of thirty dollars, (\$30.00) paid thereon on or about the month

of April, 1903. That there is now due and payable to the plaintiff for the use and benefit of said minor Edward T. Monroe, the full sum of five hundred and three dollars, (\$503.00), no part of which has been paid, except the sum of thirty dollars (\$30.00), paid thereon on or about the month of April, 1903. That said minor Edward T. Monroe will not become 18 years of age until the 21st day of May, 1908. That pursuant to the terms of said judgment and decree said defendant in said action, Mary L. Monroe, took the sole care and custody of said two minor children, and has ever since kept and retained the same, and has by her own labor and effort kept, maintained, and educated the said children without any assistance from the said Charles H. Monroe, except the sum of sixty dollars (\$60.00), as stated in paragraph No. 3. That said Mary L. Monroe has no property, and is dependent solely upon her own labor for her support, and the support and maintenance of said minor children."

Upon the foregoing allegations respondent prayed judgment for the amount of alimony that had accrued up to the time of filing the complaint, and for such additional sum as would become due under the terms of the decree before final judgment in the action, and for costs. To this complaint the defendant, appellant in this court, appeared and filed a demurrer, basing it upon two grounds, to wit: (1) That it appears from the complaint that the plaintiff has not legal capacity to sue, for the reason that upon the face of the complaint it appears that the plaintiff is not the real party in interest; and (2) that the complaint fails to state sufficient facts to constitute a cause of action. The demurrer was overruled, and, the appellant electing to stand thereon and declining to plead further, the court, upon proper proof being made, found that there was due and unpaid of the alimony sued for the sum of \$708, and entered judgment in favor of respondent and against appellant for said sum and for costs, from which judgment this appeal is taken.

Two questions are presented by the appeal: (1) Did the respondent have the legal right to maintain the action in his own name? and (2) is the judgment or order sued on a final judgment on which an action can be maintained?

As to the first proposition the fact is palpable that the respondent was neither a party, a beneficiary, nor assignee of the judgment sued on. He was not in any way related to nor interested in the subject-matter of the original action, but was connected with the result thereof merely by being made the recipient of the money as the same was ordered to be paid for the use and benefit of Mary L. Monroe, the party to the original action for divorce, and in which the order or alleged judgment sued on was made. As was said in Page v. Page, 189 Mass. 86, 75

N. E. 92, where a similar order was considered: "We construe this decree to be in substance an order to the libelee to pay to libellant the sum named, to be used by her in the support of herself and the child, and that the libellant could enforce against the libelee whatever duty was placed upon him by the decree. The provision that it should be paid to the attorney of the libellant, rather than to her in person, was doubtless inserted for the convenience of the parties." This, it must be assumed, was the purpose with respect to the order in this case, and, while the respondent had full power to receive and receipt for the payments as they fell due, he had no control over the money and could not, without anything further appearing from the record, sue for and recover the arrears in his own name. The allegation that the suit was instituted for the benefit of another did not alter his relation to the judgment or order sued on, since such an allegation could not bind the real owner of the judgment, and she might sue upon it, if a suit could be maintained thereon, regardless of respondent's action. Of course, if respondent had obtained judgment, and Mary L. Monroe had taken the money realized therefrom, such fact might be set up as a defense in another action brought by her on the same judgment. This would be so by way of an estoppel, however, and not upon the ground of former adjudication. In 23 Cyc. 1507, the rule with respect to parties to actions on judgments is stated thus: "An action on a judgment must be prosecuted by the real and beneficial owner of it, whose title to it must appear of record or by some formal transfer, and the suit cannot be maintained by a third person not answering these conditions, although the judgment may in some way define his rights or inure to his benefit or protection."

But respondent insists that the question was not properly raised by demurrer, since in the demurrer the alleged ground was a want of legal capacity to sue. It may be conceded that as a general rule the want of legal capacity to sue, referred to in section 2962, Rev. St. 1898, means a want of capacity to appear in a court and maintain an action, regardless of in whom is vested the right of action. In this state any person of sound mind, of lawful age, and under no restraint or legal disability, has the legal capacity to sue, although it may ultimately appear that he has no cause of action. Where, however, it appears from the face of the complaint, as in this case, that the right to maintain the action is not in the plaintiff, but in another, the complaint is defective for want of a statement of sufficient facts to maintain the action. It is elementary that a complaint good in law must not only state a complete cause of action against the defendant, but it must also show a right of action in the plaintiff. In this respect the complaint in this case was defective, and

hence vulnerable by demurrer. That such a defect may be raised by demurrer is amply sustained by the authorities. 15 Enc. Pl. & Pr. 564, 713, where the cases are collected. In the absence of authority, however, and resting the proposition upon principle alone, why may not a defect of this kind be raised as a question of law, when the defect is made to appear from the face of the complaint? In such event it certainly presents no issue of fact, but purely one of law, to be determined from the allegations contained in the complaint, which are admitted by the demurrer. It follows, therefore, that the court erred in not sustaining the demurrer upon this ground.

This brings us to the second proposition, which seems to us to be one of grave importance with respect to actions based on decrees and judgments of a sister state. It is urged by appellant that the order or judgment for the accumulating alimony or maintenance sued for in this action is not a final judgment, order, or decree, and therefore is not the subject of an action, and does not fall within the protection of the full faith and credit clause of the federal Constitution. Upon the other hand, respondent strenuously contends that it is such a judgment, and entitled to full faith and credit in this state, to the same extent and with like effect as it would have in the state of Colorado, where it was rendered. Authorities are cited by both parties sustaining their respective contentions. We confess to having been compelled to modify our first impressions with regard to the finality of orders or judgments of the character like the one before us. Upon principle the order or judgment sued on, as pleaded, bears on its face the usual prerequisites of a final judgment, as such are defined to be in the books. Judgments are generally defined to be final, for the purpose of basing an action thereon, when the judgment is "a definitive and personal judgment for the payment of money, final in its character and not merely interlocutory, remaining unsatisfied, and capable of immediate enforcement." 23 Cyc. 1503. The judgment or decree sued on in this case certainly was final to the extent that either party could have prosecuted an appeal therefrom, and thus was not merely interlocutory. It was enforceable as against appellant by execution in the state where rendered, and, as admitted by the demurrer, was unsatisfied, and was for the payment of money only. As to the validity and effect of judgments or decrees granting divorce and alimony in the state of Colorado we are not advised. Upon the question of whether the courts of one state take judicial notice of the laws of another state upon this subject the authorities are in conflict, some holding that in actions on judgments of a sister state, a federal question

being involved, under the full faith and credit clause of the federal Constitution, the state courts will take judicial notice of the laws of a sister state upon the subject respecting the validity and effect of judgments; while others, and what appears to be the general view, hold that the laws of other states must be proved as facts in this class as in all other cases. 23 Cyc. 1547, 1548. Our Code (section 3374, Rev. St. 1893) defines matters of which the courts in this state take judicial notice, and we think the matter respecting the laws of a sister state is not within the provisions of that section. But, be that as it may, it seems to us the safer rule is to require proof of the laws of a sister state in this regard, as well as in all others. Assuming, therefore, the law with respect to divorce and allmony in Colorado to be the same as our own, the judgment was liable to modification by the court rendering it upon application of either party at any time for good cause shown; and such, under the decisions, seems to be the effect of such judgments in the state of Colorado, as declared by the Supreme Court of that state in the case of *Stevens v. Stevens*, 72 Pac. 1061, 31 Colo. 188. Whether the law still remains so we are not advised.

Respondent's counsel, however, contend that, although the judgment required the allmony to be paid in instalments for future support, still the amount was fixed and certain; that while the amount was subject to change, or might be entirely withdrawn by the court, nevertheless the judgment was enforceable for the amount due and unpaid until modified by the court rendering it. It must be conceded that there is much force in this contention, and that it is likewise supported by some courts of great learning and of the highest respectability, as is evidenced by the following cases: *Barber v. Barber*, 21 How. (U. S.) 582, 16 L. Ed. 226; *Arrington v. Arrington*, 127 N. C. 190, 37 S. E. 212, 52 L. R. A. 201, 80 Am. St. Rep. 791; *Wagner v. Wagner*, 26 R. I. 27, 57 Atl. 1058, 65 L. R. A. 816; *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125, 54 L. R. A. 204, 83 Am. St. Rep. 806; *Knapp v. Knapp* (D. C.) 59 Fed. 641; *Brisbane v. Dodson*, 50 Mo. App. 170. While there are other cases cited by counsel for respondent in support of their contention, and in which similar judgments were enforced, the foregoing cases are all that discuss and directly pass upon the question presented by this appeal. Upon the other hand, counsel for appellant contend that, since the decree or judgment sued on was subject to change or modification at any time by the court of Colorado, it therefore was not a final judgment, and an action could not be maintained thereon; that, not being final, it did not fall within the full faith and credit clause of the federal Constitution and was not protected thereby, and that the question presented is a federal question, upon which the decisions of the Supreme Court

of the United States are controlling, and to some extent, at least, binding on this court. In support of their contention they cite authorities of equal learning and respectability, as appears from the following cases: *Lynde v. Lynde*, 41 App. Div. 280, 58 N. Y. Supp. 567; *Lynde v. Lynde*, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. Rep. 332; *Lynde v. Lynde*, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810; *Page v. Page*, 189 Mass. 85, 75 N. E. 92. While the first three cases are one and the same case, still having been passed upon by three appellate courts, considering the same facts, makes the citations fully as strong, if not stronger, as authority, as though there had been three cases decided by the same courts falling within the same principle. When we come to consider the comparative weight of the authorities cited by both sides, those cited by respondent are affected in their force or weight, while the ones cited by appellant are strengthened, by reason of the circumstances surrounding them which we will now attempt to point out.

To start with, the cases of *Trowbridge v. Spinning* and *Brisbane v. Dodson*, supra, hardly fall within the class of the case at bar. In *Trowbridge v. Spinning* the suit was for a fixed sum, payable as soon as the decree was entered, and hence comes within the rule announced by the Supreme Court of the United States in the *Lynde Case*. In *Brisbane v. Dodson* the allegations of the complaint were to the effect that the judgment sued on was final, and not subject to change or modification by the court rendering it. This case, also, is not within the class to which the case at bar belongs. *Arrington v. Arrington* and *Knapp v. Knapp* were both decided before the *Lynde Case* was passed on by the Supreme Court of the United States, and hence the latter, being a case from an inferior federal court, is overruled, by implication at least, by the *Lynde Case*, while the former is by a divided court, and might not have been decided as it is if the court deciding it had been confronted with the decision of the court of last resort on federal questions. This brings us to the only remaining case, to wit, that of *Wagner v. Wagner*, decided by the Supreme Court of Rhode Island in 1904. This is the only case, decided after the *Lynde Case* was passed on by the Supreme Court of the United States, which holds to the doctrine that a judgment like the one at bar may be sued on in a sister state before the state court in which it was rendered has fixed an absolute sum due and payable at some time prior to the bringing of the action thereon. While the case of *Barber v. Barber*, 21 How. (U. S.) 582, 16 L. Ed. 226, was not directly mentioned by the Supreme Court of the United States in deciding the *Lynde Case*, yet it was thoroughly considered and reviewed by both the New York courts, and distinguished from the *Lynde Case*; and the Supreme Court, in its

opinion in the Lynde Case, sustained the New York courts, and it must be assumed that the Supreme Court of the United States concurred with the New York courts in distinguishing the Barber Case. This is of great significance when we remember that all the cases cited by counsel for respondent are based upon the Barber Case. If thus Barber v. Barber is modified, as stated in the Lynde Case, there is little, if anything, left upon which to rely as an authority from the Supreme Court of the United States with regard to the right to sustain actions on judgments such as here in question; and this is clearly the conclusion reached by the Supreme Judicial Court of Massachusetts in the case of Page v. Page, *supra*. The latter case is the only one to which our attention has been called, and which we could find by independent research, that has passed upon the precise question before us now. That case refers to and reviews the Lynde Cases, and the court arrives at the conclusion that the Supreme Court of the United States is the final arbiter with respect to what judgments the full faith and credit clause of the Constitution applies, and its decision is binding on the state courts.

The question, as we understand it, in view of the decision in the Lynde Case, may be stated thus: That an action upon a judgment or decree for alimony or maintenance, rendered by a court of competent jurisdiction of one state, may be maintained in another court of competent jurisdiction of another state, where the amount due or payable is fixed, having a definite sum presently due and enforceable in the state where rendered; but that alimony or maintenance becoming due in the future, payable in installments, is not a final judgment upon which an action can be brought, unless and until the court which rendered it passes upon and fixes the specific amount due and payable, in some proper proceeding in the original action, or by an independent action, if such can be maintained in the state where the original order or judgment was entered. The mere fact, however, that a specific sum, presently due, is also subject to modification, does not defeat the action in any other state; but the fact that a sum is not specifically fixed as due from one to the other of the parties to the original suit, and certain sums are to become due in the future and payable in installments or otherwise, does defeat the right of action, unless the amount due is ascertained and fixed by some appropriate proceeding before the action on the judgment or order or decree is commenced, as above stated. In view, therefore, that the judgment or decree in this case falls clearly within that class which in the Lynde Case is held not to be a final judgment, and hence not within the protection of the full faith and credit clause of the federal Constitution, we have no alternative than to hold that the action cannot be maintained on the judgment as it

now stands. The trial court, therefore, erred in overruling the demurrer.

The judgment is reversed, with directions to the district court to sustain the demurrer. Appellant to recover costs.

McCARTY, C. J., and STRAUP, J., concur.

JONES v. BONANZA MIN. & MILL. CO. et al.

(Supreme Court of Utah. July 16, 1907.)

1. CORPORATIONS—OFFICERS AND AGENTS—DE FACTO OFFICERS.

All irregularities in a corporate election, the legality thereof, as well as the legal qualifications of the officers elected, are settled by the election as against a collateral attack.*

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1245.]

2. SAME—MEETINGS OF DIRECTORS—STATUTORY PROVISIONS.

A provision in articles of incorporation that a new board of directors shall organize within a time specified after their election is directory merely.

3. SAME—STOCK—ASSESSMENT—VALIDITY.

Articles of incorporation of a mining company provided that no assessment should be levied while there was treasury stock remaining in the treasury. At the time of levy of an assessment shares of such stock were undisposed of and in the treasury, but had no salable or other substantial value. *Held*, that the fact alone that such stock was undisposed of did not render the assessment void.†

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 654.]

4. SAME—DE FACTO OFFICERS.

A director who, when elected, did not hold sufficient shares of stock to qualify him for that office under the articles of incorporation, but did hold the required amount at the time an assessment was levied on the stock of the corporation by the board, was at least a de facto officer, and the assessment as against a collateral attack was valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1240-1242.]

5. SAME.

Stockholders, who not only had means of knowledge respecting all the circumstances of an assessment on their stock, but about the time it was levied and before the sale of their stock to pay the assessment made an investigation of the acts of the board of directors through a competent lawyer, and could thus have arrested the consequences of the assessment had they desired to do so, cannot thereafter complain of its invalidity.‡

6. APPEAL—REVIEW—FINDINGS OF FACT—CONCLUSIVENESS.

Findings of fact by the trial court in an equity case are conclusive, unless clearly contrary to the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3970-3972.]

7. CORPORATIONS—ACTIONS—LACHES.

Stockholders of a mining corporation, who apply to a court of equity for its interference to protect their rights against the consequences

*Hatch v. Lucky Bill Mining Company, 71 Pac. 865, 25 Utah, 405.

†Gary v. York Mining Company, 35 Pac. 494, 9 Utah, 464; Nelson v. Keith-O'Brien Company (Utah) 91 Pac. 30.

‡Hatch v. Lucky Bill Mining Company, 71 Pac. 865, 25 Utah, 405.

of alleged wrongful acts of the directors, must act with reasonable diligence, or present some good excuse for not having done so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1428.]

8. SAME—EVIDENCE—SUFFICIENCY.

Evidence, in an action to enjoin defendants from acting as the officers and board of directors of a corporation and from holding a stockholders' meeting and from making a sale of the corporate property, *held* not to establish fraud in obtaining an option on the stock of plaintiff and his associates and a proxy therefor and in failing to enter into a bond and lease.

9. SAME.

Evidence, in an action to enjoin defendants from acting as the officers and board of directors of a corporation and from holding a stockholders' meeting and from making a sale of the corporate property, *held* not to show reasonable diligence by plaintiff to correct the wrongful acts charged.

Appeal from District Court, Fifth District; Joshua Greenwood, Judge.

Action by George Jones against the Bonanza Mining & Milling Company and others. From a judgment for plaintiff, defendants appeal. Reversed, with directions to dismiss the action.

W. A. Lee, for appellants. Hendersen, Pierce, Critchlow & Barrette and B. N. C. Stott, for respondent.

FRICK, J. This action was commenced by plaintiff, hereinafter designated respondent, against the defendants, who are appellants in this court, to enjoin them from acting as the officers and board of directors of the Bonanza Mining & Milling Company, a Utah mining corporation, and to enjoin them from holding a certain stockholders' meeting, and from entering into negotiations for and from making a sale of the property of said company, and for general relief. A restraining order was duly issued pending the hearing on the merits, and upon final hearing the individual defendant E. G. Jones, and four others who were not made parties to the action, were removed as officers and directors of said company, and others reinstated into such offices, and the appellant E. G. Jones and the four other members of the board of directors were enjoined from holding any stockholders' or directors' meeting. They were enjoined from offering for sale or selling the property of said corporation, and from transacting any of its business; and all acts of the board of directors of said corporation from and after March 9, 1903, including the acts on said date, were held illegal and void. The court further decreed that the plaintiff and his associates still were the owners of and entitled to the stock which was sold on the assessment hereinafter referred to. From the findings and the decree as made by the court, appellants prosecute this appeal.

Appellants' attorney has assigned over 80 errors, but has massed them into 8 groups, and nearly all of them in some way relate to errors of the court in granting the injunc-

tion and other relief mentioned above. We shall not attempt to discuss the assignments separately, nor even do so in groups. The case may be determined upon the question as to whether under the whole evidence the respondent is entitled to the relief prayed for, or to any relief in this action. The complaint, findings of fact, conclusions of law, and decree cover 83 pages of the printed abstract, and the bill of exceptions containing the transcript of the evidence is composed of 663 pages of typewritten matter. In view of this it is utterly impossible within the limits of this opinion to attempt even a summarized statement of the pleadings and findings, nor of the evidence adduced at the trial. We will refer to such parts in the opinion as may be deemed necessary to a clear understanding with regard to the conclusions reached.

The principal matters relied on in the complaint consist of three separate agreements, all dated at Robinson, Utah, February 16, 1903, namely: (1) An agreement signed by one Ed. Mingle whereby he agreed to enter into a bond and lease with the Bonanza Mining & Milling Company "upon certain mining property in Juab county, Utah, upon terms and conditions this day agreed upon and to be agreed upon on or before April 1, 1903, or in the event of my failure so to do to forfeit and return that certain power of attorney and option to purchase this day given me by D. A. Depue, George Jones, Raymond Jones, A. J. Underwood, and the Tintic Lumber Company"; (2) an agreement by the parties last above named as stockholders of the Bonanza Mining & Milling Company to said Ed. Mingle giving him an option on 176,604 shares of the capital stock of said company at the rate of five cents per share to remain in force unconditionally until April 1, 1904; and (3) a power of attorney or proxy by the five parties above named to said Ed. Mingle whereby he was given the right to vote said shares of stock in the same manner and to the same extent as the parties could do if present at any meeting, and "reserving only from this power the right to sell or incumber said shares of stock, it being understood that the powers and authority hereby delegated shall for a period of one year from April 1, 1903, next be irrevocable and shall run jointly with that certain option or options to purchase the shares of stock now owned by us this day given to said Mingle." The two last agreements were signed by the five parties named, and the first one was signed by Ed. Mingle alone. It is also alleged in an amended complaint that the bond and lease mentioned in the first of the three agreements above mentioned were entered into, and the court so finds in findings 13 and 14; but there is no evidence to sustain these allegations or findings and respondent's attorney at the trial, as the bill of exceptions discloses, disclaimed such to have been the fact. He, therefore, rests his claim for relief upon the

fact that Mingle should have entered into such a bond and lease, but that he fraudulently failed to do so.

After the three agreements had been entered into a stockholders' meeting of the Bonanza Mining & Milling Company was duly called to be held at its office at Robinson, Juab county, at which, according to the notice therefor, a new board of directors was to be elected for said company; authority to bond and lease the property to be obtained from the stockholders and to "ratify the action of the board of directors taken at said meeting." This meeting was duly held at the time and place designated in the notice and one Wardlaw, holding the proxy given to Mingle with the consent and direction of respondent, who was secretary of the Bonanza Company, and D. A. Depue, its president, elected a new board of directors. We remark here that at the annual stockholders' meeting of said company, held in the month of January, 1903, as appears from the recorded proceedings of that meeting, the old officers were continued in office until the stockholders should elect others. At the stockholders' meeting held on March 9, 1903, Mingle was not present, nor was the appellant C. W. Jones. When this meeting adjourned, the newly elected directors, as is claimed by respondent, were to meet on the same day at Salt Lake city to organize, while the appellants claim such meeting was to be held on May 9th following. In this connection the record of that meeting shows that "March" was changed by substituting "May" therefor. How or when such change was made, or who made it, the evidence fails to make clear. The fact, however, is that the new board did not meet until May, 1903, at which time two of the newly elected members, who were not consulted when elected, could not serve, and the board was filled by the others who qualified by taking the usual director's oath of office as provided by law and thereafter filed the same with the county clerk of Juab county. Afterwards, on June 6, 1903, another director was appointed in place of one who resigned on that day, and the one appointed duly qualified on June 9th by taking the oath of office and duly filed the same on June 22d. This board from and after May 11, 1903, conducted all the corporate business of the Bonanza Company during the year 1903, and in January, 1904, at the annual stockholders' meeting duly called and held at the office of the company at Robinson, Juab county, Utah, a new board of directors was elected, who duly qualified, and the same proceeding was had in January, 1905. On July 10, 1903, the board of directors, composed of the members elected and appointed as above stated, levied an assessment of one-fourth of one cent per share upon the whole of the outstanding capital stock of the Bonanza Company. The notice of this assessment was regularly published in a newspaper, and copies of the notice

were mailed to the stockholders. The respondent and his associates received this notice, and protested against the assessment upon the ground that they had no stock except that on which they had given an option to Mingle and that he should either do the assessment work under his bond and lease or else take care of the assessment upon their stock. The officers of the company, however, disclaimed any knowledge of such an option or of any agreement to that effect, and insisted on the assessment being paid with the view of obtaining money to keep the mining claims of the company in good standing. Respondent and his associates, as they admit, consulted a lawyer at the time with respect to the regularity of the assessment; and the officers, as respondent admits, offered back at that time to him and his associates all the books, records, and matters pertaining to the affairs of the company if they would take charge of the corporate affairs and pay the debts necessarily incurred, which appeared of small consequence. But respondent refused to do this. The sale of the delinquent stock was postponed pending the controversy, but, no understanding having been arrived at, the sale took place October 3, 1903. At this sale 229,484 out of about 295,000 shares then issued were offered for sale as delinquent. Out of this number the officers of the company bid in for its benefit, for want of bidders, 168,956 shares. J. G. Campbell, the then president, bought 33,720 shares, and N. B. Campbell, the then secretary, bought 23,808 shares, and J. A. Lloyd, a director, bought 3,000 shares. From this it appears that the assessment of one-fourth of one cent per share was paid on about 66,000 shares out of the whole capital stock of 300,000 shares, for which the corporation was incorporated. The whole amount thus realized from this assessment, from the assessments paid and stock sold as above set forth, amounted to about \$300, or only sufficient to keep three out of the seven mining claims owned by the company in good standing if there were no other expenses.

It further appeared that the officers, before the assessment was levied, made frequent attempts to dispose of treasury stock to raise money to defray the necessary expenses of the corporation, and that they had disposed of treasury stock, realizing about two cents per share therefor, but could not find sale for any more, so that at the time the assessment was levied there were about 5,000 shares of the treasury stock undisposed of; but it is not seriously contended by any one that those shares had any market or other substantial value at that time, or that they were saleable. It further appeared that at least two assessments had been levied on the stock prior to the assessment of July, 1903, and that when these assessments were levied there was a large amount of stock in the treasury and unsaleable, and that respondent and his associates assented to these first two

assessments, all of which were levied and collected as provided by law. They, however, claim that these assessments were voluntary. The records show them to have been levied and enforced under the statute. The evidence is wholly insufficient to show that any money was obtained by any one connected with the company after March 9, 1903, that was not accounted for, except it be the money the Campbells and Lloyd obtained for the stock they bid for and bought at the assessment sale and no one seems to make any claim upon them therefor. The evidence is clear that at the time the corporate affairs were turned over by plaintiff and his associates there was no money in the treasury, and the company was free from debt. The mining claims were mere locations on which the assessment work had to be done each year to retain them as the property of the company, and it was upon these claims, seven in number, that the corporation was formed and the stock issued. After the assessment sale in 1903, and in the beginning of October, 1904, the appellant, C. W. Jones, with about 10 others, some of whom were his relatives residing in the state of Wisconsin, through correspondence with him, bought a large amount of the stock which had been bid in by the company and the Campbells at the assessment sale, and thus said persons became stockholders of the company, obtaining through that and other sources the controlling interest, which they held at the time of the trial. It is this stock that was by the court decreed to have been obtained illegally and through the fraudulent acts of C. W. Jones and Ed Mingle, and of which acts the court finds these Wisconsin stockholders to have had knowledge or the means of knowledge. The fraud, as we understand the findings of the court and the argument of respondent's counsel, consisted in the acts of Ed. Mingle and C. W. Jones in obtaining the option and proxy on the stock of respondent and his associates in February, 1903, and in failing to enter into the bond and lease whereby Mingle had the right to purchase the property of the company for \$15,000 at any time prior to April 1, 1904. It is too obvious to require argument that if Mingle failed to enter into this bond and lease he simply forfeited the right to purchase the property. This was a right given him, and the mere failure to comply with it would, at least not by itself, constitute a fraud on any one. But it is asserted that the power of attorney or proxy to vote the stock depended on this bond and lease, and in case Mingle failed to enter into the bond and lease the proxy was void and of no further effect. But the power of attorney or proxy in this regard speaks for itself. We have quoted the conditions imposed therein, and none such are contained in the proxy itself. The proxy, however, says that it is irrevocable for the period of time named therein, namely to April 1, 1904, this being the date on

which the option or right to purchase the 176,000 and odd shares of the stock owned by respondent and his associates terminated.

In this connection it is not easy to see why Mingle should want an option to purchase the property at precisely the same figure he had an option to purchase the stock apart from the fact that respondent wanted Mingle to advance for them \$700 for assessment work for which Mingle received absolutely no consideration in view of the right he had to purchase the stock. This fact also shows that there was no good reason why respondent and his associates wanted the bond and lease, except to obtain from Mingle the assessment work. Be that as it may, the election of the board of directors of March 9, 1903, was not based upon the condition that the election should be void if Mingle failed to enter into the bond and lease. This, however, is the claim now made by respondent's attorney, and, as he asserted at the trial, this whole case is based upon such claim. The agreement discloses no such condition, and it seems to us that to permit the authority of the board of directors and officers of a corporation to rest upon such a frail tenure would be a reproach to both law and morals. Whatever the rule might be in case of a direct and timely attack made against the directors elected upon such a condition, we think it too obvious to require discussion that such condition, even if absolutely established, could have no effect whatever on a collateral attack against the acts of the directors. All irregularities in corporate elections, and even the legality thereof, as well as the legal qualifications of the directors, are settled by the election in so far as collateral attacks are concerned. This is the clear weight of authority as is made manifest by reference to the following authorities where the cases are collected and cited: 2 Cook on Corporations, § 713; 3 Thomp. Comms. on Corp. §§ 3893-3895; 3 Clark & Marsh. on Priv. Corp. § 662. To the same effect is Hatch v. Lucky Bill Min. Co., 25 Utah, 405, 71 Pac. 865. But if we pass this by for the present and give respondent the benefit of the right to impose other conditions than those named in the agreement, what then are his rights in a court of equity as regards the acts of the board of directors elected March 9, 1903? He and his associates held the majority of the issued stock at that time, and joined in the election according to their own statements. They knew who the directors were, and they all wanted the new board to take charge of the corporate affairs. They turned all of them over, and the new board took them, not conditionally, but unconditionally. If thus Mingle was to enter into a bond and lease in less than a month from that time, why is it that neither of the interested parties ever took either the time or the pains to inquire about it? They, however, were informed within a very few months thereafter that Mingle had not entered into

a bond and lease, and that the acting officers claimed to know nothing about his agreement to do so. Respondent thus knew all about it. Moreover, respondent was then offered restitution of the property and affairs of the company. This was all Mingle offered to return in case he failed to enter into the bond and lease. Respondent refused to accept this, and yet it was just what he was entitled to if Mingle failed to comply with the alleged agreement to enter into a bond and lease.

At this time the stock remained unsold—the assessment unenforced. If respondent and his associates had taken charge then, they could have recalled the assessment under the statute, and, if they desired, could have provided the means required to protect the mining claims in some other way. They did not want this. What they wanted was that Mingle should do the assessment work when, according to their own contention, the matter was optional with him to do it or not. The right to purchase which Mingle had was contingent at best, and if he refused to perform he forfeited this right, nothing more. As a legal proposition, then, how could Mingle perpetrate a fraud upon any one by neglecting to do that which was at his option to do or not to do? But it is contended that the articles of incorporation provided that the new board should organize within 30 days after their election; that this was not done, and hence the election was void. The articles do not provide that in the event this was not done such a result or any result would follow, and hence the provision must be deemed to be directory merely. The board did organize, qualify, and thereafter acted as a board. It is also asserted that the levying of the assessment was void because the articles provided that no assessment should be levied while there was treasury stock remaining in the treasury and that there were about 5,000 shares of such stock undisposed of when this assessment was levied. It, however, appears from the articles that this stock should be disposed of by the directors for development purposes and to conduct the affairs of the company. It was contemplated, therefore, that something should be realized from the stock for the purposes named. No one contends that these 5,000 shares had any saleable or other substantial value at the time the assessment was levied. Indeed this is proved by the facts and circumstances in relation to the sale of the stock for the assessment. There were over 168,000 shares bid in for the company at the sale. No one would pay the nominal price of one-fourth of a cent a share therefor. Moreover, from the acts of respondent and his associates at that time, it is clear that they did not want the stock, even at that price. It is no answer to say that they relied on Mingle to do the assessment work under the bond and lease. They then knew he was not doing it, and that he was not likely to do it and pay five cents

per share for stock that no one seemed to want at one-fourth of a cent, when the highest obligation resting upon him was a mere option to buy it. But under the ruling of this court in *Gary v. York Min. Co.*, 9 Utah, 464, 35 Pac. 404, and under the more recent holding in *Nelson v. Kelth-O'Brien Co.*, (Utah) 91 Pac. 30, decided this term, the mere fact that there was some stock in the treasury would, under the circumstances in this case, not make the assessment void.

But it is further contended that at least one of the directors, appointed in May, 1903, to fill the vacancy occasioned by the failure of the two to qualify, vitiated the acts of the board in levying the assessment for the reason that the acting director was not eligible as a director when elected because not holding sufficient shares of stock to qualify him under the articles of incorporation. The records, however, affirmatively show that at the time the assessment was levied he was a stockholder in amount sufficient to qualify him as such, and hence until removed from office was at least a de facto if not a de jure director, and the acts of the board of which he was a member were not subject to collateral attack, under the authorities above cited. The assessment was therefore not void, but at most might perhaps have been directly attacked for irregularities, if action in some proper form had been taken in time. In view that the respondent and his associates not only had means of knowledge respecting all the circumstances of the assessment, but about the time it was levied and before the sale made an investigation of the acts of the board through a competent lawyer, and could thus have arrested the consequences of the assessment had they desired to do so, they cannot now be heard to complain in a court of equity for the reasons urged by them. The facts and circumstances of this case bring it squarely within the decision of *Hatch v. Lucky Bill Min. Co.*, supra. The irregularities in that case were in some respects much greater than in this case, and the equities much stronger, and still the court refused relief from the assessment there involved. Counsel for respondent, however, seeks to distinguish this case from the *Hatch Case* upon the ground of fraud, which, it is asserted, makes it peculiarly one for equitable relief. In a proper case this contention would be of great force, and might be conclusive, but the difficulty encountered by this record is that the evidence is wholly insufficient to establish the alleged fraud. If it were conceded that Mr. Mingle practiced fraud in entering into the agreements and in obtaining possession of the proxy to vote the stock, still this would not, in view of all the facts and circumstances, permit respondent to set aside and hold for naught all the acts and proceedings of the board of directors elected under the proxy, and under the direction of respondent and his associates and with their con-

sent. But we cannot conceive why Mingle should have intended any fraud or wrong in entering into the agreements. The evidence clearly demonstrates that he did not profit to any extent by doing so. Moreover, it is not apparent how he could have profited by it. If the property turned out all right, he had the right to purchase the stock for five cents a share by paying therefor. If he thought the property was not worth it, he could refuse to exercise his option. The same result followed if he had entered into the bond and lease; the only difference being that under it, in order to exercise the right to purchase the property apart from the stock, he would have to do at least the assessment work on the seven claims. The benefit from this would, of course, have been for the stockholders. Respondent and his associates, however, were advised before the sale of the stock upon the assessment that Mingle was not going on with the bond and lease. They were told by the officers that they knew nothing about such a bond and lease. Mr. Mingle would thus have forfeited his right under the bond and lease even if it had been executed. This respondent was bound to know. When, therefore, the officers offered to return to him the corporate affairs, he was offered all that the agreements provided for. This he would not accept, but permitted the directors to get on as best they could in raising funds to hold the mining claims; permitted the sale of the stock to take place and thereafter to be sold to the Wisconsin people and after about two years of inaction, and after the purchasers of the stock had invested their money, respondent seeks to be reinstated into all his rights as of March 9, 1903, upon the sole ground that Mingle had committed a fraud and that the subsequent purchasers of the stock knew, or had the means of knowing, all about Mingle's fraudulent acts, and this knowledge he sought to bring home to them from the various proceedings as recorded in the records of the meetings of the board of directors. But in the meantime the annual stockholders' meetings were held in January, 1904, and in January, 1905, at which at least some new men were elected upon the board of directors. These meetings were advertised and publicly held as required by law, and respondent, nor any of his associates, seemed to manifest any interest in the matter, although they knew, or ought to have known, that Mingle was neither holding these meetings nor interested in them under the proxy; that they were held under the stock purchased by others under the assessment sale. Under such circumstances it would be most inequitable to permit respondent to attack in this way, and after such a lapse of time, the

acts of those who conducted the corporate affairs under a claim of right, and who thereby kept intact the corporate property and the mining claims from being forfeited.

We have read with great care and attention the entire evidence contained in the original bill of exceptions. We did this for the reason that the respondent contends that the findings of the trial court are conclusive upon us, unless clearly contrary to the evidence. We concede this to be the rule adopted by this court in equity cases. But there are also other elementary rules in force in all courts of equity, which are, that he who seeks equity must do equity; that he who charges fraud assumes the burden of establishing it; and, finally, that when a party comes into a court to obtain relief from the acts of others in matters such as are involved in this case, he must act with reasonable diligence or present some good excuse for not having done so, or he must fall in his action. The foregoing doctrine is especially applicable, and is generally enforced in cases like the one at bar. *Great W. M. Co. v. Woodmas A. M. Co.*, 14 Colo. 90, 23 Pac. 908; *Rabe v. Dunlap*, 51 N. J. Eq. 40, 25 Atl. 959; *Speidel v. Henrich*, 120 U. S. 387, 7 Sup. Ct. 610, 30 L. Ed. 718; *Harwood v. Railroad Co.*, 17 Wall. (U. S.) 78, 21 L. Ed. 558.

The evidence in this case utterly fails to establish fraud. The most that can be said is that there are some facts from which one might conjecture fraud and that is insufficient. The evidence equally fails to show any reasonable diligence upon the part of respondent to correct the alleged wrongful acts, and he offers no excuse why he did not act sooner. The evidence, therefore, fails to sustain the findings upon which the decree is based, and it thus cannot stand, for want of support. With regard to the lack of diligence to prosecute this action, and the failure to take appropriate action in proper time in the absence of fraud, the case of *Hatch v. Lucky Bill Min. Co.*, supra, is conclusive, and leaves us no alternative but to reverse the judgment upon that ground as well. This view makes it unnecessary to pass upon the question whether the court exceeded its power in removing officers not before the court and in reinstating others in an action like this. It is also apparent from the entire record that the plaintiff cannot make a proper case for relief at this time under the facts as set forth in the complaint, or under any proper amendment thereof.

The judgment, therefore, is reversed, with directions to the district court to dismiss the action. Appellant to recover costs.

MCCARTY, C. J., and STRAUP, J., concur.

I. X. L. FURNITURE & CARPET INSTALLMENT HOUSE v. BERETS et al.

(Supreme Court of Utah. June 27, 1907.)

1. LANDLORD AND TENANT — LEASE — CONSTRUCTION.

In construing a lease, the whole instrument must be considered and all its terms looked to to ascertain the true intent of the parties; and, when the intent can be ascertained, it must prevail, though contrary to the strict letter of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 98.]

2. SAME—TERM—COMPUTATION.

Where the term of a lease extends "from December 1, 1904, to December 1, 1906, a term of two years," it expires November 30, 1906, if possession is taken December 1, 1904, or December 1, 1906, if possession is taken December 2, 1904.

3. PLEADING—DEMURRER.

In an action involving the date of expiration of a lease, the landlord's demurrer to the tenant's complaint raised a question of law and not of fact, and by demurring they must be bound by a fair construction of the terms of the lease in fixing the term granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 485.]

4. LANDLORD AND TENANT—OPTION TO RE-NEW—TIME FOR EXERCISE.

Where a lease provided that upon the lessee's election "at the expiration of the term" the lessors would renew, the lessee was bound to elect at a point of time at or before the old time was expiring, after it had expired being too late.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 271.]

5. SAME.

The provision of a lease entitling the lessee to remove improvements placed on the premises did not extend the right to possession under the lease beyond the term fixed, but at most gave the right merely to enter upon the premises within a reasonable time for the purpose only of removing the improvements.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 296, 627.]

6. SAME.

Courts may not disregard any provision of a contract, or save rights lost thereunder through the act of the party asking relief, unless it will be unconscionable or clearly inequitable not to do so; and, where a lessee failed to exercise an option to renew for three days after the time given in which to exercise it, he may not enforce the option where he pleads nothing that would have prevented him from making the election at the proper time except mere inadvertence, though the lessors knew that the lessee intended to request a new lease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 271.]

7. SAME.

The equity rule seeking to prevent forfeitures is not available to a lessee who seeks to enforce a renewal of a lease after omitting to exercise an option for a renewal within the time prescribed by the lease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 271.]

Appeal from District Court, Third District; C. W. Morse, Judge.

Specific performance suit by the I. X. L. Furniture & Carpet Installment House against Louis Berets and others. From a

judgment dismissing the action, plaintiff appeals. Affirmed.

S. P. Armstrong, for appellant. W. R. Hutchinson and J. M. Thomas, for respondents.

FRICK, J. This is an equitable action for specific performance, based upon substantially the following allegations contained in the complaint: That on the 1st day of December, 1904, the plaintiff, a corporation, appellant in this court, and the defendants, respondents here, entered into a certain contract of lease in writing, duly subscribed by the parties, whereby the respondents demised and leased certain premises, describing them, to the appellant, for the term of two years thereafter in consideration of \$2,400, payable in sums of \$100 per month, on the first day of each and every month in advance; that it was further agreed in said lease that in consideration of the sum of \$1, paid by appellant to respondents, that, in case appellant should so elect, respondents, upon the request of appellant, would, at the expiration of said lease, continue and renew the same, and give a further lease on said premises to appellant for the further term of three years commencing from the date of the expiration of said first lease upon the same terms, rental, and conditions as in said first lease contained; that for reasons, which, however, were not unavoidable nor accidental, the appellant further alleges that on the 1st day of December, 1906, when said first lease terminated, it inadvertently overlooked the matter of making a formal request of respondents for a renewal thereof, and did not do so until the 3d day of December, 1906, and that but for that fact it would have made such request for a renewal both before and at the expiration of said lease, and that the failure to do so was a mere oversight and wholly unintentional. Appellant also alleges: That during the summer of 1905 it made certain improvements on said premises, and that during the month of November, 1906, it made further improvements thereon by placing electric wires for lighting the buildings. The whole of the improvements so made it is alleged were of the value of \$750. That during the month of November, 1906, the president and general manager of appellant met and talked with one of the respondents almost daily, and frequently did so with another of the respondents, and that both said respondents knew and were fully aware during all of said time, and long before the expiration of said lease, that appellant had elected and intended to continue said lease and in the occupation of said premises, and upon information and belief alleges that said two respondents were well aware that the lease was about to expire, but refrained from calling the attention of appellant's manager to such fact, with the intent and purpose of permitting him to overlook such fact, and to

prevent him from making a formal request for a renewal of said lease, and thereby to secure an unconscionable and technical advantage. That the respondents were in no wise misled and suffered no damage or loss by reason of the failure of appellant to make a formal request sooner than it was made. That appellant upon the execution and delivery of said lease entered into and was in the sole possession of the premises up to the present time (December 21, 1906), conducting a mercantile business, buying and selling secondhand furniture, goods, and chattels, and that during the time of the occupancy of said premises appellant has built up and established said business and good will thereof on said premises, and thereby the location has become and now is valuable for carrying on and conducting said business. That appellant has duly performed all the conditions of the said lease to be performed by it, and that "on Monday, December 3, 1906, which day was the first business day at the expiration of the term of said lease, the plaintiff requested and demanded from defendants" a renewal of said lease for a further term of three years, upon the same rental and conditions as contained in the original lease, and tendered the respondents the sum of \$100, as payment for the first month's rent under the renewal, and requested them to comply with their agreement and renew said lease, but that they refused and still refuse to do so. That appellant always has been, and now is, willing to pay said rent, and brings into court said \$100, as the first month's installment, and always was, and now is, able, ready, and willing to enter into and accept a renewal of said lease pursuant to the terms of said original lease for the further term of three years from the expiration of said original term. There are additional allegations to the effect that respondents have instituted proceedings against appellant for the possession of said premises and are prosecuting the same, and thereby are seeking to dispossess and forcibly eject appellant from said premises; that appellant has no legal defense to said action, and asks for a specific performance of the agreement to renew said original lease, for an injunction, and for general relief. To the foregoing complaint there is also attached, as an exhibit, a copy of the original lease entered into between the parties in which are contained several provisions which are important in solving the questions presented. The first provision, which was intended to fix the beginning and ending of the term, reads as follows: "To have and to hold the said premises, etc., unto the said lessee, its successors and assigns from the 1st day of December, 1904, for and during and until the 1st day of December, 1906, a term of two years." The rent is stipulated to be payable at the rate of \$100 per month, payable in advance "on the first day of each and every month during said term." The other provision re-

ferred to reads as follows: "And in consideration of the sum of \$1 to said lessors, paid by the said lessee, the receipt whereof is hereby acknowledged, the said lessors * * * do hereby agree with said lessee that in case said lessee * * * so elect, and upon request of said lessee * * * at the expiration of the term of this lease, they will continue and renew this lease and give a further lease on said premises unto said lessee * * * for the further term of three years from the date of the expiration of the term of this lease, upon the same terms, rental, and conditions as are herein contained." The lease also provides for a surrender of the premises by the lessee at the expiration of the original term, or at the expiration of a renewal thereof, and further provides that "the lessee shall have the privilege of removing any and all improvements which he may place upon said premises." To the complaint, supplemented by the lease as a part thereof, the respondents demurred upon the ground that the facts therein stated are insufficient to constitute a cause of action. The district court sustained the demurrer, and upon appellant electing not to amend or plead further, entered judgment dismissing the action, from which judgment this appeal is prosecuted.

While numerous errors are assigned in different ways, the ruling of the court, as we view it, presents but two questions, to wit: (1) When did the term of the original lease begin and end? (2) Was the request for a renewal of the original lease made in time to entitle the appellant to the relief prayed for, either as a strict legal right under the terms of the lease, or by reason of the alleged equities set up in the complaint? With respect to the first proposition, it may well be conceded that in the computation of time, where a period is fixed as commencing "from" a named date, as a general rule of construction, the date named will be excluded, and by the same rule, when a period of time is to continue "until" a certain day named, such day is also excluded. From this it necessarily follows that where, as in the lease in question, both "from" and "until" are used, then, unless the two dates named are both outside of the term granted, the general rule excluding both these dates cannot be applied. This is manifest in this case from the fact that the term granted was for two years; no more, and no less. Under a lease, like the one in question, where the words "from" and "until" are used in connection with the other phrase, "a term of two years," as fixing the term granted, it may well be that either one or both of the dates named may be either included within the term or excluded therefrom. The whole instrument must be considered, and all its terms looked to to ascertain the true intent of the parties, and when this intent can be ascertained it must prevail, although it may be contrary to the strict letter of the

contract. This rule is elementary, and among other numerous authorities in support thereof we cite the following: *Tracy v. Albany Exchange Co.*, 7 N. Y. 472, 57 Am. Dec. 538; *Chicago Title Trust Co. v. Smyth*, 94 Iowa, 401, 62 N. W. 792; *Meeks v. Ring*, 51 Hun, 329, 4 N. Y. Supp. 117; *Bishop on Contracts*, § 1843; 2 Kent Com. 555. If it should be assumed as a fact, which was quite possible, if not probable, that in this case the appellant claimed and was conceded the right of possession of the demised premises on the 1st day of December, 1904, the date of the lease, then the term would have commenced on that date by mutual consent of the parties construing their own contract, and hence would have ended on the 30th day of November, 1906, because the full term of two years would have ended on that day. If, upon the other hand, the right to possession had been denied on the 1st day of December, 1904, or possession was not taken on that day, then the term of two years could not have ended until midnight of the 1st day of December, 1906. In this connection the appellant alleges in one part of its complaint that the lease was entered into on the 1st day of December, 1904, whereby the premises in question were granted to it for the term of two years "thereafter"; and in another part of the complaint it is alleged that upon the execution of the lease appellant entered into possession of the premises. Under these allegations, in view of the terms "from" and "until," together with the phrase "a term of two years," as used in the lease, with regard to fixing the beginning and ending of the term granted, it might possibly be assumed that the appellant did or did not take possession on the 1st day of December, 1904, the day the lease was executed, and upon its execution, as is alleged, possession was taken. Respondents, however, demurred, and thus raised the whole question as one of law and not of fact. By doing this we think they must be bound by a fair construction of the terms of the lease in fixing the term granted. If, therefore, we give appellant the benefit of all doubts on this question, and assume that under the terms of the lease the original term did not begin until the 2d day of December, 1904, and thus ended on midnight of the 1st day of December, 1906, what, then, are its rights?

This brings us to the second proposition above stated. Here, again, we must have regard to the language employed by the parties, and their intention must be determined from this language, the subject-matter of the agreement, and the circumstances surrounding them. The clear purpose of the parties, as gathered from their words and acts, is that the one desired to obtain a lease of certain premises for a term of two years, and the other intended to grant just that, and coupled with this grant they provided for a right or an option to appellant to have an additional term of three years by a renewal

of the old lease. This option, however, was based upon a condition to be performed by appellant, to wit, a request for such renewal. All this is conceded, but appellant insists that the option was to be exercised by a request to be made only as stated in the lease "at the expiration of the term of this lease." If this phrase were to be applied to the exercise of the option alone, without keeping in mind the subject-matter to which it was coupled and the thing to which the minds of the parties were directed, there might be some force in appellant's contention that "at the expiration of the term of this lease" should be limited so that it, at least, did not mean before the end of the term, but that it meant, strictly applied, at the very end thereof, or immediately after the term had expired, which would be the day following. Counsel cites authorities to the effect that, where a notice of sale was to be given for 30 days a sale could not legally be held until the day after the last date, or, where the right of redemption is given, a party has the full time in which to redeem; and some cases are cited where the right to purchase was given at the expiration of a certain period, that an offer on the day following the expiration was in time. The following cases illustrate the rule as applied to that class of cases: *Annan v. Baker*, 49 N. H. 161-170; *Wiggin v. Peters*, 1 Metc. (Mass.) 127; *Farwell v. Rogers*, 4 Cush. (Mass.) 460; *Steuart v. Meyer*, 54 Md. 455-463; *Burgess v. Burgess*, 117 N. C. 447, 23 S. E. 836; *Weld v. Barker*, 153 Pa. 465-470, 26 Atl. 239; *Herman v. Winter* (S. D.) 105 N. W. 457. The foregoing cases are, however, distinguishable from the case at bar, because they are controlled by some statute, or are based upon some particular contract, where the computation of time, as limited, is in accordance with the evident intention of the parties when applied to the facts and subject-matter of their contracts. If this be done in this case, we can conceive of no serious difficulty in arriving at a correct solution of what the duties of appellant were with respect to exercising the option, and the time within which it had to be done. To arrive at a correct result, we must not only keep in mind the language employed, but also the object or end in view which was sought to be accomplished in using it. Appellant was given an option to obtain a new lease for the demised premises. When was the new term to begin? Immediately upon the expiration of the old. How was the object to be made effective? By making a request for a new term. These propositions admit of neither doubt nor dispute. It seems clear, therefore, that the request was intended as a prerequisite upon which a new term depended. It is likewise clear that the new term was to begin immediately upon the expiration of the old without any interval of time between the two terms. If, then, the new term was to begin immediately upon the expiration of the old, and the new term was

to depend upon the request to be made by appellant, it seems not only the natural but the logical answer is that the request was required to be made at a point of time, either before and in no event later than the termination of the old lease. Without this request, how would respondents know that a new term was desired? The phrase "at the expiration" therefore meant, and we think was clearly intended to mean, at a point of time at or before the old term was expiring, and not after it had actually expired and passed. Moreover, the new lease was by law required to be evidenced by a written instrument, and such likewise was the manifest intention of the parties. This, therefore, was not a lease where the tenant could extend the term by simply manifesting an intention to do so by some act or acts on his part, as in a case where two periods are named in a lease, one shorter than the other, and in which the tenant, at his option, may continue in possession for the longer term named. This class is illustrated by the following cases: *Shamp v. White*, 106 Cal. 220, 39 Pac. 537; *Delashman v. Berry*, 20 Mich. 292, 4 Am. Rep. 392; *Thiebaud v. Bank*, 42 Ind. 212.

The case at bar belongs to that class of cases where the contract expires absolutely, and a new term must be granted by the same formalities as was the old. If we assume, therefore, that the term fixed by the lease in question did not expire until midnight on the 1st day of December, 1906, then the appellant's rights to possession expired with that date. True, it was given the right to remove the improvements, if any, placed on the premises by it, but this did not extend the right to possession under the lease beyond the term fixed. This, at most, gave a right simply to enter upon the premises within a reasonable time for the purpose only of removing the improvements. The tenancy ceased on the expiration of the lease, and the right to rent terminated with it. If appellant remained in possession of the premises any time after the 1st day of December, it was not either as a tenant nor as a matter of right under the old lease. In order, therefore, to remain in possession any time after the old term expired, as a tenant, respondents would have to consent thereto, and for this reason doubtless provided that they would make a new lease at the expiration of the old, if requested so to do. This request, in view of all the circumstances surrounding the parties, we think, should have been made at some time within the original term, and, at least, not after it had expired. This, in view of all the provisions contained in the lease, we think, was also the intention of the parties. Where a notice of any kind is required to obtain a renewal of a lease, and a request is no less than a notice, the general rule seems to be that such notice must be given before the expiration of the old lease, or it will be too late. In 18 A. & E. Enc. of

Law, 692, the rule is stated thus: "Where a lessee for a term of years has the option to renew his lease, it seems to be the better doctrine that he must notify his lessor before the term expires whether he elects to renew, as the lessor should know at the moment when the lease expires whether he has or has not a tenant."

Appellant's counsel concedes this to be the rule where the lease does not fix the time when the notice must be given; but contends that, where, as in this case, the request need not be made until "at the expiration of the term," the request cannot be made before such expiration, and that "at the expiration" is just as much the day following as the day preceding the actual expiration. Quite true, if the parties had named a given date on which the request must be made, that day would control; but they said "upon request of said lessee, at the expiration of the term of this lease they will continue and renew" for another term of three years. We do not think that by this it was intended to limit the time of the request to the exact moment when the lease expired, but that it could rightfully have been made before that time. Nor do we think, for the reasons hereinbefore stated, that it was intended that the request could, as a matter of right, be made after the old lease had terminated. This also seems to be the holding of the courts, as appears from the following cases: *Shamp v. White*, 106 Cal. 220, 39 Pac. 537; *Renoud v. Daskam*, 34 Conn. 512; *Darling v. Hoban*, 53 Mich. 599, 19 N. W. 545; *Tracy v. Albany Exchange Co.*, 7 N. Y. 472, 57 Am. Dec. 538; *Thiebaud v. Bank*, 42 Ind. 212; *Strousse v. Bank*, 9 Colo. App. 478, 49 Pac. 260-262; *Cooper v. Joy*, 105 Mich. 374, 63 N. W. 414. In some of the foregoing cases it is held that where a notice is required it must be given, and that mere acts are insufficient. It is further held in *Darling v. Hoban*, supra, that, where the tenant had the right of election at the termination of the lease to demand a renewal, such election and demand must be made either on or before the last day of the old term; and in *Tracy v. Albany Exchange Co.*, supra, that, although the lease provided for the election at the "termination of the lease," it could be made before. But this court has also passed upon the question in the case of *Tilton v. Sterling Coal & Coke Co.*, 28 Utah, 173, 77 Pac. 758, 107 Am. St. Rep. 689. True, the court, in that case, had under consideration the question as to when a certain option to purchase expired. The option to purchase was, however, to be exercised "at the expiration" of a subsisting lease, and therefore the question as to the time when it should have been exercised was presented for decision, and it was decided that the option had to be exercised, if at all, on or before the last day of the term granted by the lease, and could not be exercised thereafter. We conclude, therefore, that in view of the authorities, as well as upon sound reason and principle, the appel-

lant was required to make its request on or before the last day of the old term. Of course, any time on the last day would have been sufficient, but a request thereafter came too late. This also disposes of the question presented by appellant that the 2d day of December, 1906, the day after the expiration of the old lease, was a legal holiday. If, as we have held, the request should have been made on or before the end of the 1st day of December, then it was of no concern that the request could or could not legally be made on the 2d day of December.

Appellant attempted to avoid the consequences of a late request by setting up some alleged equities. There is, however, no equity in the facts pleaded, even if proved just as alleged, that would authorize any court to grant the relief prayed for. Courts have no right to disregard any provisions of a contract, or to save rights that are lost thereunder through the act of the party asking relief, unless it is made to appear that it would be unconscionable or clearly inequitable to do or not to do so. Nothing of that kind appears from the pleadings in this case. Appellant pleads nothing that would have prevented it from making the request at the proper time except mere inadvertence. The concealment attempted to be alleged does not amount to such. Appellant's manager knew, and always must have had the ready means of knowing, when the old lease expired. This fact could not have been concealed from him in view of the allegations of the complaint. Appellant, therefore, cannot predicate any right to relief upon this. Nor is the fact that at least two of the respondents had knowledge, through conversations with appellant's manager, that he intended to request a new lease available. A mere intention to make a request was not sufficient. The allegations do not go to the extent that respondents in any way prevented appellant's manager from making a request.

Finally, it is claimed that the contract should be construed and applied most strongly against respondents under the equity rule, which seeks to prevent forfeitures, and that the acts of appellant in seeking a renewal should be favorably considered in its behalf for the same reason. But the rule contended for has no application to the facts in this case. No forfeiture is involved. Appellant at most, lost nothing but an opportunity by not performing a condition required of it, which was necessary to the enjoyment of a right to an additional term, and which was to be paid for when obtained. If a man is invited to attend a sale of his neighbor's property at a certain time, and is given the right of bidding for and purchasing it, and fails to attend the sale at the hour fixed, he may miss an opportunity, but he forfeits nothing. So here, appellant simply lost the right to a renewal of a new term. He forfeited nothing in the legal sense that that term is used to respondents.

The ruling of the court upon the demurrer was clearly right, and the judgment is affirmed, with costs.

MCCARTY, C. J., and STRAUP, J., concur.

(32 Utah, 469)

In re OWEN'S ESTATE.

JOHNSON v. ARMSTRONG.

(Supreme Court of Utah. July 17, 1907.)

1. ADMINISTRATORS — APPOINTMENT — JURISDICTION.

Rev. St. 1898, § 3812, provides that relatives shall be entitled to letters of administration in the order therein prescribed. Section 3813 provides that, if none of the relatives accept, creditors shall be entitled to letters, and that if a dispute arises as to relationship between applicants, or if there is any other good and sufficient reason, the court may appoint any competent person. Section 3814 provides that letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to letters, when such persons fail to appear within three months after decedent's death and claim issuance of letters to themselves. *Held*, that though, under the statute, a relative applying within three months would be entitled to preference over a creditor, yet the expiration of that period, or waiver of the right to administration by the relative, was not essential to jurisdiction to appoint a creditor; hence the appointment of the secretary of a creditor corporation, a relative applying within three months, on a hearing of both petitions, though erroneous, was not void.

2. SAME — ACCOUNTING — VOIDABLE APPOINTMENT.

An administrator, whose appointment, though erroneous, was not made without jurisdiction, is entitled to credit for reasonable disbursements, costs, and expenses, including attorney's fees.

3. SAME — COMPENSATION — VOIDABLE APPOINTMENT.

An administrator, whose appointment, though erroneous, was not made without jurisdiction, is entitled to reasonable compensation for services rendered by him during the time of his administration.

4. SAME — COMPENSATION — SUCCESSIVE ADMINISTRATIONS.

Where an estate is administered by successive personal representatives, compensation should be apportioned among them according to the services rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 2130.]

5. SAME.

Under the statute declaring that an administrator shall be allowed commissions on the amount of the estate accounted for by him, there being but one aggregate sum to be allowed as commissions, which, in case of successive administrations, must be apportioned by the court, the allowance of commissions to the first of two successive administrators before the closing of the estate was premature.

Appeal from District Court, Third District; George G. Armstrong, Judge.

Petition by Charles W. Johnson for letters of administration on the estate of William G. Owen, deceased. Subsequently a petition was filed by Margaret Williams, praying that S. P. Armstrong be appointed administrator. An order granting letters to Johnson was reversed on appeal (85 Pac. 277), and on remit-

titur Armstrong was appointed. From an order modifying the account of Johnson, and, as modified, approving the same, Armstrong appeals. Remanded, with instructions to modify the order appealed from, and the order, as thus modified, affirmed.

H. G. Shepard and S. P. Armstrong, for appellant. Thompson & Gibson, for respondent.

STRAUP, J. William G. Owen died intestate on the 30th day of March, 1905, in the state of California. At the time of his death he was a resident of Salt Lake county, state of Utah, and owned real and personal property in that county. On the 27th day of June, 1905, the respondent, Charles W. Johnson, filed a petition, in which he alleged the death and late residence of the deceased, the value and description of his property, that his next of kin and heirs at law were unknown, that the deceased was indebted to a corporation of which petitioner was secretary, that the deceased left no will, and prayed that letters issue to himself. On the 28th day of June, 1905, Margaret Williams, a sister of the deceased, also filed a petition, in which she alleged the same facts as above set forth with respect to the intestacy, residence, and property of the deceased, and in addition thereto alleged that the deceased left surviving as heirs at law the petitioner, his sister, who resided in England, and another sister and nephew, whose residence was unknown, objected to the appointment of respondent, and prayed that letters issue to appellant, S. P. Armstrong, a resident of this state. The petitions were heard together, and upon hearing the respondent was appointed administrator of the estate, who thereupon qualified, took charge of the assets, filed an inventory, published notice to creditors, and otherwise proceeded to administer the estate. On appeal to this court from the order appointing respondent it was decided that Margaret Williams had the better right to the appointment of her nominee, and that the court erred in appointing the respondent. In *re Owen's Estate*, 30 Utah, 351, 85 Pac. 277. On remittitur, the district court revoked the appointment of respondent, and appointed appellant, Armstrong. Thereafter the respondent filed an account, which showed that the real and personal property coming into his hands amounted to over \$10,000. By way of disbursements he claimed a credit of \$78.50 for court costs, publishing a notice to creditors, and filing an inventory and appraisal, and of \$674.98 for general expenses, including taxes and interest on notes paid on behalf of the estate, supplies and labor in repairing buildings, and of which amount he paid \$25 for an administrator's bond, and \$200 for attorney's fees. He also asked an allowance of \$237.75 for commissions. After deducting such disbursements the balance of assets was turned over to his successor. The appellant, as administrator

of the estate, objected to the allowance of the disbursements, except the taxes and interest paid, and especially objected to any allowance being made to the respondent for commissions, or attorney's fees, or court costs. Upon the hearing the district court allowed the account as presented by the respondent, with the exception that it allowed the respondent only \$100 commissions and \$100 for attorney's fees. With such modification, the court approved the account. From this order, appellant, Armstrong, has prosecuted this appeal.

He contends here, as he did below, that the appointment of respondent as administrator was void, that all acts done by him in the course of administration were of no force or effect, and that, with the exception of taxes and interest paid, the respondent was not entitled to reimbursement for other alleged costs or expenses. In support of such contention it is urged that this court on the former appeal held respondent's appointment void for want of jurisdiction. Such was not the effect of our holding. The statute provides that relatives are entitled to letters of administration in the order: (1) Surviving husband or wife; (2) children; (3) father or mother; (4) brothers or sisters; (5) grandchildren; (6) next of kin—and that administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court; that, if a person entitled to serve as administrator is not a resident of the state, he may request the court or judge to appoint a resident of the state, and such person may be appointed; that, if none of the relatives accept the administration, creditors shall be entitled to letters; and that letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to apply within three months after the death of the decedent and claim the issuance of letters to themselves. Under these statutes we held that the sister of the decedent, having filed her petition within three months after his death, had the superior right to the appointment of her nominee, and that the court erred in appointing the respondent. The effect of our holding was, not that the appointment of Johnson was void for want of jurisdiction, but that the appointment was erroneously made, and therefore was voidable.

It, however, is still contended, since the statute gave relatives three months after the death of the decedent in which to apply for letters, that until such time had expired, or the right to letters had otherwise been waived, the court was without jurisdiction to appoint any other person; that an allegation in the petition showing the expiration of such time, or waiver, was essential to confer jurisdiction on the court to appoint a person other than a relative; and that the petition

of respondent contained no such allegations. We think such averments are not essential to confer jurisdiction. The statute provides that petitions for letters of administration must be in writing, signed by the applicant or his counsel, and filed with the clerk of the court, stating facts essential to give the court jurisdiction of the case, and, when known to the applicant, the names, ages, and residence of the heirs of the decedent and the value and character of the property. Now, what are the facts essential to give the court jurisdiction? They are that the person whose estate is to be administered died intestate, and was at the time of his death a resident of the county in which the application is made, or, if not a resident, that he left an estate in the county to be administered. *Wilkinson v. Conaty*, 65 Mich. 614, 32 N. W. 841. By jurisdiction is meant the right to act and the power to hear and determine a cause or matter in controversy. The right to so act and the power to determine the cause is not dependent upon the correctness of the decision. The court here heard both petitions together, as it was required to do under the statute. Upon such hearing the court had the undoubted authority to appoint an administrator. So far as concerned its power to act, the court was not obliged to appoint either of the applicants; for, upon such hearing, the court was expressly authorized by statute (section 3813 Rev. St. 1898), for good and sufficient reasons, to appoint any competent person. Upon the hearing the court appointed the respondent. The judgment so rendered was erroneous, and was subject to correction on appeal; but it was not, for that reason, void or open to collateral attack. In speaking of statutes similar to ours, in *Jones v. Bittinger*, Administrator, 110 Ind. 476, 11 N. E. 456, the court said: "It is true, we think, that the provisions of section 227, *supra*, are mandatory in form and ought to be strictly observed, as well by the court as by the clerk in vacation, in granting letters of administration upon an intestate's estate. But it cannot be correctly said, as it seems to us, that letters of administration, granted by a court or clerk out of the order prescribed by statute, are absolutely null and void. The utmost that can be said, in such a case, is that letters so granted are voidable merely, and may be revoked or set aside, upon an application to the proper court for that purpose, made within the proper time and by the party entitled to priority in the issue of such letters."

The appointment of respondent must therefore be treated as valid until it was revoked in a proceeding for that purpose. Such a proceeding was brought, and such a judgment was rendered by this court. But the respondent, who apparently acted in good faith, and who qualified and accepted the trust to which he was appointed, and who proceeded under his appointment to administer the estate, would be entitled to credit

for reasonable disbursements, costs, and expenses, and for commissions earned in the proper discharge of that trust during the time of his appointment. *Rice v. Tilton*, 14 Wyo. 101, 82 Pac. 577. As bearing on the question, see also, *Atkinson v. Hasty*, 21 Neb. 663, 33 N. W. 206; *Pick v. Strong*, 26 Minn. 303, 3 N. W. 697. This is also in harmony with the statute (section 4043), which expressly provides that, when the judgment or order appointing an administrator is reversed on appeal for error and not for want of jurisdiction of the court, all lawful acts in administration performed by such administrator are as valid as if such judgment or order had been affirmed. We therefore are of the opinion that the respondent was entitled to an allowance of reasonable costs and expenses including attorney's fees.

We are also of the opinion that the respondent is entitled to reasonable commissions or compensation for services rendered by him during the time of his administration. The statute however, provides that the administrator shall be allowed commissions upon the amount of the estate accounted for by him—for the first \$1,000 at the rate of 5 per cent.; for all above that sum, not exceeding \$5,000, at the rate of 2½ per cent.; for all above \$5,000 and not exceeding \$10,000, at the rate of 2 per cent.; and for all above \$10,000 at the rate of 1 per cent.; and in all cases such further allowance may be made as the court may deem just and reasonable for any extraordinary services, but the total amount of such extra allowance must not exceed the amount of commissions allowed by the foregoing provisions. The general rule, of course, is that where an estate is administered by successive personal representatives, the compensation should be apportioned among them according to the services rendered. 18 Cyc. 1159. But, as was said by the Supreme Court of California with reference to statutes similar to ours, there is but one aggregate sum to be allowed as commissions, which, in case of successive administrations, must be properly apportioned by the court. There is, however, no basis upon which to make an apportionment until the closing of the estate. "We scarcely see how sound judgment can determine how much the first administrator is entitled to, unless it knows and considers what the successor has done, and what the comparison is between his acts and those of his predecessor. The administration of an estate is an entirety. There may be different persons in office at different times, or at the same time; but the claim of each to compensation must be considered with reference to the rights of each and all of the others." *Estate of Barton*, 55 Cal. 87. In *Re Levinson*, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479, this case was approved and followed.

We are of the opinion that the allowance of commissions was prematurely made. The case is therefore remanded, with instructions

to the district court to modify the order appealed from, by striking therefrom all allowance for commissions, with leave to the respondent to move for an allowance of his reasonable proportion of the commissions upon a final settlement of the estate. As thus modified, the order will stand affirmed. Neither party to have costs.

MCCARTY, C. J., and STRAUP, J., concur.

(49 Or. 609)

GARDNER et al. v. WRIGHT.*

(Supreme Court of Oregon. July 30, 1907.)

1. ADVERSE POSSESSION—ACQUISITION OF TITLE BY GRANTOR.

Subsequent possession by the grantor of land under claim of ownership, etc., for the period prescribed by the statute of limitations, will not necessarily inure to the grantee's benefit, and title by adverse possession may be acquired by the grantor; but, if possession is held in subservience to the grantee's title, it will inure to his benefit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 333-338.]

2. ESTOPPEL—BY DEED—PERSONS WHO MAY CLAIM BENEFIT—PAROL TRANSFEREE—WATERS.

E. conveyed to M. and G. possessory title to public land, including the right to the full use of a stream, and G. orally transferred his interest to M. Held, that no diversion of water having been made prior to G.'s parol conveyance, nor until after a diversion by E. on land above, defendant, as E.'s successor in interest, was not estopped to claim subsequent rights acquired by E. as to G.'s interest in the water rights previously conveyed.

3. SAME.

Where one assumes to convey property by deed, he may not, to defeat his grantee's title, say that at the time of the conveyance he had no title, and that none passed by the deed, nor may he deny to the deed its full effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 63.]

4. ADVERSE POSSESSION—SUBSEQUENT POSSESSION BY GRANTOR.

One relying upon adverse possession as against his grantee must show that there was a change in the relation of the parties respecting the rights involved; any unexplained possession being presumed to be subservient to the title conveyed, and, in order to avail himself of the laches of the grantee or his assigns or limitations, the grantor must show he brought home to the grantee and his assigns actual or constructive knowledge of the change in the relations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 313, 656.]

5. WATERS AND WATER COURSES—WATER RIGHTS—ADVERSE POSSESSION.

Where one granted the full use of a stream, and afterwards openly used the water on land above under notices posted, with general knowledge thereof in the vicinity, while not sufficient to establish ownership, showed a claim of ownership, and indicated open and adverse possession against the grantee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 150.]

6. SAME—WHEN LIMITATIONS RUN.

Where it appeared one intended to claim and hold possession of the use of a stream for a beneficial purpose in defiance of rights claimed by his grantees and their assigns, limitations

commenced to run, if such intention was accompanied by acts of diversion sufficient to indicate a purpose to carry the determination into effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 148-156.]

7. SAME.

Where one permits 10 years to elapse without regaining control of water rights which he has permitted his grantor to invade, complete title reverts in the grantor, unless it appears that such use was permissive, or of such character as not to constitute an invasion of the other's rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 148-150.]

8. ADVERSE POSSESSION—CLAIMANT'S GOOD FAITH—MATERIALITY.

Title by adverse possession may be acquired, regardless of the claimant's good faith, if accompanied by a claim of title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 488-490.]

9. WATERS AND WATER COURSES—WATER RIGHTS—ADVERSE POSSESSION—EVIDENCE—ADMISSIBILITY.

Where one granted the full use of waters from a stream, to support title to the water claimed to have been afterwards acquired by adverse possession for use on land above, he could show he intended to convey no more than the surplus water after use on the land above.

10. SAME—INTERRUPTION OF POSSESSION.

Adverse use of the waters of a stream, as a defense to a suit to determine rights thereto, may be defeated by showing that the use during the irrigation seasons for the statutory time was not continuous or by proof that such use did not substantially interfere with plaintiff's rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 149.]

11. SAME—BURDEN OF PROOF.

Though an adverse right cannot grow out of mere permissive enjoyment, the burden of proving possession thus claimed to have been held by permission or subservience, or not to have been continuous, is upon him attempting to defeat the claim.

12. SAME.

Where the use of water by grantees of water rights was necessary, and they were deprived of its benefit by a landowner above for more than 10 years, a claim of adverse possession was established.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 148-150.]

13. SAME—EFFECT OF TITLE ACQUIRED.

When title is once acquired by adverse possession, it remains in the person acquiring it as completely as if acquired by deed, and hence, where water rights were so acquired, interruptions were of no avail unless open, exclusive, continuous, and adverse under claim of ownership for the statutory period.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 148-152.]

14. SAME—USE OF STREAM—DURING DIFFERENT PARTS OF YEAR.

One may establish a right to use water of a stream during one part of a year, while another may at the same time acquire a perfect right to use the water for the remainder of the season.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 152.]

15. SAME—ADVERSE USE—INTERRUPTION.

In a suit to determine water rights, defended on the ground rights were acquired by adverse use, plaintiffs may not avail themselves

* Rehearing denied September 3, 1907.

of any interruption of defendant's use by persons not parties to the suit.

16. SAME.

Under the express terms of B. & C. Comp. § 4, plaintiffs could not sue to determine water rights, unless they or their predecessors were possessed of the property within 10 years before the commencement of the suit, and such possession must have been such a re-entry or recapture of the use of the water as can be termed complete control; slight interruptions not affecting the running of the statute against one in adverse possession.

17. SAME—PRIOR APPROPRIATION—BURDEN OF PROOF.

In a suit to determine rights to waters from a stream, the burden was upon plaintiffs to prove all the elements essential to their rights claimed under prior appropriation.

18. SAME—EVIDENCE—WEIGHT.

Evidence, in a suit to determine rights to waters from a stream, held to show defendant's appropriation was prior in time to plaintiffs'.

19. ESTOPPEL—EQUITABLE—NATURE.

The doctrine of estoppel is intended to preclude fraud, and imposes silence on one, when in conscience and honesty he should not be allowed to speak.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 124.]

20. WATERS AND WATER COURSES — WATER RIGHTS—ABANDONMENT.

Where the grantees of inchoate rights to use waters of a stream delayed several years in perfecting them, they were abandoned and subject to appropriation by others.

21. ESTOPPEL—BY DEED—GROUNDS OF ESTOPPEL—SUBSEQUENTLY ACQUIRED TITLE.

An after-acquired title to water rights by the grantor will not inure to the benefit of the grantee, where the grantee knew at the time of the transfer that the grantor had no title and did not expect him to procure one, or where the title purported to be conveyed is an inchoate interest, the completion or forfeiture of which depends upon some acts to be performed, or diligence to be exercised by the grantee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 84-90, 114-120.]

22. WATERS AND WATER COURSES — AMOUNT OF WATER REQUIRED.

Where one is entitled to the use of water from a stream, and has between 60 and 70 acres of land in cultivation, including an orchard, it will be assumed that a flow of 60 inches of water is ample for his irrigation and domestic requirements.

23. SAME—MEASUREMENT.

Any certain number of inches of water, awarded under 60-inch pressure, should be determined on the basis of what is termed by engineers as "second feet," or the quantity of water flowing past at a given point in a given space of time.

24. SAME—RIGHTS OF APPROPRIATORS.

Where more than one person owns a right to the use of waters of a stream, it is the law that, regardless of who may have the first right thereto, when the water is not actually required by one, the quantity not needed nor in actual use should be at the disposal of the other for irrigation and domestic use, when needed by such other person or persons.

25. APPEAL — REVIEW—DISCRETION OF COURT—COSTS.

The trial court having discretionary powers in taxing costs, a decree in respect thereto will not be disturbed unless the discretion is abused.

Appeal from Circuit Court, Baker County: Robert Eakln, Judge.

Action by Mary S. Gardner and others

against George F. Wright. Plaintiffs appeal from the decree, and defendant cross-appeals. Modified.

This is a suit to determine the right to the use of the waters of Washington creek, in Baker county, Ore., brought by Mary S. Gardner, Edna V. Stuchell, A. V. Swift, A. B. Swift, and L. L. Swift, against George F. Wright. By stipulation it is agreed that A. V. Swift has succeeded to all the interests of the other Swifts named, and that he, with Mary S. Gardner and Edna V. Stuchell, are the sole plaintiffs in interest.

The complaint, in effect, alleges that plaintiffs, under and by virtue of prior appropriation of the waters of Washington creek, as well as by reason of a certain deed executed to their predecessors in interest, are the owners jointly of the right to the use of three-fourths of the waters of the creek named, of which it is alleged that Mary S. Gardner and Edna V. Stuchell are the owners of one-fourth, and A. V. Swift one-half. Defendant denies plaintiffs' right to the use of any of the waters of Washington creek, except the surplus, and alleges that he is the owner of the exclusive right to the entire stream for the irrigation of his lands, all of which it is claimed is necessary for the proper irrigation thereof, and has been used continuously for such purpose during the last 40 years, with the full knowledge and consent of plaintiffs and their grantors. Defendant alleged, in support of his title, prior appropriation, riparian ownership, and adverse possession since 1863; but the averment relative to riparian ownership was stricken out on motion of plaintiffs.

The reply denies the affirmative allegations, and, in response to the defenses relied on, pleads an estoppel against defendant, by reason of a certain deed with covenants of warranty therein given by H. W. Estes (defendant's grantor) and Frederick Dill to their predecessors in interest, which, omitting the signatures and acknowledgment, is as follows: "This indenture made this 9th day of September, A. D. 1864, between Harding W. Estes and Frederick Dill of the county of Baker and state of Oregon, parties of the first part, and Oscar L. Gordon and George W. Manville of the same place, parties of the second part: Witnesseth, that the said parties of the first part for and in consideration of the sum of one thousand dollars to the parties of the first part in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, conveyed, and quitclaimed and by these presents do grant, bargain, sell, convey and forever quitclaim unto the said parties of the second part their heirs and assigns forever, all the right, title, interest, and claim of the said parties of the first part in and to a certain ranch or possessory claim to agricultural lands and the improvements thereon lying and being in said county and state and described as follows, to wit: That certain ranch or land claim on

Washington creek in Powder River Valley below and adjoining Gray's ranch which has been improved by the parties of the first part and upon which they have resided from the month of June, A. D. 1863, to the past summer, and bounded as follows, to wit: Commencing at a stake about three rods south of said creek and about thirty rods in a south-westerly direction from the log house built by said parties of the first part and occupied by them as a residence; thence east along a fence one hundred and sixty rods; thence north along a fence one hundred and sixty rods; thence west along a fence one hundred and sixty rods; thence south along a fence one hundred and sixty rods to the place of beginning; together with the right to the full and free use of the water of said Washington gulch and all privileges connected with the same, the said water having been taken up and appropriated by the parties of the first part, for the use and benefit of said ranch in the month of June, A. D. 1862, at the time said ranch was located and claimed. To have and to hold the said premises, together with all and singular the rights, privileges, tenements, appurtenances, and improvements thereunto belonging or in any manner appertaining. And the said parties of the first part hereby covenant with and to the parties of the second part, their heirs and assigns, that they are the lawful possessors of said land or ranch and the sole owners of the improvements thereon and of the water right above mentioned, and that they have a full and perfect right to sell and dispose of the same, and that the title to the same they will forever warrant and defend against all persons whomsoever claiming by, through, or under them, or either of them. In witness whereof the said parties of the first part have hereunto set their hands and seals this the day and year first above written."

By stipulation it was admitted that A. V. Swift is the owner in fee of the S. E. $\frac{1}{4}$ of section 2; that Mary S. Gardner and Edna V. Stuchell have succeeded to the interest of J. B. Gardner, deceased, in and to the N. E. $\frac{1}{4}$ of section 11; and that George F. Wright is the owner in fee by purchase from H. W. Estes of the lands described in the answer, viz.: W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, section 11; E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, section 10; N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, section 15—all the lands so described being in township 9 S., range 39 E., W. M.

Washington creek is a natural stream fed by springs and snow in the mountains west of Baker City, and flows in a northeasterly direction through Washington gulch across defendant's premises and through Gardner and Stuchell's lands onto the Swift farm, where it spreads out and disappears. It varies in quantity from a flow of 10 miner's inches in the low-water season to 150 inches during the early spring freshets. In 1862 Estes and Dill settled upon what is now defendant's farm, and in the following spring took possession of some lands lower down

the stream, now constituting the farm of A. V. Swift; the latter farm being the premises referred to in the deed to Gordon and Manville. The first place named is known as the "Estes Farm," and the second as the "Swift Ranch." In the spring of 1863 a ditch was constructed by Estes and Dill tapping Washington creek, through which water was conveyed onto the Estes place for the purpose of irrigation, and on April 25th of the following spring they located a water right for the lower Swift farm by posting a notice thereof on the channels of the stream, which was on that date recorded with the county clerk of that county, as follows: "Washington Gulch. Know all men that the undersigned hereby claims all the water of Washington gulch for the purpose of using the same on his land claim in Powder River Valley. Said ranch joins Gray's ranch on the east. And the water hereby claimed is the natural water of said gulch that flows in its natural channel through said land claim, which is thus claimed for the purpose of preventing the same from being abstracted in its flow at any point above said claim. Frederick Dill."

In February, 1864, the Estes farm was sold to Abner Smith, who resided there until his death, which occurred in the fall of 1865. His family continued to live there, and in 1867 his widow married Estes, one of the former owners of the farm. At that time all the land on Washington creek was unsurveyed public land of the United States. In 1869 Estes filed a homestead on the land, to which the right of possession had been sold to Smith, as stated, and about two years later made final proof thereon, receiving his patent in 1878. After his marriage, Estes continued the cultivation of the crops, which he irrigated with water diverted from Washington creek through the ditches previously constructed for that purpose; and, in order to publicly announce and record his claim thereto, posted a notice at the head of the ditch constructed in 1863, which he caused to be recorded in the county clerk's office, as follows: "Washington Creek. Notice is hereby given that I, Hardin W. Estes, hereby claim 75 inches of the waters of Washington creek for mining, mechanical, and irrigating purposes, the same having been heretofore taken, appropriated, and diverted from said stream by a certain ditch constructed by the undersigned in 1863, tapping said creek at a point about a quarter of a mile above what is known as the 'Washington Ranch' in Baker county, Oregon, and claimed and used by the undersigned since said date. Dated and signed at Washington ranch, Baker county, Oregon, March 19, 1872. Hardin W. Estes." On the same date, and recorded at the same time, another notice of like import was posted farther down the creek by him on his land, claiming an additional 75 inches of water through a ditch tapping the creek on his premises "at a point opposite what is known

as Washington ranch house," alleging diversion from that point through a ditch constructed in June, 1863.

In support of their claims, plaintiffs, at the trial, introduced deeds, showing the record evidence of title to their respective interests from the date of the first written instrument executed by Estes and Dill to plaintiffs' predecessors in interest. Witnesses were then called, who testified to the use of the water of the stream for irrigation of plaintiffs' lands in the production of hay, grain, vegetables, and some orchard at various times since the year 1884, but not prior to that time, except that M. J. Hindman referred to some irrigation on the Swift place in 1867, but did not state to what extent and for what purpose used, but that hay and grain were raised on the premises during that year. With this exception, no evidence was offered tending to show an appropriation prior to 1884, except in so far as an appropriation might be inferred from wild hay raised on the land, the moisture for which was produced by the waters of Washington creek spreading over and sinking into the ground, and from springs rising below defendant's farm.

W. C. Hindman testified that he has resided in the vicinity of the property and been familiar with it since 1863; that in the fall of 1863 he bought hay on the Swift farm from Estes and Dill; that hay and grain lands in that vicinity are usually irrigated until some time in July of each year, and lands along Washington creek require about one inch per acre for their proper irrigation; that on the place now owned by Swift the land is naturally damp. When asked whether three-fourths of the water from Washington creek would properly irrigate plaintiffs' lands, he answered: "There might be enough in a season where there was a flow of water, but in a dry season there would be a scarcity. * * * I don't think that it would be (sufficient) at present. It might at one time. There was several years there that the miners threw down sometimes 1,000 inches, from 500 to 1,000 inches, and it has carried an immense deposit of debris onto his ranches, and since that it has taken more water than it formerly did."

Mary S. Gardner testified that she was the wife of J. B. Gardner, deceased, and the mother of Mrs. Stuchell, one of the plaintiffs; that in 1897 she had a conversation with H. W. Estes, in which he admitted both had rights in the waters of Washington creek; that Estes said his right was given him by the court in his suit with Sparks, the amount of which was 75 inches.

J. P. Kennison testified that he has lived in Baker county since 1862, and has been familiar with the Washington gulch at all times since; that he cut wild hay on the Swift place in August, 1863, but there were no ditches there at that time; that the wa-

ter spread out over the ground when it reached the place, covering about 80 acres, which condition does not exist on the Estes place and could not without dams to divert the flow from the channel.

C. M. Foster deposed that he has known the farms on Washington creek since 1862, seeing them at various times every year since; that on request of Estes he surveyed the ditch on the south side of the creek on the Estes place many years ago; that the ditch would probably carry 75 inches of water; that he also saw a ditch on that farm in 1863 or 1864, which would carry from 30 to 50 inches of water, then used there for irrigation purposes; that the altitude of the Estes ranch is about 100 feet higher than that of the Swift farm, and was one of the first settled in Baker county, and since in the early sixties has been irrigated and used for raising hay and all kinds of fruits and vegetables; that the orchard covers from 15 to 20 acres, and has been there so long he cannot tell when it was first set out; that he bought hay on the Swift ranch in 1865; that the creek flows down onto the Swift place and spreads out over 50 to 70 acres, where the creek and channel disappears.

H. Kennison testified to having known the premises since 1863, and substantially corroborates the statements of the two witnesses last quoted.

David Littlefield testified to having mined and known the farms in that locality since 1862; that he noticed the Estes farm being cultivated during each season at all times since 1863, during which year the road passed in front of the house and crossed the ditch going west, which ditch has been used ever since for irrigating the garden, orchard, and ranch generally; that the orchard was small at first and increased in size from year to year, and has been there over 30 years; that he first saw the ditch on the J. B. Gardner ranch in 1875, which place was then occupied and owned by Mrs. Irland, who, at that time, wanted to sell the farm to him, stating she owned one-fourth of the water coming down the gulch, but that the neighbors were taking it away, and said: "We have no claim on Mr. Estes' water, but we have all the water below that Mr. Estes don't use." Witness also stated that he never saw any ditches of any kind on the Swift place prior to 1875 or 1876.

H. W. Estes testified to having been in partnership with Dill in the lands owned by the parties to the suit, to having located the water rights and selling the lands, etc., as hereinbefore given, and substantially corroborated the statements of Kennison, Foster, and Littlefield; that at all times since 1863, vegetables, fruit, hay, and grain have been raised on the Estes place, and all the waters of Washington gulch were used in the irrigation thereof, whenever needed, and without interruption; that sometimes he turned the

water down to those below when he could spare it for their accommodation; that the water right considered sold and intended to be conveyed by the deed to Gordon and Manville was for water which flowed down to the Swift place after being used on the Estes place, and he never recognized any other right; that after the first few years he took all the water of the gulch to irrigate the lands in cultivation; that he lived on the place until about 1894, when he rented it and moved to Baker City; that all the water ever used at any time on the farms below him was the surplus passing his farm; that the creek furnishes from 100 to 130 inches in the early spring, and falls as low as 15 inches in the fall; that the irrigation season on defendant's place has been from May to November of each year; that the orchard was set out in 1868, and increased from year to year, having been of its present size for about 12 years, and must be irrigated through August, September, and October of each year, but hay and grain in that vicinity do not need irrigation after July; that the lands cultivated on the defendant's farm are from 60 to 70 acres; that he filed on the Estes place as a homestead in 1869, and made his final proof in 1871; that, after his marriage to Mrs. Smith in 1867, he always claimed the waters of Washington gulch; that he was never interrupted in the use of the water but once, and that was by Mrs. Swift about the year 1893; that he never had any trouble with any one below, and no one ever tore out any of his dams at any time.

The statements of this witness as to the date of commencement, time, manner, and purpose of use is corroborated by Mrs. Estes. She also adds that her first husband, Abner Smith, purchased the water right to the Estes place from Estes and Dill; that she married Estes in 1867; that a large crop has always been raised on the farm, and, so far as she knew, the use of the water by Estes had not been interrupted at any time prior to the date of his conveyance to defendant.

W. H. Kennedy testified to having resided on the J. B. Gardner ranch 13 years. That during that time he has irrigated all the land on the place for which he could get water, being about 90 acres, consisting of pasture, 10 acres; hay, 30 acres; grain, 50 acres. That with water the farm is worth about \$4,000, but of little value without it. That he farmed the Swift place from 1886 to 1888. That with water it is worth about \$5,000, but without water, about half that value. That while there he occasionally tore out both Estes' dams. That during most of the time he has been on the Gardner place he has done without water on account of persons using it on the Estes place, and "once in a great while" he would go up and tear the dams out, sometimes once, and sometimes twice a week, but

never said anything to either Estes or Wright about it, and when the water was obtained as indicated it would "probably come down one day, and may be not two hours." That the effect was it came near drying them out altogether. That Washington creek flows through the Swift place about a quarter of a mile, and then spreads out over the meadow. That the irrigation season begins "as soon as the frost goes out," but for grain they irrigate during June and July. That they quit irrigating about August 1st of each year. That when on the Swift place ('86-'88) there were 66 acres of grain and 70 acres of hay land. That on the Gardner place there were at that time 60 acres of grain land and 25 acres of hay land, and about the same amount now. That the dams were torn out during the months of May and June. That the creek furnishes insufficient water to properly irrigate the Gardner and Swift places. That in April the water is very high, but in May the supply dwindles down to about 25 inches, and in June will average about 20 inches, but in July not more than 12 inches, which continues about the same during the rest of the season. That there are some small springs on both the Gardner and Swift places.

Frank Kennedy testified that in 1904 they had no water for irrigation of the Gardner place, but cut about 15 tons of grain and 80 tons of hay; the hay being raised on land which was usually moist. That the usual hay crop is from 70 to 90 tons. That the water is usually turned on the grain land the last of April, from which the hay land situated below is subirrigated.

A. V. Swift testified that he has 120 acres in cultivation; that he irrigates 40 acres of hay land with Washington creek, and there are 80 acres of hay land on the Swift place, which has been there as long as he can remember, and 100 acres on the J. B. Gardner ranch, requiring irrigation.

George F. Wright (defendant) testified that Washington creek flows in well-defined channels northerly through his land; that immediately below his place the combined springs furnish a supply of about 10 inches of water, which is caught by a ditch running onto what is known as the "Rea Place" (not here involved), and is used to irrigate an orchard on the Gardner place, but at times flows down the creek, and, if unobstructed, would continuously flow to plaintiffs' farms; that the amount of water in the creek at his place in April is sometimes 200 inches, in May will average 75 inches, June 50 inches, July 30 inches, and the rest of the season about 10 inches; that it is absolutely necessary to irrigate his orchard through July, August, September, and October, of each year, without which the land is worth not more than \$6 per acre, but with the water during those months is worth about \$22.000; that the orchard covers about 20 acres

and requires all the water in the stream during those months for its irrigation. Fred Intermill testified that while farming the Swift place in 1900 he asked Estes for some water, which was turned down for the irrigation of his garden. Otto Lambert testified that he lived on the J. B. Gardner ranch from 1884 to 1888, when Mrs. Irland had it, living there one year with his father, and during that time irrigating the farm with water taken from Washington gulch; that, when there was not sufficient water, witness' father was ordered by the person in charge to go and turn it down, and he would sometimes tear the dam out; that Mr. Estes was around the road near there, and would sometimes ask what they were doing, etc.; that this occurred nearly every season, and on such occasions they would get most of the water; that when they would cut the Estes dams the water would sometimes run a day, and again it would not run that long; that this occurred each year he was there; and that, when they would tear out the dams, they would not speak to Estes about it, but he would go and turn the water back and use it for irrigation.

Henry Lambert and a number of other witnesses on behalf of plaintiff testified to like interruptions having occurred at various times from 1884 to the date of the commencement of this suit.

The testimony was taken before the court, resulting in a decree in favor of plaintiffs, by which Mary S. Gardner and Edna Stuchell, jointly, were decreed an eighth interest, and A. V. Swift, one-fourth of the entire stream, and enjoining defendant from interfering with plaintiffs' use to the extent of three-eighths' interest, jointly, in Washington creek during all seasons of the year. From the decree so entered plaintiffs appealed, and defendant filed a cross-appeal.

J. N. Hart, for appellants. C. A. Johns, for respondent.

KING, C. (after stating the facts). It is unnecessary to determine whether the court erred in sustaining plaintiffs' motion to strike out defendant's averment concerning riparian ownership, since the evidence as taken does not indicate an intention to rely upon this defense. Plaintiffs, through their predecessors in interest, claim the entire flow of Washington creek by prior appropriation, which is asserted through the Estes and Dill deed given to Gordon and Manville in 1864, wherein the appropriation is expressed as having been first made by these grantors in June, 1862. The defendant, as indicated by the evidence adduced in his behalf, relies on adverse possession through his grantor, Estes, for more than the statutory period, having its inception in an appropriation made in the spring of 1863, which

is alleged to be prior in time and superior in right to any valid claim of plaintiffs.

It is urged by defendant, and testified to by Estes, that there was no intention of conveying any water rights by the deed referred to, except a right to the surplus water flowing below defendant's lands; but the covenants in the deed, when construed in connection with the water notice of Dill, then on record, convey and warrant the title to the entire stream, to the extent that it may be applied to a beneficial use on the land, to which right of possession was therein conveyed, whether such use should be for irrigation or for other purposes. The showing made to that effect in support of the allegations of the complaint, in the absence of other evidence, establishes, as against defendant, a prima facie right to the use of the water in plaintiffs to the extent that they may have succeeded to the interests named in the Estes and Dill deed. To overcome this proof defendant insists that he has established his right to the use of the stream (except as to the surplus water) by adverse possession for more than 40 years. Plaintiffs maintain that defendant, through his grantor, is estopped by the covenants in the deed from asserting this defense. It appears well settled that a subsequent possession by a grantor of premises conveyed, under claim of ownership, etc., for the period prescribed by the statute of limitations, will not necessarily inure to the benefit of his grantee, and title by adverse possession for such period may be acquired by such grantor. 16 Cyc. 697; *Jones v. Miller* (C. C.) 3 Fed. 384; *Stearns v. Hendersass*, 9 Cush. (Mass.) 497, 57 Am. Dec. 65; *Hines v. Robinson*, 57 Me. 324, 99 Am. Dec. 772; *Sherman v. Kane*, 86 N. Y. 57; *Horbach v. Boyd*, 64 Neb. 129, 89 N. W. 644. In the case last cited, the Supreme Court of Nebraska on this point say: "It must be evident that, if the grantor subsequently makes an entry upon the possession of the grantee, there is no presumption that the new possession so acquired is permissive or subordinate to the grantee. This would be more obvious where several years intervene between the grant and the entry. Whatever the rule may be where the possession of the grantor continues after the conveyance, in such a case the new title may be established by proof of open and notorious adverse possession, as in other cases."

It must be conceded, however, that, notwithstanding the rule stated, if such possession is held in subservency to the title of the grantee, the possession thereof would inure to the grantee's benefit. The circuit court held, in effect, that, when Estes reacquired the water rights above the Swift farm, any interest so obtained inured to the successors in interest of Manville by reason of the covenants in the deed given to Manville and Gordon in 1864, and that defendant, through

Estes, his grantor, is estopped from asserting his claim to the subsequently acquired water rights to the extent that plaintiffs have succeeded to the interest of Gordon and Manville; but held that, since Gordon made only an oral transfer to Manville of his interest in the possessory title to the property acquired under the Estes deed, upon which water had not been diverted at the time of the conveyance, nor prior to the diversion by Estes, the estoppel could not be invoked as to Gordon's half interest in the property described in the deed. The court accordingly held that defendant, as successor in interest to Estes, was estopped to the extent of only one-half of the water right previously conveyed, and found in favor of plaintiffs for one-half of the rights claimed and demanded by each of them. Since no diversion was made prior to the time of the parol conveyances by Gordon, nor until after the diversion and use subsequently made by Estes, it is clear that the court did not err in this holding in respect to Gordon's interest, although a different rule applies where actual appropriation has been made. *Nevada Ditch Co. v. Bennett*, 80 Or. 59, 45 Pac. 472, 60 Am. St. Rep. 777. We are then confronted with the question: Was Estes estopped to assert title adversely as to the remaining interest claimed by the successors in interest of Manville? The general rule is recognized to be that, when a person assumes to convey property by deed, he will not be heard, for the purpose of defeating the title of the grantee, to say that, at the time of the conveyance, he had no title, and that none passed by the deed. Nor can he deny to the deed its full operation and effect as a conveyance, and such deed conveys all after-acquired titles. 16 Cyc. 686, 689, 701; *Taggart v. Riely*, 4 Or. 235; *Wilson v. McEwan*, 7 Or. 87; *Raymond v. Flavel*, 27 Or. 219, 40 Pac. 158. From the foregoing authorities it is clear, under the prima facie showing made by plaintiffs by the deed and Dill notice of location of water right, that defendant, by reason of receiving his title through Estes, would be estopped from asserting that, at the time of the execution of the deed from Gordon and Manville, the grantors had no authority to convey more than the surplus waters of the stream; that, notwithstanding they had previously sold an interest therein to Abner Smith, they were estopped in equity from setting up such sale as against any claims of the grantees, or their assigns. This would preclude defendant, as grantee of Estes, in the absence of other testimony, from asserting any title to the water through any rights that may have been received, if any, through the marriage of Estes to Mrs. Smith; but, as to whether Estes or his grantee are estopped by the covenants in the deed from claiming title by adverse possession against Manville's grantees, another and different question arises.

There can be no doubt, under the law, that

it is incumbent upon a person relying upon a claim of adverse possession, as against a grantee in a warranty deed, to clearly show that there was a change in the relation of the parties with reference to the rights involved before such right can be maintained. Any unexplained possession, therefore, is presumed to be in subserviency to the title placed on record by the deed, from which it follows that the grantor, in order to avail himself of the laches of the grantee or assigns, or of the limitations prescribed by law, must show that he brought home to the grantee and his assigns knowledge, either actual or constructive, of such change in the relations of the parties. *Jones v. Miller* (C. C.) 3 Fed. 384; *Sellers v. Crossan*, 52 Kan. 570, 35 Pac. 205; *Schwallback v. Chicago, M. & St. P. Ry. Co.*, 69 Wis. 292, 34 N. W. 128, 2 Am. St. Rep. 740.

It is incumbent, therefore, upon defendant to show, to the satisfaction of the court, that his possession was not in subserviency to the grantee. The authorities are practically unanimous in support of this view, which appears to be the strong contention of plaintiffs' counsel. We will then examine into the status of the case before us on this point. An examination of the testimony discloses no question as to the character of the holding, not only as to the possession of the defendant, but of his predecessor in interest, Estes. We find that Estes and Dill conveyed all the water, so far as the language of the deed is concerned, to plaintiffs' predecessors in interest, and that possession was surrendered to them under the deed, although, prior to such conveyance, they had sold the land above with a water right in the stream to Smith. Three years after the execution of the deed to Gordon and Manville, at a point on the same stream above their lands and for the irrigation of the farm previously sold to Smith, upon which Estes afterwards filed as a homestead, Estes began to assert a separate and distinct right and to use the water for the irrigation of his homestead. Five years later, presumably for the purpose of further protecting and maintaining his claim to the water, he, at the diversion points, posted and recorded the notices mentioned. When considered under the issues, as pleaded, together with the fact that the Estes farm was being irrigated by the use of the ditches mentioned, that a large orchard had been planted, which, with crops of hay and grain, were necessarily being sustained by the use of the water of this stream, all of which notices, with the other facts and circumstances stated, were sufficient to establish a disclaimer, under the covenants given, and bring home to the knowledge of the grantee full notice of the change in their relations. *Petrain v. Kiernan*, 23 Or. 455, 32 Pac. 158; *Horbach v. Boyd*, 64 Neb. 129, 80 N. W. 644. The testimony showing the open use of the water under the notices posted,

growing crops, and general knowledge thereof in the vicinity, while not sufficient to establish ownership, was clearly competent as evidence for the purpose of establishing claim of ownership as well as to indicate open and adverse possession under this defense. *Petrain v. Kiernan*, supra; *Rowland v. Williams*, 23 Or. 515, 32 Pac. 402; *Boyce v. Cupper*, 37 Or. 256, 61 Pac. 642; *Eastern Or. Land Co. v. Cole* (Or.) 92 Fed. 949, 35 C. C. A. 100; *Fitzgerald v. Brewster*, 31 Neb. 51, 47 N. W. 475; *Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586, 14 Sup. Ct. 458, 38 L. Ed. 279.

When it appears that there was an intention on the part of Estes to claim and hold possession of the use of the stream for a beneficial purpose, in defiance of any rights claimed by his grantees and their assigns, the statute commenced to run, if such intention was accompanied by acts of diversion sufficient to indicate a purpose to carry such determination into effect. We have evidence of such motive and purpose in the notices posted and recorded, together with the use of the water both prior and subsequently made. From that time (April 15, 1872) the character of his possession cannot be doubted, and from which date, if not before, the statute of limitations began to take effect. If it appears that plaintiffs and their predecessors in interest permitted 10 years to elapse without regaining control, during which Estes was using the water, when needed, for irrigation and domestic use, then such delay vested a complete title thereto in Estes, and constituted an absolute bar to the maintenance of this suit, unless it is shown that such use was permissive, or that it was of such character as not to constitute an invasion of the rights of the lower proprietors, against whom he was claiming and asserting such right. From the time, therefore, that Estes openly manifested his intention by the notices and use of the water, as stated, whatever may have been the character of his possession before, his possession became adverse, and in no way could it then be found that he was holding in subserviency to the deed previously given. Being in actual possession and making constant use, when needed, of the necessary amount, it required only an adverse claim, however wrongful it may have been, and however well he may have known that his rights were unfounded, to render the possession adverse, and as to whether such possession and use were either knowingly wrongful or without right is unnecessary to determine. It is the office of the statute of limitations, as enacted by our Legislatures, as well as recognized by the courts from earliest history on the subject, to prevent and avoid the uncertainty in titles and property rights which would necessarily exist if persons were permitted to wait until after a generation had passed away, taking with it the most capable witnesses, before question-

ing another's rights. It is therefore settled that title by adverse possession may be acquired regardless of the good faith of the claimant, if accompanied by even a pretense, commonly known as a claim of title. The principles here invoked on these points have long been recognized in this state. *Parker v. Metzger*, 12 Or. 407, 7 Pac. 518; *Joy v. Stump*, 14 Or. 361, 12 Pac. 929; *Coventon v. Seufert*, 23 Or. 548, 32 Pac. 508; *Oregon Con. Co. v. Allen Ditch Co.*, 41 Or. 209, 69 Pac. 455, 93 Am. St. Rep. 701.

On this point, however, it will be observed that, while prior to the posting of the notices, Estes may not have had what is termed a color of title, yet he claimed under what was, to say the least its equivalent, and held under circumstances furnishing strong evidence of good faith. He had married the occupant of the unsurveyed farm, and to preserve their holdings, when the public lands occupied by himself and family were surveyed, filed on the land as a homestead, receiving the government's receipt therefor. He testifies that it was not his intention, by the deed given plaintiffs' predecessors, to convey more than the surplus water, which testimony is admissible for the purpose of showing his intention when he made the diversion under his notices; and evidently believing it was only the surplus to which his grantees were entitled, and becoming a riparian proprietor on the stream by virtue of it being his homestead, he presumably considered his claim to be under a valid and existing right. While such claim was not conclusive against his grantees, these circumstances are entitled to great weight in determining the status of his claim at its inception, as to whether his possession was in subserviency of, or adverse to, others on the stream.

The adverse possession urged and established as a defense may be defeated by showing that such use was interrupted within the statutory period, or, in other words, that the use during the irrigation seasons for the statutory time, under the conditions named, was not continuous, or by proof that such use did not substantially interfere with plaintiffs' rights. *Britt v. Reed*, 42 Or. 76, 70 Pac. 1029. While an adverse right cannot grow out of mere permissive enjoyment, the burden of proving possession thus claimed to have been held by such permission or subserviency is cast upon the party attempting to defeat such claim. *Coventon v. Seufert*, 23 Or. 548, 32 Pac. 508; *Rowland v. Williams*, 23 Or. 515, 32 Pac. 402; *Bauers v. Bull*, 46 Or. 60, 78 Pac. 757; *Horbach v. Boyd*, 64 Neb. 129, 89 N. W. 644. The same rule would necessarily apply to any other assertion made for the purpose of defeating the running of the statute, and it accordingly follows, after the showing made by defendant, that, in order to defeat his claim of adverse possession, the onus was upon plaintiffs to establish that the use by Estes was not continuous

for the statutory period, as well as to establish, if reliance is had thereon, that the use by defendant and his grantor was not such as to constitute a substantial interference with their rights. So far as appears in the record, the plaintiffs and their predecessors in interest at all times, since the open manifestation by Estes of his claim in 1872 to the waters of Washington creek, actually needed all the water of this stream for domestic and irrigation purposes. Its use, therefore, by defendant and his grantor under such conditions constituted an invasion of the rights claimed by plaintiffs and their predecessors. It being incumbent upon the plaintiffs to show that the use of the water on the Estes farm did not substantially interfere with their wants, nor constitute an invasion of their rights, and there being no evidence in the record to that effect, but, on the contrary, it appearing that the use of the water was necessary, and that they were deprived of its benefit by the Estes place for more than the 10-year period, the claim of adverse possession is clearly established, unless shown that the interruptions by plaintiffs' predecessors were sufficient to prevent the running of the statute in defendant's favor. On this point it will be observed that no claim of interruption is asserted, nor attempted to be established, prior to the year 1884. No principle of law is better established than that, when title is once acquired by adverse possession for the statutory period, such title remains in the person so acquiring it as completely as if conveyed to him by deed from the owner. *Joy v. Stump*, 14 Or. 361, 12 Pac. 929. Therefore, after the title by such possession became complete, no interruptions were of any avail to plaintiffs, unless actual, open, exclusive, continuous, and adverse, under claim of ownership for the statutory period. *B. & C. Comp. § 4*; *Pearson v. Dryden*, 28 Or. 350, 43 Pac. 166; *Oregon Con. Co. v. Allen Ditch Co.*, 41 Or. 209, 69 Pac. 455, 93 Am. St. Rep. 701; *Sherman v. Kane*, 86 N. Y. 57. In this case, then, it is conclusively shown that Estes, under his adverse claim, had the continuous and uninterrupted use of the waters from 1872 to 1884, without interference by any one, and his claim and open assertion of right being established as commencing not later than 1872, it ripened into a complete title prior to 1884, of which he has not been divested.

It is urged, however, that his title had not then become fully vested, and that the temporary interruptions of his use of the water, after 1884, were sufficient to stop the running of the statute; that is, that the use did not continue, without interruptions, for any 10-year period. On that point it will be observed that none of the uses testified to by plaintiffs are shown to have been permanent, and none are claimed to have taken place at any time, except during June and July. It is the law that one person may es-

tablish a right to the use of water during one part of a year, while another may, at the same time, secure a perfect right to the use of the waters of the same stream for the remainder of the season. *Long, Irrigation*, § 61; *McCall v. Porter*, 42 Or. 49, 70 Pac. 820, 71 Pac. 976. It follows, then, that, under the most favorable application of the testimony possible for plaintiffs, they have lost the rights which they or their predecessors may have had to the waters of Washington creek by adverse possession of defendant and his grantor, unless it be during June and July of each year. The question then arises: Were the interruptions of Estes' use of the waters, in the manner testified to by some of plaintiffs' witnesses, sufficient to prevent the running of the statute in his favor during those months? From the record it appears that much of the testimony relative to interference with his use was by parties farming the Rea place adjoining plaintiffs' lands, and whatever water may have been procured by them was used on that place. But since the right to the use of the water by the owners of the Rea farm is not involved in this suit, plaintiffs cannot avail themselves of any interference on the part of persons occupying those premises. The result of this proceeding must be determined with reference only to the parties involved here. *McCall v. Porter*, supra. As to the parties herein, the testimony of nearly all the witnesses indicates the water to have been taken by them from the Estes place without his knowledge, and that, when he discovered any interference, its use would be immediately reclaimed. A fair example of these interruptions, if they can be termed such, finds expression in the statement of some of plaintiffs' witnesses, to the effect that they would sometimes go up and cut the Estes dams, after which water would occasionally run a day, and again not that long; that when they went up and turned the water down or cut the dams they would not speak to Estes about it; or, as stated by Kennedy, that during the 13 years he was on the Gardner place he did without water most of the time on account of persons using it on the Estes farm, and "once in a great while" he would go up and tear dams out, and that when the water was thus obtained it would "probably come down one day and maybe not two hours," the effect of which was that it came near drying them out altogether.

Under *B. & C. Comp. § 4*, plaintiffs cannot maintain the suit unless it appears that they or their predecessors were seised or possessed of the property in question within 10 years immediately prior to the commencement of this proceeding. *Fellows v. Evans*, 33 Or. 30, 53 Pac. 491; *Maas v. Burdetzke*, 93 Minn. 295, 101 N. W. 182, 106 Am. St. Rep. 436; *Dean v. Goddard*, 55 Minn. 291, 56 N. W. 1060; *Blumer v. Iowa R. Land Co.*, 129 Iowa, 32, 105 N.

W. 342, 113 Am. St. Rep. 444, on appeal to U. S. Sup. Ct. (decided May 27, 1907) 206 U. S. 482, 27 Sup. Ct. 769, 51 L. Ed. 1148; Johnson v. Gorham, 38 Conn. 521; Northern Pac. Ry. Co. v. Ely, 25 Wash. 384, 65 Pac. 555, 54 L. R. A. 526, 87 Am. St. Rep. 766; Longley v. Warren, 11 Tex. Civ. App. 269, 33 S. W. 304. To gain possession it must be such a re-entry or recapture of the use of the water as can be termed complete. Possession by permission of Estes was insufficient for this purpose, and a mere temporary cutting of his dams, without his knowledge, whether to his injury or not, would be insufficient. It would not be seriously contended if A. takes possession of land, fences it, constructs and occupies a residence thereon under a claim of ownership, etc., for 10 years, and B. at different short intervals forced himself onto the land, placing his tent there and remaining until discovered, or until dispossessed as soon as discovered, that such interference and possession would be sufficient to stop the running of the statute. In discussing the question as to whether an unsuccessful action in ejectment would toll the statute, it is given as the rule that "prosecutions to stop the running of the statute must be successful, and lead to a change of possession." Moore v. Greene, 19 How. (U. S.) 69, 15 L. Ed. 533. So it might also be said that an attempt to regain possession of a water right, the use of which had been under the actual control and in the possession of another, must be successful and lead to a change in its control before it can defeat such claim under the statute. In order to have affected the legal status of Estes as an adverse claimant, so as to prevent the statute from running, he must not only have had knowledge, actual or implied, that the interference was taking place; but there must also have been at least an implied yielding thereto; or, if not, then there should have been such an entry as would have challenged this right to such extent as would ordinarily have been termed successful, and not possession for merely such time as to enable Estes to learn of the removal of the dams and replace them. Angell, Watercourses (6th Ed.) § 211; Workman v. Guthrie, 29 Pa. 495, 72 Am. Dec. 654. The reason and spirit of our statute on the subject does not contemplate that slight interruptions will stop its running in favor of one, who, for all practical purposes, maintains possession of the property, for, if such rule should prevail, so far as applicable to the determination of water rights, it would, in effect, be a mere nullity.

Thus far we have examined only the question of estoppel urged by plaintiffs relative to the defense of adverse possession, relied upon by the defendant, thereby first considering the main points to which our attention has been directed by counsel for the contending parties. But whether intended as

a foundation upon which to base the defense of adverse possession, by way of indicating the origin of the "claim of right" of his grantor, or as a separate, complete, and sufficient defense, defendant pleads and maintains that his claim is prior in time and superior in right to plaintiffs', and, these averments being consistent, it becomes immaterial as to which is intended. A similar allegation relative to priority of their appropriation is made and urged by plaintiffs. This feature, being essential to a complete determination of the effect of the question of estoppel under the issues and evidence relative thereto, will be considered. From the proof it appears that plaintiffs' rights, when considered with reference to their allegation of prior appropriation, independent of the Estes and Gordon deed, did not attach prior to 1875, if prior to 1884. Littlefield testified to having known the various farms on the creek continuously since 1862, and that he first saw ditches on plaintiffs' lands in 1875. The testimony of M. J. Hindman indicates that a garden was irrigated there in 1867, but from what source of water supply is not shown. The ditches observed, so far as appears, may have been constructed to catch the flow from springs testified to as being below defendant's points of diversion, some of which were on plaintiffs' lands. It was incumbent upon plaintiffs, in order to avail themselves of this right, to clearly prove all the elements essential to a right under the doctrine of prior appropriation, and the evidence disclosed is insufficient to establish their diversion and appropriation for that purpose earlier than 1884 (Morgan v. Shaw, 47 Or. 333, 83 Pac. 534), unless the deed referred to is sufficient. In fact it is not clear that plaintiffs are endeavoring to show an actual appropriation of the stream sufficient to maintain their rights in this respect, earlier than that year, except to the extent shown by the color of title beginning with Estes' deed, already considered. The defendant, however, clearly and without question establishes a diversion for his lands not later than the year 1872, and shows the application thereof to a beneficial use at all times since. It cannot be doubted, therefore, that the appropriation claimed by defendant is prior in time to plaintiffs' appropriation; but it is maintained that defendant should be and is estopped, by reason of his grantor's deed to their predecessors, from pleading any right or claim to the use of any water from Washington creek as against them, not only by adverse possession, as heretofore discussed, but from pleading a prior right to its use. Estoppel, as here urged, is evidently based on the assumption that defendant, in relying on his claim as prior appropriator, does so on the theory that he obtained his right to divert the water by reason of the interests sold to Smith in 1864, which had its inception in the appropriation made on the Estes

farm in 1863. Owing to there being no priv-
 ity of estate between Estes and Smith, this
 claim cannot be maintained. *Low v. Schaf-
 fer*, 24 Or. 239, 33 Pac. 678. But notwith-
 standing Estes cannot tack his appropriation
 to Smith's rights, the diversion in his own
 right, as above stated, attached prior to that
 of defendant.

We are then confronted with the question:
 Can the defendant, notwithstanding such
 deed, avail himself of his claim in this re-
 spect? The doctrine of estoppel is intended
 to preclude fraud, and to that end imposes
 silence on a party, when in conscience and
 honesty he should not be allowed to speak.
Van Rensselaer v. Kearney, 11 How. (U. S.)
 297, 13 L. Ed. 703. As usually understood
 and applied, estoppel can be used only that
 the ends of justice might be subserved. Then,
 when it is remembered that Estes and Dill
 conveyed only their inchoate title to the wa-
 ters of Washington creek, which consisted on-
 ly of such rights as a notice of location there-
 of could give, which, so far as appears from
 the record, was but a claim of right requiring
 due diligence for its complete development,
 they transferred by their deed all they were
 able to convey, and since, after receiving such
 conveyance, the grantees neglected, or failed,
 to perfect the right thus granted, can it then
 be said the ends of right and justice would
 be subserved by holding the grantors to ac-
 count under their covenants of warranty for
 the failure of the grantees to perform a duty
 imposed upon them by law, and whose acts
 or nonaction the grantors could not control,
 and over which they had no supervision? We
 think not. To hold their grantors estop-
 ped to assert an after-acquired title, under
 such conditions, would be to make estoppel
 a weapon of injustice, rather than a shield
 to protect the wronged. When the deed was
 given, the grantors warranted that, up to
 that stage of the proceedings, there were no
 outstanding claims which could defeat the
 rights therein conveyed, if diligently per-
 fected. The grantors warranted that they
 would hold up their end of the log, but not
 that the grantees would not let theirs fall.
 At the date of the deed the legal title to
 both land and water was in the government.
 The grantors had but an inchoate right in
 each, and both were subject to forfeiture
 either by intentional abandonment or an act
 or failure to act, which the law implied as
 such. The long delay after 1864, whether
 for 5 years or 20, constituted an abandon-
 ment under the facts shown, and left all
 rights thus forfeited subject to an appropri-
 ation by others. *Seaward v. Pac. L. Co.*
 (Or.) 88 Pac. 963. Estes, in 1872, if not
 earlier, made such an appropriation as vest-
 ed in himself a complete right to the use of
 the stream to the extent thus applied, and,
 unless estopped, as claimed, the rights of
 plaintiffs' predecessors became subsequent

to this title thus acquired by him, both in
 time and right; and it is immaterial whether
 he thought by his marriage to Mrs. Smith,
 in 1867, he succeeded to the interest of the
 heirs of her former husband, for he openly as-
 serted and maintained his right as an appro-
 priator, independent of any previous claim
 thereto. When the deed was executed to
 Gordon and Manville, the grantees knew, or
 were bound to know, as a matter of law,
 the extent of the title conveyed; that the
 grantors had but an inchoate interest, re-
 quiring a duty to be performed on the part
 of the recipients, in order to carry into ef-
 fect the right transferred to them—as much
 so as to the "squatter's rights" to the land de-
 scribed in the deed, the forfeiture of which,
 under like circumstances, would not have
 precluded the grantors from asserting an
 after-acquired title thereto.

The adjudications on this question are not
 numerous, but we feel fully warranted by the
 principles enunciated in the few decisions
 bearing on the question, as well as by the
 reasonableness and justice of the rule, in
 holding that an after-acquired title by the
 grantor will not inure to the benefit of the
 grantee, where the latter knew at the time of
 the transfer that the grantor had no title
 and did not expect him to procure one, or
 where the title purported to be conveyed
 is an inchoate interest, the completion or
 forfeiture of which depends upon some acts
 to be performed, or diligence to be exercised
 by the grantee. We find no authorities to
 the contrary, and supporting this rule are
Viele v. Van Steenberg (C. C.) 31 Fed. 249;
Goodel v. Bennett, 22 Wis. 565; *Wallace*
v. Pereles, 109 Wis. 316, 85 N. W. 371, 53 L.
 R. A. 614, 83 Am. St. Rep. 898; *Altamus*
v. Nickell, 115 Ky. 506, 74 S. W. 221, 103 Am.
 St. Rep. 333. It follows that defendant is
 not estopped to claim either as an owner
 through his grantor by prior appropriation,
 or by adverse possession for the statutory
 period, and, when both claims are consid-
 ered in connection with the facts disclosed,
 it conclusively appears that defendant has
 acquired a right to the use of sufficient wa-
 ter from Washington creek to properly irri-
 gate the amount of lands heretofore culti-
 vated, amounting to not less than 60 acres.
 As to the quantity of water, however, to
 which he is entitled for this purpose, it is not
 so clear. Witnesses for plaintiffs testify that
 their farms have consumed all the stream will
 furnish, when it could be procured, and that
 all of it has been and is necessary. Defend-
 ant, and his witnesses also indicate that all
 has been necessary for, and applied in, the
 irrigation of his premises. In this respect
 they give only their opinion, without stating
 the facts from which their conclusions are in-
 ferred; but as it is shown, and not contro-
 verted, that the lands along Washington gulch
 require from an inch to an inch and a half of

water per acre for their proper cultivation, it will be presumed that this amount is sufficient, and the apportionment will be on this basis, notwithstanding the opinion of defendant's witnesses that the Estes farm requires all the water in the stream.

It being shown, and not questioned, that defendant has between 60 and 70 acres of land in cultivation, including orchard, upon which good crops have been raised each year, it will be assumed that a flow of 60 inches of water is ample for defendant's irrigation and domestic requirements. *Morgan v. Shaw*, 47 Or. 333, 83 Pac. 534. The record is silent as to the quantity of water understood by the use of the word "inch"; but it has been held that, when the record fails to disclose the amount intended by such designation, it will be presumed that it was to be measured under a six-inch pressure. *Mill's Irr. Manual*, §§ 88-92; *Morgan v. Shaw*, supra; *Bowman v. Bowman*, 35 Or. 279, 57 Pac. 546. This designation, however, is not sufficiently definite to be a safe guide at all times in ascertaining when the rights of a person awarded a given number of inches under six-inch pressure, etc., are being invaded. In speaking of the measurements of water in use in California, Mr. William Kent, in his recent reference book, for use by engineers and mechanics, states the situation, thus: "The term 'miner's inch' is more or less indefinite, for the reason that California water companies do not all use the same head above the center of the aperture, and the inch varies from 1.36 to 1.73 cubic feet per minute each; but the most common measurement is through an aperture two inches high and whatever length is required, and through a plank $1\frac{1}{4}$ inches thick. The lower edge of the aperture should be two inches above the bottom of the measuring box and the plank five inches above the aperture, thus making a six-inch head above the center of the stream. Each square inch of this opening represents a miner's inch (under six-inch pressure) which is equal to a flow of $1\frac{1}{2}$ cubic feet per minute." See, also, *Wiel, Water Rights*, pp. 147, 175; *Newell's (Practical) Irrigation*, p. 128; *Troutwine on Civil Engineering*, p. 546; *Merriman's Treat-*

ise on Hydraulics (1904) pp. 122, 123, 124; *Dougherty v. Haggin*, 56 Cal. 522.

It is evident that the only reliable method by which any certain number of inches of water, when awarded under this method of measurement, can always be determined, is on the basis of what is termed by engineers as "second feet," or quantity of water flowing past a certain point in a given space of time. The ratio recognized by the authorities cited and rule quoted is that one inch of water under six-inch pressure equals one-fortieth of a "second foot"—that is, 40 miner's inches furnish a flow of water equal to one cubic foot ($7\frac{1}{2}$ gallons) per second of time—which ratio we find substantially accurate, and will be adopted here. "Inches" of water, when unexplained, having been determined to have reference to the quantity so designated under six-inch pressure (*Bowman v. Bowman*, supra), it follows that defendant, having from 60 to 70 acres of cultivated land requiring irrigation, is entitled as a first right to the use of 60 inches of the waters of Washington creek, for irrigation and domestic use; but as to any water in excess of his actual requirements, as here awarded, including the quantity of water that may pass below defendant's lands after its use thereon, plaintiffs have acquired a right thereto, at such times as needed by them for the purposes stated, as against defendant. *Seaweed v. Pac. L. S. Co. (Or.)* 88 Pac. 963. And, as between the parties, plaintiffs and defendant herein, at all times that the water is not required by one of them, it should be at the disposal of the other, for irrigation and domestic use, when needed. *Mann v. Parker*, 48 Or. 321, 86 Pac. 598.

The trial court being invested with discretionary powers in taxation of costs, in the exercise of which there appears no abuse, the decree in that respect should not be disturbed; but the cross-appeal appearing justifiable on the part of defendant, he should be allowed his costs in this court.

The decree of the circuit court should be modified and one entered in conformity with this opinion.

EAKIN, J., having tried the cause in the court below, did not sit in this case.

(50 Or. 48)

ALDERMAN v. TILLAMOOK COUNTY et al.

(Supreme Court of Oregon. July 30, 1907.)

1. INJUNCTION—RESTRAINT OF PROCEEDINGS IN OTHER COURTS.

Administratrix, at the time a proceeding for her removal was instituted in the county court by the county, claiming to be a creditor, was engaged in litigation over a claim for a large sum of money asserted by the county against the estate of which she was administratrix, and was making an honest and apparently successful defense thereto, and the county had been unable to establish its claim; and it was for the purpose of preventing administratrix from making such defense and to enable the county to succeed that it instituted the proceeding for her removal. The county judge had been most active in the county's behalf, and it was under his direction that the litigation against the estate was being conducted. *Held*, that administratrix was entitled to enjoin the prosecution of the proceeding for her removal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 69.]

2. COURTS—EXCLUSIVE JURISDICTION—INTERFERENCE BY INJUNCTION AGAINST PROCEEDINGS.

The issuance of an injunction in such a case would not constitute an interference with the exclusive jurisdiction of the county court, in the first instance, to appoint and remove an administratrix.

3. INJUNCTION — PROCEEDINGS IN OTHER COURTS—ADEQUACY OF OTHER REMEDY.

Administratrix was not limited to her right to appear in the county court and contest the proceeding, and to appeal from the decree, if against her; the county judge having agreed to remove her, if the proceeding was instituted, and an appeal from the decree not staying the order of removal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 69.]

4. ABATEMENT AND REVIVAL—ACTION FOR INJUNCTION—COUNTY JUDGE AS DEFENDANT—EXPIRATION OF TERM.

The expiration of the county judge's term did not abate the action.

Appeal from Circuit Court, Tillamook County; Wm. Galloway, Judge.

Action by Edith A. Alderman, as administratrix, etc., of H. H. Alderman, deceased, against the county of Tillamook and others. From a judgment for defendants, plaintiff appeals. Reversed.

Ralph R. Duniway, for appellant. S. S. Johnson, for respondents.

BEAN, C. J. This suit was brought by the plaintiff against Tillamook county, W. W. Conder, county judge thereof, and Handley & Thayer, its attorneys, to enjoin and restrain the prosecution of a proceeding instituted by the county, in the county court of such county, for the removal of the plaintiff as administratrix of her husband's estate. A demurrer to the complaint was sustained in the court below, and the sufficiency of the complaint is the only question for determination on this appeal.

The facts alleged in the complaint are that H. H. Alderman, the husband of plaintiff, was sheriff and ex officio tax collector of defendant county from September 7, 1897, until his death, January 24, 1904. Soon after his death plaintiff was duly and regularly appointed administratrix of his estate, and on July 28, 1904, the defendant county presented to her, as such administratrix, a claim against the estate of her intestate for \$8,127.17 for money alleged to have been received by him as tax collector and not paid over to the county or otherwise accounted for. This claim was examined and disallowed by the plaintiff on August 1, 1904. On September 7th of that year the county, acting through the defendant Conder, as county judge, entered into a written contract with Handley & Thayer, by the terms of which they agreed, for a certain per cent. of the amount recovered, to immediately commence and prosecute to final decision any and all necessary and practicable legal process to enforce the claim of the county against the intestate's estate for moneys collected by him and not accounted for; no suit or action, however, to be commenced without the approval of the county judge. About the time of the making of this contract the claim of the county, which had been presented to and disallowed by the plaintiff as administratrix, was, in pursuance of section 1161, B. & C. Comp., presented to the county court, presided over by the defendant Conder, for allowance, and the same was, on October 6th, duly allowed by him. The plaintiff appealed from this order, and pending the determination thereof the defendant county, through its attorneys, and by the sanction of Conder, commenced a suit in equity against plaintiff to subject certain real property, the title to which was in her name, to the payment of its claim, on the ground that such property had been conveyed to her by her husband for the purpose of defrauding creditors. The complaint was verified by Conder, and alleged that the county was a creditor of the estate by virtue of the order of the county court allowing its claim. Before this suit came on for hearing the appeal of the plaintiff from the order of the county court allowing the claim was heard and decided in her favor, and no appeal has been taken from such decision, and it has become final. The plaintiff thereupon pleaded such judgment in abatement of the suit referred to. This plea was sustained, and the suit dismissed, on the ground that the county had not reduced its claim against the estate to judgment, and therefore could not maintain a creditors' bill to subject property held by her to its payment. On October 25, 1905, while this suit was pending and undetermined, the defendant county, through its attorneys and by the direction of Conder, as county judge, commenced four separate suits in equity against plaintiff and certain

persons alleged to have been bondsmen of her husband, to restore lost bonds and for an accounting, and also an action at law against plaintiff as administratrix of her husband's estate, to establish its claim against such estate. The complaint, in all these suits and in the action, was verified by Conder as county judge, and the litigation was prosecuted with his approval and sanction. The plaintiff appeared in each of these suits and in the action, and was making apparently successful defenses thereto, when defendant county, acting through its attorneys, filed a petition in the county court, of which the defendant Conder was judge, alleging that it was a creditor of the estate of plaintiff's decedent, and that she had been unfaithful in her trust as administratrix, because she had failed and neglected to include in the inventory thereof certain real property, the title to which was in her name, but which, it was alleged, had been conveyed to her by her husband in fraud of creditors, and praying that she be cited to appear and show cause why she should not be removed as administratrix. The plaintiff thereupon commenced this suit to enjoin further prosecution of such proceeding, alleging that it was instituted in pursuance of a conspiracy entered into by Conder, as county judge, and the attorneys of the county, to deprive the estate of her husband of any defense in the several suits and action pending against such estate, by removing her as administratrix and appointing some one friendly to the county's interest. It is alleged that it was agreed, as a part of the conspiracy, that the attorneys should, in the name of the county, file false charges of misconduct against plaintiff, as administratrix, in the county court, over which defendant Conder presided, and that Conder, acting as judge of such court, should make an order removing her, without regard to any defense she might make, and that he would appoint another as administratrix of such estate, who would confess judgment in favor of the county in the several suits and action then pending, and thereby deprive the estate of any defense thereto; that Conder had been active in prosecuting the county's claim against the estate, and had agreed to decide all questions brought before him in favor of the county, and to remove the plaintiff as administratrix whenever he got an opportunity to do so; that, if she is removed by the county court, her right to act as administratrix will be suspended, pending an appeal from such order, and before the same could be heard or determined the estate and the bondsmen of her husband will forever be deprived of the right to make any defense to such suits and action; that the claim of the county is wrongful and illegal, and without merit, and, if permitted, the plaintiff can make a successful defense thereto.

That a court of equity has jurisdiction to enjoin pending or threatened proceedings in

another court to prevent oppressive and vexatious litigation, and especially when such litigation is not brought in good faith, but is instituted for an illegal and wrongful purpose, is undisputed. 22 Cyc. 790, 793; 2 Story on Equity, § 901; N. & N. B. H. Co. v. Arnold, 143 N. Y. 263, 38 N. E. 271. The courts are not agreed as to what constitutes such litigation, and, as said by Mr. Justice Gray, "every case must necessarily be governed in its disposition by its facts and circumstances, and the discretion of the court must be influenced in its exercise by a consideration of the relative injury and convenience which may result from granting or refusing equitable relief by way of injunction." *Bomelsler v. Forster*, 154 N. Y. 229, 238, 48 N. E. 534, 535, 39 L. R. A. 240. It is unnecessary at this time for us to attempt to lay down any general rule on the subject or review the authorities. From the allegations of the complaint, which for the purposes of this appeal are admitted by the demurrer, and must be taken as true, a case appealing more strongly to a court of equity for relief could rarely be found. The plaintiff and defendant, at the time the proceedings for her removal were instituted in the county court, were engaged in litigation over a claim for a large amount of money asserted by the county against the estate of which plaintiff is administratrix. The county had brought sundry actions, suits, and proceedings to establish its claim. The plaintiff was making an honest and apparently successful defense thereto, and the county had been unable to establish its claim. To prevent the plaintiff from making such defense, and to enable the county to succeed in the litigation, it instituted a proceeding for her removal in the court presided over by the person who had been most active on its behalf and under whose direction the litigation was being conducted. To give it an apparent standing to maintain such proceeding, it alleges that it was a creditor of the estate, although it had not established its claim to that relationship and was not entitled to the rights of a creditor. It seems manifest, therefore, that the proceeding could not have been instituted in good faith, but for the purpose of vexing, annoying, and harassing plaintiff, and to illegally and wrongfully deprive the estate, of which she is administratrix, of the right to defend against the action and suits brought by the county on an alleged wrongful claim. Under these circumstances we are of the opinion that a court of equity should not hesitate to interfere by injunction to protect the rights of the plaintiff. If the county has a valid claim against the estate, the courts are open to it; but it should establish such claim in a regular and orderly manner, and not be permitted to resort to proceedings of the kind here instituted for the purpose of taking an undue advantage of its opponent.

It is argued that the county court has exclusive jurisdiction in the first instance over proceedings in the administration of estates and the appointment and removal of executors and administrators, and that this is an attempt to interfere with such jurisdiction by injunction. But this is in no sense a proceeding to interfere with the jurisdiction of the county court. It is not and could not be made a party to the suit. Any process which will issue will not be addressed to the court and will not interfere with it in any way. A decree, if rendered, will operate only on the parties, by restraining them from proceeding further with the litigation in such court, and this is a jurisdiction clearly vested in a court of equity upon a proper case being made. *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448; *Clafflin & Co. v. Hamlin & Hamlin*, 62 How. Prac. (N. Y.) 284. In *Dehon v. Foster*, 4 Allen (Mass.) 545, Mr. Chief Justice Bigelow says: "The authority of this court as a court of chancery, upon a proper case being made, to restrain persons within its jurisdiction from prosecuting suits either in the courts of this state or of other states or foreign countries, is clear and indisputable. In the exercise of this power courts of equity proceed, not upon any claim of right to interfere with or control the course of proceeding in other tribunals, or to prevent them from adjudicating on the rights of parties when drawn in controversy and duly presented for their determination. But the jurisdiction is founded on the clear authority vested in courts of equity over persons within the limits of their jurisdiction and amenable to process, to restrain them from doing acts which will work wrong and injury to others, and are therefore contrary to equity

and good conscience. As the decree of the court in such cases is pointed solely at the party, and does not extend to the tribunal where the suit or proceeding is pending, it is wholly immaterial that the party is prosecuting his action in the courts of a foreign state or country."

Again it is said that the remedy of the plaintiff is to appear in the county court and contest the proceeding there, and, if the decree is against her, to appeal. But under the averments of the complaint such a remedy would be a mere mockery of justice. The case against her had been prejudged, and the decree to be entered agreed upon before the proceeding was instituted, and any attempt to make a defense thereto by plaintiff would be futile and unavailing. It is true she could appeal from any decree rendered against her, but the appeal would not stay the order removing her as administratrix; but the duties of that position would devolve upon the person appointed in her place. *Knight v. Hamaker*, 33 Or. 154, 54 Pac. 277, 659. And thus the object and purpose of the conspiracy in pursuance of which the proceeding was instituted would be accomplished before the appeal could be heard and determined.

It is also suggested that Conder's term as county judge has expired; but this is no reason why the action should abate. Until the county has established its claim against the estate in some manner provided by law, it ought not to be permitted to vex and annoy plaintiff with needless and unnecessary proceedings for her removal.

We are of the opinion, therefore, that the decree of the court below should be reversed, the demurrer to the complaint overruled, and a decree entered in favor of plaintiff.

STATE v. REYNER.

(Supreme Court of Oregon. July 30, 1907.)

1. INDICTMENT AND INFORMATION—OBJECTION AT TRIAL—SUFFICIENCY OF FACTS.

By express provision of B. & C. Comp. § 1365, objection to an indictment that the facts stated do not constitute a crime may be taken at the trial, under a plea of not guilty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 633, 634.]

2. LARCENY—FROM THE PERSON.

Where defendant proposed to F. an exchange of vests, and, on F. removing his vest and handing it to defendant, defendant turning his back to F. took from the vest and retained a roll of bills, and then handed the vest back to F., the stealing was larceny from the person, within B. & C. Comp. § 1800, prohibiting such thefts, and prescribing the measure of punishment therefor, provided the taking was without F.'s knowledge or consent, or so sudden as to preclude resistance before asportation.

3. SAME—NATURE—COMPOUND CRIMES.

The crimes of larceny from a store (B. & C. Comp. § 1799) and larceny from the person (section 1800) are compound larcenies, consisting of simple larceny (section 1798), aggravated by the circumstance of taking the property from a store or the person of another, in which the value of the property is not an ingredient of the offense, as in case of simple larceny.

4. SAME—STATING TWO OFFENSES—WAIVER OF OBJECTION.

Objection that an indictment contravenes B. & C. Comp. § 1308, requiring the indictment to charge but one offense, and in one form only, which section 1357, subd. 3, makes ground for demurrer, and section 1365 provides can be raised only by demurrer, not having been so raised, is waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 635.]

5. SAME—SUFFICIENCY TO SUSTAIN CONVICTION.

An information charging larceny from a store, a compound larceny, and also alleging the value of the property, not being demurred to as charging two offenses, will sustain a verdict and judgment based on a simple larceny; the verdict determining the value of the property taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 648.]

6. CRIMINAL LAW—APPEAL—SUFFICIENCY OF EVIDENCE—WAIVER OF OBJECTION.

There being some evidence on the trial to establish the identity and value of the money alleged to have been stolen, objection to the sufficiency of the proof thereon is waived; it not having been made other than by a request for an instruction to find a verdict of not guilty, not particularly specifying the ground on which it was based.

7. SAME—DISCRETION OF TRIAL COURT—QUESTIONS AFFECTING CREDIBILITY OF WITNESSES.

The necessity of answering the question asked on cross-examination of a witness, whether he did not "bum" his meals off free-lunch counters, is a matter within the discretion of the trial court, not to be interfered with, in the absence of abuse of its discretion.

8. SAME—INSTRUCTIONS—NECESSITY OF REQUEST.

Where an information charges an offense which necessarily includes a lesser offense, it is not necessary that the court, without a request

therefor, instruct that the jury may find defendant guilty of the lesser crime, if they entertain a reasonable doubt as to his guilt as to the greater offense.

9. SAME—CREDIBILITY OF WITNESS—EVIDENCE—INSTRUCTIONS.

Under B. & C. Comp. § 852, providing that a witness may be impeached by the record of the judgment of his conviction of a crime, it is proper to instruct that the judgment of conviction of defendant of assault may be considered for the purpose of determining the credit to be given his testimony.

Appeal from Circuit Court, Union County; T. H. Crawford, Judge.

F. K. Reyner was convicted of larceny, and appeals. Affirmed.

C. H. Finn, for appellant. A. M. Crawford, Atty. Gen., for the State.

MOORE, J. The defendant, F. K. Reyner, was convicted of the crime of larceny and sentenced to imprisonment in the penitentiary for the term of three years, from which judgment he appeals.

His counsel contend that the information does not state facts sufficient to constitute a crime, and that the evidence produced at the trial was insufficient to warrant a conviction, and hence the court erred in denying their request to instruct the jury, as follows: "I charge you that, under the testimony, you must find the defendant not guilty." The information, omitting the title, the contra formam statuti clause, the signature of the prosecuting officer, the names of the witnesses, and other indorsements, is as follows: "F. K. Reyner, the above-named defendant, is accused by the district attorney for the Tenth judicial district of the state of Oregon, in this information, of the crime of larceny in a building, committed as follows: The said F. K. Reyner did, in the county of Union, and state of Oregon, on the 15th day of November, 1906, wrongfully, unlawfully, and feloniously take, steal, and carry away in a certain store building, to wit, the Owl Saloon, a certain sum of money, to wit, the sum of \$80, lawful money and currency of the United States, the denominations thereof to the district attorney unknown, said money being then and there the personal property of one Loule Fagin, and of the value of \$80." No demurrer to the formal accusation was interposed; but, a plea of not guilty having been entered, the defendant's counsel objected and excepted to the introduction of any incriminating testimony against their client. Such evidence, though controverted, tended to show that, at the time stated in the information, the defendant was temporarily employed as a bartender in a saloon at La Grande; that the prosecuting witness, Loule Fagin, visited such resort, having in his vest pocket a roll of bills, whereupon the defendant proposed an exchange of vests with him; that Fagin removed his vest and handed it to the de-

fendant, who, turning his back to such witness, took from the garment and retained the roll of bills, and thereupon handed the vest back to the owner. Fagin, as a witness for the state, in describing the money alleged to have been taken from him, testified that the night preceding his loss he left with one W. C. Hesse, at La Grande, for safe-keeping, "two \$20 pieces in paper, four \$10 bills, and one \$10 in gold," and the next morning received the same, placing the paper money in his vest pocket and the gold in a purse, which he carried in his trousers pocket. The testimony of this witness is corroborated by that of Hesse as to the denomination and kind of money left with and given back by him. H. C. Cotner, the proprietor of the saloon where the defendant was employed, testified that, upon returning to his place of business, after a short absence, he found Fagin censuring the defendant for taking from him a package of paper money, saying: "This foreigner was accusing this man Reyner, over there, that he had taken a roll of greenbacks from him, his money, and he pulled open his coat that way, and said: 'He took it out of there.' * * * Of course, he talked broken, but he made me understand there were \$85 in it in greenbacks, paper money, and he says, 'There is two \$20 greenbacks, bills,' and he made me understand the balance of it was \$5 and \$10 bills." W. W. Crawford testified that he was in Cotner's saloon, November 15, 1906, and saw Fagin take "from his pocket what looked like greenback bills, and put them back in his coat pocket." The foregoing is the only testimony tending in any manner to identify the kind of money alleged to have been taken, or to establish its value, and, based on such evidence, the court said to the jury: "When you retire, gentlemen, you will select one of your number as foreman, who will sign whatever verdict you agree upon. If you are satisfied from the evidence in this case beyond a reasonable doubt of the guilt of the defendant, as I have indicated to you, you will sign and return this verdict: 'We, the jury in the above-entitled criminal action, find the defendant, F. K. Reyner, guilty of larceny, and the value of the property stolen \$——, filling in the number of dollars, the value of the property stolen, and sign it above the word 'Foreman.' " An exception to this part of the charge was reserved by the defendant's counsel. Pursuant to the direction, however, the jury inserted in the verdict the following: "80.00."

The information hereinbefore set out is evidently based on an alleged violation of section 1799, B. & C. Comp., which, so far as involved herein, is as follows: "If any person shall commit the crime of larceny in any dwelling house, banking house, office, store, shop, or warehouse * * * and commit the crime of larceny therein, such person, upon conviction thereof, shall be punished," etc.

As this section is entitled "Larceny in House, Boat, or Public Building," it is argued that the crime of larceny in a building is not classified as a special offense under our statute, unless such structure is used by the public, and the defect in the information was not remedied by the averment "In a certain store building," for the idea intended to be expressed by the use of that phrase is to charge the commission of an offense in a building, rather than in a store.

The failure of an information to state facts sufficient to constitute a crime may be taken advantage of at the trial, as was done in the case at bar, under plea of not guilty (B. & C. Comp. § 1365), thereby making an examination of the charging part of the formal accusation necessary. Before considering such question, however, attention is called to the testimony, which, it will be remembered, tended to show that the money alleged to have been stolen was taken by the defendant from a vest which was delivered to him by Fagin, the owner of the property. If it be assumed that the money was abstracted from the garment under the circumstances adverted to, the stealing was larceny from the person, provided the taking was without Fagin's knowledge or consent, or so suddenly as to preclude resistance before asportation. *Rapalje, Larceny*, § 16; *McClain, Crim. Law*, § 575; *Commonwealth v. Lester*, 129 Mass. 101. Our statute, prohibiting such thefts and prescribing the measure of punishment therefor, is as follows: "If any person shall commit the crime of larceny by stealing from the person of another, such person shall, upon conviction thereof, be punished," etc. B. & C. Comp. § 1800. The conviction herein was undoubtedly based on a violation of Id. § 1798, as amended (Laws 1905, p. 83), which, so far as considered material in the case at bar, is as follows: "If any person shall steal any goods or chattels, or any government note, bank note, * * * which is the property of another, such person shall be deemed guilty of larceny, and upon conviction thereof, if the property stolen shall exceed in value \$35, shall be punished by imprisonment in the penitentiary not less than one nor more than ten years; but if the property stolen shall not exceed the value of \$35, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than one month nor more than one year, or by fine not less than twenty-five nor more than one hundred dollars." An examination of the provisions of the statute relating to stealing from any dwelling house, etc., or from the person of another, will show that the commission of such crimes is a compound larceny, consisting of simple larceny, aggravated by the circumstance of taking personal property of the class designated from a building in which it has been placed for safety, or from the person of another, who is awake and has the goods, chat-

tels, or choses in action under his immediate observation and protection (*State v. Patterson*, 98 Mo. 283, 11 S. W. 728), in which cases the value of the property taken is not an ingredient of the offense. Larceny in a dwelling house or from the person of another is therefore a crime of greater magnitude than simple larceny, and, either of the former being a crime consisting of degrees, the larger offense necessarily includes the smaller.

The information stated the value of the property taken, but such averment was unnecessary, and, if it be assumed that the designation of "a certain store building" was a sufficient compliance with the requirement of the statute to make the offense larceny in a house of the specified class, the accusation might have been construed as stating facts constituting the commission of two crimes. Notwithstanding it is enacted that a written accusation must charge but one crime, and in one form only (*B. & C. Comp. § 1308*), and a failure to comply therewith renders the pleading demurrable (*Id. § 1357*, subd. 3), if the information is not thus challenged on account of its double aspect, the defect is waived. *Id. § 1305*; *State v. Lee*, 33 Or. 506, 56 Pac. 415; *State v. Carlson*, 30 Or. 19, 62 Pac. 1016, 1119.

No demurrer to the pleading was interposed in the case at bar, and as the offense charged was a compound larceny, the information is sufficient to uphold the verdict and judgment, which are based on simple larceny, where the worth of the property taken is alleged and determined by the verdict, thereby removing any doubt on that subject (*State v. Hanlon*, 32 Or. 95, 48 Pac. 353; *State v. Savage*, 36 Or. 191, 60 Pac. 610, 61 Pac. 1129); and no error was committed in directing a finding as to such value.

It is maintained by defendant's counsel that no direct proof was offered tending to show that the property claimed to have been stolen was "lawful money and currency of the United States," as alleged in the information, and that there was an entire failure to establish the value of the bills asserted to have been taken, and for these reasons the testimony was insufficient to authorize a finding as to such value; and hence the court was at fault in denying the request to give the instruction hereinbefore set out, and also erred in charging the jury as follows: "I instruct you that government notes in the form of greenbacks, silver certificates, or gold notes, and national bank notes, are current moneys of the United States, and are subject of larceny under our statutes"—to the giving of which an exception was saved. It will be recalled that the testimony tended to show that the property alleged to have been unlawfully taken consisted of two \$20 and four \$10 bills in greenbacks. These bills were not specifically identified, nor was any person called as a witness to prove the value thereof. If the court's attention had been particularly attracted to the failure of proof

in the respect indicated, it is quite probable that, notwithstanding both parties had rested, the cause would have been opened so that evidence of the kind and value of the bills might have been supplied. This court was established to correct, after careful deliberation, the errors alleged to have been committed in the hurry of a trial by a circuit court; but, unless the latter tribunal has had an opportunity to pass upon the question that is brought to this court for examination, the consideration thereof would not be a review, as contemplated by the rules of law, but the contemplation of an independent inquiry, which, if sanctioned, would permit a party to an appeal to try a cause upon an entirely different theory from that pursued in the court below. To obviate such a system of procedure, a party who seeks to review the action of a trial court on account of a lack of evidence, of which he complains, is required particularly to point out to it the legal principle for the maintenance of which he contends, and, if he fails to do so at the proper time, any error, unless there is a total failure of proof, is necessarily waived. *State v. Tamler & Polly*, 19 Or. 528, 25 Pac. 71, 9 L. R. A. 853; *State v. Foot You*, 24 Or. 61, 32 Pac. 1031, 33 Pac. 537; *State v. Robinson*, 32 Or. 43, 48 Pac. 357; *State v. Flester*, 32 Or. 254, 50 Pac. 561; *State v. Schuman*, 36 Or. 16, 58 Pac. 661, 47 L. R. A. 153, 78 Am. St. Rep. 754; *State v. Sally*, 41 Or. 366, 70 Pac. 396. As there was some evidence introduced at the trial tending to establish the identity and value of the paper money alleged to have been stolen, and as the request for an instruction to find a verdict of "not guilty" did not particularly specify the ground on which it was based, no error was committed in refusing to charge the jury as desired, or in giving the instruction hereinbefore set out and assigned as error.

A. P. Southwick, having testified as a witness for the state, was not permitted, on cross-examination, to answer the following question: "And didn't you a majority of the time 'bum' your meals off the free-lunch counters of the saloons?" The defendant's counsel thereupon stated to the court that they expected to prove, by the answer sought, that the witness was a vagrant and a tramp; but, all testimony to that effect having been rejected, an exception was reserved, and it is insisted that an error was thereby committed. If Southwick had given an affirmative answer to the question asked him, or if the defendant's counsel had been permitted to prove the truth of the declaration which they made to the court, the state of feeling existing between the witness and the defendant would not have been disclosed. The necessity of answering such a question as was propounded to Southwick, who did not interpose a claim of privilege, is to be determined by the trial court as a matter within its discre-

tion, which will not be disturbed, except in cases of an abuse thereof. *State v. Bacon*, 13 Or. 143, 9 Pac. 393, 57 Am. Rep. 8; *State v. Chee Gong*, 17 Or. 635, 21 Pac. 882; *State v. Olds*, 18 Or. 440, 22 Pac. 940; *State v. Welch*, 33 Or. 33, 54 Pac. 213. We do not think there was any abuse of discretion in refusing to permit the witness to answer the question asked or in rejecting the proof offered.

The defendant's counsel, invoking the principle announced in the case of *State v. Cody*, 18 Or. 506, 23 Pac. 891, 24 Pac. 895, insist that, when an information charges the commission of a crime, which necessarily includes a lesser offense, it is incumbent upon the court, without any request therefor, to instruct the jury that they have the right to find the accused guilty of the lesser crime, if they entertain a reasonable doubt as to his guilt as to the greater offense, and that, no charge to that effect having been given, an error was committed. In *State v. Foot You*, 24 Or. 61, 32 Pac. 1031, 33 Pac. 537, the doctrine promulgated in the case relied upon was expressly overruled, and hence no error was committed, as alleged.

The court gave to the jury the following instructions: "The state has introduced in evidence in this case the judgment roll in the case of the state against Fred Reyner, wherein the defendant therein was charged

with the crime of assault with a dangerous weapon, and, upon a plea of guilty to simple assault, was adjudged to pay a fine of \$50; and the state has also offered the testimony of the clerk of this court to the effect that Fred Reyner, named in the judgment roll, is the identical and same person as F. K. Reyner, the defendant in this case. I instruct you, gentlemen of the jury, that you can only consider this judgment roll for the purpose of determining the credit to be given to the testimony of the defendant. You cannot consider this record as a circumstance from which you might infer guilt of the defendant in this case, but only as a matter affecting the credibility of F. K. Reyner as a witness in his own behalf in this case upon the witness stand." An exception having been taken to this part of the charge, it is contended by the defendant's counsel that an error was thereby committed. For the purpose of determining the degree of credibility to which a witness is entitled, the record of a judgment may be received in evidence to show that he has been convicted of a crime. B. & C. Comp. § 852. We think no error was committed in giving this instruction.

Exceptions were taken to other parts of the court's charge, but, believing the errors assigned are unimportant, the judgment is affirmed.

STATE v. DWYER. (No. 1,712.)

(Supreme Court of Nevada. Aug. 12, 1907.)

CRIMINAL LAW—VENUE—REFUSAL OF CHANGE—ABUSE OF DISCRETION.

Evidence in a homicide case, deceased being a man favorably and widely known in the county and defendant a stranger, as to the very general and unqualified belief in the county in defendant's guilt and the bitter feeling against him, and of the knowledge of the jurors of such feeling and the possession by many of them of qualified opinions as to his guilt which would require evidence to remove, *held* to show an abuse of discretion in refusing a change of venue, under Cr. Prac. Act (Laws 1861, p. 467, c. 104) § 306, authorizing removal on the ground that a fair and impartial trial cannot be had in the county where the indictment is pending.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 243.]

Appeal from District Court, Lander County.

Patrick Dwyer was convicted of murder, and appeals. Reversed, and change of venue and new trial ordered.

Jas. F. Dennis, P. A. McCarran, and Wm. Woodburn, Sr., for appellant. R. C. Stoddard, Atty. Gen., and A. J. Maestretti, Dist. Atty., for the State.

NORCROSS, J. Appellant was convicted in the Third judicial district court in and for Lander county of the crime of murder in the first degree and sentenced to be hanged. From such judgment he appeals.

The principal question presented upon this appeal is whether or not the court erred in denying the defendant's various motions for a change of venue. Section 306 of the criminal practice act (Laws 1861, p. 467, c. 104) provides: "A criminal action, prosecuted by indictment, may be removed from the court in which it is pending, on the application of the defendant or state, on the ground that a fair and impartial trial cannot be had in the county where the indictment is pending." In the case of *State v. Millain*, 3 Nev. 432, this court said: "There are few cases that present themselves to appellate courts where it is more difficult to determine upon any settled principles or rule of action than in these cases relating to a change of venue. By all it is admitted that there is a broad discretionary power allowed the court of original jurisdiction. But, whilst that court has such discretion, it is still a judicial and not an arbitrary, discretion. If that discretion is used in an arbitrary and oppressive manner, an appellate court is bound to correct the error. But to distinguish between what is and what is not an abuse of that discretion is often a very nice and difficult question. There are two circumstances, the existence of either of which should entitle the defendant to a change of venue. The one is the impossibility of obtaining an impartial jury. The other is such a state of public excitement against the defendant that even an impartial jury would be likely to be intimidated and overawed by public demonstrations against the

accused." Commenting upon a similar motion in the case of *State v. McLane*, 15 Nev. 372, this court said: "On the whole, we think the application in this case for a change of venue was not materially stronger than that in the case of *Millain*, 3 Nev. 433, where the order overruling the motion was affirmed by this court. It is not shown in this case, any more than in that, that the parties threatening violence to the defendant were either numerous or influential; and we do not understand that the mere prevalence of a belief in the guilt of a prisoner, however widely diffused, is a circumstance from which it must be inferred that a jury would be intimidated or overawed." Again, in the case of *State v. Gray*, 19 Nev. 215, 8 Pac. 457, this court had the following to say in reference to a motion for change of venue: "Defendant applied for a change of venue on the ground of prejudice existing against him in the county where the indictment was pending which would prevent him from having a fair and impartial trial. The application was based upon affidavits tending to establish the fact alleged, and resisted by counter affidavits. It is unnecessary to consider the contents of the affidavits. The district court overruled the motion for the time being, until it could be shown by an examination of a sufficient number of jurors that a fair and impartial jury could not be obtained. After examining 81 persons a jury was impaneled. The statute authorizing a change of venue in criminal cases provides that, before granting the order, the court shall be satisfied that the representations of the moving party are true. The question whether a fair and impartial jury could be obtained depended largely upon the opinions of witnesses. Opinions differed widely, and the court adopted a very satisfactory test to ascertain the fact. The practice pursued was approved in *State v. Millain*, 3 Nev. 433, and by the Supreme Court of California in *People v. Plummer*, 9 Cal. 299, and in *People v. Mahoney*, 18 Cal. 181." The foregoing furnishes about all the light we may gather from the decisions of this court upon a question like that here presented. Outside of the fact that every case where a change of venue is sought must come within certain broad principles, each case must be determined upon its own particular facts.

The defendant's motion for a change of venue under the provisions of the statute was first made on September 26, 1906, after two days had been spent in examining jurymen, and after 81 jurymen had been examined upon their voir dire, with the result that only 11 had been passed, 3 of whom were passed over defendant's challenge for cause. At this time none of the 8 peremptory challenges allowed to each side had been exercised. The motion was based upon a lengthy affidavit of the defendant, affidavits of defendant's three attorneys, and the testimony of witnesses taken before the court. Affidavits and the testimony of witnesses in op-

position to the motion were also offered by the state. After considering the evidence in support of the motion at length the court said: "I think I shall overrule the motion, with permission to the defense to renew it at the close of the examination of the jurors in attendance to-morrow." Pursuant to the ruling of the court, on September 29th, and after 103 jurymen had been examined and the jury list exhausted without securing a jury, the motion for a change of venue was renewed, and based upon the additional showing of the jurymen examined since the motion was first made. The court examined the sheriff as to the number of electors who in his opinion were left in the county who would be subject to jury duty, and the sheriff gave it as his opinion that there were 150, approximately. The court denied the motion, and a recess was taken until 10 o'clock a. m. on October 1st, at which time the court notified counsel that he had submitted to the county commissioners the selection of 150 more names for jurymen. At the session of court held on the 1st day of October the motion for change of venue was again renewed, and denied by the court. The court announced that he would issue a venire for 100 names, stating at the same time: "I do not know whether you [the sheriff] can find 150 in the county or not." A recess was then taken until October 10th. On the day last mentioned court convened, and all the new veniremen responded to their names, excepting 26, who were returned as sick, out of the county, or not served. Immediately after the convening of court counsel for defendant presented a motion, supported by the affidavit of the defendant, for leave to examine the 8 jurors who had been passed and who were in the box at the time the recess was taken on the 1st of October, because of a certain alleged threatened assault upon the jail to secure the person of the defendant by violent means, which alleged threatened assault it was alleged might have come to the knowledge of the jurymen in the box, and, further, because of certain remarks of the county clerk made in the hearing of certain of the talesmen. The hearing upon this motion was in the absence of the jury. T. A. Oliver, the deputy sheriff and jailer, testified that during the recess of the court he had been informed by George Watt, an ex-sheriff of the county, "that there was going to be an effort made, or very likely to be an effort made, to take the man from the jail and lynch him, and I had better be very cautious and get help if I could. He (Watt) said he could not find out the parties, but he was told that the man would not be allowed to leave town; that it was either lynch him or break the county. I asked him if he could do nothing in the matter, and he said he did not know whether he could or not. If it was possible he would do so. He came to me the next evening, and told me there would be nothing done at present." The witness further testified to the

effect that Watt informed him "that he did not know where the parties were coming from, but that he was satisfied that they were from out of town; that he (Watt) had been asked to take part." Mr. Watt was out of town at the time the motion was presented, and, although a subpoena had been issued for him, the sheriff had been unable to serve it, and consequently the testimony of Mr. Watt was not at the time obtainable.

With reference to the matter of the statements of Mr. Dron, the county clerk, it had previously been shown by affidavit and the testimony of witnesses that Dron had remarked to one of defendant's counsel, within the hearing of the talesman: "I'll tell you one thing, if I had been in Austin when this occurred, you would not have been put to the trouble of trying the case." Because of this remark by the clerk, the court ordered him to provide a deputy and refrain from attendance upon the court. With regard to the remark in question the court, in considering the motion now under discussion, said: "You have already made a showing that the eight jurors in all probability heard the statement made by Mr. Dron, and, as it was not contradicted, it must be accepted as a fact." Upon the showing thus made the motion for leave to re-examine the jurors then in the box was denied, and the examination of the talesmen on the new venire was proceeded with, and a jury finally obtained; the defendant in the meantime having exhausted all his peremptory challenges. Upon finally securing the jury counsel for defendant asked for and were granted until the following day to prepare affidavits in support of a renewal of the motion for a change of venue. The final motion for change of venue was as follows: "The plaintiff will please take notice that on the opening of said court on the 12th day of October, 1906, the defendant will move said court to change the place of trial of said action to some other county within said state. Said motion will be made and based upon the ground that a fair and impartial trial cannot be had within the county of Lander, which is the county where said defendant was indicted and where said action was set for trial, for the reason that 98 per cent. of the people of said county are incensed and angry at the defendant, and are clamoring for his life, and have threatened him with violence prior to the date of his said trial and since said trial has been in progress. At the hearing of said motion said defendant will use his affidavit, a copy of which is hereby attached, a copy of the testimony of the witnesses heretofore testifying on a similar motion, and the affidavit used on said last-named motion, together with the stenographic copy of the voir dire of the jurymen E. W. Hunt, J. A. Hoskins, and Geo. Litster; also the stenographic report of the examination of all the jurors examined in said case since the 24th day of September,

1906, and all of the records and files of said case, together with the testimony of Scott Hickey and the testimony of one Plummer."

Without setting forth the contents of the numerous affidavits filed in support of the various motions for a change of venue, we will review the testimony of various witnesses in support of and in opposition to the motion, and state certain facts which are either admitted or clearly established by proof. The defendant, Dwyer, shot and killed one A. C. Williams on one of the principal streets in the town of Austin about 8 o'clock of the evening of July 31, 1906. At the same time he shot one Henry Dyer, the companion of Williams, inflicting a wound on Dyer which rendered him a cripple for life. There is nothing in the record showing or tending to show any motive upon the part of the defendant that would cause him to wish to kill Williams or injure Dyer. In fact, it appears undisputed that the defendant was not even acquainted with the deceased, and had only a slight acquaintance with Dyer, and that acquaintance entirely friendly. The theory of the state, if we understand it, was that the defendant killed Williams by mistake, thinking the latter was one O'Brien, a man with whom defendant had had trouble during the day over a prostitute. Williams, the deceased, was a young man highly respected in the community, where he resided with his parents. He was conductor on the local narrow-gauge railroad running between Austin and Battle Mountain, the only towns of any considerable importance in the county. He was known by the majority of the people of the county, and was regarded as a very popular young man. Dyer, the wounded associate of Williams, was at the time county recorder, a man almost universally known in the county. The defendant had only been in Austin and in the county a few days when the homicide occurred. He was a gambler by occupation, and was without friends, and had but few acquaintances in the county where he was to be tried for his life. It does not appear, and it is not likely from the facts shown, that he had many friends of influence at any place. The shooting down of two prominent citizens of Lander county upon one of the principal streets of the county seat, without any apparent cause, by a stranger whose character was not of the best, was something that quite naturally would arouse general public indignation. Immediately following the homicide it is shown that threats of violence against the defendant were made; some of these threats being made by prominent citizens both at Austin and at Battle Mountain. Whether or not there was ever any real danger of mob violence, the public feeling was such that the sheriff and peace officials of the county deemed it necessary to take precautions for the safety of the prisoner. The public feeling immediately following the homicide and at

the time of the trial may be indicated by the following extracts from the testimony of witnesses given in support of and in opposition to the motion for a change of venue:

P. A. McCarran, one of defendant's attorneys, testified: That in conversation with C. F. Littrell, the postmaster of Austin, during the progress of the trial, the latter remarked concerning the defendant: "It would be a hell of a jury that wouldn't convict that fellow." Also that in a later conversation Mr. Littrell said: "If he was acquitted tomorrow, he would not be apt to get out of town alive."

C. F. Littrell testified as follows: "I asked McCarran if he was one of the counsel, and told him he had a pretty hard fight here, and he said: "Would you want to proffer a box of cigars that we do not clear him?" I said: "It would be a hell of a jury that would turn him loose. * * * Q. Is it not true that the opinion you expressed is entertained by all the intelligent members of this community? A. At the time the thing happened there was quite a feeling, but I cannot say that I have heard any one express themselves lately. Q. Have you ever heard anybody express themselves contrary to the opinion that you expressed yourself? A. No, sir. * * * Q. Do you remember expressing a further opinion to Mr. McCarran with reference to the probable result to the defendant in case he should be acquitted on this trial? * * * A. I remember saying that I thought that if the officers had not made the arrest as soon as they did, and the defendant had attempted to get out of town, I do not think they would have ever had him locked up. Q. You mean that he would have been lynched? A. Yes, sir. Q. The public feeling at that time was very strong? A. Most assuredly. Q. If the officers had not got hold of him, the people would have lynched him? A. Yes, sir. Q. The feeling against the defendant at the present is very strong, as far as you know? A. I have not discussed with anybody except Mr. McCarran recently. I remember telling Mr. McCarran about the first part of it. Q. Did you hear Mr. McCarran testify this morning? A. Yes, sir. Q. Wasn't his testimony with reference to this matter substantially correct? A. I would differ in the point as to whether I said he would not get out of this trial, or whether I said when the arrest was made. I will not be positive about that. * * * Q. Don't you think that the condition of public sentiment with reference to this matter will have some slight effect on any jury that is impaneled to try the case, however fair the jury might be? A. I could not say in regard to that. Of course, it might have some; but I don't see why a man could not be conscientious in the matter."

C. B. Francis, a native of Austin, testified that he saw the remains of A. C. Williams and the condition of Henry Dyer after the

shooting; that the general expression of opinion was that the party who killed him "ought to be hung—summarily executed"; that he heard several expressions of opinion that he ought to be lynched. Subsequently the witness Francis was employed as a deputy sheriff to assist in guarding the prisoner. Witness testified that after he was so employed he was approached by two or three parties and asked if he would take a hand in lynching the defendant.

H. Warren, one of defendant's attorneys, testified that he had talked with more than 50 persons at Battle Mountain and Austin with a view of ascertaining what the feeling was in Lander county relative to the defendant, and that he had not heard an expression of opinion favorable to defendant, but that he had invariably heard expressions of opinion strongly unfavorable to him.

R. R. Landes, an employé of the Bank of Austin, testified substantially to the following effect: That from the expressions of opinion that he had heard the feeling in the community was not at all in favor of the defendant, and in the majority of cases was very strong against him. On the night of the killing, witness testified, he heard two or three persons express themselves to the effect that the defendant should be lynched.

T. A. Oliver, deputy sheriff and jailer, testified to the following: "Q. You have had an opportunity since to learn what the public opinion is with reference to the defendant? A. Yes, I have heard talk. Q. Will you state whether or not, as far as you have heard, that it is favorable or unfavorable? A. I should say it is unfavorable. Q. Very unfavorable? A. I should say very unfavorable. Q. To what number of people of Lander county does this feeling extend? A. I could not say. Q. Do you think it is entertained by a small number or a large number? A. Judging from our efforts to select a jury, I should say quite a large number of people. Q. Do you think that a jury, if selected in this case, will not be influenced by that opinion? A. I would not like to say whether I do or not. Q. Don't you believe, from your knowledge of the situation, that a jury that failed to find a verdict for conviction would receive a very hot reception in the town of Austin? A. I believe they would. Q. You believe a verdict of that kind would be very unpopular? A. Yes, sir. Q. Don't you think that the fact that it would be unpopular would influence a jury in arriving at a verdict? A. I have no right to say. Q. What is your opinion? A. If I were a juror, I would say it would have no influence. Q. With your knowledge of juries here and the community, do you think that a jury will not be influenced to some extent by the public feeling that exists? A. If a juror qualifies, he should not be so; but I should not like to say that I believe he would be. That is going too far."

Chas. A. Cantwell, assistant cashier of the

Bank of Austin, also an attorney at law, testified as follows: "Q. Some time along about the 31st of July or the 1st day of August you were asked to counsel with or see the defendant, were you not, or told that you could have the case, or something to that effect? A. I think it was some time within a week after the killing of Mr. Williams that Sheriff Murphy came to me. I don't remember just what the proposition was, but the idea he gave me was that I could have a place in the defense of this case if I desired it. Q. What did you reply? A. I told him that I did not want it. Q. Why? A. I told him in the first place that it was the unpopular side of the case, and I did not care to go into it, and my own feelings were such that I did not feel that I could do Mr. Dwyer justice as an attorney. Q. What did you consider the feelings as against the defendant? A. I took it that his position was so unpopular that I would injure myself in the long run by taking any part in the case. Q. Do you think there has been very much of a change since that time? A. No, sir; I do not. * * * My friendship for Henry Dyer, and my friendship and respect for Bert Williams, and the general view that I took of this killing, were such that I could not go into the defense of this man with my whole heart and soul, and give him what he was entitled to get from me as an attorney under the oath that I have taken before this court. * * * Q. Mr. Cantwell, what did you consider the public opinion in this town and this vicinity with reference to the guilt of Mr. Dwyer at the present time? A. I should judge it is almost the unanimous opinion of the community that he is guilty of the offense charged against him. Q. Do you believe, from your own experience, that any one, being in this town and community at the time of this occurrence, and remaining here ever since, could escape a feeling in this matter? I mean a feeling of resentment against the defendant? A. No; I do not think they could. * * * Q. Do you not believe that any jury impaneled to try this case would be to some extent influenced by the feeling of prejudice against the defendant, which you say exists in this community? A. Of course, there is a possibility that you could get a jury so strong-minded that they would not consider this; but I do not believe that it is possible. Q. To get a jury that would not be influenced to some extent by the feeling of the community? A. I think it would not be possible to get such a jury."

N. El Bartoo, master mechanic of the Nevada Central Railroad Company, testified as follows: "Q. Do you know of any excited condition of public feeling at Battle Mountain? A. Yes, sir; it was very strong. Q. It is right now? A. Yes; there is some feeling there yet. Q. What were the manifestations, so far as you remember, of that feeling? A. The feeling was that they wanted

to hang Dwyer. Q. You mean by that they wanted to hang him by violence? A. Yes, sir; they talked about lynching. Q. Were you present at any meeting that was held there? A. There was not any meeting. It seemed to be a general feeling with everybody. Q. Didn't some of them, with the view of carrying into effect the general public sentiment, arrange for car or engine to come to Austin? A. They asked me if they could get an engine to bring them up here. I told them, 'Yes'; that I would run the engine and help pull the string. Q. How long was that after the death of Mr. Williams? A. It was on the 1st of August. Q. Did you meet Mr. Watt when you came to Austin? A. I met him the first time after I came up to the funeral, in the afternoon about 2 o'clock. Q. Did you have some conversation with him regarding what ought to be done regarding the matter? A. We talked the matter over, and he said: 'I don't know as we can do anything now. We might see Williams, and if he wants to do anything, it is not too late yet.' I said if there was anything doing I would stay. Q. Were you discussing the lynching of defendant? A. Yes, sir."

George Watt, ex-sheriff of Lander county, testified as follows: "A. I have forgotten whether it was the day before Bert was buried, or the day after, * * * I met Bartoo in front of the post office, and we talked about the murder, and he asked me what I thought about it. I told him I thought we ought to hang him (Dwyer); but I said that, if his father would not take the interest, I did not feel as if I cared to put myself out. Bartoo said, 'We will go down and see Williams,' and I said 'All right.' As we walked down the street, we met him at the corner of Bray's, coming down the hill. We put the facts before him, and he said that he did not care to see any more of us get into trouble, and would rather we would let it drop. I said 'We will let it drop right here,' and since then I have taken no interest in the case. Q. You are quite extensively acquainted in Austin? A. Yes, sir; I know every one here. Q. Did you hear many expressions of opinion as to what ought to be done by Dwyer? A. No; I was very busy at the time, and did not hear very much talk. As far as I heard was a general expression of opinion. All were very much worked up over the matter, nearly every one. Q. The feeling was strong against Dwyer? A. Yes, sir."

A. J. Maestretti, district attorney, called by the defense as a witness in support of the motion, testified to certain precautions taken by the sheriff to protect the defendant in case of threatened danger, after which the following questions and answers appear in his testimony: "Q. You thought it necessary to take extra precaution? A. I did not think it was absolutely necessary. It is a fact that I thought a great many of the people were very angry and excited about this af-

fair, and if Dwyer should be taken out without proper precaution, and lose his life, it would be a sad reflection on the officers of this court, and it was to take every precaution that, in the event of anything of the kind did occur, the prisoner would have all the protection it was possible to give him. Q. You must have thought there was some danger? A. I thought there was a possibility of an attempt to get him. Q. You thought that by reason of the excited condition of public opinion? A. Yes, sir."

M. J. Murphy, sheriff of the county, was called by the state and gave the following testimony: "Q. Were you here July 31st last? A. No, sir; I arrived here on the 1st of August. Q. Did you on that day, or any day subsequent to that time, witness the gathering of any mob making any violent manifestations, demonstrations, or clamoring for the life of Dwyer? A. Well, I did see several little crowds around. Q. Did you hear them encouraging or soliciting each other or any one to make an attack on the jail or otherwise get possession of Dwyer? A. I did not hear them, but surmised what was going on. Q. You saw people standing together talking, and you surmised that they were discussing that subject? A. Yes, sir. * * * Q. You took what steps were necessary, according to your judgment and those with whom you advised, for the safe care and protection of the defendant? A. I did. Q. Is it not a fact, Mr. Murphy, that you openly and on more than one occasion said that any who made an attempt to take the life of Dwyer would have to do so over your dead body? A. I did." On cross-examination the witness testified: "Q. I understood you to say you were at Battle Mountain when this thing occurred? A. I was. Q. Did you hear anything of the excited condition of public opinion at that time? A. I did. Q. By reason of which you telegraphed special instructions to the deputy here to take special precautions? A. Yes, sir; I wired him to capture the man if possible, and use all precaution for protection. Q. The reason of that was you were aware of the condition of public opinion? A. Yes, sir. Q. When you came to Austin, wasn't the condition of public opinion, to your mind, in such an excited state that you thought it was necessary to employ extra guards? A. I did. Q. You did employ extra guards? A. Yes, sir. Q. How many? A. Four. * * * Q. You have quite an extensive knowledge in this county? A. Yes, sir. Q. Doesn't the feeling that existed in Austin at that time with reference to this defendant extend generally to the county? A. As an officer I hear more or less of it going around. Q. You hear a good deal? A. Yes, sir. Q. You regard it as being general? A. In a sense I do. Q. As an officer, do you believe that, with the present state of public feeling in this county, a fair and impartial jury can be obtained to try this case? A. That is a very hard question for me to an-

swer. I believe it is possible to get 12 men here. There are good square men here. Q. Do you think it probable? A. I will say it is possible. Q. During the time these hostile demonstrations and feelings prevailed against the defendant, did you not, on more than one occasion, have to tell people in this town that they could not take Dwyer unless they took him over your dead body? A. I did. Q. Did you believe it necessary to make those statements? A. Yes, sir."

L. A. Weller, justice of the peace for Austin, was called by the state and testified to the following: "Q. Do you believe it is probable at this time, from your experience and opinion, and what you have heard, that a fair and impartial jury can be secured in this case? A. I have never seen any demonstrations that would lead me to fear for one moment that there would be any violence or attempt to take the defendant. I have heard it talked about more here to-day than at any other time. Q. Do you believe that there is any existence of any such feeling that would have any influence whatever on a jury sworn to try the case? A. I do not think there is. I have not heard anything that would lead me to believe that there was any violence contemplated. Q. Do you believe, from what you have been able to hear, that in the event that a jury was secured to try this case, and they would render a verdict of acquittal of this defendant, that they would be subjected to any abuse, contempt, or anything of that kind. A. None whatever. If he was entitled to an acquittal, I think the community would applaud the act of the jury." Upon cross-examination the witness gave the following testimony: "Q. Didn't you hear, since this killing occurred, and haven't you heard frequently, expressions in this community against the defendant? A. I have heard expressions against lots of people. Q. Did you hear any expressions against this defendant? A. Not particularly. Q. Expressions of opinion characterizing the offense? A. I have heard criticisms upon his acts. Q. Were they favorable or unfavorable? A. I have heard several people say that he ought to be hung for his act. Q. Didn't you yourself say that if any man ever deserved hanging it was this defendant? A. No, sir. Q. Didn't you say that in front of this courthouse? A. No, sir; I said if the man had committed the offense, in all probability he would be hung. Q. If he committed the offense he ought to be hung? A. It was first reported that he killed these two people in cold blood. I said: 'If that is true, he deserves to hang.' Q. What was it you said with reference to the defendant and what ought to be done to him? A. I said, if he was guilty of the cold-blooded murder, he should be hung."

Dr. A. L. Mann, a physician residing at Austin, testified on behalf of the state as follows: "Q. Have you heard any expressions of feeling with reference to this defendant? A. Yes, sir; I have heard a good deal

of adverse criticism of his act, and the opinion that the penalty of the law should be visited on him. Q. Have you heard anything favorable to him in the way of expressions? A. I did hear that there was a good deal of sympathy being manifested, but from what quarters I could not tell. Q. Did you witness the gathering of any mobs, at or about any of those times, for the purpose of taking the defendant's life? A. No, sir. Q. Did you know of any such act? A. No, sir."

Cross-examination by Mr. Warren: "Q. You say that you have heard some expressions of sympathy in certain quarters, but you do not know the quarters? A. I said I heard that there were some expressions of sympathy, but from what quarters I did not know. On the 19th of August I was introduced to a gentleman for the first time, and the conversation led up to the recent tragedy, and about the second expression that the gentleman made to me was that there were a great many people in Austin sympathizing with the defendant. He was a stranger here. Said he had never been here before, and I did not ask him for specific information as to who was expressing sympathy for the defendant. Q. It is a wonder that you did not have some doubts as to his sanity. A. Yes, sir; I did, but he proved to be a very intelligent man. Q. Have you ever expressed your own opinion in a public way? A. Yes, sir. Q. You have heard a number of people express the same opinion that you entertain? A. Not quite as strong as I did. Q. It was not favorable to the defendant? A. No, sir. Q. Outside of this solitary instance, you have heard no expressions of sympathy for the defendant? A. No, sir." Redirect: "Q. You have stated that you stated your opinion very emphatically. Have you any objection to stating at this time the expression that you made? A. No, sir; I said that if the defendant had killed my boy in the manner in which he had killed that boy, if I could get hold of my pet rifle, I would get him if it was the last thing I did on earth."

A. B. Cooper, called on behalf of the state, testified as follows: "Q. I want to read you a little portion of the affidavit of Mr. Dwyer at the bottom of page 9. (Reads portion of defendant's affidavit concerning A. B. Cooper.) Mr. Cooper, what have you to say as to the truth of those matters? A. I don't think it is as it ought to be. I did not make any remark that I would lose my license if I testified in this case. I did talk with Mr. Warren, and he asked me a few questions, and I told him I thought I did not know enough about it to make a witness, and I asked him if the prosecution did not subpoena me, if he would not, and he said, 'No.' Q. Did you say you were afraid to be called as a witness because your business would be ruined? A. No, sir. Q. Did you say your license would be taken away from you? A. No, sir. Q. If you knew any testimony that would be favorable to Dwyer, would you hear-

itate on any account to give him the benefit of that testimony? A. No, sir." Upon cross-examination the witness testified as follows: "Q. Didn't you tell me, Mr. Cooper, that you wanted to be left out of it; that it was hurting your business? A. No, sir; I just said that the killing had hurt business all around. Q. Didn't you say that it hurt your business especially? A. It hurt my business the same as anybody else. Q. Didn't you say it would hurt your business if you testified in favor of the defendant? A. Yes, sir. Q. By reason of it being supposed that you were for the defendant? A. No, sir; I said if I should sympathize with him in any way it would hurt my business."

S. E. McIntyre, called on behalf of the state, denied certain allegations in defendant's affidavit that he (McIntyre) had made any violent expressions concerning defendant, or that he had at any time solicited or encouraged the doing of any violence to defendant, or that any one invited or solicited him to engage in any unlawful act towards the defendant, or that he knew of any mobs for such purpose. Upon cross-examination the witness testified: "Q. The people thought he ought to be punished for committing the crime. That feeling was general? A. I should judge so. Q. It extends to every one you know around here? A. Yes, sir; I think most every one is of that opinion. Q. Entertains a feeling against the defendant? A. I don't know as it is against him. Q. I believe you said you thought he was guilty? A. A man is not guilty until he is proven so. Q. It is a general opinion that he is guilty? A. Yes, sir. Q. All it needs is the stamp of approval of the court and jury? A. Yes, sir; to be legally guilty. Q. That is the general feeling, is it not, here? A. As far as I know. Q. Don't you think that general feeling is going to influence any juror? A. No, sir; I don't know as it would. Q. Do you think that you could get two people out of Austin that would be free from that feeling? A. I think you could out of the county. Q. What part of the county? A. From different parts. Q. You do not know where there are enough people residing to obtain a jury? A. No, sir."

The state also introduced a number of affidavits denying portions of the defendant's affidavits wherein he charged the affiants as advocating violent measures against him, but which did not refer to the feeling generally in the county.

Upon the last renewal of the motion for a change of venue the defendant offered the following testimony:

Scott Hickey testified as follows: "Q. What was your occupation formerly? A. An officer. Q. In Nye county? A. Yes, sir. Q. How did you first happen to come to this county? With reference to the case now on trial? A. At the request of Mr. Lynch and a man named Goodfriend, who loaned a team to these boys that came in here. Q. For

what purpose? A. Mr. Goodfriend wanted me to get the team, which I understood they were trying to sell, and Mr. Lynch wanted me to come, as Mr. Dwyer was in this trouble, because he thought I was pretty well acquainted here, and there was some pretty bad talk being made. * * * Q. Where have you been, out of town, since that time? A. In Battle Mountain, Bullion, Tonabo, and here again. Q. During all of the several times that you have been in this county, and the several places you have been, have you conversed with many citizens of this county relative to the defendant? A. Yes, sir; I have conversed with quite a number. Q. Approximately how many would you say? A. I don't know. I have talked more or less every day, and with a great many different people. Q. Have you talked with a hundred people? A. Yes, sir. Q. In consideration of your talking with that number of people, what would you consider the feeling here is toward the defendant? * * * A. Against him. Q. In what degree, mildly or strong? A. Strongly against him. Q. Angry and excited? A. Well, they speak very strongly against him, not in his favor by any means. There is no sympathy for him." Cross-examination: "Q. How long have you known the defendant? A. I think about a year and a half. Q. You are friendly disposed towards him? A. Yes; by meeting him and speaking to him."

George Watt testified concerning his informing Deputy Sheriff Oliver of an alleged attack on the jail as follows: "A. I believe it was a week ago yesterday. Henry Dyer telephoned up to me that he would like to see me, and I came down. I met him in the door of the saloon. He called me back and said he wanted to talk with me. He was pretty much under the influence of liquor at the time. He said: 'I have been thinking this matter over, and partly made up my mind to get that fellow if I can get some of the boys to go with me; but I don't want to do anything where I would have to hurt Al Oliver.' He asked me to ask Oliver how he felt about it. He said: 'I am a cripple for life, and he killed one of my best friends, and I am pretty much enraged over it.' I went to Al, and he said to tell the boys they had better not come. * * * Mr. Dyer was the only person who spoke to me about it, and he mentioned no associates. He said he thought he could get some of the boys to go with him. I spoke to Henry the next morning, and he said he would say no more about it. Q. From your observation, knowledge, and intercourse with the people, what would you consider the state of public feeling against this defendant throughout the county? A. At the time it happened it was pretty strong, but I believe right now I could try Mr. Dwyer. Q. You think you could try him, and give him what you believe he is entitled to? A. Yes, sir; and not any more, either. Q. Don't you think it would take a good deal of evi-

dence to make you turn him loose? A. I would surely turn him loose if he was innocent. Q. You say that you believe you are in a condition to try him. You believe you know the state of facts, and from that state of facts he deserves punishment? A. From my condition at present, it is hard to tell what I would do." Recross-examination by Mr. Maestretti: "Q. Isn't it what you mean to say that, if you were taken as a juror, if the state did not show you something in the way of evidence, you would not convict him? A. No, sir. Q. You believe now that, although you may have been somewhat excited at first, now you would be absolutely fair? A. Yes, sir. Q. Don't you believe that that is the statement of most of the people? A. It ought to be."

H. W. Dyer testified as follows: "A. What Mr. Watt said was true, except that I said I had made up my mind to get this fellow. I do not want to be understood as saying that I had made up my mind to get this defendant; but what Mr. Watt said was true in all other respects. * * * Q. Was there anything further back of your declaration to Mr. Watt? Had you consulted anybody or taken any steps toward forming a mob? A. I just asked Mr. Watt's advice."

H. J. Plummer was called by the defense and testified that he had resided in Austin since the 21st of May preceding; that he had heard E. W. Hunt, one of the jurors selected to try defendant, remark concerning the defendant: "The ———, they ought to hang him." E. W. Hunt was subsequently examined, and denied that he had ever made such a remark.

The foregoing contains substantially all of the material evidence before the court upon the motion, excepting that shown by the examination of the various jurymen on their voir dire. With the exception of L. A. Weller, the justice of the peace, there is not a witness who expressed an opinion that he thought a jury could be obtained that would not be influenced by the public sentiment against the defendant. The sheriff thought it possible to get such a jury, but he would not say he thought it probable. George Watt was of the opinion that he had cooled down sufficiently so that he could give the defendant a fair trial, and he expressed an opinion to the effect that the sentiments of most of the people ought to be the same as his own; but he did not venture the opinion that he believed they were. One hundred and seventy-five jurymen were examined before the jury was finally obtained, and it appears that the available jurymen of the county were very nearly exhausted when the jury was secured. Of the talesmen examined, 143 were excused by the court for having formed or expressed unqualified opinions touching the guilt or innocence of the defendant, and, all things considered, there can be but little, if any, doubt that the opinion formed or expressed went to the guilt of

the accused. After deducting from the list those that were excused for other causes, it is safe to say that 85 per cent. of the jury lists had formed or expressed an unqualified opinion as to the guilt or innocence of the defendant. Of the jury that was finally secured to try the case, 5, who resided in or near the towns of Austin or Battle Mountain, had expressed qualified opinions touching the guilt or innocence of the defendant that they stated would take evidence to remove, and of the 5 it has been strenuously contended that 2, at least, were shown to have been disqualified, namely, L. A. Lemaire and E. W. Hunt.

L. A. Lemaire, after testifying, and showing satisfactorily, we think, that the opinion which he then had was a qualified one, testified as follows concerning the expression of an opinion: "Q. Have you expressed an opinion as to the guilt or innocence of the defendant? A. Yes, sir. Q. Was that opinion expressed with a qualification, or just an expressed opinion without a qualification? A. The opinion is from what I have heard and read of the matter. Q. Did you qualify it when you expressed it? A. I don't think I qualified it. * * * Q. You stated that you have expressed an opinion, and without any qualifications? A. Yes, sir." Upon examination by the district attorney the juror testified: "Q. Mr. Lemaire, if I understand you correctly, you say that the opinion you expressed was one you had formed from what you had heard and read? A. Yes, sir. Q. You based your opinion on that? A. Yes, sir. Q. You have not heard any of the proceedings in the case? A. No, sir. Q. You were not present at the coroner's inquest or the preliminary examination? A. No, sir. Q. Then you have not heard any opinion, except that which you formed on what you had heard and read? A. No, sir. Q. Is that the opinion you expressed? A. Yes, sir. Q. Did you, at the time you expressed that opinion, have in your mind the reservation that it was a qualified opinion, based on those things that you had heard and read? A. If I had not heard and read anything, I could not have formed any opinion. Q. Isn't your opinion something like this: If so and so is the case I believe so and so, or if matters I have heard are true I believe such and such a thing. Was that the nature of the expressions you made? A. I took what I heard and read to be the facts of the case, and expressed an opinion accordingly. Q. You had no reason to doubt what you had heard? A. No, sir. Q. It was on the strength of that that you expressed an opinion? A. Yes, sir." The court then examined the jurymen as follows: "The Court: Do you know the difference between a qualified and an unqualified opinion? A. Yes, sir. Q. What opinion did you express? Was it qualified, or unqualified? A. I think it was a qualified opinion."

The expressing of an unqualified opinion

touching the guilt or innocence of the defendant, when such opinion is not based solely upon newspaper reports, is by statute made a disqualification of a jurymen, regardless of what opinion the talesman may actually have at the time of his examination. Criminal Practice Act, § 340 (Comp. Laws, § 4305); State v. Roberts, 27 Nev. 449, 77 Pac. 598. Mr. Lemaire, having been examined both as to the opinion which he then entertained and as to an expression of an opinion which he had previously made, must have confused the two propositions; for his answers given to the court and to counsel are in conflict. It is to be regretted that his attention was not called to this conflict, and the jurymen given an opportunity to express himself so that there would be no possibility of a misunderstanding. From the examination of this jurymen by counsel for the state, as well as the defendant, taken alone, we think the jurymen would be disqualified. The answers given to the only two questions propounded by the court, taken alone, would show him to be a qualified jurymen. Taking his whole examination upon the question of the character of opinion he expressed, and it is contradictory, if not utterly confusing; a condition which one or two questions from counsel would have easily cleared.

E. W. Hunt testified that he had both formed and expressed a qualified opinion touching the guilt or innocence of the defendant. During the course of his examination the following questions were propounded and answers given: "Q. Have you ever expressed the opinion that the defendant was guilty or ought to be hung? A. No, sir. Q. Have you ever expressed the opinion that he was guilty? A. I have. Q. You have expressed that opinion? A. Yes, sir. Q. Do you entertain that opinion at this time? A. Not of the indictment. Q. Do you in any sense? A. I do of the act; yes, sir." Prior to the foregoing the following questions and answers appear in the examination of this jurymen: "Q. How many people have you talked with about this case? A. Quite a number. Q. Have you heard any expressions of a favorable opinion to the defendant? A. Yes, sir; one. Q. Outside of court? A. No, sir. Q. You have expressed your opinion a good many times? A. Yes, sir. Q. You have expressed it to the effect that the defendant was guilty, have you not? A. Not of the indictment; no, sir. Q. But he was guilty of the homicide? A. Yes, sir. Q. You have expressed the opinion that the defendant was guilty of the act? Is that what you said? A. I have never expressed that opinion, because it is not necessary. There is no opinion on such a thing. Q. He is guilty of the homicide; you know that? A. I believe that to be true. I do not know it. Q. You have expressed an opinion that far, have you not? A. Yes, sir. Q. Have you expressed an opinion any further than that? A. I expressed a qualified opinion. Q. Fur-

ther than the opinion that he committed the act? A. Yes, sir. Q. But it was a qualified opinion? A. Yes, sir. Q. You qualified it, then? A. Yes, sir. Q. How did you qualify it? A. By the word 'if.'"

While it is urged that, upon the testimony quoted, this jurymen is disqualified, we will only consider his examination, the same as that of Mr. Lemaire, as a part of the case presented to the court upon a motion for a change of venue. From all the facts and circumstances before the court, can it be said that it was an abuse of discretion to have denied defendant's motion for a change of venue? It must be apparent that the proper solution of the question here presented is of far greater importance than the mere question of the guilt or innocence of this defendant. The right of trial by a fair and impartial jury is one of the most valuable privileges guaranteed by Constitution to the citizen. The law cannot be a respecter of persons, and say that this man shall be tried by a jury uninfluenced by public sentiment, and another man must take his chances with a jury that is subject to all the insidious forces that an almost universal public sentiment has time and again been demonstrated to wield. It is the glory of our judicial system that it throws the safeguards of protection from improper influences around the high and the low, the rich and the poor, alike. No matter how low a man may fall in the scale of human degradation, no matter how deep-dyed a criminal he may be, the law says he shall not be punished for his crimes, except upon a fair and impartial trial before an unprejudiced jury. If we are to say that the showing was in this case insufficient to warrant a change of venue, we have at least established a precedent that more of a showing than that here disclosed must be made before a change of venue can properly be had. But we do not believe such precedent should be established. It is shown here by overwhelming proof that it was almost the universal belief in the county of Lander that the defendant was guilty of the crime charged. The homicide was one which naturally would create a strong feeling of prejudice against the prisoner in a county of small population and where the person killed was very generally known, respected, and popular. Even if it were possible to procure a jury of 12 men from remote parts of the county who were not acquainted with the parties, and who had not heard the case discussed, and who could readily qualify, yet it would be hardly possible for such a jury not to become aware of the existence of such a general public sentiment; for the jurymen could not help but listen to the examination of the other talesmen, nearly nine-tenths of whom were disqualifying themselves because of their opinions, a circumstance to be considered, with others in the case, even though it alone might not be sufficient to warrant a change of venue. In this case, however, a

number of the jurymen selected to try appellant must have been acquainted with the public sentiment, independent of what might be disclosed upon the examination of other jurymen.

As apropos to the case now under consideration we quote from an opinion of the Supreme Court of Iowa in the case of *State v. Crafton*, 89 Iowa, 109, 56 N. W. 257: "Each case must depend upon its own peculiar facts and circumstances. We know how difficult it is for an appellate court to see these matters as they may have appeared to the trial judge, and hence it becomes us to be exceedingly careful in passing upon the question of the proper exercise of the discretion vested in the trial court. When, after due investigation, we are satisfied that the trial court has made a mistake, it is our duty to rectify it as far as possible. The language of this court in the case of *State v. Nash*, 7 Iowa, 347, is applicable in this case. It was there said: 'It is important, to maintain the usefulness of our judicial system, that no suspicion of influence from popular excitement in the administration of the law should be allowed to impair the public confidence in the fairness and impartiality of judicial proceedings. An excited state of public feeling and opinion is always the most unfavorable for the investigation of the truth. Not only should the mind of the juror be wholly without bias and prejudice, it should not only be free from all undue feeling and excitement in itself, but it should be, as far as possible, removed from the influence of prejudice and feeling and excitement in others.' A man charged with the commission of the grave crime of murder has a right to be tried by an impartial jury and in a community where his case has not been prejudiced and prejudged. It matters not what the standing or reputation of this defendant may be, or how low his condition, the law throws around him all the safeguards which the enlightened wisdom of the ages has shown essential to the safe, orderly, and impartial administration of justice. Considering the magnitude of the crime charged, the limited time between the homicide and the trial, the showing made for a change of venue, and the weakness of the resistance, we are impressed with the conviction that the court below erred in overruling defendant's motion." Also from the opinion of the Supreme Court of Alabama in the case of *Seams v. State*, 84 Ala. 410, 4 South. 521: "We repeat that the trial must be just, as well as the verdict reached through its appliances. This cannot be done as long as the minds of the jury are liable to be influenced by a prevailing public prejudice against the prisoner. When excitement runs high, and a public sentiment generally or widely prevails which would justify or tolerate a dealing with the

prisoner by the culpable modes of mob violence, which is the enemy of all law and good government, it is difficult to keep the infection of such prejudice from finding its way into the jury box, however honest in purpose the jury may be, or however enlightened may be the community from which they come. The duress of public opinion is often insidious and potent, and the best of men sometimes become its victims without being aware of it, or without the courage to resist the dominion of its influence." See, also, *People v. Suesser*, 132 Cal. 631, 64 Pac. 1095; *State v. Manns*, 48 W. Va. 480, 37 S. E. 613. As we have before stated, each case must depend upon its own particular facts and circumstances; but none of the numerous cases cited by counsel for the state, in our judgment, afford a precedent for sustaining the order of the court in this case.

The defense of insanity, superinduced by alcoholism, was interposed by the defendant. Two physicians, Dr. W. L. Samuels and Dr. Monihan, testified that, from their examination of the defendant and from the evidence adduced, the defendant was, at the time of the homicide and at the time of their testifying, suffering from alcoholic insanity, and was mentally irresponsible for his acts. Dr. A. L. Mann, from what would appear to be equal opportunities of examination and observation and from the evidence adduced, testified on behalf of the state that the defendant in his opinion was sane, both at the time of the homicide and at the time of the trial. This disagreement in the views of physicians of standing upon a question of so great importance serves to illustrate how dangerous it might be for such a vital question, upon such a conflict of testimony, to be left to a jury selected from the body of a county, where it may be reasonably presumed from the evidence adduced that nearly nine-tenths of the residents of the county believed unqualifiedly in the guilt of the defendant, and where nearly half of the jurymen were selected from whose portions of the county where the feeling was most general and bitter, and who showed by their examination that they were aware of the public feeling and were themselves possessed of qualified opinions as to the guilt or innocence of the defendant which would require evidence to remove. From all the facts and circumstances of this case we think a jury selected as this one was would likely be influenced more or less by the general public feeling, instead of being governed entirely by the evidence introduced upon the trial.

For the reasons given, the judgment is reversed, and the trial court is directed to grant the motion for a change of venue, for the purposes of a new trial, which is ordered.

TALBOT, C. J., and SWEENEY, J., concur.

SMITH v. WELLS ESTATE CO. (No. 1,714.)

(Supreme Court of Nevada. Aug. 3, 1907.)

1. APPEAL—RECORD—SUFFICIENCY.

In the absence of a waiver of objection, appellant's affidavit setting out the proceedings of the trial court would be an insufficient transcript, since the methods of taking appeals are matters of purely statutory regulation, and only bills of exception properly settled and signed by the judge and records complying with the statute will be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2462.]

2. SAME—WAIVER OF OBJECTION—BRIEF.

Under Supreme Court Rule 11 (73 Pac. xiv), requiring respondent to file and serve his brief within 15 days after the service of appellant's brief, and making a failure by either party to file his brief within the time provided a waiver of the right to orally argue the case, or to recover certain costs, and under rule 8, providing that exceptions or objections to the statement or transcript must be taken at the first term after the transcript is filed, and must be noted in the written or printed points of respondent and filed at least one day before the argument, or they will not be regarded, where appellant filed his brief February 26th and on April 1st, without making any reservation respondent obtained an order allowing it 10 days to file its brief, and it failed to file a brief or make any motion to dismiss the appeal within 15 days after the filing of appellant's brief, it waived its right to object to an irregularity in the manner or form of certification of the order appealed from.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2791, 2795.]

3. SAME—STATUTES CONSTRUED.

Prac. Act, § 332 (Comp. Laws, § 3427), provides that when a party, who has a right of appeal, desires a statement of the case to be annexed to the record of the judgment or order, he should prepare and file such statement and serve a copy thereof on the adverse party, who may file proposed amendments thereto, which may be settled and certified by the judge. Section 337 (Comp. Laws, § 3432) provides that the five preceding sections "shall not apply to appeals taken from an order made upon affidavit filed but such affidavit shall be annexed to the order in the place of the statement mentioned in those sections." *Held*, that the language quoted was not intended to authorize the filing of records on appeal set out and supported by an affidavit made after the order of the lower court and filed in the Supreme Court for the purpose of showing its proceedings, but rather to allow a simple method for taking to the Supreme Court for review orders of the district court made upon affidavits filed therein previous to the making of such orders, by filing as the record on appeal copies of such orders attached to the affidavit on which they were based, supported by the proper certificate of the clerk.

4. PLEADING—DEMURRERS SUSTAINED FOR MISJOINDER—RIGHT TO AMEND.

Under Prac. Act, § 68 (Comp. Laws, § 3163), providing that the court may in furtherance of justice amend any pleading or proceeding by adding or striking out the name of any party, and section 71, providing that the court shall in every stage of an action disregard any error in the pleadings or proceedings not affecting substantial rights, where plaintiff and others, several owners of different lots, sued for the diversion of water therefrom, and a demurrer for misjoinder of parties and causes of action was sustained, it was improper to strike plaintiff's amended complaint in which he sued alone; the allegations of the amended complaint relating only to property, acts, and matters set

out in the original complaint, and both demanding damages and general relief.

Norcross, J., dissenting.

Appeal from District Court, Washoe County.

Action by G. M. Smith against the Wells Estate Company. From an order dismissing his amended complaint, plaintiff appeals, and defendant moves to dismiss the appeal. Motion denied, and order appealed from reversed.

O. H. Mack, for appellant. S. Summerfield, for respondent.

TALBOT, C. J. The motion to dismiss the appeal and the merits in this case may be more conveniently understood and considered together.

The appellant, G. M. Smith, with P. W. Nicholson, T. J. Pickett, and his wife, Mary M. Pickett, filed a complaint against the Wells Estate Company, a corporation, in the court below, alleging Smith to be the owner in fee of 10 lots, together with 1½ miners' inches of water in the S. O. Wells ditch, in McCormick's addition to the city of Reno, and that he is in possession of these lots and entitled to the possession of this water; that Pickett and his wife were the owners in fee of 3 lots, and 1 miners' inch of water, in the S. O. Wells ditch, in said McCormick's addition, and were in the possession of these lots and entitled to the possession of this water; that Nicholson had purchased of the plaintiffs Pickett and wife the 3 lots and 1 miners' inch of water so owned by them, and had made partial payments therefor. There was an allegation that the water flowed, and that plaintiff Smith was entitled to an easement and right of way to have it flow, through the S. O. Wells ditch to his lands, and that he had long and continuously used it therein; that the defendant, through its agents and employes, disregarding the plaintiffs' rights, had filled up large portions of the ditch above the plaintiffs' lands and diverted all the water from their premises, to the damage of the plaintiff Smith in the sum of \$800. There were special allegations that, by reason of such diversion, the grass, verdure, garden, trees, and shrubbery growing on Smith's lands had dried up and died, to his damage in the sum of \$200, and that he had been compelled to pump and carry all the water for his live stock and poultry and for domestic purposes in his residence, to his damage in the sum of \$240. There were separate allegations of diversion of the water from and damage to the lands of the other plaintiffs. The prayer in the complaint asked for an order of the court compelling the defendant to open, repair, and clean out the S. O. Wells ditch and to let the waters of the plaintiffs flow through it undisturbed to their lands, for damages to them in separate amounts and for general relief. A demurrer to this complaint on the grounds, among others, that there was

a misjoinder of parties plaintiff, and that they had no joint or common interest in the subject-matter or in the damages or relief sought to be recovered, that several causes of action had been improperly joined, and that the alleged causes of action of the several plaintiffs were independent, was sustained by the court. An amended complaint was filed, naming Smith alone as plaintiff, alleging that he was the owner of the same lots and water as claimed by him in the first complaint, and that he was entitled to have it flow through the S. O. Wells ditch to his premises, and alleging, as before, that it had been filled up and the water diverted by the defendant, and special damages to him for the same cause and in the same amount as in the original complaint and general damages for the same diversion in a different amount. He demanded to have the title quieted to the water and water rights, ditch and ditch rights, and privileges belonging and appurtenant to his lands and premises, and for damages, costs, and general relief. The defendant filed a demurrer to the amended complaint, which was sustained, and moved to have it stricken from the files, on the ground that it was an attempt to change the parties mentioned in the original complaint and the nature of the original complaint of which it purported to be an amendment. This motion was granted by the court. The transcript on appeal, in two volumes, one designated "Plaintiff's and Appellant's Affidavit on Appeal," and the other without designation, were filed in this court on the 26th day of February, 1907, and the appellant's brief was filed on the same day. On April 10th respondent's brief was filed in this court, and therein it was asked that the appeal herein be dismissed upon the ground that the record is not in the form required by law. On April 11th appellant filed notice of a motion to have respondent's brief stricken from the files because it was not filed within the time required by rule 11 of this court (73 Pac. xiv). Accordingly two questions are suggested—whether the record is properly certified, and whether the respondent has waived its right to have the appeal dismissed if the certification is defective, at least one of which it is essential to determine.

In the volume of the transcript marked "Plaintiff's and Appellant's Affidavit on Appeal" copies of papers and proceedings of the court are set out and stated in the form of an affidavit by the plaintiff, followed by a certificate of the district judge that "the foregoing is the plaintiff's original affidavit on appeal and identified as such," and by the certificate of the county clerk of similar effect. The other and undesignated volume of the transcript seems to contain original papers which are followed by the certificate of the clerk, certifying that it contained all of the original files and papers, excepting the affidavit on appeal, including the original judgment roll, original complaint, amended complaint,

demurrers, and other papers. There was no certificate by the judge that the statement had been allowed and was correct, such as is usually attached to statements on appeal. In the absence of any waiver of objections, the affidavit made by the appellant setting out the proceedings of the court would be insufficient, as stated in *Hart v. Spencer*, 29 Nev. —, 89 Pac. 289. As has been held by this court, the methods of taking appeals are matters of purely statutory regulation. *Burbank v. Rivers*, 20 Nev. 81, 16 Pac. 430. By analogy only bills of exception properly settled and signed by the judge and records complying with the statute will be considered. *State v. Mills*, 12 Nev. 403; *State v. Rover*, 13 Nev. 17; *State v. Wilson*, 5 Nev. 43; *State v. Ah Mook*, 12 Nev. 369. Following this rule, the court has refused to receive affidavits to show irregularities or proceedings not regularly certified. *State v. Baker*, 8 Nev. 141; *State v. McMahon*, 17 Nev. 365, 30 Pac. 1000; *State v. Larkin*, 11 Nev. 314; *State v. Roderigas*, 7 Nev. 328; *State v. McLane*, 15 Nev. 345. Under rule 11, respondent is required to file and serve his points and authorities or brief within 15 days after the service of appellant's brief, and a failure by either party to file his brief within the time provided is deemed a waiver of the right to orally argue the case or to recover certain costs, and under rule 8 exceptions or objections to the statement or transcript must be taken at the first term after the transcript is filed, and must be noted in the written or printed points of respondent and filed at least one day before the argument, or they will not be regarded. On April 1st, without making any reservation, respondent obtained an order allowing it 10 days within which to file its brief, and this and the fact that it failed to file its brief or make any motion to dismiss the appeal within 15 days after the filing of appellant's brief we deem to be a waiver of its right to make the objections offered to the transcript. *Johnson v. Wells*, 6 Nev. 224, 3 Am. Rep. 245; *Truckee Lodge v. Wood*, 14 Nev. 293. The notice and undertaking on appeal are in proper form, duly certified by the clerk. If the order from which the appeal is taken were not included in the record, its omission would be fatal and could not be waived; but the same conclusion and result does not follow because there is an irregularity in the manner or form of certification of the order by reason of its presence here attached to the specification of error under an affidavit, a well-recognized method of proof in general practice, to which is attached the certificate of the clerk and district judge that it is appellant's "Affidavit on Appeal," instead of under a certificate following the language of the statute.

This case may be distinguished from *Marx v. Lewis*, 24 Nev. 306, 53 Pac. 600, in that the defect in the certification here is not as vital as the question involved there relating to the absence of any notice or bond

on appeal. If an inference may be drawn from the dicta in that case that no defects in the record can be waived, it would be opposed to these decisions of this court in 6 and 14 Nev., but more directly it is in conflict with the opinions of the Supreme Court of the United States and other courts holding that the lack of an undertaking on appeal and other omissions and irregularities may be waived. *Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. Ed. 1047; *Michel v. Meyer*, 27 La. Ann. 173; *Weidner v. Matthews*, 11 Pa. 336; *Gardner v. Investment Co.*, 129 Cal. 528, 62 Pac. 110; *Thompson v. Lea*, 28 Ala. 453; *Wheeler v. Burlingham*, 137 Mass. 581; *Ross v. Tedder*, 10 Ga. 426; *Howth v. Shumard* (Tex. Civ. App.) 40 S. W. 1079; *Hoagland v. Hoagland*, 18 Utah, 304, 54 Pac. 978; *Kirkpatrick v. Cooper*, 89 Ill. 210; *Pace v. Lanier*, 25 Fla. 558, 6 South. 262; *Engle v. Rowan* (Tex. Civ. App.) 48 S. W. 757; *Norris v. Monroe*, 128 Mass. 386; *Bolton v. McKinley*, 19 Ill. 404; *Wilson v. Kelly*, 81 Pa. 411; 2 Enc. P. & P. 348; 2 Cyc. 882, and cases there cited.

Apparently there was no attempt to serve or file the record as a statement on appeal under section 332 of the practice act (Comp. Laws, § 3427), which provides that, when the party who has a right of appeal wishes a statement of the case to be annexed to the record of the judgment or order, he should prepare and file such statement and serve a copy thereof on the adverse party, who may file proposed amendments thereto, which may be settled and certified by the judge. It would seem that, instead of following these provisions, plaintiff intended to proceed under section 337, which provides that the sections to which we have referred "shall not apply to appeals taken from an order made upon affidavit filed, but such affidavit shall be annexed to the order in the place of the statement mentioned in those sections." The language quoted was not intended to authorize the filing of records on appeal set out and supported by an affidavit made after the order of the lower court and filed here for the purpose of showing its proceedings, but rather to allow a simple method for bringing into this court for review orders of the district court made upon affidavits filed therein previous to the making of such orders by filing as the record on appeal copies of such orders attached to the affidavits on which they were based, supported by the proper certificate of the clerk. However, it being conceded that the record is not sufficient as a statement on appeal as distinguished from a transcript, if there were doubt as to objections to the record being waived because they were not presented in time, it might be claimed that the order in the lower court by analogy was made upon affidavit because it was based upon the complaint and amended complaint, both of which were verified, but more properly be said that the order dis-

missing the complaint was in the nature of a final judgment which might be reviewed on the judgment roll and papers certified here by the clerk. The practice act distinguishes between the methods of certification of statements and of transcripts on appeal. *Irwin v. Samson*, 10 Nev. 282; *Ry. Co. v. Johnson*, 7 Wash. 97, 34 Pac. 567. Section 335 provides: "The statement, when settled by the judge or referee, shall be signed by him, with his certificate that the same has been allowed and is correct. When the statement is agreed upon by the parties, they or their attorneys shall sign the same, with their certificate that it has been agreed upon by them and is correct." Section 340 provides: "On an appeal from a final judgment, the appellant shall furnish the court with a transcript of the notice of appeal, and the statement, if there be one, certified by the respective attorneys of the parties to the appeal, or by the clerk of the court. On an appeal from a judgment rendered on an appeal, or from an order, the appellant shall furnish the court with a copy of the notice of appeal, the judgment or order appealed from, and a copy of the papers used on the hearing in the court below, such copies to be certified in like manner to be correct." The amended complaint did not add any new cause of action or a new party, as was attempted to be done in the cases cited by the respondent. The allegations of the amended complaint relate only to property, acts, and matters set out in the original complaint. Both demanded damages and general relief. The fact that the damages are not asked in the same amount in the different paragraphs is nothing unusual in amended complaints. The prayer in the amended complaint that the title be quieted is controlled by the allegations which were similar in both so far as the plaintiff Smith is concerned. The court could grant any relief consistent with these allegations or with those in an answer. A part of the plaintiffs and the allegations on their behalf relating to damages, which it had been held by the court on demurrer could not be joined, were omitted in the amended complaint apparently for the purpose of bringing it within the order of the court sustaining the demurrer. Section 68 of the practice act provides that "the court may, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings by adding or striking out the name of any party," and section 71 that "the court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties."

As all the papers on which the court acted are before us under proper certification, and its order with them under affidavit and certification of the clerk and district judge, which do not comply with the statute, we think the latter defects should be deemed waived because no objection to them, or mo-

tion to dismiss the appeal, was made within 15 days as required by the rule, nor for more than 40 days after the filing of the transcript and appellant's brief, nor until after respondent had without reservation applied for additional time in which to file his brief, and, as the complaint states a good cause of action, we believe it is better that this technicality be so considered and disregarded, to the end that a trial may be had and the rights of the parties more speedily determined.

The order dismissing the amended complaint is reversed, and the district court will allow the defendant a reasonable time in which to answer.

SWEENEY, J., concurs.

NORCROSS, J. (dissenting). Conceding, for the purposes of this case, that respondent's motion to dismiss the appeal was not filed in time, and, for that reason, such motion cannot be considered, nevertheless I think the record in this case requires a dismissal of the appeal upon the court's own motion. What the appellant designates as his "Affidavit on Appeal" is something unknown to our practice, and is not authorized by any possible construction of our civil practice act. *Hart v. Spencer*, 29 Nev. —, 89 Pac. 289. That counsel filed his so-called "Affidavit on Appeal" under a misconception of our statute is clear. While I concede that defects and irregularities in the matter of an appeal, otherwise regular, may be waived, I do not regard the present appeal in such a condition. The so-called "Affidavit on Appeal," having no authorization in law, is, in my opinion, a nullity and cannot be considered for any purpose. As the other volume of the record, taken alone, does not present anything for the court's consideration, I think the appeal should be dismissed.

FINNEY v. AMERICAN BONDING CO.
(Supreme Court of Idaho. July 30, 1907.)

On petition for rehearing. Denied.
For former opinion, see 90 Pac. 859.

Neal & Kinyon and J. T. Morrison, for appellant. Frank J. Smith and W. E. Borah, for respondent.

SULLIVAN, J. This case was dismissed on the motion of the respondent at the May, 1907, term of this court, on the ground that the transcript on appeal was not filed and served in the time provided by paragraph 9 of rule 27 of the rules of this court (32 Pac. v). The facts in the case, so far as the decision on the motion is concerned, are sufficiently stated in the opinion on the motion. 90 Pac. 859.

It is earnestly contended by counsel for

the appellant that the court has misapprehended the facts and misapplied the law which ought to obtain on those facts. It is contended that, during all the time that the case was pending in the United States court, the proceedings in the state court were coram non iudice and void; and counsel for appellant cite *McIver v. Florida Central & P. R. Co.*, 65 L. R. A. 437, 110 Ga. 223, 36 S. E. 775, and *Kern v. Huidekoper*, 103 U. S. 485, 26 L. Ed. 354. In the last case above cited it is held that a proper removal of the cause from a state court to a United States court divests the state court of jurisdiction; but in the case at bar the Circuit Court of Appeals held that the United States court had acquired no jurisdiction by the attempted removal, and hence the removal was not a proper one. Aside from that, counsel for appellant appeared in the state court after the attempted removal, tried the case there, and, after judgment had been rendered against the appellant, attempted to take an appeal to this court by serving notice of appeal and filing an appeal bond, and thereafter did nothing further in the matter for about two years. They made no application to this court for an extension of time in which to serve and file their transcript on appeal. They cannot be permitted to blow both hot and cold in this matter. They contend in one breath that the state court had no jurisdiction, and again they claim that they took a valid appeal from the judgment of the state court during the very time that they now contend the state court had no jurisdiction of the case. If the state court had no jurisdiction, they, of course, could take no valid appeal from any judgment rendered by it; but, as we view it, their appeal was a valid appeal, because the case had not been properly removed.

Having neglected and failed to comply with the rules in filing their transcript and in pressing their appeal for more than two years after the appeal was taken, and having utterly failed to comply with the rules of this court in preparing, serving, and filing their transcript on appeal, the petition for a rehearing must be denied; and it is so ordered.

ALLSHIE, C. J., concurs.

STATE v. NEIL.

(Supreme Court of Idaho. July 30, 1907.)

On petition for rehearing. Denied.
For former opinion, see 90 Pac. 860.

Bartch & Bagley and Snyder & Snyder, for appellant. J. J. Guheen, Atty. Gen., and Edwin Snow, for the State.

SULLIVAN, J. This is a petition for rehearing. Under the provisions of section 8076, Rev. St. 1887, when the judgment of

the appellate court is rendered in a criminal case, it must be entered in the minutes, and a certified copy of the entry forthwith remitted to the clerk of the court from which the appeal was taken. It would seem clear from the provisions of that section that the appellate court does not retain jurisdiction in criminal cases after the judgment is entered and a certified copy thereof remitted to the trial court; for, after the remittitur goes down, the general rule is that the appellate court has no further jurisdiction. However, we have gone through the petition for rehearing, and have concluded that a rehearing ought not to be granted, even if this court still had jurisdiction to hear such petition.

It is urged in the petition that the court misapprehended the facts in the case; that in the original opinion the court assumed that the prosecutrix went boat riding with the appellant, when according to the evidence she went with Macbeth. It is admitted in the petition that the statement in the transcript leaves it somewhat ambiguous, at first impression, as to which person went boat riding with the prosecutrix. It is clear, at any rate, that she went boat riding with Macbeth. The defendant testified that his arms were lame from rowing the boat; but, conceding that the defendant did not take the prosecutrix boat riding, it makes no difference. The evidence is amply sufficient to sustain the verdict of the jury.

As to whether there were scratches upon the defendant's face, there is a conflict in the evidence, and the jury, no doubt, passed upon that question. As to whether the parties locked arms, the defendant testified that he took hold of the prosecutrix's arm, and they went outside and walked over to the barn, where the mules were standing. The evidence also shows that they had their arms partly around each other. We have gone carefully through the petition for rehearing upon the other points suggested, and are satisfied that, if this court had power to grant a rehearing, the showing is not sufficient in this case; and the petition for a rehearing must be denied.

AILSHIE, C. J., concurs.

ARWINE v. BOARD OF MEDICAL EXAMINERS OF CALIFORNIA et al.
(L. A. 2,009.)

(Supreme Court of California. July 8, 1907.)

1. PHYSICIANS AND SURGEONS—LICENSE TO PRACTICE—CERTIFICATES OF FOREIGN MEDICAL BOARDS.

St. 1901, pp. 57, 59, c. 51, §§ 5, 6, authorize the board of medical examiners to license an applicant to practice after examination, or without examination on presentation of a certificate from the medical examining board of the District of Columbia or any state or territory whose legal requirements at the time of issuing

the certificate were not less than those of California at the time such certificate was presented for registration to the California board. *Held*, that certificates or licenses to practice medicine and surgery granted by the board of examiners of the District of Columbia and the state of Indiana, in the absence of proof that the requirements of such boards were not less than those of California at the time the certificates were presented for registration, were insufficient to entitle the applicant to a license in California.

2. MANDAMUS—BURDEN OF PROOF.

On an application for mandamus against a medical board to compel petitioner's registration as a physician and surgeon within the state, the burden is on the petitioner to prove such material allegations on behalf of his claim as are denied by the answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 372.]

3. CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER.

St. 1901, p. 56, c. 51, authorizes the state medical board to accept from an applicant for registration as a physician and surgeon only such a diploma as is issued by some legally chartered medical school, the requirements of which shall have been at the time of granting the diploma in no particular less than those prescribed by the Association of American Medical Colleges for that year, was not void as an improper delegation of legislative power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 99.]

4. PHYSICIANS AND SURGEONS—LICENSE—QUALIFICATIONS—PROOF.

St. 1901, p. 56, c. 51, authorizing issuance of licenses to practice medicine within the state, declares that, when any applicant has shown himself possessed of the qualifications required "and" has successfully passed the examination by the board, the certificate must be issued, etc.; and section 5 (page 57) requires the production of the diploma issued by some legally chartered medical school, the requirements of which shall have been in no particular less than those prescribed by the Association of American Medical Colleges of that year, or satisfactory evidence of having possessed such diploma or a license from a legally constituted institution granting medical and surgical licenses only on actual examination or satisfactory evidence as having possessed such a license. *Held*, that such act required both a diploma or license and an examination by the board.

In Bank. Application by James T. Arwine for writ of mandamus against the board of medical examiners of the state of California and the members of the board, etc. An order was entered granting the relief prayed by the District Court of Appeal, and the case was transferred to the Supreme Court for hearing in bank. Writ denied.

Wallace W. Wideman and Benjamin P. Welch, for plaintiff. William C. Tait, George B. Becke, and Charles S. Wheeler (J. F. Bowie, of counsel), for defendants.

ANGELLOTTI, J. This is an application for a writ of mandamus directed to the defendants requiring them to issue to the plaintiff a certificate to practice medicine and surgery in the state of California. The application was originally made to the District Court of Appeal for the Second District. The matter was submitted for decision to

that court upon the affidavits filed by plaintiff at the institution of the proceeding and the verified answer of the defendants thereto. That court gave judgment for plaintiff, directing the issuance of the writ as prayed. In its opinion that court found as a fact that plaintiff had successfully passed the examination required by the provisions of the act for the regulation of the practice of medicine and surgery. St. 1901, p. 56, c. 51. On petition for a hearing in this court, an order was made by us vacating such judgment and directing that the proceeding be heard and determined by this court. The matter has now been submitted to us for decision, as it was to the District Court of Appeal, upon the affidavits and answer, and the stipulation of counsel for defendants, made upon the oral argument, that as to the facts of the case the opinion of the District Court of Appeal may be accepted as correct.

The right of the plaintiff to the certificate sought by him was dependent upon his compliance with the provisions of the act already referred to. That act required that, in order to procure such certificate, he must produce before the board of medical examiners, in addition to satisfactory testimonials of good moral character, a "diploma issued by some legally chartered medical school, the requirements of which medical school shall have been at the time of granting such diploma, in no particular less than those prescribed by the Association of American Medical Colleges for that year, or satisfactory evidence of having possessed such a diploma, or a license from some legally constituted institution which grants medical and surgical licenses only upon actual examination, or satisfactory evidence of having possessed such a license." It further required that, in addition to the presentation of such credentials, the applicant must be personally examined by such board of medical examiners and successfully pass such examination. It further provided that such board might, in its discretion, accept and register, without examination of the applicant, any certificate which shall have been issued to the applicant by the medical examining board of the District of Columbia or any state or territory of the United States, provided that the legal requirements of such medical examining board shall have been, at the time of issuing such certificate, in no degree or particular less than those of California at the time when such certificate shall be presented for registration to the board created by this act. Sections 5, 6, pp. 57, 59, of said act. The affidavits filed by plaintiff in instituting this proceeding contained allegations showing a sufficient compliance with these provisions to entitle him to a certificate. These allegations were denied by the answer in two material matters, viz.: As to the sufficiency of the credentials presented

by him with his application for a certificate, and as to the satisfactory character of his examination as to qualifications.

Upon the question as to the satisfactory character of the examination, we shall assume that the issue must be determined in favor of plaintiff under the stipulation of defendants' counsel as to the effect to be given to the opinion of the District Court of Appeal relating to the facts of the case. In this regard, the ultimate fact was as to whether or not the plaintiff had successfully passed the examination, and the District Court of Appeal explicitly found "that the plaintiff's examination was successful."

In the matter of credentials, the only documents alleged by the affidavits to have been produced to the board of medical examiners were, first, a diploma issued to plaintiff from the medical department of the University of the South at Sewanee, Tenn., which was alleged to be a legally chartered medical school, the requirements of which at the time of granting the diploma were in no material particular less than those prescribed by the Association of American Medical Colleges for that year; and, second, certificates or licenses to practice medicine and surgery granted by the boards of examiners of the District of Columbia and the state of Indiana. As to the latter, it was not alleged nor does it otherwise appear that either of such boards granted licenses "only upon actual examination," or that the legal requirements of either of said boards were, at the time it issued the certificate, in no degree or particular less than those of California at the time when such certificates were presented for registration. So far as the record before us shows, these certificates were, therefore, insufficient under the requirements of the act, and could not authorize the granting of a license by defendants.

Concerning the diploma from the medical department of the University of the South, the allegations as to the requirements of the school were such, as we have seen, as to require acceptance of the diploma issued to plaintiff as satisfactory, viz., that those requirements were in no particular less than those prescribed by the Association of American Medical Colleges for that year. This allegation is, however, denied by defendants in their answer. The issue of fact thus made was not determined by the District Court of Appeals; that court saying in its opinion that upon the evidence before it that question of fact could not be determined. That opinion does not state any evidence which enables us to determine this question, and no evidence was introduced before us upon the issue. The burden is, of course, upon the plaintiff, in a proceeding of this character, to prove such material allegations in behalf of his claim as are denied by the answer.

The finding upon this issue must, therefore, be against plaintiff, and it follows that, upon the case made before us, the diploma must be held insufficient under the requirements of the act.

It is suggested that the provision of the act authorizing the acceptance of only such a diploma as is issued by some legally chartered medical school, "the requirements of which medical school shall have been at the time of granting such diploma, in no particular less than those prescribed by the Association of American Medical Colleges for that year," is void, because the effect thereof is to delegate to this association a power which, it is claimed, can be exercised only by the Legislature itself. This court has recently decided to the contrary, in a case where a similar contention was made and fully considered. *Ex parte Gerino*, 143 Cal. 412, 417, 419, 77 Pac. 166, 66 L. R. A. 249. It is urged that what was said upon this point in that case was dictum. We do not so consider it; but, even if it were, we see no reason for receding from or modifying the views there expressed, and we adhere thereto.

It is further urged that the act should be construed as rendering an applicant entitled to a certificate upon his passing a satisfactory examination, even though he fails to produce the required diploma or license; in other words, that the act entitles him to a certificate either upon the production of a proper diploma or license, or upon passing a satisfactory examination. Clearly the act will bear no such construction. The language of the provision as to production of diploma or license is such as to necessarily make it applicable to every case, and no exception thereto is declared in any other part of the act. This provision is immediately followed by the provision as to examination, which declares: "In addition to the requirements above set forth, each applicant for a certificate must be personally examined as to his qualifications to practice medicine and surgery," etc. The next section (6) provides: "When any applicant has shown himself to be possessed of the qualifications herein required, and has successfully passed the said examination, a certificate must be issued," etc. In the face of such clear and unambiguous language, there can be no doubt as to the proper construction of the act in this regard. A diploma or license coming up to the requirements of the act is essential in every case to the right to a certificate, however well qualified the applicant may be in other respects.

We are forced to the conclusion that, notwithstanding the long experience of plaintiff as a practicing physician and surgeon, extending over a period of more than 10 years, and notwithstanding that he may have successfully passed the examination as to his qualifications to practice, it must be here held that he has failed to comply with the provisions of the act in the matter of pro-

ducing a proper diploma or license, and, therefore, that he must fail in this proceeding.

The application for a writ of mandamus is denied.

We concur: SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

(151 Cal. 559)

LITTLE v. THATCHER. (L. A. 2,005.)

(Supreme Court of California. July 23, 1907.)

1. APPEAL—INSUFFICIENT UNDERTAKING.

A notice of appeal from an order denying a new trial is not supported by an undertaking reciting only the judgment, stating that it was rendered on the date when the motion for a new trial was overruled, the judgment having been rendered several months before, and reciting a desire to appeal therefrom, the surety only undertaking that appellant will pay such costs and damages as may be awarded against her on "said appeal."

2. SAME—RIGHT TO CURE ERROR.

The recitals in an undertaking on appeal must identify the appeal it is intended to support, and, if they do not do so, the error is not curable under Code Civ. Proc. § 954, prohibiting the dismissal of an appeal for insufficiency of the undertaking, if a good one be filed before the hearing of the motion to dismiss.

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by W. E. Little against Catherine M. Thatcher. From an order denying a new trial, defendant appeals, and plaintiff moves to dismiss the appeal. Appeal dismissed.

Hahn & Hahn and Gavin McNab, for appellant. James P. Clark, M. M. Meyers, Borden & Carhart, Chas. L. Batcheller, E. E. Meillette, J. B. Wilder, Lawler, Allen & Van Dyke, A. L. & J. E. Stephens, and John W. Shenk, for respondent.

BEATTY, C. J. This is a motion to dismiss an appeal based upon the grounds, first, that the transcript was not served on the respondents; second, that no sufficient transcript was filed; and, third, that the notice of appeal is not supported by an undertaking. As to the first ground, it is now admitted that the printed transcripts were duly served. As to the second, the objection is obviated by the filing of a supplemental transcript by leave of the court. The only question remaining relates to the \$300 undertaking on appeal. The judgment in the action was rendered and entered February 20, 1906. A motion for a new trial was denied October 12, 1906, after the time for appealing from the judgment had expired. On the 22d of October two of the defendants gave notice of an appeal from that order, and within the time allowed by law filed the following undertaking: "Whereas, in an action in the superior court of the county of Los Angeles, state of California, judgment was on the 12th day of October, 1906, rendered by the said court in favor of the defendants and against the plaintiffs for the sum of \$1700 principal;

and, whereas, the said defendants are dissatisfied with the said judgment and desirous of appealing therefrom to the District Court of Appeals of California: Now, therefore, in consideration of the premises, and of such appeal, the National Surety Company of New York, a corporation having its principal place of business in the city of New York, state of New York, and having complied with all the requirements of the laws of the state of California respecting such corporations, does hereby undertake in the sum of three hundred dollars (\$300) and promises on the part of the appellant that said appellant will pay all damages and costs which may be awarded against them on said appeal, or on a dismissal thereof not exceeding the aforesaid sum of three hundred dollars \$300.00, to which amount it acknowledges itself bound."

The undertaking, it will be observed, recites only the judgment, and states that it was rendered on the date when the motion for a new trial was overruled. It recites the desire of the said defendants to appeal therefrom, and the surety only undertakes that the appellants will pay such costs and damages as may be awarded against them on "said appeal." Clearly it is insufficient in terms to support the appeal from the order; but, since an undertaking in proper form, approved by one of the justices of this court, was filed before the hearing of the motion to dismiss, the question to be decided is whether the undertaking originally filed was merely insufficient within the meaning of section 954 of the Code of Civil Procedure, and the fault curable by the approval and filing of a new one, or whether with respect to the appeal from the order it was in effect no undertaking at all. In a number of cases heretofore decided this court has held that the recitals in an undertaking on appeal must identify the appeal which it is intended to support, and that if they fail to do so the error is incurable. See *Estate of Heydenfeldt*, 119 Cal. 347, 51 Pac. 543, and cases there cited. See, also, *Pac. Pav. Co. v. Bolton*, 89 Cal. 154, 26 Pac. 650, *Schurtz v. Romer*, 81 Cal. 244, 22 Pac. 657, and cases cited under this case in the notes to California Decisions. I have never yielded a willing assent to this strict construction of the statute, but the rule is settled, and there does not seem to be any ground upon which this case can be distinguished from those in which the undertaking has been held to be fatally defective. The fact that when the undertaking was executed the time for appealing from the judgment had expired and that the only appeal by which the judgment might be set aside was an appeal from the order, the fact that the date of the judgment as recited shows that the surety confused the judgment and the order, and all the extraneous facts in the case amount to nothing in the face of the doctrine upon which the rule is founded; the doctrine, that is to say, that the recitals in the

undertaking must identify the particular appeal which it is intended to perfect.

The appeal is dismissed.

We concur: ANGELLOTTI, J.; SLOSS, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; McFARLAND, J.

151 Cal. 544

BELL v. STAACKE et al. (L. A. 1,852.)

(Supreme Court of California. July 22, 1907.)

1. APPEAL—DISMISSAL—NEW TRIAL—EFFECT ON JUDGMENT.

Where an appeal from a judgment is dismissed, the judgment is vacated by a subsequent order granting a new trial on appeal from an order denying the same.

2. SAME—SPECIFICATION OF ERRORS—FORM.

Appellant's motion for a new trial contained 285 specifications of errors of law occurring at the trial as to which appellant's brief contained only a reference to pages "685-703" of the transcript, making such pages and each and all of the specifications of errors of law therein set forth a part of its specifications, designating each of the errors as grounds for reversal of the order denying a new trial. The transcript merely contained bare specifications of alleged errors, and there was neither in the transcript nor brief any reference to the page or folio of the transcript where any ruling complained of was shown nor any argument in support of the alleged errors appeared. *Held*, that such specifications were fatally defective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3093.]

Department 1. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by John S. Bell against George Staacke and others. From a judgment in favor of defendants and from an order denying plaintiff's motion for a new trial, he appealed. Appeal from judgment dismissed. Order affirmed.

See 83 Pac. 245.

Richards & Currier and J. L. Crittenden, for appellant. T. Z. Blakeman, for respondents.

ANGELLOTTI, J. Plaintiff brought this action against defendant Staacke, and the representatives of the estate of Thomas Bell, deceased, to obtain a decree declaring that a tract of land in Santa Barbara county containing 10,000 acres, the title to which stands of record in the name of said Staacke, is held by him in trust for plaintiff, and requiring a conveyance thereof to him by Staacke. The defendants, by answer and cross-complaint, alleged that, while the title to the land was held by Staacke in trust for plaintiff, it was also held by him as security for certain advances made by Thomas Bell in his lifetime, at the instance and for the benefit of plaintiff, and asked that the claim of the estate against the land be enforced by a sale thereof. Upon a former trial the trial court, while finding that plaintiff was indebted to the estate of Thomas Bell in the sum of \$52,120.15 for money advanced and

loaned him by Thomas Bell, also found that the land was held by Staacke in trust solely for plaintiff, and not as security for any indebtedness due from him to the estate. It therefore gave personal judgment only in favor of the estate against plaintiff for the said amount, and directed a conveyance of the land by Staacke to plaintiff. The defendants appealed from the judgment and from an order denying their motion for a new trial. The appeal from the judgment was dismissed on the ground that the same had been prematurely taken. *Bell v. Staacke*, 137 Cal. 307, 70 Pac. 171. On the appeal from the order denying the motion for a new trial, which was subsequently heard, it was decided by this court that the evidence was insufficient to sustain the conclusion of the trial court that the land was not held as security for the payment of the indebtedness due Thomas Bell from plaintiff; it being declared after a careful view of the evidence contained in the record that such evidence showed without substantial conflict that the land was conveyed to Staacke to be held by him as security for the payment by plaintiff to Thomas Bell of all sums of money theretofore advanced or thereafter to be advanced to plaintiff by said Thomas Bell. The order denying defendants' motion for a new trial was reversed, except as to the issues relative to the amount of indebtedness due the estate from plaintiff, and the cause remanded for a new trial except as to the issues last referred to. *Bell v. Staacke*, 141 Cal. 186, 74 Pac. 774. Upon the new trial, which was had on the same pleadings, without change or amendment of any kind therein, the court found in favor of defendants upon the issues tendered by the answer and cross-complaint, and determined that Staacke holds the land in trust, first, as security for the payment of the sums due the estate, amounting with interest accrued on the \$52,120.15 indebtedness to \$95,101.07; and, second, in trust for the use and benefit of plaintiff. Judgment was given for the sale of the land for the payment of the indebtedness, together with costs and accruing interest. Plaintiff appealed from such judgment and from an order denying his motion for a new trial, but the appeal from the judgment has heretofore been dismissed.

It is contended that the evidence on the retrial was insufficient to sustain any of the material findings in favor of defendant. An examination of the 466 pages of the printed transcript containing the evidence given on the retrial shows that the evidence before the court was practically the same as that given on the former trial. Most of the testimony given consisted, by stipulation, of transcriptions of the reporter's notes taken at the former trial, and the additional evidence introduced did not materially affect the situation. The evidence was amply sufficient to support all the material allegations.

The brief of counsel for plaintiff contains a statement of facts which they claim were admitted by the pleadings, and which, they further claim, are in some respects contrary to the findings. This matter was available to plaintiff on the former appeal in support of the decision on the facts there under review; there having been no change in the pleadings. We have examined the record in the light of this statement of counsel, and find no admission in the pleadings contrary to any finding of fact, unless the pleadings show an admission that on or about March 6, 1889, the plaintiff and Thomas Bell by consent rescinded the agreement relating to the holding by said Thomas Bell, as security for plaintiff's indebtedness, of the Grover notes and mortgages, which agreement is described in the former opinion. 141 Cal. 197. The allegation to this effect was made in one of plaintiff's amendments to plaintiff's amended and supplemental complaint, and it is claimed that the allegation was not denied. It was apparently treated at the trial as denied, and evidence was received thereon, the trial court finding against the allegation. This matter is, however, of no importance on this appeal. It may be assumed that the rescission of this agreement as to the Grover notes and mortgages was made as alleged, and there is still ample evidence to support the material findings of the court as to the terms and conditions upon which the land in dispute was placed in the name of Staacke. If the court had found in accord with such allegation of rescission, instead of against it, such finding would have been simply a finding as to a specific fact not necessarily inconsistent with the findings as to the agreement and understanding upon which the land was placed in the name of Staacke. What we have said on this point sufficiently disposes also of the claim that, by reason of said alleged admission, the decision is against law, and the claim that, for the same reason, the findings do not support the judgment. It should be observed, however, that questions as to the sufficiency of the findings to support the judgment cannot be considered on an appeal from an order granting or denying a motion for a new trial.

A claim that the superior court had no jurisdiction to retry this case, notwithstanding that it was remanded by this court for a new trial, is based on the fact that the appeal from the former judgment in favor of plaintiff was dismissed. This, it is said, constituted an affirmance of the judgment, preventing the subsequent giving of any other judgment. But a judgment, even although expressly affirmed on appeal, is vacated by an order granting a new trial. See *Swett v. Grey*, 141 Cal. 83, 88, 74 Pac. 561.

There are 285 specifications of errors in law occurring at the trial made in the statement on motion for a new trial. As to these,

all that is said in their brief by counsel for plaintiff is that they "hereby specially and respectfully refer to pages 685 to 703 of the transcript as to the specification of errors in law occurring at the trial and excepted to by the plaintiff, and hereby make said pages of the transcript, and each and all of the specifications of errors of law therein set forth a part of this point and of these points and authorities as if set forth at length herein, and we hereby point out and designate each of said errors so specified as one of the grounds upon which appellants claim the right to a reversal of said order denying a new trial." The portions of the transcript thus referred to contain simply the bare specifications of alleged errors. There is neither in transcript nor brief any reference to the page or folio of the 723-page transcript where any ruling complained of is shown, or any argument in support of the claim that the trial court erred to plaintiff's prejudice in any of these rulings. Under such circumstances we are justified in disregarding such claim altogether. See *People v. Wo*, 120 Cal. 294, 297, 52 Pac. 833; *Whyte v. Rosencrantz*, 123 Cal. 634, 642, 56 Pac. 436, 69 Am. St. Rep. 90; *People v. Gibson*, 106 Cal. 458, 475, 39 Pac. 864; *People v. Daniels*, 105 Cal. 262, 264, 38 Pac. 720; *Wheelock v. Godfrey*, 100 Cal. 578, 589, 35 Pac. 317; *Neylan v. Green*, 82 Cal. 128, 23 Pac. 42; *West v. Crawford*, 80 Cal. 19, 33, 21 Pac. 1123. It is proper to say, however, that in our examination of the evidence contained in the record we have discovered no erroneous ruling on the part of the trial court.

The order denying plaintiff's motion for a new trial is affirmed.

We concur: SLOSS, J.; SHAW, J.

151 Cal. 500

CHAPMAN v. MOORE et al. (L. A. 1,881.)
(Supreme Court of California. July 16, 1907.)

1. ABATEMENT AND REVIVAL—OTHER ACTION
PENDING.

Evidence that a prior suit to quiet title to the same lot against the same parties had been brought by plaintiff's predecessor in interest, and was pending as to defendants S. when the present action for the same relief was brought against them and others, was sufficient to entitle them to the abatement of the present action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, §§ 73, 76.]

2. PROCESS—PUBLICATION—SUMMONS—AFFIDAVIT.

An affidavit for publication of a summons against nonresidents recited that they had been sought for to obtain service, but after diligent search and inquiry could not be found within the state. It then proceeded to show the kind of search and inquiry that had been made; that the affiant had made inquiry of all persons from whom he could expect to obtain information as to the residence of the defendants, together with the names of the persons of whom he made inquiries, and why he expected them to

know of the defendants' whereabouts. *Held*, that the affidavit constituted a substantial compliance with Code Civ. Proc. § 412, authorizing service by publication where the person sought to be served "cannot after due diligence be found within the state," though the affidavit failed to expressly state the result of the affiant's inquiries.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 118.]

3. JUDGMENT—QUIETING TITLE—EFFECT AS EVIDENCE.

Where a judgment in a suit to quiet title determined that a party to the action was the owner of the property in controversy, such judgment was admissible in evidence in behalf of a party claiming under the judgment and subsequently asserting a claim to the property affected by it, as a link in his chain of title as against persons not parties nor privies claiming an interest in the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1233.]

Department 2. Appeal from Superior Court, Los Angeles County; P. Conrey, Judge.

Action by William Chapman against O. A. Moore and others. From a judgment in favor of defendants, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed as to defendants Strohm and reversed as to defendant Moore.

Charles Lantz, for appellant. William Chambers, for respondents.

LORIGAN, J. This action was originally commenced by M. M. Davis as plaintiff, and subsequent to its commencement the present plaintiff, William Chapman, was substituted in the superior court for said Davis as plaintiff. The action was brought to quiet title to lot 4 in block C of the Sunset tract, in the city of Los Angeles; the plaintiff making the usual allegations of ownership of the property, and the defendants asserting claims thereto adverse to him. The defendant O. A. Moore, in her answer, denied the alleged ownership of plaintiff, and asserted ownership of the lot to be in herself. The defendants Strohm, in a separate answer, also denied the ownership of plaintiff, and asserted that the defendant Susan Strohm was the owner of the property. These latter defendants also pleaded in abatement of the present action the pendency of a prior action brought against them by M. M. Davis to quiet title to this same lot. Upon the trial the court found in favor of the defendants Strohm on their plea of abatement, found also that plaintiff was not the owner of the property, and entered judgment that the action abate as to the Strohm, and in favor of O. A. Moore for her costs. Plaintiff appeals from the judgment and an order denying a motion made by him for a new trial. On the trial of the cause the only evidence presented upon the issue of ownership of the property was that offered by the plaintiff. No evidence was offered by the defendants at all save by the Strohm in support of their plea in abatement.

As grounds for a reversal it is insisted by,

appellant that the court erred in sustaining the plea of abatement interposed by the Strohm, that it erred also in rejecting certain evidence offered by plaintiff, and that the finding of the court that plaintiff was not the owner of the property in dispute was not justified by the evidence.

As to the plea in abatement: This was the first issue tried by the court. In support of it the Strohm, offered in evidence the record in the suit of *M. M. Davis v. B. E. Ninde, Samuel Strohm, Susan Strohm, William Patterson et al.*, which showed that a suit to quiet title to the same lot involved in the action then on trial was commenced February 3, 1903 (the complaint in this action was filed August 27, 1904), and was then pending as to the said defendants Strohm. This was the only evidence offered, and at its conclusion a motion was made on behalf of said defendants Strohm, on such showing, to have this action as to them dismissed, which was granted. The showing was sufficient to sustain the plea and upon it the Strohm were entitled to have the subsequent action against them abated. Section 430, subd. 3, Code Civ. Proc., and section 433, Code Civ. Proc. The Strohm by this order of the court having been dismissed from the case, the trial then proceeded between the plaintiff and the defendant Moore. To sustain his title against her, plaintiff offered in evidence, among other documents, a certificate of sale of said property made July 3, 1895, to the state of California for state and county taxes for the year 1894, a deed of said property, dated July 6, 1900, from the county tax collector to the state of California for said taxes, also a deed of said property from said tax collector to plaintiff dated September 21, 1901, made pursuant to an authorization of the State Controller to sell said land. The court refused, upon defendants' objection, to admit such instruments in evidence, and this ruling is assigned as error. In the briefs of respondent no grounds are suggested in support of the ruling and no specific objections are urged against the validity of these several tax-sale instruments. Counsel for respondent simply says: "The questions as to the validity of this state deed involved in this action are the same as those now before the Supreme Court in the case of *Barrett* (which should have been *Baird*) versus *Munroe*, Los Angeles No. 1623 * * *." The case of *Baird v. Munroe*, 89 Pac. 352, had not been decided by this court, when the briefs in this present appeal were filed, but it has been since, and the various grounds urged against the validity of a tax deed there involved, similar to the one in question here, were deemed untenable, and the validity of the deed sustained. It is unnecessary to refer here to the objections urged against the deed considered in that case, or to restate the grounds upon which the court sustained its validity, as they will fully appear from an examination of the decision rendered. *Baird*

v. Munroe, 89 Pac. 352. See, also, *Carter v. Osborn*, 89 Pac. 608. It follows, therefore, that the trial court erred in refusing to admit in evidence the tax deed offered by plaintiff.

The only other questions presented upon this appeal involve the validity of a certain judgment and its effect, if valid. It was stipulated on the trial that a certain deed dated and recorded in October, 1887, conveyed title in fee to the lot of land in controversy here to one *Walter Patterson*. Such admission being made, the plaintiff offered in evidence a judgment roll in a suit brought by *M. M. Davis*, the predecessor of plaintiff, versus *B. E. Linde, Samuel Strohm, Susan Strohm, and Walter Patterson* (the same action heretofore referred to as pleaded in bar by the Strohm), which showed that an action to quiet title to this same property was commenced by *Davis* against the defendants by complaint filed February 3, 1903; that an affidavit and order for publication of summons on one of the defendants—*Walter Patterson*—were subsequently made and filed and service of the summons made upon said *Patterson* by publication; that the default of *Patterson* was subsequently entered and thereafter on April 4, 1904, a decree was entered quieting the title of said *Davis* to said lot against the said defendant *Patterson*. No objection was offered to the admission of the judgment roll, and it was received in evidence. The plaintiff supplemented this offer by proof of a conveyance of the lot in controversy from *M. M. Davis* to himself, and rested his case.

It is insisted by appellant that this showing—the admission of title in *Patterson* at a given date, the decree quieting title subsequently obtained against *Patterson* by plaintiff's predecessor *Davis*, and the conveyance of *Davis* to himself—sustained his claim of ownership to the property against the defendant *Moore*, and the finding of the court that he was not such owner was not justified by the evidence. This claim of appellant is in our judgment unquestionably true, unless, as insisted by respondent, the decree quieting title to the lot in question against *Patterson* in the case just referred to is void, or unless there is some merit in the position of respondent, that, even if valid, the decree was not available to plaintiff as a muniment of title against her.

Now, as to the validity of the decree: The order for service of summons upon the defendant *Patterson* by publication was based on an affidavit of the attorney for *Davis* purporting to make out a sufficient showing that defendant *Patterson*, at the time when the service of summons was sought to be made upon him, could not, with due diligence, be found in the state of California. It is contended by respondent, and this is the only point made as to the sufficiency of the affidavit, that, while it shows that the affiant made inquiries to ascertain the whereabouts

of Patterson, it does not appear what information he got from those of whom he made the inquiries; that for all the affidavit shows these persons may have informed him that Patterson was residing in Los Angeles, or somewhere in the state; that a statement of the result of his inquiries in the affidavit was essential to warrant an order of publication; that without it the court had no jurisdiction to make the order, and the order for the service of summons and the service under it and the decree were all void. It is true, as claimed by respondent, that the affidavit fails to state what information the affiant received concerning the whereabouts of Patterson from those of whom he inquired concerning him. But in the case of *Ligare v. Cal. S. R. R. Co.*, 78 Cal. 610, 612, 18 Pac. 777, it was held that such an omission was not fatal, if from the other facts stated in the affidavit it could be reasonably inferred that such inquiries to ascertain the whereabouts of the defendant were unavailing. In the case at bar the affidavit, in so far as it bears upon the point involved, stated that Walter Patterson could not be found in the state of California after diligent search made therein for him by affiant; that such diligent search consisted of making inquiries of each and every person from whom he had reason to believe he would receive knowledge of the whereabouts of Patterson. Then follows a statement of the persons of whom he made inquiries, and why he expected them to know of his whereabouts. In the case cited the affidavit under consideration there contained the same statements, but, like the case at bar, failed to state what the result of the inquiries was. It was held, however, that the affidavit was sufficient; the court saying: "It is argued that the affidavit for publication was insufficient on the question of diligence. The Code provides that service may be made by publication (among other cases) where the person on whom it is to be made 'cannot, after due diligence, be found within the state.' Code Civ. Proc. § 412. The affidavit in question first states that certain defendants, among whom is the plaintiff here, 'have been sought for to obtain service of summons thereon, but, after diligent search and inquiry, cannot be found within the state.' It then goes on to show what kind of search and inquiry have been made, viz., that the affiant 'has made inquiry of all persons from whom he could expect to obtain information as to the residence of said defendants.' It is not expressly stated what was the result of these inquiries. But the statement must be read in connection with what preceded it, viz., that after inquiry the said defendants 'cannot be found within the state.' And, so reading it, we think it is to be inferred that the inquiries were fruitless." The court held the decree attacked in that case for insufficiency of the affidavit

of publication valid against a collateral attack such as is made here, and upon the authority of that case the affidavit here must be held sufficient and the decree quieting title to the lot in question in favor of Davis and against Patterson to be valid.

Now, as to the effect of the decree: While respondent has contended here, though ineffectually, that the decree is void, he also insists that, even if valid, the trial court properly rejected it when offered as constituting a muniment of title in behalf of plaintiff against the defendant; that the decree was only conclusive against Patterson and parties in privity with him having notice of the judgment (subdivision 2, § 1908, Code Civ. Proc.), and did not affect the rights of the defendant Moore. And it is asserted by respondent in his brief that this was the view taken by the trial court. If so, it was incorrect. While the general rule undoubtedly is that judgments bind only parties and privies, still there is an exception to the rule universally recognized which sustains their admissibility against third parties who are not parties or privies to the judgments for certain purposes. This exception is that the judgment rendered in an action involving title to property, and in which it is determined that the title is in one of the parties to the action, is admissible in evidence in behalf of the party claiming under the judgment, and subsequently asserting a claim to the property affected by it as a link in his chain of title, although such judgment would not be conclusive on the party against whom it is offered because he was not a party or privy thereto. It is admissible in evidence, not for the purpose of defeating or affecting any claim or title of a party who was not a party or privy to such judgment, but solely as a muniment in an asserted title. In *Barr v. Gratz's Executors*, 4 Wheat. (U. S.) 213, 4 L. Ed. 553, the rule is stated: "It is true that in general judgments or decrees are evidence only in suits between parties and privies. But the doctrine is wholly inapplicable to a case where the decree is not introduced as per se binding upon any rights of the other party, but as an introductory fact to a link in the chain of plaintiff's title and constituting a part of the muniments of his estate. * * * To reject the proof of the decree would be, in effect, to declare that no title derived under a decree in chancery was of any validity except in a suit between parties and privies, so that in a suit by or against a stranger it would be a mere nullity. It might with as much propriety be argued that the plaintiff was not at liberty to prove any other title deeds in this suit, because they were *res inter alios acta*." To the same effect are the cases of *Kurtz v. St. Paul & D. R. Co.*, 65 Minn. 60, 67 N. W. 808; *Gage v. Goudy*, 141 Ill. 215, 30 N. E. 320; *Railroad Equip. Co. v. Blair*, 145 N. Y. 607, 39 N. E. 962; *Bussey v. Dodge*, 94 Ga. 548,

21 S. E. 151; *Skelly v. Jones*, 70 N. Y. Supp. 447, 61 App. Div. 173. Also 24 Am. & Eng. Ency. of Law, p. 757; *Freeman on Judgments*, § 416. These authorities declare the exception to the general rule to be well established that a party claiming under a judgment is entitled to prove it as a muniment in his chain of title, and we content ourselves simply with a reference to them as nothing to the contrary is cited by respondent.

Applying this rule, then, to the effect of this judgment considered with the other proofs of title made by appellant, and it is clear that the finding of the court complained of was not justified by the evidence. It was conceded on the trial that in 1887 the legal title to the lot in controversy was in Walter Patterson, and the presumption is that the legal title continued in him until it was shown that he had conveyed it, or that in some way it had become extinguished, or his title defeated or barred. It was defeated and barred by the judgment obtained by Davis, the predecessor of plaintiff, against Patterson in 1894. As between these two, it was there adjudged that the legal title, conceded, and theretofore presumed to continue in Patterson, was, as against him, in Davis, and such adjudication was as effective evidence of title to the property in the latter, and as conclusive of any claim of Patterson, or his privies, as if Patterson had made him a conveyance of it by deed. A deed from Patterson to Davis would have been conclusive evidence against Patterson that legal title had in fact been transferred to Davis by him, and, of course, would be admissible as a link in the asserted claim of plaintiff of title to the property. So with the judgment. As it was effective as against Patterson's claim of title as if he had made Davis a deed to the property, it was, under the rule heretofore stated, admissible for the same purpose that his deed would have been—as a muniment of title. Being so admissible, it, with the previous concession of legal title in Patterson, and the presumption arising therefrom, together with the conveyance from Davis to plaintiff, established in him *prima facie* title to the property, which in the absence of any evidence of title in the defendant would have warranted a judgment in his favor against the defendant Moore, and the finding of the court in the face of this *prima facie* showing, that plaintiff was not the owner, was not justified by the evidence.

These are the only points made in the case, and for the reasons given the judgment and order denying the motion of appellant for a new trial are reversed with costs on appeal to appellant, and affirmed as to the Strohm's, with costs in their favor.

We concur: McFARLAND, J.; HENSHAW, J.

151 Cal. 530

HIMMELS v. SENTOUS et al. (L. A. 2,019.)
(Supreme Court of California. July 20, 1907.
Rehearing Denied Aug. 20, 1907.)

1. CHATTEL MORTGAGES—MORTGAGED PROPERTY—REMOVAL—EFFECT.

Civ. Code, § 2965, provides that, where mortgaged chattels are removed to another county, they are relieved from the operation of the mortgage, except as between the parties, unless the mortgagee within 30 days after such removal causes the mortgage to be recorded in the county to which the property is removed or takes possession. *Held* that, where mortgaged property is removed to another county by the mortgagor, the mortgage remains a subsisting lien, of which the original record is constructive notice to all the world during the 30 days after such removal within which the mortgagee is authorized to continue the lien by re-recording the mortgage or taking possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 166, 167.]

2. SAME—FAILURE TO RECORD.

Where, after the removal of mortgaged hogs to another county, the mortgagor sold them to defendants, who slaughtered them and sold the meat within 30 days after such removal, the mortgagee's failure to re-record the mortgage in the county to which the hogs were removed after they had been killed did not impair his lien nor his right to recover against defendants for the conversion of the hogs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 167, 269.]

3. SAME.

In the absence of specific statutory provisions regarding the removal of mortgaged chattels, the regular original record of a chattel mortgage is constructive notice to all the world, and the mortgage continues a valid lien, notwithstanding the removal of the property to another town, county, or state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 166.]

In Bank. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by James G. Himmels against Louis Sentous and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Hutton & Williams, Henry T. Gage, and W. I. Foley, for appellants. Powers & Holland, for respondent.

SLOSS, J. This is an action to recover damages for the conversion of personal property. Plaintiff had judgment for \$660, and the defendants appeal.

On November 22, 1904, one E. M. Coe made and delivered to plaintiff, in the county of San Diego, his promissory note for \$1,750, and, as security therefor, executed and delivered to plaintiff a chattel mortgage upon 41 head of dairy heifers and 169 head of hogs, then situated in said San Diego county. The mortgage was duly acknowledged and was accompanied by the affidavit of the parties, as required by Civ. Code, § 2957. On December 2, 1904, it was recorded in the office of the recorder of San Diego county. At all the times named the mortgagor, E. M. Coe, resided in San Diego county, and the mortgaged property was in said county. On January

4, 1905, Coe, without the knowledge or consent of the plaintiff, removed 86 head of hogs, a part of the mortgaged property, from the county of San Diego, and had them shipped to Los Angeles county. There, on the following day, the 5th of January, 1905, he sold and delivered said hogs to defendants, who, within 10 days thereafter, slaughtered the hogs and sold and disposed of their meat. The defendants had no actual notice of plaintiff's mortgage, and bought the hogs in the belief that Coe was the owner, as he represented himself to be. The plaintiff on the 4th of March, 1905, shortly after he had learned of the removal of the hogs from San Diego county, demanded possession of them from defendants, and was informed that the hogs had been killed and sold. The chattel mortgage has never been recorded in Los Angeles county. The mortgaged property, other than that here involved, has been sold, leaving a deficiency in excess of the value of the hogs. The judgment is for such value, with interest and costs. The decision of the case depends upon the construction of section 2965 of the Civil Code, reading as follows: "When personal property mortgaged is thereafter by the mortgagor removed from the county in which it is situated, it is, except as between the parties to the mortgage, exempted from the operation thereof, unless either: (1) The mortgagee, within thirty days after such removal, causes the mortgage to be recorded in the county to which the property has been removed; or, (2) the mortgagee, within thirty days after such removal, takes possession of the property, as prescribed in the next section." So long as the property remained in the county of San Diego, the mortgage was a valid lien. What was the effect of removal to another county? The appellants contend that, by the removal, the property was at once relieved of the lien of the mortgage, and that such lien could again attach to the property only upon the recording of the mortgage in the new county (or the taking of possession by the mortgagee) within 30 days. Until such recording, the mortgagor was in a position to convey a clear title to a bona fide purchaser. The respondents, on the other hand, take the position that the mortgage remains a valid and subsisting lien, of which the original record is constructive notice to all the world, notwithstanding the removal of the property, but that, unless one of the two steps specified by section 2965 is taken during the thirty days after removal, the validity of the mortgage ceases, except as between the parties, at the expiration of such 30 days. In applying the section in question to the facts of the present case, it is immaterial, under either construction, that the mortgage was never, in fact, recorded in Los Angeles county; for, if the mortgage was suspended by the removal, and was not in force when the defendants purchased the hogs, a good title passed by such purchase, and nothing was

added to it by the fact that plaintiff did not subsequently record his mortgage in Los Angeles county. On the other hand, if the mortgage was a valid and subsisting lien for 30 days after removal, the defendants were guilty of conversion in appropriating the property and destroying it during such period. *Wilson v. Prouty*, 70 Cal. 196, 11 Pac. 608. The plaintiff had a complete cause of action when such conversion was committed, and did not lose this cause of action by failing at a later date to comply with the useless form of recording a mortgage of property no longer in existence.

We think the construction of section 2965 urged by respondent is the proper one. The section declares that, when mortgaged property is removed from the county in which it is situated, it is exempted from the operation of the mortgage, unless, within 30 days, the mortgagee does one of two things. To express the same idea in slightly different words, the property is exempted from the operation of the mortgage if the mortgagee does not, within 30 days, record the mortgage in the county in which the property is removed, or take possession of it. By necessary implication from the language used, the property is not exempted if, within 30 days, the mortgagee does either of the prescribed acts. Whether or not he will do one of them cannot be determined until the 30 days shall expire. In the interval the condition upon which the statute has made the loss of his lien depend has not taken place. Until he has failed to do what is required of him for the preservation of his mortgage—and he cannot be said to have so failed until thirty days after the removal of the property—the mortgage is unaffected by the removal, and the exemption declared by section 2965 has not arisen. But, apart from the mere question of grammatical interpretation, the position of respondent is supported by considerations of reason and justice. The lender, who has taken a mortgage of personal property, and has had it executed and recorded as required by law, has acquired a right of property. The statute evidently contemplates that this right may be preserved, notwithstanding a removal to another county of the mortgaged chattels. If it be held that, upon removal, the mortgage is at once suspended until there is a new record of the mortgage, or a seizure, and that a purchaser in the interim takes free of the mortgage, the mortgagee loses his lien, notwithstanding the fact that he may, immediately upon learning of the removal, and within the 30 days allowed him, record his mortgage in the new county. Such construction would work a practical forfeiture as against one who had not been guilty of the slightest want of care or vigilance—a result that should not be held to follow unless it is demanded by the plain letter of the statute. In the absence of any, specific statutory provision regarding the removal of mortgaged property, the record of a

chattel mortgage in the town or county where it is required to be originally filed for record is held to be constructive notice to all the world, and the mortgage is valid, even though the property may be removed to another town or county, or even to another state. *Pease v. Odenkirchen*, 42 Conn. 415; *Barrows v. Turner*, 50 Me. 127; *Brigham v. Weaver*, 6 Cush. (Mass.) 398; *Whitney v. Heywood*, 6 Cush. (Mass.) 82; *Holt v. Remick*, 11 N. H. 235; *Hicks v. Williams*, 17 Barb. (N. Y.) 523; *Kanaga v. Taylor*, 7 Ohio St. 134; *Greenville Nat. Bank v. Evans*, 60 Pac. 249, 9 Okl. 353; *Hornthal v. Burwell*, 13 S. E. 721, 109 N. C. 10, 13 L. R. A. 740, 26 Am. St. Rep. 556; *Shapard v. Hynes*, 104 Fed. 449, 45 C. C. A. 271, 52 L. R. A. 675.

It is said in *Holt v. Remick*, supra: "The object of the statute was to give publicity to such conveyances, and to provide sources of information common to all persons, in order to enable purchasers and creditors and all others to determine with some degree of facility, convenience and certainty the question of title to property, which they may be interested to know, while, at the same time, it was not among the purposes of the act to subject the bona fide mortgagee, who is, of course, a creditor, to the inconvenience, if not impracticability, of the constant vigilance and ceaseless watching which would be requisite to guard and secure his interests, if he were obliged to record his mortgage in every town into which the mortgagor might see fit to remove with the property to reside." Our statute, it is true, goes further than those considered in the foregoing cases. It does require the mortgagee to exercise some degree of vigilance in order to protect his right in case of removal of the property; but it allows him 30 days after such removal in which to perform the acts essential to the continuance of the mortgage lien. During those 30 days he cannot be said to have fallen short of full compliance with every duty imposed upon him by the law, and should not therefore be held to have lost any of the rights vested in him by the due execution and registration of his mortgage.

The appellants urge that the rule invoked by respondent would work a hardship upon innocent purchasers of mortgaged property in a county in which no record of the mortgage exists. Such hardship may result, but it is no more burdensome than the injury which would be sustained by a bona fide mortgagee who, on the contrary construction, would be held to have lost his lien by a surreptitious removal and sale of the property before he could know of the removal, and before the lapse of the time allowed him by the statute within which to protect his right in the county to which the property had been removed. The question is purely one of legislative policy, and we think the policy intended to be declared in section 2965 is the same as that adopted in other states which require a mortgage to be re-recorded after

removal of the property. While the language of the statutes in those states is somewhat different from that of the section in question, it is instructive to note that such statutes are held to declare an intention that the mortgage shall remain in force after removal of the property and until the expiration of the time allowed for re-registration. *Wilkinson v. King*, 8 South. 189, 81 Ala. 156; *Malone v. Bedsole* (Ala.) 9 South. 520, 93 Ala. 41; *Ames Iron Works v. Chinn*, 38 S. W. 247, 15 Tex. Civ. App. 88. The cases cited by appellants do not conflict with these views. In *Fassett v. Wise*, 115 Cal. 316, 47 Pac. 47, 1095, 36 L. R. A. 505, the mortgage had not been recorded, before removal of the property, so as to make it valid as against creditors or subsequent purchasers. The prevailing opinion of Temple, J., expressly points out that section 2965 is not applicable to such a case as the one there presented. So far as there is any discussion of section 2965 in *Fassett v. Wise*, both the majority and the dissenting opinions tend to sustain the views here expressed. *Ruggles v. Cannedy*, 127 Cal. 290, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371, merely declares that a chattel mortgage must be recorded promptly in order to make it valid as against certain creditors of the mortgagor. The case throws no light on the question here presented.

We are satisfied that the court below properly entered judgment for the plaintiff upon the facts found.

The judgment is affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; MCFARLAND, J.; HENSHAW, J.; LORIGAN, J.

151 Cal. 559

In re CORNELIUS' ESTATE. (Sac. 1555.)
(Supreme Court of California. July 24, 1907.)

1. ESCROWS—DELIVERY—INTENT.

A finding of intent to make an absolute delivery is authorized, where one, being ill and expecting to die, presently signed and acknowledged a deed to her stepsons of her interest in her deceased husband's estate, and delivered it to a third person, telling him to keep it till after her death, and then to give it to said sons.

2. SAME—RETURN OF DEED.

Where one being ill and expecting to die presently signed and acknowledged a deed to her stepsons, and delivered to B., a third person, telling him to keep it till after her death, and then to give it to said sons, her intent being to make an absolute delivery to B., the deed became an executed conveyance on the delivery to B., so that the subsequent return thereof to the grantor by B., without the consent or knowledge of the grantees, and its destruction by the grantor, did not destroy its effect as a conveyance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Escrows, § 10.]

Department 1. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

In the matter of the estate of H. P. Cornelius, deceased. From an order of distribu-

tion, S. B. Smith, administrator of Margaret Cornelius, deceased, appeals. Affirmed.

S. Solomon Hall, for appellant. Hopkins & Hinsdale, for respondent.

SHAW, J. Appeal from an order distributing the estate of H. P. Cornelius, deceased. The question presented concerns only the distribution of the interest in the estate which, upon the death of the deceased, descended to his widow, Margaret Cornelius.

After the death of her husband she signed and acknowledged a deed purporting to convey to her two stepsons, Robert P. Cornelius and John B. Cornelius, her interest in said estate, and delivered it to Charles V. Bartholomew, telling him at the time to keep it until after her death and then to give it to the grantees. She was at that time very ill and expecting to die presently. She recovered from that illness and lived more than three years thereafter. Two years and six months thereafter, Bartholomew, of his own volition and without any request from her, and without the knowledge or consent of the grantees, delivered the deed to her, and some four months thereafter she destroyed it. The court finds from the evidence that at the time of the delivery to Bartholomew Margaret Cornelius parted with all dominion and control over the deed and reserved no right to recall or alter it. The intent of the grantor to make an absolute delivery of the deed to Bartholomew is a question of fact, to be decided largely by inference from the circumstances proved to have occurred at the time. The decision of the court below in regard to this fact is, under the evidence in the case, conclusive.

Upon the facts stated the deed became an executed conveyance upon the delivery to Bartholomew for the grantees. He was thereafter holding for them as their trustee, and for the grantor as her trustee. His duty to her was to withhold it from the grantees during her lifetime, and thus preserve to her, in effect, a life estate in the property. His duty to the grantees was to hold the deed in his possession until her death, and then deliver it to them. His delivery of the deed to the grantor without their consent did not affect the validity of the deed, nor deprive them of their prospective estate in the property. Civ. Code, §§ 1057, 1058. The principles governing this case are fully discussed and decided in *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186. The grantor in that case endeavored to defeat the grant by an unsuccessful attempt to regain possession of the deed by devising the property to another. This difference in the facts does not distinguish that case from the present one. If, after such a conveyance is so delivered that the grantor has no dominion or control over it or right to recall it, he gains possession of it and wrongfully destroys it, there can be no doubt that he cannot profit by his wrongful act, nor deprive the grantees of

their interest thereby, without their consent. The doctrine applicable to the case is further illustrated by the decisions in *Rulz v. Dow*, 113 Cal. 490, 45 Pac. 867; *Wittenbrock v. Cass*, 110 Cal. 1, 42 Pac. 300; *Keyes v. Meyers*, 147 Cal. 702, 82 Pac. 304. The cases of *Standiford v. Standiford*, 97 Mo. 231, 10 S. W. 836, 3 L. R. A. 299, and *Williams v. Latham*, 113 Mo. 165, 20 S. W. 99, are to the same effect as *Bury v. Young*. There are inconsistent cases in other states, but the rule in this state is settled by the decisions above cited.

The part of the decree of distribution appealed from is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

DOEHLE v. PHILLIPS. (L. A. 1,893.)

(Supreme Court of California. July 8, 1907.)

1. JUDGMENTS—DORMANT JUDGMENTS—REVIVAL.

Code Civ. Proc. § 685, as amended by St. 1895, p. 38, c. 33, providing that judgments may be enforced after the lapse of five years from entry by leave of court, on motion, or by judgment for that purpose, founded on supplementary pleadings, but that nothing in the section should be construed to revive a judgment for the recovery of money which was barred by limitations prior to the passage of the act, whether technically retroactive or not, was applicable to all judgments existing at the time the amendment was passed, which were not then barred by limitation.

2. EXECUTION—LEAVE TO ISSUE—NOTICE.

Notice of the time and place of the hearing of an application for leave to have an execution issued on a judgment more than five years after the entry thereof, as authorized by Code Civ. Proc. § 685, as amended by St. 1895, p. 38, c. 33, is not required to be given to the judgment debtor.

3. SAME—LIMITATIONS.

An application for leave to have an execution issued on a judgment more than five years after the entry thereof, as authorized by Code Civ. Proc. § 685, as amended by St. 1895, p. 38, c. 33, is not an action or special proceeding of a civil nature, but a motion in the original action to which the general statutes of limitations do not apply.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 161.]

4. CONSTITUTIONAL LAW — OBLIGATION OF CONTRACT—LIMITATIONS.

A judgment debtor having no vested right to a particular statute of limitation until the period fixed has completely run and barred the action, Code Civ. Proc. § 685, as amended by St. 1895, p. 38, c. 33, authorizing the enforcement of judgments after the expiration of five years from the entry thereof, was not invalid as impairing the obligation of contracts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 506, 507.]

5. EXECUTION—LEAVE TO ISSUE—APPLICATION—LACHES—DISCRETION.

Where a judgment recovered for money loaned the defendant had never been satisfied, and no reason was shown why in equity and good conscience defendant should not be compelled to pay, it was not an abuse of the trial court's discretion to authorize the issuance of an execution thereon, under Code Civ. Proc. § 685, as amended by St. 1895, p. 38, c. 33, authorizing the enforcement of judgments after 5

years from the date of entry, though more than 13 years had elapsed since the entry of the judgment in question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 161.]

6. JUDGMENT—REVIVAL—CONSTRUCTION OF ORDER.

Where, on an application for the enforcement of a judgment after the expiration of five years from the date of its entry, the court ordered that the judgment be revived and enforced in the sum of \$518.35, with interest from December 30, 1891, a further provision that the total amount due was \$995.70, and that plaintiff should recover that amount from the defendant, should be construed merely as an adjudication of the amount of principal and interest then due, and not as requiring payment of interest on anything but the original amount.

7. EXECUTION—VARIANCE.

Where a revived judgment provided for the recovery of the original sum of \$518.35, with interest from December 30, 1891, and recited the total as \$995.70, an execution requiring the collection of the latter sum, "with interest on the whole thereof" from March 10, 1905, while irregular as requiring the collection of interest from that date on the interest then accrued, was not fatally defective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 179.]

8. APPEAL—QUESTIONS REVIEWABLE—PRESENTATION TO TRIAL COURT.

A specification in a notice of motion to withdraw an execution that there was a material variance between the judgment and the execution was insufficient to present an objection to the trial court that the execution was irregular, in that it provided for the collection of compound interest or justify a review thereof on appeal.

9. EXECUTION—LEAVE TO ISSUE—JOINT DEFENDANTS.

Where at the time an execution was granted on a judgment against two defendants one of them had died leaving no property, the other was not prejudiced by the fact that the court did not revive the judgment and authorize execution against the deceased defendant's estate.

In Bank. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Annie Doehle against T. F. Phillips. From an order granting plaintiff's application for leave to issue execution for the enforcement of a judgment in her favor after the expiration of five years from the entry thereof, defendant appeals. Affirmed.

John W. Kemp, for appellant. Louis Luckel, for respondent.

ANGELLOTTI, J. These are appeals from an order directing the enforcement of a judgment as against appellant, and from an order denying a motion to recall the execution and vacate the former order.

The judgment was made December 30, 1891, and entered December 31, 1891, in favor of plaintiff and against appellant and one Carrie D. Phillips, for \$518.25, then due under the terms of a promissory note given by the defendants as joint makers. Nothing was done in the matter of enforcing said judgment until March 10, 1905, when ex parte application was made to the superior court for an order allowing the enforcement thereof. The affidavit of plaintiff was filed on

said application. This affidavit showed that no part of the judgment or interest thereon has ever been paid, and that such judgment is wholly unsatisfied. The court thereupon, without notice to appellant, made an order which is substantially one under section 685, Code Civ. Proc., allowing the original judgment to be enforced and carried into execution for the amount then due, as against appellant. An execution was accordingly issued on March 14, 1905. On April 12, 1905, appellant gave notice of his motion to vacate said order and recall said execution on various grounds, which will be noticed hereafter so far as may be necessary. The motion was heard upon the records and the affidavits of plaintiff and appellant. The affidavits before the superior court showed without conflict that the judgment was wholly unsatisfied, that the note upon which the judgment was based was given for money loaned to appellant, and that the other defendant, Carrie Phillips, had died without leaving any property. They were also sufficient to sustain a conclusion that plaintiff is the owner of the judgment, and that she did not know until about March 6, 1905, that either of the defendants owned any property except a certain lot of land which was protected from execution by a homestead declaration. The affidavits failed entirely to show any prejudice resulting to appellant from the delay in enforcing the judgment, of which he can rightly complain.

Prior to the amendment of section 685, Code Civ. Proc., a judgment for the recovery of money could not be revived or enforced in any way after the expiration of five years from the time the judgment became final. Section 681, Code Civ. Proc., restricted the absolute right to an execution to the five years after entry of judgment, the time within which an action could be brought upon a judgment was fixed at five years by our statute of limitations (section 336, Code Civ. Proc.), the writ of *scire facias* had been abolished (section 802, Code Civ. Proc.), and section 685, Code Civ. Proc., authorizing the judgment to "be enforced or carried into execution after the lapse of five years from the date of its entry," was, by its terms, applicable only to cases "other than for the recovery of money." By amendment taking effect March 9, 1895 (St. 1895, p. 38, c. 33), section 685 was made to read as follows: "In all cases, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings; but nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by limitation at the time of the passage of this act." The only change made by this amendment in the original section was the striking out of the words "oth-

er than for the recovery of money" after the words "In all cases," and the addition of the proviso as to judgments for money barred by limitation at the time of the adoption of the amendment. The effect of this change was to make the section applicable to every character of case, including actions for the recovery of money.

As has been seen, the judgment here was entered prior to this amendment, but it was not at the time of the passage thereof barred by limitation. It is urged that the amendment should not be held to apply to any judgment for money rendered before its adoption. There can be no question as to the power of the Legislature to make it applicable to all judgments already rendered, and not barred by limitation at the time of their action. The constitutionality of statutes establishing or altering a period of limitation as to contracts then in force is beyond question. Subject always to the limitation that a reasonable time must be allowed for prosecuting a proceeding after the passage of an act establishing or shortening such a period, the power of the Legislature is absolute in such matters. There is in such legislation no forbidden impairment of the obligation of any contract. As said in *Terry v. Anderson*, 95 U. S. 628, 24 L. Ed. 365, the parties to a contract "have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced, and, as to the forms of action or modes of remedy, it is well settled that the Legislature may change them at its discretion, provided adequate means of enforcing the right remain." It was said by this court in *Swamp Land District v. Glide*, 112 Cal. 85, 44 Pac. 451, that "a man has no vested right in the running of the statute of limitations until it has completely run and barred the action." See, also, 19 Am. & Eng. Ency. of Law (2d Ed.) pp. 167, 168, 171. We think it equally clear that the amendment to section 685 was intended to be applicable to all judgments not then barred by limitation. In addition to the inclusive character of the language used, we have the proviso excepting judgments for the recovery of money then barred by limitation. The making of this sole exception under well-settled rules of construction excludes any other exception, and leaves the amended section applicable to every judgment not included within the exception made. In the case of *Mann v. McAtee*, 37 Cal. 11, cited by appellant, the question before the court was as to whether section 214 of the practice act as enacted in 1866 (St. 1865-66, p. 704, c. 534), which was the same as section 685, Code Civ. Proc., prior to the amendment, was applicable in the case of a judgment barred by limitation at the time of the enactment of the section. The court said that it could not believe that the Legislature intended in reviving section 214 in its amended form to give new vitality to old judgments long since defunct, and the remedy on which had already been

barred by the lapse of time, and therefore construed the act as prospective only in operation, and applicable only to judgments thereafter to be rendered. The distinction between that statute and the one now under consideration is that in the latter there is a provision excepting one class of judgments already rendered, viz., such judgments as are already barred, as was the one involved in *Mann v. McAtee*, supra, which obviously shows that the amendment was intended to apply to all other judgments already rendered. In *Pignas v. Burnett*, 119 Cal. 157, 51 Pac. 48, also cited by appellant, the amendment shortening the time within which an appeal might be taken from 12 to 6 months was construed as not intended to be retrospective in effect. No time whatever was given by this amendment to appeal in those cases in which judgments had been entered for six months or more. The court said that, unless it was absolutely necessary, no intent to thus cut off the right of appeal from judgments already given should be attributed to the Legislature, and concluded that such intent did not necessarily appear. Neither of these cases is applicable here.

It is further claimed that, conceding the applicability of section 685 to money judgments rendered before the passage of the amendment, the relief thereby afforded is barred in this case by the provisions of section 343, Code Civ. Proc., which provides: "An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued." We are satisfied that neither this nor any other section of our general statute of limitation is applicable to the procedure contemplated by section 685, Code Civ. Proc. That procedure constitutes neither an "action" nor a "special proceeding of a civil nature" within the meaning of those terms as used in such statute, nor is it in the nature of either. It is a mere subsequent step in an action or special proceeding already commenced, which is governed entirely, so far as the time within which the same may be taken is concerned, by the provisions of the statute specially relating thereto. No limitation of time whatever is prescribed by such provisions; the plain effect of section 685, Code Civ. Proc., being to empower the court to authorize the issuance of an execution upon a judgment at any time after its entry; the time within which the court may so act being without limitation. This was the view expressed by this court in *Harrier v. Bassford*, 145 Cal. 529, 532, 78 Pac. 1038, where the question was not directly involved. Section 336, Code Civ. Proc., in the general statute of limitations, provides the period within which an independent action may be commenced on a judgment, an action in which the plaintiff upon proving his judgment and its nonsatisfaction is entitled, as a matter of right, to a new judgment. It has no relevancy to the question under consideration here. It may,

be argued that it is inconsistent that a judgment which is barred by limitation so far as the maintenance of a new action thereon is concerned can, by leave of the court, be enforced by execution, but the Legislature may so provide, and we cannot construe the language of the statute before us otherwise than as showing such provision. Courts are not authorized to make exceptions not reasonably sustainable by the language of a statute. As we have seen, the only exception made by the statute is as to judgments barred by limitation "at the time of the passage of this act." What was said in *Merguire v. O'Donnell*, 139 Cal. 6, 72 Pac. 337, 96 Am. St. Rep. 91, as to the applicability of section 343, Code Civ. Proc., to the remedy provided by section 708, Code Civ. Proc., the revival of a judgment in the name of the purchaser at sheriff's sale thereunder where he has failed to recover possession of the property purchased in consequence of irregularity in the proceedings, etc., was dictum. The question there presented was as to the applicability in such a case of section 336, Code Civ. Proc., the five-year statute as to judgments, which period had elapsed. The court, in holding the purchaser entitled to the relief sought, declared that it had no application, saying: "There is nothing to indicate that the Legislature intended to control the effect or operation of section 708 of the Code of Civil Procedure, or the remedy under it, by said section 336." So far, at least, as section 685, Code Civ. Proc., is concerned, the same is undoubtedly true as to section 343, Code Civ. Proc. The order for execution is not invalid for want of previous notice of the application. The statute does not require any notice to be given, and the failure of the statute to require notice does not render it void. This is settled by at least two decisions of this court, in each of which the question was directly presented for determination. *Bryan v. Stidger*, 17 Cal. 270; *Harrier v. Bassford*, supra. As was pointed out in *Bryan v. Stidger*, supra, if the defendant has a good defense, or any cause to show against the enforcement of process, he has a plain and speedy remedy in a motion to vacate the order and recall the execution.

We see no force whatever in the contention that in making the order for the issuance of the execution, under the circumstances here appearing, the lower court was guilty of an abuse of the discretion confided to it. Admittedly the judgment, which was for money loaned to the appellant, had never been satisfied in whole or in part, and no reason whatever appeared why, in equity and good conscience, he should not be compelled to pay the same. The failure of plaintiff to earlier enforce the judgment which appellant should and could have at any time voluntarily paid was entirely without prejudice to any of his legal rights, and did not render the granting of the order an abuse of discretion. Under such circumstances it would appear that the

exercise of a sound discretion would require the enforcement of the judgment. *Wheeler v. Eldred*, 121 Cal. 23, 53 Pac. 431, 68 Am. St. Rep. 20, relied on by appellant, was a case where there was no question as to whether there had been an abuse of discretion, the sole contention there being that the court had no discretion to refuse to grant an application under section 685, Code Civ. Proc., for the execution of a decree of foreclosure as to real property, where the decree had not been executed. The court held that the statute was permissive as regards the power given to the court in actions where title to real property is involved, "and that the court must determine in the exercise of a sound discretion whether the dormant judgment shall be enforced." It may be conceded for the purposes of this decision that this is equally true as to judgments in cases not involving title to real property.

What we have said upon the claim as to abuse of discretion sufficiently disposes of the claim that plaintiff was not entitled to the remedy afforded by section 685, Code Civ. Proc., for the collection of his judgment, by reason of laches.

As contended by appellant, the lower court had no power without notice to enter a new judgment against him, but we do not read the order made on March 10, 1905, as doing this. It is ordered thereby "that the said judgment be revived and enforced * * * in the sum of \$518.35, with interest from December 30th, 1891." The further provision therein, "that the total amount now due is the sum of \$995.70, and that plaintiff do recover of and from said named defendant the said sum of \$995.70," was evidently intended simply as an adjudication of the amount of principal and interest then due, and for which execution should issue, and cannot reasonably be construed as requiring payment of interest on anything but the original \$518.35. The amount so named was a trifle less than the amount due, as a calculation will demonstrate.

The execution as issued, however, requires the collection by the sheriff of said sum of \$995.70, with interest on the whole thereof from March 10, 1905. In this respect the execution was not in accord with the order or judgment, requiring, as it did, the collection of interest from March 10, 1905, on the interest that had accrued on that date. This variance as to the amount to be collected did not, however, render the execution void, but only irregular. 1 *Freeman on Execution*, § 43; *Hunt v. Loucks*, 38 Cal. 372, 99 Am. Dec. 404. The only specification in the notice of motion touching the matter was the general specification that there is a material variance between the judgment and the execution heretofore issued pursuant to the said order of this court, and it does not appear that any more particular specification was made on the hearing in the court below. This was not a sufficiently definite

specification to bring the matter now complained of to the attention of the lower court and the adverse party at a time when the same might perhaps have been remedied and plaintiff's lien saved for the proper amount due, and we are of the opinion that the appellant should not now be heard upon that matter here.

It is urged that the court had no right to direct the enforcement of the judgment against the appellant without doing the same as to his codefendant. Passing without deciding other arguments made in support of this action of the lower court, it is sufficient to point out that appellant could not be prejudiced thereby in view of the fact that the codefendant had died, leaving no property. The orders appealed from are affirmed.

We concur: BEATTY, C. J.; SHAW, J.; McFARLAND, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

151 Cal. 497

BREDFIELD v. HANNON et al. (L. A. 1,890.)

(Supreme Court of California. July 8, 1907.)
MOTIONS—AFFIDAVITS IN OPPOSITION—SERVICE ON MOVING PARTY—NECESSITY.

Where plaintiff obtained leave to have execution issued on a judgment, and defendant filed an affidavit on motion to set aside the order, the court properly permitted plaintiff to file a counter affidavit at the hearing without previous notice or service on defendant; her remedy being an application for time to file an affidavit in rebuttal if desired.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Motions, § 42.]

In Bank. Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Action by Jennie Bredfield against J. Hannon and others. From an order granting plaintiff's application for execution on a judgment in her favor, defendant Laura Hannon appeals. Affirmed.

Valentine & Newby, for appellant. F. B. Guthrie, for respondent.

SHAW, J. On September 26, 1891, the plaintiff recovered judgment in the superior court against J. Hannon, Laura Hannon, and E. W. Reid, for \$560. Nothing was paid on the judgment, and thereafter, on June 19, 1905, upon application of plaintiff, made without notice to the defendants, or either of them, the court made an order that an execution issue upon the judgment against the defendants, and upon the same day an execution was issued in accordance with the order. Thereafter, upon notice duly given, the defendant Laura Hannon moved the court to set aside the order for the issuance of the execution. The motion came on for hearing upon affidavits and a counter affidavit, and was denied by the court. From this last order, the defendant Laura Hannon appeals.

It is not claimed that the judgment has

been paid. At the time it was rendered and for a long time afterward, the defendants had no property, and the issuance of an execution would have been fruitless and would have entailed useless expense. The plaintiff did not discover that the defendant Laura Hannon had acquired any property until a short time before the execution was issued. The following propositions are established in the case of *Doehla v. Phillips* (this day decided) 91 Pac. 330: (1) The amendment of 1895 to section 685 of the Code of Civil Procedure, whether technically retroactive, as that word is used in section 3, Code Civ. Proc., or not, is applicable to all judgments then existing, and not barred by the statute of limitations at the time the amendment was passed. (2) Notice to the defendants of the time and place of the hearing of the motion for leave to have the execution issued was not necessary. See, also, *Harrier v. Bassford*, 145 Cal. 532, and *Bryan v. Stidger*, 17 Cal. 270. (3) The general statutes of limitations apply only to actions and to special proceedings of a civil nature, and they do not apply to motions of this character, under section 685, for leave to issue an execution. The right to make the motion was not barred by any of the provisions of the statute of limitations. (4) The amendment does not impair the obligation of contracts and is not unconstitutional. (5) No abuse of discretion by the court is shown, nor did the delay, under the circumstances, constitute such laches on the part of the plaintiff as to defeat her right to the execution. We will add that there was no error in permitting the plaintiff at the time of the hearing to file a counter affidavit without previous notice or service upon the defendant. If the defendant so desired, she might have asked for further time to file an affidavit in rebuttal, and, if good reason for delay was shown, doubtless the court would have given her time. She did not make any application.

These propositions are decisive of this case, and fully support the action of the court below. We refer to *Doehla v. Phillips* for a full discussion of the above questions. The order is affirmed.

We concur: BEATTY, C. J.; SLOSS, J.; ANGELLOTTI, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

151 Cal. 517

Ex parte MOGENSON. (Cr. 1,314.)

(Supreme Court of California. July 17, 1907.)

HABEAS CORPUS—PROCEDURE—HEARING BEFORE JUSTICE OF SUPREME COURT.

Pen. Code, § 1475, as amended by St. 1907, c. 286, p. 560, provides that, if a prior writ of habeas corpus has been returned or made returnable before a district court of appeal or any justice thereof, no writ shall be issued on a second or other application, except by the Supreme Court or some justice thereof returnable before the Supreme Court or some justice thereof.

Held that, if a single justice of a District Court of Appeal has remanded a prisoner on habeas corpus, a single justice of the Supreme Court may not overrule such decision on the return of a new writ issued by him, but the new writ, if issued at all, must be made returnable before the Supreme Court in banc.

Habeas corpus on petition by J. P. Mogenson before the Chief Justice of the Supreme Court. Writ denied.

See 90 Pac. 1063.

A. H. Jarman, for petitioner. R. R. Bell, City Atty., and Beasley & Fry, for respondent.

BEATTY, C. J. The petitioner was convicted upon a charge of violating an ordinance of the town of Los Gatos prohibiting the sale of intoxicating liquors. He sued out a writ of habeas corpus from the District Court of Appeal for the purpose of testing the validity of the ordinance, the sufficiency of the complaint to state a case within the terms of the ordinance, and the sufficiency of the judgment to show a conviction of the offense, if any offense was charged. After a hearing upon the return of the writ that court, in an opinion filed May 27, 1907, overruled all the objections to the validity of the ordinance and the regularity of the proceedings under it, and remanded the prisoner to the custody of the sheriff of Santa Clara county, by whom he was detained in execution of the judgment. 90 Pac. 1063. Subsequently a petition was presented to me, based upon the same objections to the legality of the imprisonment that had been considered and overruled by the District Court of Appeal. Counsel, however, in presenting the petition to me, as Chief Justice of the Supreme Court, did not intend or expect that I should by myself review and overrule the decision of the District Court of Appeal. His desire and request was that I should issue the writ and make it returnable before the court in banc, as I have the power to do under section 4 of article 6 of the Constitution, and section 1475 of the Penal Code. See section as amended March 18, 1907. St. p. 560, c. 286.

For the future guidance of the profession in similar cases, I have deemed it important to state the reason why this course was not pursued. The authority of one justice of this court to make a writ of habeas corpus issued by himself returnable before the whole court was formerly exercised with great freedom—so much freedom, indeed, as to result in a serious detriment to the more important business of the court. It was a favorite method with certain practitioners to present their petitions to some one justice, and often to several different justices in succession, asking for a writ returnable before the court, and, if they could get the writ allowed in that way, the whole court would be compelled, on the day named in the writ, to drop all other business for the purpose of hearing the return to a petition which would never have been granted if the court, or a quorum of the

justices, had been consulted beforehand. The evil consequences of this practice were, not alone the interruption to more important business of the court, but the unnecessary expense to counties involved in the production of prisoners at the bar of the court in response to writs issued upon petitions insufficient on their face and often utterly frivolous in the light of the facts developed at the hearing.

In view of these inconveniences, it was long ago agreed among the members of the court that, if a petition was addressed to one justice, he should, if he issued the writ, make it returnable before himself and not before the court, and that, if the party desired a hearing before the court, he should be required to address his petition to the court, so that a majority of the justices could determine whether, upon the matters alleged, it was proper to issue the writ at all, and, if so, when the matter could be conveniently heard. Ever since this agreement was reached I have consistently adhered to the practice indicated. But long as the practice has prevailed it seems not to have been generally understood, and petitions are still, in many instances, addressed to the Chief Justice alone, with the expectation of having a hearing before the court. Heretofore such mistakes have not involved any serious trouble or inconvenience, as they could always be corrected by merely changing a few words in the caption of the petition. But since the amendment to section 1475 of the Penal Code, above cited, it has become more important that the practice in these cases should be generally understood. The effect of that amendment, as I understand it, is to put an end to the practice heretofore prevailing of going from one judge to another of no greater authority, with the same petition for a writ of habeas corpus, in order to secure from one relief that has been denied by another. Among its provisions is the following: "In the event, however, that the prior writ was returned or made returnable before a District Court of Appeal, or any justice thereof, no writ can be issued upon a second or other application except by the Supreme Court or some judge thereof, and such writ must be made returnable before said supreme court or some judge thereof." As I construe this clause of the section, it does not mean that after the District Court of Appeal has, by the unanimous decision of the three judges, remanded a prisoner on habeas corpus, a single justice of this court may issue a new writ upon a similar petition, returnable before himself, and, upon the hearing, overrule the decision of the District Court of Appeal and discharge the prisoner. It means only that, when a single judge of the District Court of Appeal has remanded a prisoner, a single justice of this court may overrule his decision upon the return of a new writ issued by him, but, when the order of remand has been made by the District Court of Appeal,

the new writ, if issued at all, must be made returnable before the Supreme Court in banc, where alone rests an authority superior to that of the District Court of Appeal, and where alone its decisions can with any propriety be corrected or reviewed.

Entertaining these views, I very reluctantly issued the writ in this case, making it returnable before myself, but upon an understanding with counsel for petitioner that, unless the court would consent to hear the matter, the proceeding would necessarily be dismissed. My associates having, upon due consideration of the matter declined to order a hearing of the petition before the whole court, the writ was discharged, and the prisoner remanded.

6 Cal. App. 52

FAIRCHILD v. WHITMORE. (Civ. 343.)

(Court of Appeal, First District, California.
June 25, 1907. Rehearing Denied by
Supreme Court Aug. 23, 1907.)

ATTORNEY AND CLIENT—CLAIM FOR COMPENSATION—EVIDENCE.

Defendant, seeking to defeat a claim of an attorney for services on the theory that the services were rendered for a corporation, may show in evidence that the attorney had filed claim for the services rendered against the corporation, which was insolvent.

Appeal from Superior Court, Alameda County; S. P. Hall, Judge.

Action by C. H. Fairchild against Welles Whitmore. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Welles Whitmore and M. C. Chapman, for appellant. William P. Hubbard, for respondent.

KERRIGAN, J. This is an action brought to recover upon a promissory note. The defendant in his answer admitted the execution of the note, and set up in defense a counterclaim for services performed as an attorney and counselor at law. The jury brought in a verdict for the plaintiff, upon which judgment was entered. This appeal is from the judgment and order denying defendant's motion for a new trial.

It is claimed that the trial court erroneously admitted in evidence a certified copy of the claim of the defendant presented to the referee in the matter of the Richards Pump Company, an insolvent debtor. Among other items of services contained in this claim is the following: "Also services and preparation of papers in removal of two directors of said company" (Richards Pump Company). The appellant supported by his own testimony all the items of his bill of particulars, except one, which reads: "Feb. 5, 1904, assisting Wm. P. Hubbard in removing John J. Meyers and C. H. Humphreys as directors of the Richards Pump Company, and electing C. H. Fairchild and H. J. Piersol in their place, \$50." This bill of particulars

itself, however, was offered and read in evidence. The claim was admitted to meet this item of the bill of particulars, and to show that the appellant for this service had presented a claim against the insolvent corporation. It was respondent's theory that the services of appellant, for which the latter sought, by his counterclaim, to recover compensation, were rendered not for him, but for the Richards Pump Company, insolvent. This claim against that insolvent company, so far as that item was concerned, carried out this theory, and was clearly admissible.

It is also asserted that the court erred in overruling the objection of appellant to the testimony of C. H. Humphreys. This witness was an attorney at law. In answer to a hypothetical question he testified as to the value of the services rendered by appellant. This and other instances, in which it is claimed the trial court erred in admitting evidence, are without merit. The evidence was amply sufficient to support the verdict.

The bill of exceptions was originally settled upon stipulation of counsel by the judge before whom the case was tried. Subsequently, upon motion under section 473, Code Civ. Proc., an amendment to the engrossed bill of exceptions was allowed and settled by the successor of the judge who presided at the trial. The judge who heard the cause was not requested to settle the amendment. It is the contention of the appellant that, until he was requested to do so and refused, his successor was without authority in the matter, and that the amendment must be disregarded. Code Civ. Proc. § 653. It is needless to pass on this question, for we have carefully examined the points discussed in the briefs without reference to the amendment, and from such examination we are satisfied that the judgment and order should be affirmed. It is so ordered.

We concur: COOPER, P. J.; HALL, J.

6 Cal. App. 44

In re WELCH'S WILL. (Civ. 323.)

(Court of Appeal, First District, California.
June 24, 1907. Rehearing Denied July
24, 1907; Denied by Supreme Court
Aug. 23, 1907.)

1. WILLS—CONTEST—MOTION FOR NONSUIT.

In determining the question of the sufficiency of the evidence of contestant in a will contest to require the submission of the case to the jury, the court must concede to the jury the right, not only to regard all the testimony of contestant as true, but to draw all reasonable inferences therefrom, and, where the evidence so considered is susceptible of two constructions, contestant is entitled to have the case go to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 769, 773.]

2. SAME—UNDUE INFLUENCE.

Undue influence to avoid a will is the use, by one in whom a confidence is reposed by another, of such confidence for the purpose of obtaining an unfair advantage of the weakness

of the mind of the latter or of his necessities or distress.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 375, 383.]

3. SAME—CONFIDENTIAL RELATIONS.

In a suit to set aside a will on the ground of undue influence exercised by the wife of the testator, the confidential relation between husband and wife, though not raising a presumption of undue influence, is important in weighing the evidence in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 383.]

4. SAME—EVIDENCE—QUESTION FOR JURY.

In a suit to set aside a will on the ground of undue influence, evidence examined, and held to require the submission to the jury of the question of undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 769.]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Petition by Mary Ellen Aston for the revocation of the probate of the will of Richard R. Welch, deceased, in which Bridget Welch, the widow, appeared and filed answer. From a judgment of nonsuit, petitioner appeals. Reversed.

H. C. Wyckoff, for appellant. Charles B. Younger, Jr., and David F. Maher, for respondent.

COOPER, P. J. The last will of deceased was admitted to probate, and Bridget Welch, the widow, appointed executrix thereof. The appellant, Mary Ellen Aston, the daughter of the deceased and the executrix, within the year filed a petition for the revocation of the probate of the will upon the ground of undue influence. The respondent, who is the mother of appellant, filed an answer to the petition, denying the allegations as to undue influence. The case came on for trial upon such issue before the court with a jury. After appellant had introduced her testimony and rested, respondent made a motion for a nonsuit, which was granted, and judgment accordingly entered. The appeal is from the judgment, and presents the question as to the ruling on the nonsuit.

The case presented is entirely different from one in which the lower court has granted a new trial on conflicting or insufficient evidence. Here the jury was a part of the machinery of the trial. It was, in the first place, subject to the revisory power of the court, the judge of the facts. The evidence introduced must, for the purposes of this motion, be all considered as true. It must be given the greatest probative force to which, according to the law of evidence, it is fairly entitled. We must concede to the jury the right, not only to regard all the testimony as absolutely true, but to draw all reasonable inferences therefrom. In *Estate of Arnold*, 147 Cal. 583, 82 Pac. 252, the rule is thus stated: "In determining whether or not, in a proceeding to contest a will, the evidence produced by the contestants is sufficient to require the submission of the case to the jury, the same rules apply as in civil cases. Every favor-

able inference fairly deducible, and every favorable presumption fairly arising, from the evidence produced, must be considered as facts proved in favor of the contestants. Where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestants. All the evidence in favor of the contestants must be taken as true, and, if contradictory evidence has been given, it must be disregarded. If there is any substantial evidence tending to prove in favor of contestants all the facts necessary to make out their case, they are entitled to have the case go to the jury for a verdict on the merits." With the above rule in mind, we will briefly examine the evidence tending to prove that the will was procured by undue influence, or, in other words, that it was not the free and voluntary act of the deceased.

Undue influence has been defined by our court to be the use, by one in whom a confidence is reposed by another, who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage of his weakness of mind, or of his necessities or distress. *Dolliver v. Dolliver*, 94 Cal. 646, 30 Pac. 4. It must be borne in mind that the undue influence is alleged to have been by the wife, and the relation between husband and wife is confidential. While such confidential relation does not, perhaps, of itself, in this state raise a presumption of undue influence in regard to making a will, yet it is important in weighing the evidence in all cases of this character. In fact, it has been held in some jurisdictions that there is a presumption of undue influence in such cases when such confidential relations exist. The question as to the boundary of legitimate influence must be determined by consideration of the relation between the parties, the character, strength, and condition of each of them, the circumstances of the case, and the application of sound practical sense to the facts of each given case. The mental and physical condition of the testator, and the provisions of the will itself, may be considered. The deceased was 70 years old, and during the last few years of his life was in the habit of using intoxicating liquors at times to excess. He had been in feeble health for some time. The respondent appears to have been the stronger of the two, either mentally or by force of her will power. She took charge of the money of the community, deposited it in banks in her own name, and superintended the affairs generally. The appellant was the only living child, and there were no grandchildren. She married Joseph F. Aston in December, 1882, and has ever since lived with him, but they have no children. The mother opposed the marriage of her daughter to Aston, would not consent to it, and stated that, if she married Aston, he would never get any of the property. She

never forgave the daughter for marrying Aston. The deceased was always friendly with his daughter, and often visited her at her home. The will gives the property—quite a little estate—to the respondent for life, making her executrix without bonds, with remainder to appellant for life, and, in case of her death without issue, "all of my said property shall go to the heirs of my said beloved wife." Deceased did not know his wife's relatives, who they were, nor where they resided. The appellant testified that during their married life and up to the time of her father's death her mother controlled him in everything; that her mother insisted upon, and her father did, turn over all the money he earned and all rents to her; that her mother told him what to do and how to do it; that some four or five years before his death he sold some property in Santa Cruz for about \$2,400, and her mother deposited the money in the Pajaro Valley Bank in her name; that on an occasion when visiting her father, and when her father was kissing her, the mother told her that she came too often; that her mother would always be present when she visited her father; that her father had blood relations living; and that two of his nephews visited him at his home in Watsonville. The witness Romine, who was a tenant of deceased, testified that, when he paid his rent, the respondent would reach over and take it, and on one occasion she grabbed the money from deceased; that respondent would always direct how the work should be done on the place; that deceased asked the witness at one time when deceased sat down to rest not to mention it to respondent; that on one occasion, when deceased borrowed \$3 of witness, he asked him not to mention it to respondent. The witness McCallum testified that a short time before the death of deceased the respondent told witness that she was very anxious that her husband should make his will, and in the same conversation the respondent said she did not wish Mr. Aston to get a dollar. The witness Murphy testified that she was at the Welch home a short time before his death; that Mrs. Welch said he was in a very bad condition, and expressed a desire that he should arrange his business; that in the conversation Mrs. Welch said she wanted control of the property during her life, and then to have it go to her daughter, and then to her people, and used the expression "If it is not that way, I will not have it;" that on one occasion deceased came into the home of witness, and asked for a pen and ink, stating that he wanted to sign a note for a saloon bill, but did not want his wife to know about it.

Respondent was called as a witness for appellant, and testified that deceased never saw any of her relations, and that none of them ever visited at her home. When asked if she was present when the will was signed,

she answered, "I certainly was when that will was signed." When asked by her own attorney (Mr. Maher) in cross-examination to state what occurred at the time of making the will, the respondent answered: "You drew the will out and he signed it; after he signed you read it twice to him, and he asked me, 'Are you satisfied with the will, mamma?'" When respondent was asked if she knew beforehand what was going to be put in the will, she said she never heard that he was going to make a will till three hours before. "I was as innocent as a child in the cradle, he said when Mr. Maher read it." When asked if she suggested leaving the property to her relatives, she answered, "Oh, no, no, no; I never spoke to him about them." If deceased never saw any of his wife's relatives, and she never spoke to him about them, or about making the will, it might have appeared to the jury a little singular that the fee of the property should be left to her relatives. The will was made three days before the death of the deceased. The witness Mary Aston testified that the deceased and respondent stopped at her place of business in the afternoon after the will had been made, and respondent told witness about the will having been made and "he had it fixed to suit her."

The witness Faustino testified that Mr. and Mrs. Welch stopped at his store about 5 o'clock in the afternoon of the day the will was drawn; that deceased came up to the counter, put his elbow on the counter, and laid his head on his hand, and witness gave him a little wine; that Mrs. Welch told witness about the will having been made, and said, "I got the will just the way I wanted it."

The appellant testified that she was at the home of her parents on the evening of January 27th, just after the will had been made; that nothing was said to her about a will in any way; that she heard a part of an expression made by her mother to her father which was "don't tell"; that she did not hear of the making of the will until after the death of her father, which occurred January 30, 1904.

About three weeks before his death the testator had a serious attack of neuralgia of the heart, and could not put on his shoes without assistance. No disinterested party appears to have been present when the will was executed. Deceased does not appear to have had any but the most affectionate feeling for his daughter. While feeble and near dissolution, he went with the respondent to the lawyer's office, and was with her and in her presence when the will was executed. Who can say as matter of law that the act was the free and voluntary act of deceased under the circumstances? When the respondent said that the will was as she desired, might not the jury infer and find from all the evidence that it was in fact the will of respondent, acting through the signature of a feeble, dying old man? In a case like this

where a will is made by one in feeble health, just before death, in the hearing and presence of a person of dominating mind, and to suit the interests and purposes of such person, courts and juries should carefully scrutinize every act and circumstance in connection with the matter. In many cases it is utterly impossible to prove the exercise of the influence directly upon the testamentary act, but this is not necessary. The question in all cases is as to whether or not such influence produced the act. It may have been the result of a long course of conduct, fear, or persuasion. A party exerting such influence would not take along witnesses to prove that she had no such influence. Such influence has been exerted in many cases where the party whose influence produced the act was not present at the making of the will. The fact that such a party was present, both in going to, remaining in, and returning from the lawyer's office, is certainly a very potent circumstance.

In *Estate of Arnold*, supra, the order granting a nonsuit in a will contest was reversed, although the facts and circumstances tending to show undue influence were not of a convincing nature. The court said: "There were circumstances from which it might have been inferred that Leonard had, by these means, obtained great control over the mind and actions of the testatrix, and that he was acting in bad faith, for the purpose of procuring the new will to be made in order to supplant Rosenheim and promote his own advantage. Some of the evidence, it is true, was capable of a different construction, and there was little, if any, direct evidence as to the motives of Leonard, or as to the actual operation of the undue influence. If a jury had, upon the evidence given, found in favor of the disputed will, we might not be disposed to disturb the verdict. Questions involving motives, and inferences to be deduced from circumstances, are, within reasonable bounds, exclusively within the province of the jury, or the trial court when sitting without a jury, and, under the rules regarding the granting of a nonsuit, they must all be resolved so far as possible in favor of contestants. It would not be unreasonable to conclude upon all the facts and evidence before the jury that the will in question was not the natural result of the uncontrolled will of Mrs. Arnold, but the direct result of the fears exerted, false beliefs engendered, and sinister influences exercised over her to that end by William H. Leonard. In such case it is error to grant a nonsuit." It certainly would not be unreasonable to conclude, upon all the facts and circumstances before the jury in this case, that the will was not the natural result of the uncontrolled mind of the old man Welch. In *Estate of Tibbetts*, 137 Cal. 123, 69 Pac. 978, the verdict of a jury, finding that the will of deceased was the result of undue influence, was up-

held. In that case the mother of the testatrix was unfriendly to the contestant, and went with her daughter, the testatrix, to have the will signed, but gave no directions as to its terms at the time. The court said: "After mature consideration of the case at bar we have reached the conclusion that the evidence was not so entirely insufficient to support the finding of undue influence as to warrant us in disturbing the verdict." In *Estate of Kendrick*, 130 Cal. 360, 62 Pac. 605, it was held that the evidence was sufficient to uphold the verdict of the jury that the will was procured by undue influence. The evidence did not show that the influence was exerted at the very time of the making of the will, but that whispered conversations had occurred between the deceased and her niece. The court, after referring to the facts, and the fact that at the conclusion of the conversations the deceased seemed to have put herself unreservedly in the hands of her niece, and to have been dominated by her, said: "These facts and circumstances, taken with the admittedly mental and physical condition of the testatrix, we think must be held sufficient to justify the verdict of the jury."

In the case at bar the facts that the deceased was feeble, and somewhat addicted to the use of intoxicating liquor; that he was dominated by the respondent; that he made his will just three days before he died; that respondent was with him at the time and the will was made in her favor; that respondent said to third parties that she had the will to suit her; that deceased left the fee of the real estate to his wife's relatives, whom he did not know and had never seen, to the exclusion not only of his own relatives but to the exclusion of his only daughter; that respondent entertained a strong dislike to the husband of the daughter; that deceased had always been friendly to the daughter and her husband; that the daughter was not spoken to about the will, and respondent desired to keep the fact of its having been made from the daughter—in our opinion would amply sustain a verdict finding that the will was produced by undue influence.

The judgment is reversed.

We concur: HALL, J.; KERRIGAN, J.

(6 Cal. App. 67)

GABLE et al. v. PAGE et al. (Civ. 324.)
(Court of Appeal, Second District, California.
June 26, 1907. Rehearing Denied by Supreme Court Aug. 23, 1907.)

1. APPEAL—TIME OF TAKING.

An appeal from a judgment taken 10 months after entry thereof cannot be considered.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1879.]

2. JUDGMENT—RES JUDICATA.

The validity of the trust cannot be questioned by defendants in an action to quiet title

to land held by plaintiff under a trust established in a prior action brought by one to whom defendants are privies.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Mary A. Gable, trustee, and others, against Elias C. Page and others. From a judgment for plaintiff and from an order denying a new trial, defendants appeal. Dismissed and affirmed.

E. T. Cosper, for appellants. T. E. Clark, for respondents.

SHAW, J. This is an action to quiet plaintiff's title to lands which she holds under a trust established by a final judgment and decree rendered several years prior to the institution of this suit. The appeal from the judgment herein was taken 10 months after the entry thereof; hence cannot be considered. *Hunter v. Milam*, 133 Cal. 601, 65 Pac. 1079.

It is not urged that any errors of law occurred at the trial to which exception was taken, nor are the findings attacked as being unsupported by the evidence. Appellants' argument is confined to an attack upon the validity of the trust, the existence of which it is conceded was found and adjudged by the court. Admitting its establishment by this adjudication, the point becomes one of law to be considered upon an appeal from the judgment only. *Hunter v. Milam*, supra; *Sharp v. Bowie*, 142 Cal. 402, 76 Pac. 62. Thus considered the grounds upon which it is claimed the trust is void might properly have been, and presumably were, urged in the suit wherein it was made an issue. The court there having, by its decree, established it, appellants, who are privies to the plaintiff in that action, must be held bound by such judgment. "The judgment may be grossly unjust or erroneous, but the decision of the court as to all issues involved in the action stands as a finality between the parties and their privies until set aside in some mode recognized by law." *Page v. Garver* (Cal.) 90 Pac. 481.

The appeal from the judgment is dismissed, and the order denying appellants' motion for a new trial is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

5 Cal. App. 708

BAKER & HAMILTON v. LAMBERT. (Civ. 343.)

(Court of Appeal, First District, California. June 11, 1907.)

PLEADING—EVIDENCE—ADMISSIBLE UNDER—NONJOINDER OF PARTIES—WAIVER.

Under Code Civ. Proc. § 433, providing that, when a defect of parties defendant does not appear from the complaint, objection must be taken by answer, and section 434, providing, if no objection be taken, the defendant is deemed to have waived the same, the allegations of a complaint against a single defendant as to an

individual indebtedness may, in the absence of a plea of nonjoinder by defendant, be supported by evidence of a partnership indebtedness, defendant being one of the partners.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1237.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Baker & Hamilton against G. W. Lambert. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Reversed.

Page, McCutchen & Knight, for appellant. William H. Johnson, for respondent.

COOPER, P. J. This is an appeal from a judgment in favor of defendant, and from an order denying the plaintiff's motion for a new trial.

The complaint contains the common counts, alleging in various forms that the defendant is indebted to the plaintiff in the sum of \$575.28 for goods, wares, and merchandise, sold and delivered by plaintiff to defendant at his special instance and request. Upon the trial the evidence showed that a partnership had existed between the defendant and one Lipsett. Plaintiff then offered testimony tending to show a sale of the goods and merchandise to the partnership. The defendant objected to the offered testimony, on the ground that under the pleadings the proof of a partnership indebtedness was inadmissible, and the court sustained the objection.

The question presented for decision is as to whether the allegations of the complaint as to an individual indebtedness can, in the absence of any plea of nonjoinder by defendant, be supported by evidence of a partnership indebtedness; the defendant being one of the partners. The precise question does not appear to have been decided in this state, and is an important one. We are of opinion that the evidence was admissible. The indebtedness was the joint indebtedness of both the partners. The complaint, therefore, should have been against both, as they are united in interest. Code Civ. Proc. § 382. The Code provides (Code Civ. Proc. § 430) that the defendant may demur to the complaint when it appears upon the face thereof that there is defect of parties defendant. It does not appear upon the face of the complaint that there is such defect, and hence the point could not have been raised by demurrer. It is further provided (section 433) that in such case the objection may be taken by answer. Then follows section 434, which provides: "If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same." The defendant, knowing the fact that his partner was not joined, should have raised the question of such nonjoinder by his answer, if he desired to rely upon it. The provisions of the Code in regard to the matter are simple and easily followed. The object is to

require the parties in good faith to state the matters and things relied upon so as to inform the adversary of the issues to be tried, with a view of disposing of cases upon their merits. It is with this object in view that courts must construe pleadings with reference to the Code, so that neither party may gain an unfair advantage over his adversary. With the provisions of the Code cited before his eyes, the defendant cannot be allowed to lull his adversary into repose, and, for the first time, raise the point which was at all times within his knowledge, but which he waived by not alleging in his answer. Having remained silent when he should have informed the plaintiff, he will be precluded from speaking afterwards. The rule was the same at common law.

In *Rice v. Shute*, 5 Burr. 2811, the judgment of the King's Bench was given by Lord Mansfield. On the trial evidence was given that one Cole, who had not been made defendant, was a partner of Shute, and thereupon on motion of the defendant the lower court gave judgment of nonsuit against the plaintiff. The nonsuit was set aside, and the court held that, as the defendant had not pleaded the matter in abatement, he had waived it. The above case was followed by Chief Justice Marshall in *Barry v. Foyles*, 1 Pet. (U. S.) 311, 7 L. Ed. 157. It was there said: "If, therefore, the defendant fails to avail himself of the variance in abatement, when the form of his plea obliges him to give the plaintiff a proper action, the policy of the law does not permit him to avail himself of it at the trial. The course of decisions since the case of *Rice v. Shute* has been so uniform that the principle would have been considered as too well settled for controversy had it not lately been questioned by a judge from whose opinions we ought not lightly to depart." *Rice v. Shute* was again followed and approved by the Supreme Court of the United States in *Mason v. Eldred*, 6 Wall. (U. S.) 231, 18 L. Ed. 783. The opinion was by Judge Field, and it is there said: "It is true that each copartner is bound for the entire amount due on copartnership contracts; and that this obligation is so far several that if he is sued alone, and does not plead the nonjoinder of his copartners, a recovery may be had against him for the whole amount due upon the contract." In 15 *Encyclopedia of Pleading and Practice*, p. 98, the rule is stated as follows: "Where one partner is declared against, and nonjoinder is not pleaded in abatement, proof of a partnership contract is not a variance, as partnership obligations are to this extent regarded as joint and several." See, further, *Abbott v. Smith*, 2 W. Black. 925; *Woodworth v. Spafford*, 2 McLean, 168; *Fed. Cas. No. 18,020*; *Robertson v. Smith*, 18 Johns. (N. Y.) 469, 9 Am. Dec. 227; *Wilson v. McCormick*, 86 Va. 995, 11 S. E. 976; *Smith v. Cooke*, 31 Md. 174, 100 Am. Dec. 58. In the cases of

Williams v. Southern Pacific R. R. Co., 110 Cal. 457, 42 Pac. 974, it was held that, in the absence of a plea of misjoinder, one member of a copartnership may recover in his individual name the whole amount due the firm of which he was a member. That case was approved and followed as to the same point in *Ah Tong v. Earle Fruit Co.*, 112 Cal. 679, 45 Pac. 7. It would seem upon principle that if, in the absence of a plea of misjoinder, in abatement, an individual as plaintiff can recover upon a liability due a partnership of which he is a member, a recovery could under like circumstances be had against him as defendant upon a partnership liability due from a partnership of which he is one of the partners. A case very much like the case at bar is *Kerry v. Pacific Marine Co.*, 121 Cal. 564, 54 Pac. 89, 66 Am. St. Rep. 65. The action was there brought against one of the part owners upon a contract relating to the ship, which should have been brought against all the owners jointly, and it was held that the action would lie in the absence of a plea by the defendant of the misjoinder of the other part owners. It would require a great deal of imagination to give a reason why, if a part owner of a vessel cannot claim a misjoinder because he has not availed himself of it by proper plea in abatement, a member of a partnership can under like circumstances claim such misjoinder.

We have examined the cases cited by defendant; and, while there are in many of them expressions which tend to support his position, we do not think any one of them is direct authority for the proposition contended for by defendant here. The one upon which most reliance is placed is *McCord v. Seale*, 56 Cal. 264. It was stated there in broad terms that the proof of a partnership contract would not sustain the allegation of the complaint as to an individual contract; but the report of the case shows that the answer contained, besides a general denial, "a separate defense of a partnership existing between the plaintiffs under the firm name of *McCord & Malone* at the time of the alleged transaction between them and the defendant." The case is decided upon the theory that the point was properly raised in the answer. The question of waiver is not mentioned in the opinion.

It follows that the judgment and order should each be reversed; and it is so ordered.

We concur: KERRIGAN, J.; HALL, J.

5 Cal. App. 702
HERCULES OIL REFINING CO. v. HOCK-
NELL et al. (Civ. 345.)
(Court of Appeal, Second District, California,
June 7, 1907.)

1. CORPORATIONS — OFFICERS — LIABILITY —
CONSTITUTIONAL PROVISIONS.
Const. art. 12, § 3, providing that directors
of corporations shall be liable for "all moneys

embezzled or misappropriated" by the officers thereof, etc., makes the directors sureties of officers who are guilty of misappropriating corporate moneys, and the liability created is that of suretyship only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1350-1355.]

2. SAME.

An officer of a corporation having no authority to sell stock, and having no stock belonging to the corporation to sell, and owning stock, sold stock at 20 cents a share, and received the money therefor without accounting to the corporation. He used treasury stock for which he had paid 2 cents per share to make delivery on such sales. *Held*, that the directors of the corporation were not liable for the officer's act under Const. art. 12, § 8, providing that the directors of corporations shall be liable for all moneys misappropriated by the officers thereof, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1350-1355.]

3. TRIAL—NONSUIT—WHEN AUTHORIZED.

A nonsuit should be denied, where the evidence and the presumptions arising therefrom are legally sufficient to prove the material allegations of the complaint, and in other cases it should be granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 332-344, 360, 373.]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by the Hercules Oil Refining Company against George Hocknell and others. From a judgment for defendants, plaintiff appeals. Affirmed.

E. B. Drake and Jones & Drake, for appellant. A. M. Cates and Geo. A. Corbin, for respondents.

TAGGART, J. This is an action to recover from defendants, as directors of the corporation plaintiff, moneys of the corporation alleged to have been embezzled and misappropriated by an officer of the corporation during the term of office of said directors. The officer who was charged with the misappropriation (defendant Hocknell) was not before the court, but the other defendants appeared and defended, and, as to them, and each of them, the court granted a motion for a nonsuit. Plaintiff appeals from the judgment and presents a bill of exceptions on the ruling of the court granting the nonsuit.

The charge against Hocknell, as president, rests upon the following facts, to wit: On November 25, 1902, the board of directors of plaintiff adopted a resolution authorizing and empowering the defendant B. L. Vickrey, as secretary of the company, to sell and dispose of all the remaining treasury stock of plaintiff (being 130,000 shares of the par value of \$1 per share) at the best price obtainable in the market. November 28, 1902, 13 certificates (Nos. 1,718 to 1,730, inclusive) of said stock for 10,000 shares each, were issued to C. Walton Cannon, a broker in New York city, and forwarded to him for sale. He did not sell any of the stock, but under date of August 31, 1903, an entry was made in the books of the company by the book-

keeper, at the direction of Hocknell, in the name of W. H. Cannon (conceded to be intended for C. Walton Cannon): "To capital account, 130,000 shares of the capital stock of Hercules Oil Refining Company, two cents. See minutes of meeting of board of directors, 11, 25, 1902. \$2,600.00." Hocknell procured the stock certificates from Cannon personally while in New York city at least as early as June 15, 1903, and "when he returned from the East" told the secretary of the company that he (Hocknell) had bought the stock at two cents a share and "turned in \$2,600 for the stock." He did not say who he bought it from, but the secretary (who was empowered to sell) testified that he considered he (the secretary) had sold the stock to Hocknell at two cents per share; that being the best price obtainable at the time, and because the company needed the money. He further testified: "I felt I was doing the company a favor to get two cents for the stock," and that "there would soon be an assessment on the stock of 10 or 15 cents a share." There was no transfer of any of the Cannon stock to Hocknell on the books of the corporation. In the latter part of 1902, or the first of 1903, Hocknell sold to Alexander Campbell 25,000 shares of the capital stock of the Hercules Oil Refining Company and received \$5,000 cash therefor. On June 15, 1903, Hocknell forwarded from Ocean Park three certificates of stock, one (No. 1,762) for 7,105 shares in the name of George Hocknell, two (1,718 and 1,719) for 10,000 shares in the name of Walter Cannon. Later, September, 1903, three certificates in the name of Campbell for 5,000, 10,000, and 10,000 shares, respectively, were substituted for the original certificates. About the same time Campbell purchased, Fred A. Pennell also bought from Hocknell 1,000 shares, for which he paid \$200 cash, and by letter dated at Ocean Park on June 15, 1903, received a certificate for it in the name of George Hocknell. Later, on September 10, 1903, he received a certificate in his own name in lieu of the Hocknell one. Thomas B. McPherson, on October 25, 1901, bought 6,250 shares of stock from George Hocknell and paid him \$1,250 for them, and again on the 23d day of January, 1903, made another purchase of a similar amount for the same price. The first certificates of stock sent to him were in his name and bore date September 3, 1903. Each block of stock was paid for on the date of its purchase. Mr. J. W. Hupp bought 10,000 shares of stock from Hocknell, and paid \$2,000 cash for them, but does not give the date of purchase. The stock certificate was issued in his name and received about September 6, 1903. The circumstances appear to justify the inference that this purchase was made about the same time that Campbell and Pennell purchased. All of these purchasers bought from Hocknell and knew nothing, apparently, of whether the stock purchased was treasury stock or stock belonging to Hocknell. The

evidence does not disclose how much of the residue of the 600,000 shares of the capital stock of the corporation was held or owned by Hocknell, either at the time of sale or the time of delivery of the stock sold by him. The books of the company show that the certificates for the 48,500 shares issued to these four purchasers in their respective names in September, 1903, were all by transfer and cancellation of the Cannon certificates to that amount, and that the residue of the 180,000 shares, 81,500 shares, was sold to one B. M. Frees. The latter sale is not material to this action. The time at which the secretary accepted Hocknell's declaration that he had bought the stock, as a sale thereof, is stated with much uncertainty in the testimony. "Sometime in July, if I remember correctly," and "after he returned from the East with the stock," cover Mr. Vickrey's recollection of the matter. The letter from Hocknell to Campbell shows he had the Cannon certificates at Ocean Park as early as June 15, 1903, and was assuming to deal with them as his own. There was nothing on the books of the company until August 31, 1903, to show that he (or any one else) had bought them.

It is admitted that the motion for a nonsuit was properly granted upon the first cause of action, which counted on a participation of the other defendants with Hocknell in the transactions complained of; but appellant claims that there was a sufficient showing made of the liability of the defendants other than Hocknell, under section 3 of article 12 of the Constitution of the state of California, to avoid the granting of a nonsuit as to such defendants on the second cause of action. The section of the Constitution invoked merely makes the directors sureties for their fellow directors and for the officers of the corporation for "moneys," when so misappropriated as to make the officer misappropriating liable, and authorizes the creditors and stockholders to sue. * * * The section is not penal in the technical sense, as it allows no recovery as a punishment, but only to compensate for a loss. But the liability created is that of suretyship, in which the innocent always suffers for the guilty, and therefore the surety may always stand upon the very letter of his bond. For this reason the liability must be limited strictly to moneys misappropriated. *Winchester v. Howard*, 136 Cal. 444, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153.

The allegation of the complaint is to the effect that said defendant Hocknell did, on or about January 15, 1903, misappropriate the sum of \$8,730 of plaintiff's funds. The evidence to support this shows that in the latter part of 1902, or the first part of 1903, Hocknell received from Campbell \$5,000, from Pennell \$200, and from Hupp \$2,000. That he received \$1,250 from McPherson in October, 1901, and \$1,250 in January, 1903. The

October, 1901, payment by McPherson is apparently not included in the sums alleged to have been misappropriated. At this time the Cannon stock was in New York city in the hands of Cannon for sale, subject to the direction of the secretary of the company. The first connection between Hocknell and this stock appears when he, on June 15, 1903, assumed to send two of the certificates therefor (1,718 and 1,819) from Ocean Park to Campbell on account of the sales of stock made to the latter about five or six months before. If Vickrey's fixing of dates is correct, the next is when he told Vickrey he had bought the Cannon stock, and the latter accepted him as the purchaser thereof, after his return from the East about July. The circumstances surrounding these transactions might justify a finding that the return mentioned was at least as early as June 15, 1903, thus accounting for the stock being in Hocknell's possession on that date after he had purchased it. Giving the inconsistency between the assumption of ownership of the stock by Hocknell June 15, 1903, and Vickrey's testimony that it was in July, all the consideration rationally possible, and it cannot be said that the trial court should have done more than to hold for the purpose of the nonsuit that Hocknell took control of the Cannon stock as early as June 15, 1902. We find, then, that he sold stock of the Hercules Oil Company at 20 cents in January, and that about five months thereafter he used the treasury stock of the corporation, for which he paid but 2 cents per share to the company, to make delivery on such sales. The date of the purchase from the secretary was either in June or July, and some uncertainty exists as to whether he made this purchase before or after he had used the stock for the purpose named. This stock was never registered in the name of Hocknell in the books of the company, but transferred to Hocknell's vendees upon cancellation of the Cannon certificates, and a record of the purchase of the stock in Cannon's name did not appear upon the books until August 31, 1903.

Conceding that the lack of certainty in the evidence as to the transactions from June to September was sufficient to arouse a suspicion or put the company upon inquiry as to these matters, there is no evidence to justify an inference that the money received in January belonged to the company. At that time the Cannon stock was in New York. Hocknell had no stock of the corporation to sell, and was not authorized to sell any on the company's account. There was no stock belonging to the company under his control that he could have fraudulently sold. The company could not have been compelled to deliver any stock to make good these sales. There is nothing in the evidence to show that the transactions were anything more than sales by Hocknell for future delivery made on his own individual account. A misrepresentation

to his purchasers as to the stock he had or was authorized to sell would have been a fraud upon them, and not upon the company, and the taking of funds so received would not have been a misappropriation of moneys of the corporation. There is not a scintilla of evidence from which the inference can be reasonably drawn that when the sales were made in January Hocknell expected to acquire the Cannon stock to make delivery therefrom on these sales. If there were, the transaction would have been good as to the company, if it be shown that Hocknell paid the full value of the stock at the time of purchase. The transactions as to the stock after Hocknell's return from the East appear from Mr. Vickrey's testimony to have been carried out in good faith, and the company's interest properly looked after, and the full value of the stock at the time of sale obtained. Even the burden put upon accounting trustees was fairly met, and this all appears as part of plaintiff's case. Mr. Vickrey's testimony was uncontradicted and was entitled to, and no doubt did, receive full weight and credit from the trial court in granting the defendants' motion for a nonsuit.

A nonsuit may be granted by the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. Code Civ. Proc. § 581, subd. 5. The rules as to nonsuit are the same whether the trial is by the court or by a jury. *Freese v. Hibernia Sav., etc., Soc.*, 139 Cal. 392, 394, 73 Pac. 172. The motion admits the truth of all the plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, and the evidence should be interpreted most strongly against the defendant. *Goldstone v. Merchants', etc., Co.*, 123 Cal. 625, 56 Pac. 776; *Hanley v. California, etc.*, 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597. Whatever facts relevant to the issue the evidence tended to prove on plaintiff's behalf must be regarded as proved (*Ferris v. Baker*, 127 Cal. 520, 59 Pac. 937), and the sufficiency or insufficiency of the evidence tending to sustain plaintiff's case cannot be considered (*Zilmer v. Gerichten*, 111 Cal. 77, 43 Pac. 408). All of these shadings of the rule, we think, mean simply that a nonsuit should be denied where the evidence, and the presumptions reasonably arising therefrom, are legally sufficient to prove the material allegations of the complaint, and that it should be granted where they are not. *Goldstone v. Merchants', etc., Co.*, supra. To avoid a nonsuit, the evidence of the plaintiff must be sufficient to raise more than a mere surmise or conjecture that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists. *Janin v. London & S. F. Bk.*, 92 Cal. 27, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82.

Measured by these rules, the evidence fail-

ed to show any misappropriation of moneys belonging to the plaintiff by Mr. Hocknell, and the nonsuit was properly granted. Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

5 Cal. App. 748

HIGGINS et al. v. LOS ANGELES RY. CO.
(Civ. 357.)

(Court of Appeal, Second District, California.
June 18, 1907.)

1. APPEAL—REVIEW—TRIAL—JUDGE'S OPINION.

The reasons assigned by a trial judge for his conclusions upon the final determination of a case embodied in an opinion constitute no part of the record on appeal, and, though such an opinion may be cited and referred to in argument as a means of assisting the court in reaching a correct solution of the questions submitted, a proper ruling will not be disturbed because the court reaches its conclusions by erroneous reasoning.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3408.]

2. SAME—RECORD—INSUFFICIENT PRESENTATION.

Supreme Court rule 29 (78 Pac. xii), requiring appeals from superior court orders, that the papers and evidence used on the hearing of a motion for new trial to be authenticated by incorporation in a bill of exceptions, etc., provides the only method by which affidavits used on a motion for new trial may be presented on appeal from the order on the motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2416.]

3. SAME—REVIEW—CONCLUSIVENESS OF FINDING.

A finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3983.]

4. STREET RAILROADS—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

Decedent was guilty of contributory negligence barring recovery for his death, where at night he attempted to cross a street railway track in front of a moving car, when it was from 8 to 15 feet distant, the headlight plainly visible, and the gong ringing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 207.]

5. APPEAL—REVIEW—HARMLESS ERROR.

Any error in excluding testimony was cured by its admission afterwards.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4200.]

6. SAME.

In an action for a pedestrian's death caused in collision with a street car, any error in excluding evidence for plaintiff as to the car's speed was harmless, where the death resulted from contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4187.]

7. TRIAL—INTRODUCTION OF EVIDENCE—REBUTTAL.

Where, in an action for the death of a pedestrian attempting to cross a street car track at night, plaintiff offered testimony as to the absence of signal lights at the place, at the close of defendant's case, it was not error to exclude similar testimony; the evidence being not in rebuttal, and no reason being given tending to appeal to the discretion of the court, nor ex-

cuse given for not offering the testimony when the other was given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 151.]

Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Action by Linna A. Higgins and others against the Los Angeles Railway Company. Plaintiffs appeal from a judgment for defendant. Affirmed.

A. D. Warner and Ansel Smith, for appellants. Bicknell, Gibson, Trask, Dunn & Crutcher (Norman S. Sterry, of counsel), for respondent.

SHAW, J. On the night of December 6, 1904, John T. Higgins, while crossing Central avenue at its intersection with Sixth street in the city of Los Angeles, was struck by an electric street car operated by the Los Angeles Railway Company, receiving injuries which caused his death on the following morning. His widow in her own right and as administratrix of his estate, and also as guardian ad litem of his minor children, instituted this action against said railway company to recover damages claimed to have been sustained on account of his death. Judgment was rendered for defendant, from which, and an order denying a motion for a new trial, plaintiff prosecutes this appeal.

The complaint charges that the death of the deceased was due to the negligence of said railway company in making and leaving unprotected certain excavations along its tracks at the intersection of said Central avenue and Sixth street, into one of which excavations said Higgins stepped while attempting to cross said avenue in the nighttime while the same was unguarded by signal lights and in the absence of any warning as to its dangerous condition, and from which he was unable to extricate himself before being struck by a car operated over the track at said point at a high, dangerous, and reckless rate of speed, and thereby received injuries which caused his death. The answer is a general denial, with an allegation that the death of said Higgins was due to his own carelessness and negligence, which directly contributed to the collision which caused his death.

The transcript contains certain affidavits which purport to embody the opinion of the trial judge, delivered orally at the close of the trial. It is claimed that these affidavits incorporating this opinion were used in support of the motion for a new trial, and the reasoning of the trial judge in determining the case in favor of respondent is assigned as error and here strenuously urged as a ground for the reversal of the order denying appellant's motion for a new trial. The reasons assigned by the trial judge for his conclusions upon the final determination of a case constitute no part of the record on appeal. However erroneous the reasoning may be, error cannot be predicated thereon. Such

an opinion may be cited and referred to in argument, and thus be the means of assisting the court in reaching a correct solution of the questions submitted; but a proper ruling will not be disturbed because the court reaches its conclusions by a process of erroneous reasoning. "If this court finds that upon any ground or for any reason the action of the court below was correct, such action will be affirmed, regardless of the reason which the court may have given for it." *White v. Merrill*, 82 Cal. 14, 22 Pac. 1129; *Schwerdtle v. Placer County*, 103 Cal. 589, 41 Pac. 448. The affidavits cannot be considered on appeal from the order denying the motion for a new trial, because they are not incorporated in a bill of exceptions as required by rule 29 of this court (78 Pac. xii), which provides: "In all cases of appeal from the orders of the superior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law." The law provides no other mode. Hence, their incorporation in a bill of exceptions is the exclusive method of presenting such affidavits to this court for its consideration upon an appeal from an order denying a new trial. *Skinner v. Horn*, 144 Cal. 278, 77 Pac. 904. The affidavits in question, as printed in the transcript (after title of court and cause) are entitled: "Affidavits of A. D. Warner, Linna A. Higgins, Joseph Tilley, on Motion for New Trial." And are indorsed "Used on Motion for New Trial. G. A. Gibbs, Judge." Following these affidavits there is printed in the transcript a counter affidavit entitled, "Affidavit of Geo. A. Gibbs on Motion for New Trial," with a like indorsement. While it is reasonably certain that these affidavits were used at the hearing of the motion for a new trial, it does not appear that such affidavits were the only ones so used. *Shain v. Elkerenkotter*, 88 Cal. 13, 25 Pac. 966; *Spreckels v. Spreckels*, 114 Cal. 60, 45 Pac. 1022; *Melde v. Reynolds*, 120 Cal. 234, 52 Pac. 491.

Counsel for appellant, while contending in a general way that the evidence is insufficient to justify the findings, does not direct our attention to any specific finding thus unsupported, or point out wherein the evidence is insufficient. His argument is directed to a vigorous attack upon what he terms the "system of ratiocination" by means of which the learned trial judge arrived at his conclusion in deciding the case. As we have seen, this "system" is not a subject of review by this court.

The court, in effect, finds that the excavations made by the defendant in repairing its track were not large, deep, or dangerous; that defendant placed lights at each excavation to warn travelers of its presence; that defendant was not negligent in making or leaving said excavations, nor in the manner of placing its lights to warn persons of the

existence of the same; that the deceased did not step or stumble over or into any excavation; and that none of said excavations caused or contributed in any manner to the collision between deceased and the defendant's car. As to all of these findings there was, taking the most favorable view to appellant, a substantial conflict of evidence, and hence the finding of the court will not be disturbed. Having made the above finding, the court further found, upon the issue of contributory negligence alleged in the answer, "that said collision between the said John T. Higgins and the said car of said defendant, and his death resulting therefrom, were caused wholly and entirely by the fault, carelessness, and negligence of said John T. Higgins, and without any fault, carelessness, or negligence upon the part of the said defendant or any of its servants, agents, or employes"; and further, by finding 8, "that the said John T. Higgins was guilty of negligence which directly and proximately contributed to the collision between himself and the said car, and his death resulting therefrom." In support of these findings, one Newton, who was walking north on Central avenue, testifying on behalf of plaintiff, says: "When I got within about 50 feet of Sixth street, I saw a car coming towards me on Central avenue, and I saw a man coming diagonally across Sixth street. I saw the man by the light of the headlight. I think I was about 50 feet from him when he was hit." He further said that he could see the hole into which the man stepped from that distance, and that deceased was in as good a position to see the hole as he was. "His range of vision," says the witness, "was better than mine, and he ought to see it better than I did. The car was anywhere from 8 to 10 feet from the man when I first saw him." He further says that the man stumbled across a pile of dirt when he was 8 or 10 feet from the car; that the man seemed to stumble over a pile of dirt between the two tracks, there being double tracks on Central avenue, and the deceased having crossed the east track, the injury occurring on the west line of track upon which the car was traveling south. No other evidence was offered upon this point by plaintiff. The uncontradicted evidence of the motorman is that he rang the gong twice as the car came into Sixth street; that the deceased was 10 to 15 feet in front of the car when he first saw him; that upon seeing him he rang the gong and shouted and applied the air hard to his brake; that deceased paid no attention, but jumped on the track in an attempt to cross, without increasing his pace, and when he reached the west rail of the west track the car hit him. Another witness, who was in the car, testified that he saw deceased suddenly walk into the rays of the headlight about 10 to 15 feet from the car and in the act of stepping across the east rail of the west track. Other uncontradicted evidence was

to the effect that deceased seemed preoccupied and apparently unconscious of the near approach of the car; that "he didn't seem to see or hear anything. He seemed to be in deep thought. That was the appearance to me when he went between the tracks."

It thus conclusively appears by appellant's testimony the car was 8 to 10 feet, and by that of defendant, 10 to 15 feet, distant from the point where deceased first stepped upon the east rail and was struck by the car when he had reached the west rail of the track. The headlight, plainly visible, and the ringing of the gong, was notice and warning of the approach of the car, and the court might well conclude from the evidence that the deceased failed to exercise that degree of care and prudence ordinarily exercised by men possessing those qualities. The evidence justified the finding of the court as to contributory negligence on the part of appellant's intestate. *Bailey v. Market Street Ry. Co.*, 110 Cal. 320, 42 Pac. 914; *Portsmouth Street Ry. Co. v. Peed's Adm'r* (Va.) 47 S. E. 850; *Jewett v. Paterson Ry. Co.*, 41 Atl. 707, 62 N. J. Law, 424; *Schwaneviede v. North Hudson Ry. Co.*, 51 Atl. 696, 87 N. J. Law, 449.

As to errors excluding testimony, the court sustained defendant's objection, upon the ground that he was not an expert, and no foundation was laid, to a question asked of witness Newton as to how fast the car was running at the time deceased was struck. Later the witness testified that the car was running 25 to 30 miles per hour. Conceding that the court erred in sustaining defendant's objection to the question asked as to the speed of the car when the collision occurred, it was cured by the fact that he subsequently answered it. *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 525, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85. Witness Rowe was asked a similar question, to which the court sustained defendant's objection made upon like grounds. Admitting, but not holding, this ruling to be error, it could not have prejudiced appellant, in view of the finding that the injury resulting in the death of deceased was due to his own negligence. *Wolfskill v. Los Angeles Ry. Co.*, 129 Cal. 114, 61 Pac. 775; *Sego v. Southern Pac. Co.*, 137 Cal. 405, 70 Pac. 279. Five witnesses testified that the car was running at a speed not to exceed eight miles per hour. Had the testimony of Rowe upon this point been admitted, and conceding that his evidence and that of Newton had justified the court in finding that the car was running at a speed of 25 or 30 miles per hour, could such fact have warranted the court in finding otherwise than it did upon the question of contributory negligence? Assuming the evidence tendered by plaintiff as to the speed of the car, of the exclusion of which appellant complains, had been admitted, deceased would still have been guilty of contributory negligence. It is manifest that the reception of this evidence could not have changed the result, and therefore appellant

suffered no injury by reason of said ruling. Code Civ. Proc. § 475; Est. of Morey, 147 Cal. 495, 82 Pac. 57.

At the close of defendant's evidence, plaintiff called Alex Geddis in rebuttal and asked: "Was there any lights or lamps or lanterns anywhere at the intersection of Sixth and Central avenue at that time (7:30 p. m.) that night?" The court sustained respondent's objection thereto upon the ground that the testimony sought to be elicited by the question was not rebuttal. In presenting her evidence in chief, appellant offered several witnesses who testified to the absence of signal lights at the point in question. No excuse was suggested for not calling this witness at that time. The evidence tendered was not in rebuttal, and no reason was offered calculated to appeal to the discretion of the court, or which would warrant any other ruling than that made. *Patterson v. San Francisco, etc., Ry. Co.*, 147 Cal. 178, 81 Pac. 531.

The order and judgment appealed from are affirmed

We concur: ALLEN, P. J.; TAGGART, J.

5 Cal. App. 722

NEWSOM v. WOOLLACOTT. (Civ. 347.)

(Court of Appeal, Second District, California. June 14, 1907.)

1. PLEADING—JUDGMENT ON PLEADING.

In an action for services performed, where defendant pleaded an accord and satisfaction, and inserted in his answer a check, which he alleged was given to defendant as payment of his claim, the failure of plaintiff to serve and file an affidavit denying the check, as provided in Code Civ. Proc. § 448, was only an admission of the genuineness of the check, and not an admission of accord and satisfaction, or that the check related in any way to the transaction sued on, all of which, under the express provisions of Code Civ. Proc. § 462, must be deemed to be controverted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 864-879.]

2. PLEADING — ANSWER — WRITTEN INSTRUMENT—FAILURE TO DENY EXECUTION.

Code Civ. Proc. § 448, makes the failure of a party to deny by affidavit the genuineness and due execution of a written instrument, a part of an adverse pleading, an admission of the same. In an action to recover for services in connection with a certain building, defendant pleaded accord and satisfaction, and set forth in his answer a check given plaintiff, on which was written that it was in full for fees in connection with the building. Plaintiff did not deny by affidavit the execution of the check. Held an admission of the same, and, where plaintiff offered no evidence to controvert the instrument, or to show that it had no connection with the demand sued upon, he was presumed to have had knowledge of the memorandum on the check, so that it was error to instruct that, notwithstanding the jury found the check was intended to apply to the demand sued upon, they must also find, in order to render a verdict for defendant, that plaintiff was aware of the memorandum on the check at the time of its delivery to him, or that he knew of it before the check passed out of his possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 864-879.]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by J. Cather Newsom against H. J. Woollacott to recover for services as an architect. From a judgment for plaintiff and an order denying defendant's motion for new trial, defendant appeals. Reversed.

Tom C. Thornton, for appellant. Drew Puritt, Morton, Houser & Jones, for respondent.

SHAW, J. The respondent, who is an architect, alleges that he was employed by appellant to prepare certain plans and specifications and receive estimates for, and superintend the erection of, a three-story hotel on the southwest corner of Ninth street and Grand avenue, in the city of Los Angeles, of the estimated cost of \$64,000; that the reasonable value of the services agreed to be performed by respondent for appellant was the sum of \$2,560; that respondent entered upon said employment, prepared the necessary plans and specifications for said building, and received estimates for the erection thereof; that, notwithstanding the fact that respondent at all times was ready and willing to perform his part of said agreement, he was, about June, 1904, wrongfully discharged by appellant. In his answer, appellant denies all of said allegations, and sets up another agreement, under which respondent was to submit plans for a building which should not involve an expenditure to exceed \$25,000; that the plans submitted called for the expenditure of an amount largely in excess of said sum; that respondent admitted that such plans were not in conformity with their agreement; that thereupon plaintiff and defendant, after a full discussion of plaintiff's claim for compensation, had a full accounting and accord and satisfaction, where-in it was agreed that defendant should pay plaintiff the sum of \$150 in full of all demands which plaintiff might have or claim against defendant by reason of his negotiations, labors, or otherwise, in connection with the proposed building on Ninth street and Grand avenue, which sum appellant paid to respondent in full satisfaction of all his demands in the premises; that said payment was made by a check, payable to the order of plaintiff, in the lower left-hand corner of which was a memorandum in the words and figures following, "In full for Ninth and Grand avenue fees," which check was duly indorsed and cashed by plaintiff. A copy of this check, with the indorsement thereon, is made a part of defendant's answer. No affidavit denying the check was served or filed by plaintiff, as provided in section 448, Code Civ. Proc. Defendant's motion for judgment on the pleadings was denied. The case was tried before a jury, which gave a verdict for plaintiff, and judgment was entered accordingly. The appeal is from the judgment and

an order denying defendant's motion for a new trial.

There was no error in the denial of appellant's motion for judgment on the pleadings. Admitting the execution and genuineness of the check was not an admission of the new matter set up in the answer by way of accord and satisfaction, or that the check related in any way to the transaction set forth in the complaint; all of which, under section 462, Code Civ. Proc., must be deemed to be controverted. It therefore devolved upon defendant to connect this check with the transaction upon which plaintiff based his action and prove that it was given and received as alleged in the answer. In the absence of evidence establishing such facts, it did not in itself constitute sufficient evidence in support of the new matter alleged in the answer. While plaintiff admitted receiving the check, and that it was genuine and duly executed, he did not admit that it was received as set forth in the answer. "The effect of an admission of the genuineness and due execution of an instrument pleaded by a defendant, and not denied, as provided by section 448 of the Code of Civil Procedure, is to avoid the necessity of proof of its genuineness and due execution, and nothing more; and whether it is proven, or its execution is admitted, its terms and legal effect are to be determined by an inspection of the instrument." *Carpenter v. Shinnors*, 108 Cal. 362, 41 Pac. 473.

At the trial the appellant offered no evidence whatever. He now contends that the evidence was insufficient to justify the verdict, and that the court erred in its charge to the jury. The court instructed the jury as follows: "If you find that the check was intended to apply to the demand here sued upon, and that plaintiff accepted the check with words written thereon indicating that it was to be in full payment of all of such demands, and that he was aware of the presence of such words, then the check should be received by you as evidence of a complete settlement of such demand." In another part of the charge the jury were instructed upon the theory that it was for them to find from the evidence whether or not plaintiff had knowledge of the presence of the memorandum at the time of the delivery of the check to him, or knew of the writing upon such check, before it passed out of his possession.

Having failed to file the affidavit of denial required by section 448 of the Code of Civil Procedure, respondent is deemed to have admitted the execution and genuineness of the instrument. Notwithstanding this admission, he may controvert the instrument by evidence of mistake, fraud, and like defenses, or show that it had no connection with the demand sued upon. *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630. He offered no evidence touching the question, and, in the absence of any testimony, the instrument

stands as an exponent of the facts therein set out, and its terms and legal effect are to be determined by an inspection of the instrument. *Carpenter v. Shinnors*, supra. In the absence of any evidence to the contrary respondent is chargeable with what the instrument purports on its face to be, and it must be taken for just what it appears to mean. *Petersen v. Taylor* (Cal.) 34 Pac. 724; *Brooks v. Johnson*, 122 Cal. 509, 55 Pac. 423. Having failed to controvert it, respondent must be presumed to have had knowledge of the existence of the memorandum on the check at the time of the delivery thereof to him, and to have known of the writing thereon before it passed out of his possession. No proof of this fact was necessary. It was therefore error to instruct the jury, in effect, that, notwithstanding they found the check was intended to apply to the demand sued upon, they must nevertheless, in order to render a verdict for defendant, find the further fact that respondent was aware of the presence thereon of the words, "In full for Ninth and Grand avenue fees," and that respondent "had knowledge of the presence of the memorandum written on the check at the time of its delivery to him," or that "he knew of the writing upon such check before it passed out of his possession." All that can be claimed for this check is that it constituted a receipt for money paid to respondent pursuant to the alleged settlement. As such, it is open to contradiction or explanation by parol testimony. In the absence of such contradiction or explanation, respondent is bound by what it purports on its face to mean. *Simmons v. Oullahan*, 75 Cal. 508, 17 Pac. 543; *Snodgrass v. Parks*, 79 Cal. 55, 21 Pac. 429. There is nothing in *Greer v. Laws*, 18 S. W. 1038, 56 Ark. 37, or in *Rapp v. Giddings*, 4 S. D. 492, 57 N. W. 237, cited by respondent, inconsistent with the general rule.

The judgment and order are reversed.

We concur: ALLEN, P. J.; TAGGART, J.

6 Cal. App. 30

YORDI v. YORDI. (Civ. 300.)

(Court of Appeal, Third District, California.
June 20, 1907. Rehearing Denied by Supreme Court Aug. 19, 1907.)

1. DEEDS—ACTIONS TO SET ASIDE—EVIDENCE—SUFFICIENCY.

Evidence examined, and held to show that a deed executed by a wife to her husband was procured by undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 641.]

2. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE—ADMISSION.

Code Civ. Proc. § 1962, subd. 2, provides that the presumption of the truth of the facts recited in a written instrument shall be deemed conclusive between the parties thereto or their successors in interest. A wife conveyed to her husband premises which had been conveyed by him to her before their marriage by a deed wherein she was described as his wife. Held,

in an action to set aside her deed for undue influence, that evidence that the deed to her was delivered before the marriage ceremony was performed, though on the same day, was without prejudice to defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4153.]

3. WITNESSES—CROSS-EXAMINATION.

Where, in an action by a widow to set aside a deed executed to her husband in his lifetime of premises he had previously conveyed to her, the notary who prepared her deed merely testified on direct examination that the husband instructed him to prepare a deed similar to another given him, statements on his cross-examination that the husband had told him that the deed to his wife should not have been recorded, was recorded by mistake, and that they were going to change it were properly stricken out as improper cross-examination.

4. EVIDENCE—DECLARATIONS—SELF-SERVING.

In an action by a widow to set aside a deed to her husband in his lifetime of premises he had previously conveyed to her, evidence by the notary who prepared her deed as to statements by the husband that the deed to his wife should not have been recorded, was recorded by mistake, and that they were going to change it, not made in the wife's presence, were properly stricken out.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1068, 1069.]

5. WITNESSES—EXAMINATION—REDIRECT.

Where, in an action by a widow to set aside a deed executed to her husband in his lifetime, she was cross-examined as to whether she had told her defendant stepchildren that the property was hers, to which she replied that she had not, she was properly permitted to explain on redirect examination why she was silent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1000.]

6. EVIDENCE—OPINION EVIDENCE—CONCLUSION OF FACTS—DEEDS—WANT OF CONSIDERATION.

In an action by a widow to set aside a deed executed to her husband in his lifetime of premises he had previously conveyed to her, she was properly permitted to state that the same was executed without consideration, and such answer was not equivalent to permitting her to testify that she did not hold the premises on an implied trust for the benefit of her husband.

7. DEEDS—VALIDITY—UNDUE INFLUENCE—PLEADING—SUFFICIENCY.

A complaint in an action by a widow to set aside on the ground of undue influence, a deed to her husband in his lifetime, alleging the marriage relation, intimidation by the husband, the exertion of his predominating influence over her, the taking advantage by him of the confidence reposed in him, and that she acted without independent advice, stated a cause of action, though not setting out the acts constituting the alleged intimidation or undue influence.

8. PLEADING—DEMURRER—GROUNDS—UNCERTAINTY.

Uncertainty is not a good ground of general demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Pleading, § 409.]

9. APPEAL—REVIEW—HARMLESS ERROR—RULING ON DEMURRER.

Error in overruling a demurrer for ambiguity or uncertainty is not ground of reversal, unless a party shall have been misled, to his prejudice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4089.]

10. PLEADING—COMPLAINT—AMENDMENT—TIME FOR.

Under Code Civ. Proc. § 473, providing that the court may in its discretion after notice to

the adverse party allow an amendment to any pleading, a complaint may be amended in the discretion of the court after submission of the cause, but before entry of the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 664, 686.]

Appeal from Superior Court, Sonoma County; S. K. Dougherty, Judge.

Action by Sarah J. Yordi against Flora I. Yordi and others. From a judgment for plaintiff, and from an order denying their motion for a new trial, defendants appeal. Affirmed.

William B. Bosley, for appellants. John O'Gara, for respondent.

CHIPMAN, P. J. Action to compel a reconveyance of real property from defendants to plaintiff. Plaintiff had judgment, from which and from the order denying their motion for a new trial defendants appeal.

Plaintiff and Fred Yordi, father of defendants, intermarried on July 5, 1898. On their wedding day, and before the wedding ceremony, Yordi conveyed the premises in dispute to plaintiff by deed of gift. At that time Yordi was a widower and occupied the premises together with his children, three sons and three daughters (the latter defendants). Thereafter he continued to reside thereon with plaintiff and defendants at the town of Cloverdale, until his death, May 22, 1901. Plaintiff's deed was not recorded until November 14, 1900, and on November 20, 1900, plaintiff reconveyed the premises to her husband, which was recorded November 21, 1900, and on May 3, 1901, he conveyed the said premises by deed of gift to defendants, which was not recorded until May 22d, on the day of his death. The deed from plaintiff to Yordi purports to be a grant, bargain, and sale conveyance, and recites a consideration of \$10, but the uncontradicted evidence was, and the court found, that it was without consideration. About June 22, 1901, plaintiff notified defendants that she rescinded the conveyance made by her to said Fred Yordi and demanded that defendants convey to her the said premises, which, being refused, plaintiff on July 3, 1901, filed her complaint herein. The ground of the action was undue influence of plaintiff's husband in procuring the deed from her to him of date November 20, 1900. The defendants in their answer denied the allegations of undue influence, and averred that the deed from their father to plaintiff was given in trust with the promise to hold the legal title to said premises for his use and benefit, and that she would, whenever requested so to do, reconvey the same to him, and that meantime she would refrain from recording said deed. Upon the issues the court found the facts in favor of plaintiff and against defendants. Appellants challenge the sufficiency of the evidence to support the findings. Certain errors of law are assigned in the admission or exclusion of testimony. It

is also contended that the demurrer to the second amended complaint should have been sustained, and also that the court erred in permitting plaintiff to so amend the complaint, after the cause was submitted, as to offer what are claimed to have been issues of fact differing materially from the issues on which the cause was tried.

1. Much of the discussion in the briefs is directed to the inquiry whether a presumption of undue influence arises out of the marriage relation alone in a transaction where the wife conveys real property to the husband; and, assuming that there is no such presumption, does the evidence establish undue influence? There is printed in the record the written opinion of the learned trial judge which holds with appellants as to the presumption referred to above. But his conclusion was that the evidence was sufficient to establish undue influence. In its main features we are impressed with the correctness of the conclusions reached upon the evidence and have adopted the opinion as our own. It is as follows:

"Sarah J. Yordl, a resident of San Francisco, prosecutes this action to have a certain deed of conveyance executed by her to her husband, Fred Yordl, on the 20th day of November, 1900, canceled and set aside. The defendants are her stepchildren, and they reside in Cloverdale. The property involved was the home of the plaintiff and her husband from the time of their marriage on July 5, 1898, to the time of his death in May, 1901. It has always been the home of the defendants, and they claim to own the property by deed of gift made to them by Fred Yordl, their father, on the 3d day of May, 1901. Fred Yordl and the plaintiff, Sarah J. Yordl, were married in San Francisco between 5 and 6 o'clock p. m. on the 5th day of July, 1898. After their marriage they went to Cloverdale, and resided there with six children by a former wife. Prior to the marriage he made and executed to her a deed of his home in Cloverdale. The consideration of this deed was love and affection. Its value was about \$4,000, and he handed the deed to her in the presence of her aunt, Mrs. Duffy, with the words, 'Here, my dear, this is yours.' The presentation and delivery of this deed vested her with the absolute title to the property in fee simple. This deed was not recorded at the time, and the reason therefor, fairly deducible from the facts proved, was to keep peace in the family. They lived happily together for two years and three months, when Mr. Yordl died of consumption after a lingering illness. During their married life she always reposed great confidence in him. A few months before his death, when it became manifest to Mrs. Yordl that her husband was commencing to settle up his worldly affairs and had converted his mercantile store at Cloverdale into a corporation and had given the shares thereof to his children, she had her ante-

nuptial deed recorded. Its existence had never been known to the children. The recording of this deed becoming known to one of the sons through the newspapers, a condition of affairs arose that was unpleasant to the Yordl family. The recording of the deed first became known to Carl Yordl. He informed his father thereof. The next day, when Mr. Yordl went home to his dinner, he had an interview with his wife. What was said in that conversation was privileged, and not permitted to be stated by her as evidence in the case. After this conversation Mr. Yordl went down town and employed a notary to prepare a deed to be signed by his wife conveying this property to him. About an hour afterwards Mrs. Yordl went down to Mr. Yordl's store, into his office, and met her husband and notary there, and, amid profound silence, she signed the deed and went back home.

"From these facts plaintiff contends that the transaction was one between husband and wife, and when this is shown she has made out a prima facie case and the fairness of the transaction must be proven by the defendants, and a failure on their part to do so would entitle her to judgment. The defendants take issue with plaintiff upon this principal of law, and contend that the presumption of unfairness does not exist in transactions between husband and wife. They rely on *Tillaux v. Tillaux*, 115 Cal. 671, 47 Pac. 691; *Dimond v. Sanderson*, 103 Cal. 97, 37 Pac. 189; *Stiles v. Cain*, 66 Pac. 232, 134 Cal. 170. These decisions are cited and approved in the recent case of *McDougall v. McDougall* (decided January 8, 1902) 67 Pac. 778, 135 Cal. 316, wherein the court says: 'There was, in fact, no evidence tending to show undue influence, unless it be the relation of husband and wife existing between the parties to the deed, and this relation, under the authority of *Tillaux v. Tillaux*, 115 Cal. 670, 47 Pac. 691, *White v. Warren*, 120 Cal. 324, 49 Pac. 129, 52 Pac. 723, *Sheehan v. Sullivan*, 126 Cal. 192, 58 Pac. 543, and *Stiles v. Cain* (Cal.) 66 Pac. 231, must be regarded as of itself, having no such effect.' These decisions establish the law of this state, and from the mere relation of husband and wife a business transaction between them will not be tainted with any suspicion of undue influence; that, notwithstanding the influence which may exist by the one over the other, a transaction will not, from this relation alone, be presumed to be made under undue influence. These decisions may also be said to fix the law of this state that this confidential relation, coupled with an entire want of consideration, will not raise an inference of any unfairness in a transaction between them, but this is the scope of the California cases. Therefore, if plaintiff's case extends no further than this, but is confined within the limits fixed by them, her case is lost. If she has simply

shown the marital relation and want of consideration, she falls short of making out a case of undue influence. She cannot there stop and shift the burden to defendants to prove that this confidence has not been abused. The burden is upon her to go further, and show that the husband made use of the confidence reposed in him by his wife for the purpose of obtaining an unfair advantage over her. Section 1575, Civ. Code. In determining this question, the fact that they were husband and wife when the deed was executed is to be considered as one of the facts in connection with the other facts of the case, and it has more or less weight in determining the question. The relation is one that is easily used and easily abused. As Justice Temple has said in *Stiles v. Cain*, supra: 'The right to control her own affairs would not free her from what usually in fact is, and is always presumed to be, the predominating influence of her husband.'

"The want of consideration is also a fact present in this case, and, while a deed solemnly executed will not be declared void for this reason, if in fact nothing was received by the grantor, or if the consideration was so small as to 'shock the conscience,' yet the fact is one to be considered with the other facts indicative of an abuse of confidence. People make gifts, the consideration may be love and affection entertained and for their better maintenance, support, protection, and livelihood, but the deed herein was not a deed of gift. The consideration recited therein was the cold sum of \$10 and was never paid. How could such a sacrifice by Mrs. Yordi benefit a dying husband? Is it possible to suggest a rational or reasonable motive on her part in dispossessing herself of her home that her husband had given her before their marriage? The unnaturalness of the transaction suggests the predominating influence. To these two facts—that is, to the fact of a confidential relation and a want of consideration—let there be supplemented the fact that she first formed her intention to make this deed during the conversation with her husband at their home, about an hour before she signed the deed, and at that time her mind was in a state of fear. Plaintiff was asked: 'Q. At the time when you first formed your intention to convey this property back to Mr. Yordi, what was the state of your mind with respect to fear or absence of fear? A. I feared. I had fear.' This fear must, I think, be connected with the intention to make the deed and with reference to it, and to no other subject, and is not consistent with that state of mind which should exist with reference to such a transaction. It is not in consonance with a state of mind produced by honest persuasion or by any arguments addressed to the understanding or appeals to the affection, and this state of mind formed a part of the whole transaction. Within an hour

after this intention was formed she went to her husband's store, met the notary, signed the deed, and went home. No conversation at all took place, no one was present save Mr. and Mrs. Yordi and the notary. And this brings us to the consideration of another strong circumstance usually considered in determining undue influence, namely, Mr. Yordi employed the notary and conducted the whole transaction. Our Code provides that a husband is bound to act in the highest good faith towards his wife, and may not obtain any advantage over her by the slightest misrepresentation, concealment, threat or adverse pressure of any kind. Sections 158, 2228, Civ. Code. There must be no constraint upon her or against her free will of what she is unable to refuse. *Greenleaf on Ev.* § 688.

"As the writers upon the subject would put it, he must deal with her at arm's length. And closely connected with this fact is the fact that Mrs. Yordi had no independent or other advice. I take it to be a well-established principle of this court that persons standing in a confidential relation towards others can not entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the person by whom the benefits have been conferred had competent and independent advice in conferring them. *Rhodes v. Bate*, L. R. 1st Ch. 257. The rule is further stated, and I think correctly, in the English note to *Hugeln v. Basely*, 2 Lead. Cas. Eq. 595, as follows: 'The conduct of the party benefited must be such as to sever the connection and to place him in the same circumstances in which a mere stranger would have stood, giving him no advantage save only whatever kindness or favor may have arisen out of the connection.' As was said in a recent case:

"The wife should have had the benefit of a full, free, and private preliminary conference with a competent lawyer or business man who was employed and paid by her and in whom she had confidence and who would be devoted to her interest and hers only.' *Pironi v. Corrigan*, 20 Atl. 227, 47 N. J. Eq. 135.

"The relation of confidence therefore existing, the consideration mentioned in the deed being untrue, the wife receiving no pecuniary advantage by the transfer, but, on the contrary, losing her home, the husband obtaining property for nothing and soon transferring it as a gift to defendants, the fact that she formed her intention to deed in an interview with her husband, and was at the time and when she signed the deed in a mental state of fear, that Mr. Yordi employed the notary who took her acknowledgment, and the entire absence of independent advice and that freedom of marital influence which should characterize every such act—all taken together, would, under the law as I interpret it, constitute undue influence. The

facts of the case are as strong as, if not stronger, than either *Dolliver v. Dolliver*, 94 Cal. 643, 30 Pac. 4, and *Ross v. Conway*, 92 Cal. 637, 28 Pac. 785, and the Supreme Court of this state in both cases held that the facts established undue influence.

"There is evidence in the case of declarations by Mrs. Yordi to the defendants and their brothers that may tend to show fairness of the transfer, but such testimony, under our Code and the law of evidence, is not entitled to much weight, especially when contradicted. It is entitled to but little weight as against the uncontradicted facts above stated, constituting in themselves undue influence.

"Plaintiff has proved the issues by a clear preponderance of the evidence, and may prepare and present findings in accordance with this opinion. S. K. Dougherty, Judge.

"Dated March 28th, 1902."

We may here remark that, after plaintiff had conveyed the property to her husband, he held the title until shortly before his death, although he had previously deeded all his property to a corporation, the shares of which he gave his children, and plaintiff's deed to him was not recorded until the day of his death. During this interval the children of Yordi showed considerable ill feeling towards plaintiff, which would have been greatly increased had Yordi reconveyed the property to his wife. When, however, he found his life fast ebbing away, and that he was about to depart where his wife's reproaches would not reach him, he deeded to his children and they withheld the deed from record and from her knowledge until his act was beyond recall. Under the circumstances shown it is no unfair inference that Yordi obtained the deed with the secret purpose to convey title to his children and that the fact was withheld from plaintiff, leaving her to indulge her "confidence in her husband that he would give it [the property] back to her again," as she testified.

2. The deed from Yordi to plaintiff was executed and delivered on the day of their marriage. The parties to the deed are thus described: "Fred Yordi, of the county of Sonoma, state of California, the party of the first part, and Sarah Jane Yordi (wife), the party of the second part." Plaintiff was permitted to prove, over defendants' objection, and the court found, that the deed was delivered before the marriage was actually celebrated, but on the same day. It is claimed that the finding is not supported by the evidence, because the deed conclusively proved that when delivered the grantee was the grantor's wife, citing subdivision 2, § 1962, Code Civ. Proc. It seems to us that defendants were in no wise prejudiced by this testimony if it be conceded that it was error to admit it. But we do not think it was error. The question of the time of the delivery, whether before or after the mar-

riage ceremony, was not material. No presumption of undue influence would have arisen in favor of the husband if the deed be regarded as having been delivered after the marriage.

3. On the direct examination Notary Lewis, who prepared the deed from plaintiff to her husband under the latter's direction, testified that Yordi instructed him to prepare a new deed similar to an old deed then handed him. Upon cross-examination defendants sought to bring out all that Yordi said to the notary at that time. Plaintiff objected unless it was limited to such parts of the conversation as related to the preparation of the deed by the notary, Lewis. The court allowed the question, with leave to plaintiff to move to strike out the answer. The witness answered that Yordi told him "that the former deed made by him to Mrs Yordi should not have been recorded, that it was recorded by mistake, and now they were going to change it, she was going to deed it back to him." The court, on plaintiff's motion, struck out that part of the answer which referred to the recording of the former deed. The ruling was correct. The answer was not cross-examination as to matters testified to by the witness in chief, was not made in plaintiff's presence, and, besides, was self-serving. Appellants claim that it helped to establish one of the issues presented by defendants' answer. It was not competent to thus prove it.

4. Upon her cross-examination by defendants plaintiff, as a witness, was asked whether at any time after she had executed the deed of November 20, 1900, to her husband, and prior to his death she had told the defendants or either of them that the property in question was hers, or that she claimed it, or owned, or had any interest in it, to all of which she answered "No." Upon the redirect, plaintiff's counsel asked her, "What was the reason for not doing so?" Defendants' objection was overruled, and the witness answered that it would cause trouble for her husband and herself; that "there would have been war" if she had made known her claim to defendants; that she "had confidence in her husband that he would give it back to me (her) again." It is urged that the court erred and should have disallowed the testimony and should have stricken it out on defendants' motion because the answers were but conclusions and opinions of the witness. But they had a direct relation to the matter brought out on the cross-examination, and were intended to remove from the mind of the court any prejudicial inference it might have drawn from the witness' answers that she had not made known her claim to defendants during her husband's last sickness. If it was material for defendants to show that plaintiff was silent as to her claim upon the property after she had deeded it to her husband, she had

a right in reply to explain why she was silent.

5. Upon her direct examination plaintiff was asked the following question: "State what the consideration was for this deed which you executed to your husband." She answered: "No consideration." She had previously testified that she had received nothing for executing the deed. It was objected that the question called for the conclusion of the witness as to a question of law, and that, in permitting her to answer, it was equivalent to allowing her to testify that "she did not hold the said deed on November 20, 1900, upon implied or constructive trust for the benefit of her husband." It was said in *Hardison v. Davis*, 131 Cal. 635, 63 Pac. 1005, where the right to make a similar inquiry arose: " * * * Being in a position to know the ultimate fact, and appellant having the opportunity to cross-examine him (the witness), it was not improper for him to testify directly that there was no consideration." The inference which appellants say might have been drawn from the answer is highly conjectural, and we think not warranted. The court manifestly accepted the answer as referring wholly to the money consideration.

6. It is also claimed that the demurrer to the second amended complaint should have been sustained. It is contended, first, that the general demurrer should have been sustained because the complaint "alleged that said deed of November 20, 1900, was obtained partly by means of intimidation and partly by means of undue influence, but does not set out the facts constituting the alleged intimidation or duress," citing *Goodwin v. Goodwin*, 59 Cal. 560; second, it is contended that if not obnoxious to a general demurrer the complaint was demurrable for uncertainty. The complaint alleges the marriage relation, plaintiff's ownership of the premises as her separate property; that said Yordi, "for the purpose of causing her [plaintiff] to convey to him [her husband] the said lot of land, without consideration, intimidated plaintiff, and exerted upon her the predominating influence which he then had over her by reason of his position as her husband, and used the complete confidence which she then and at all times, until his death, reposed in him, and thereby did then and there cause her, against her will and contrary to her wishes, to make, acknowledge, execute, and deliver to him a deed of conveyance of said lot of land, without consideration"; that "plaintiff made * * * and delivered the said deed to said Fred Yordi solely by reason of his said acts and conduct, and not freely or voluntarily"; that "said deed was prepared by a scrivener selected by said Fred Yordi," and under his "personal direction"; that the property was of the value of \$4,000; that plaintiff received "no pecuniary advantage in return for said deed, and said Yordi

suffered no pecuniary damage therefor," and that "plaintiff had no independent advice in said transaction."

The point in objection to the complaint chiefly urged is that the particular acts constituting the alleged intimidation or undue influence or abuse of confidence are not set forth. This is not the case usually found in the reports where the instrument was executed by one enfeebled mentally or bodily, and easily susceptible for that reason to the operation of undue influences. It is a case where the effect of the alleged acts must be judged from circumstances difficult of precise affirmation. While, as our Supreme Court has held, marriage of itself alone will not give rise to a presumption of undue influence in a transaction such as this, the conjugal relation still is an important fact to be considered. Intimidation on the part of plaintiff's husband is alleged and the exertion of his predominating influence over her and taking advantage of the confidence reposed in him by her, and at a time when she was called upon to act without any independent advice, all of which resulted in his obtaining title to valuable property without consideration. The complaint contains sufficient facts to constitute a cause of action. Furthermore, uncertainty is not good ground in support of a general demurrer. *Ward v. Clay*, 82 Cal. 502, 505, 23 Pac. 50, 227. This court will not in all cases where error has been committed by the trial court in overruling demurrers for alleged ambiguity or uncertainty order a reversal of a judgment based upon a trial of the issues made by the complaint and the answer. Prejudicial error must appear. The party must have been misled to his prejudice, or the error otherwise appear injurious and not merely abstract, before cause for complaint can be predicated of its uncertainty or ambiguity. *Gassen v. Bower*, 72 Cal. 555, 14 Pac. 206; *Alexander v. Central L. & M. Co.*, 104 Cal. 532, 38 Pac. 410. The answer specifically denies the averments of the complaint, and sets forth distinctly the facts upon which defendants relied at the trial. The evidence was directed to the issues thus framed and it is manifest from the record that defendants were not misled or injured by the failure of plaintiff to allege with greater particularity the facts upon which she relied. Conceding the rule of pleading to be as claimed by appellants, we are satisfied that the substantial rights of the parties were not affected by the alleged uncertainty in the complaint.

7. The opinion of the court was filed March 29, 1902, and findings of fact and judgment entered September 16, 1902. The second amended complaint was filed July 18th, to which answer was filed September 10, 1902. On June 9, 1902, plaintiff, after due notice, moved the court for leave to file amended complaint "to conform to the proof given at

the trial thereof." This was objected to on the grounds (1) that it would raise issues of fact other than those presented by the original complaint and answer thereto; (2) that no evidence had been received outside of the issues presented by the pleadings on which the cause was tried; (3) that it would be an abuse of discretion to allow the proposed amendment. The objections were overruled and amended complaint filed. The court made an order allowing defendants 10 days to plead to the amended complaint, and findings were deferred until the coming in of defendants' answer. Subsequently plaintiff confessed the demurrer with leave to file a second amended complaint to conform to the proofs at the trial which the court ordered plaintiff to file within 10 days. On July 16th plaintiff served and filed her second amended complaint to conform to the proof, and on July 25th defendants filed their demurrer thereto. This demurrer was called for hearing on September 2, 1902, on which date defendants applied for a postponement of two weeks. The court refused this request, and heard and overruled the demurrer, allowing defendants five days to answer, and on September 8th defendants answered the second amended complaint. On September 10th plaintiff gave notice that she would on September 15th move the court to sign and file the findings of fact and conclusions of law. On September 12th defendants served and filed a notice that they would on September 22d move the court to set aside the submission of the cause, and also for an order granting leave to defendants to introduce testimony in addition to that adduced at the trial and for a further order setting said cause for trial. The grounds of the motion were (1) that plaintiff's second amended complaint does not conform to the evidence; (2) that the issues presented by plaintiff's second amended complaint and defendants' answer thereto differ from the issues presented in the original complaint and defendant's answer thereto; (3) that defendants desire to and can adduce testimony, in addition to that presented at the trial, tending to support the denials and allegations in their answer to plaintiff's second amended complaint. The motion was made upon the affidavit of one of defendants' counsel and upon the papers and records in the case. On September 15th plaintiff moved the court in accordance with her notice of September 10th, and thereupon defendants moved for a continuance of the hearing of said motion until September 22d, the day noticed for the hearing of the motion mentioned in their notice of September 12th, and until after the hearing of their said motion to set aside the submission of the cause. The court denied defendants' motion for continuance and made and signed

findings on said September 15th, and final judgment was entered September 16th. On September 22d the court heard and denied defendants' motion to set aside the submission. It was said in *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955, that, while it is unusual to find it necessary to amend the complaint after a case has been submitted, there is, under the power given by section 473 of the Code of Civil Procedure, no limitation as to the time before judgment entered when the power of the court ceases. It was also there said that this power to allow amendments in the interest of justice is uniformly held to be within the discretion of the trial court.

The only question, then, is: Did the court abuse its discretion in allowing the amendment? And this question must be answered in the negative unless the amended complaint introduced new issues substantially different from those presented by the complaint under which the evidence was submitted, and unless it appears that the rights of the defendants were prejudiced by the amendment. The evidence adduced on both sides seems to have been addressed to the issue of undue influence, and there is no showing beyond the opinion of one of the counsel for defendants, expressed in his affidavit, that, if the case were reopened, important additional evidence would be produced to rebut plaintiff's case. So far as we can see, defendants had an opportunity at the trial to rebut the evidence on which the amended complaint rests, and they seem to have availed themselves of the opportunity. If they refrained, as they say they did, from cross-examining plaintiff, when called as a witness, upon any point bearing upon the issue of undue influence, they cannot now be heard to complain. The tendency of plaintiff's testimony was obvious, and that she was not permitted to go into particulars as to what took place between her and her husband on November 20, 1900, was due to no reluctance on her part, but from a ruling of the court forbidding it. Defendants had then the opportunity they now say they desire to cross-examine her. In their motion for a new trial neither surprise nor newly discovered evidence is made a ground. If the defendants' motion to set aside the submission of the case had no merit, it was not prejudicial error to file findings and enter judgment without waiting to hear such motion, and it appears that when, subsequently, the motion was denied no exception was taken.

We cannot discover that defendants have been deprived of any substantial right by the procedure complained of.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

MARIONEUX v. CUTLER, Governor, et al.

(Supreme Court of Utah. Aug. 1, 1907.)

1. JUDGES—COMPENSATION—STATUTES—CONSTRUCTION—PROVISOS.

Laws 1903, p. 71, c. 86, providing that the salaries of district judges should be fixed at \$4,000 per annum, "provided" that no mileage or expenses should be allowed, was not subject to construction as though the proviso was omitted, because the contents thereof was not strictly a proper subject of a proviso; the intent of the Legislature to restrict the "salary" by cutting off mileages and expenses being apparent.

2. STATUTES—SUBJECTS—SALARY OF JUDGES.

Const. art. 8, § 20, fixed the salary of judges until otherwise provided by law at \$3,000 per annum and mileage. Laws 1896, p. 364, c. 124, allowed mileage to district judges, the act being entitled, "An act to provide for fixing the salaries and compensation of state and county officers," and Laws 1903, p. 71, c. 86, entitled, "An act fixing salaries of judges of the district court," provided that their salaries should be fixed at \$4,000 per annum, provided that no mileage or expenses should be allowed. *Held*, that such act treated the mileage as a part of the salary, and was not therefore objectionable as containing a double subject.

3. SAME—TITLE.

Laws 1903, p. 71, c. 86, entitled, "An act fixing the salaries of district judges," and providing that no mileage or expenses should be allowed, was not objectionable for the reason that the subject of the act was not clearly expressed in the title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 136.]

4. JUDGES—COMPENSATION—MILEAGE—STATUTES—REPEAL BY IMPLICATION.

Laws 1903, p. 71, c. 86, entitled, "An act fixing the salaries of district judges," and fixing such salary at \$4,000, and expressly providing that no mileage or expenses should be allowed, though containing no express provisions for repeal, repealed by implication Rev. St. 1898, § 2051, declaring that district judges should receive mileage at the rate of eight cents for each mile actually and necessarily traveled in the performance of their official duties.

Application of Thomas Marioneux for a writ of mandate against John C. Cutler, Governor, and others, constituting the state board of examiners, to compel defendants to allow petitioner's claim as a district judge for mileage. Writ denied.

Thomas Marioneux, in pro. per. M. A. Breeden, for respondents.

FRICK, J. This is an original application to this court for a writ of mandate. The applicant, hereinafter designated "petitioner," in substance alleges that from January, 1901, to January, 1905, he was the duly qualified and acting district judge of the Fifth judicial district of this state; that between April 4, 1903, and November 18, 1904, he actually and necessarily traveled in the performance of his official duties a certain number of miles, setting forth the dates, distances, and amounts, aggregating the sum of \$416.10;

that on the 21st day of August, 1905, he duly presented to John C. Cutler, Governor, M. A. Breeden, Attorney General, and C. S. Tingey, Secretary of State, constituting the state board of examiners of the state of Utah, hereinafter called "respondents," said mileage account duly verified and itemized as provided by law, for allowance; that thereafter said respondents, acting as said board, refused to audit and allow said claim, upon the sole ground that respondents were advised and believed that there was no law of this state authorizing the allowance thereof, and therefore rejected the same. The petitioner further alleges that there are sufficient funds in the state treasury to pay said claim, and that the same is justly due and payable. Upon substantially the foregoing allegations the petitioner prayed that a writ of mandate issue requiring said respondents to allow said claim and to certify the same for payment, as required by law, or to show cause why they do not do so. Upon the application and prayer aforesaid, this court issued an alternative writ of mandate, to which respondents appeared by filing both an answer and a general demurrer.

The question to be determined arises upon the demurrer alone. There is no question raised respecting the sufficiency of the facts stated, if there be any law of this state which warrants the allowance of the claim presented to respondents. Is there such a law? The answer to this question hinges upon the constitutional and statutory provisions of this state respecting the salary or compensation and mileage allowable to district judges during the period of time mentioned in the petition. To determine the question requires a review of the constitutional and statutory provisions upon the subject.

The initial step in this legislation is found in section 20 of article 8 of the Constitution of this state, which provides: "Until otherwise provided by law, the salaries of the Supreme and district judges, shall be three thousand dollars per annum, and mileage, payable quarterly out of the state treasury." The Constitution became effective January 4, 1896, and the first Legislature under the Constitution, on April 5, 1896 (Laws 1896, p. 364, c. 124), passed an act fixing the salaries of certain state and county officers, and in that act also fixed the mileage to be allowed the district judges under the following title: "An act to provide for fixing the salaries and compensation of state and county officers." This act was evidently passed to fix the salaries of the officers which were not fixed in the Constitution, and to limit the amount of mileage to be allowed to the judges. The mileage was limited to eight cents a mile, and this was done because no amount or limit had been named in the Constitution. This act, in respect to the mileage of the district judges, was carried into the

Revised Statutes of 1898, § 2051, which reads as follows: "District judges shall receive mileage at the rate of eight cents per mile for each mile actually and necessarily traveled in the performance of their official duties." In 1901 this section was amended (Laws 1901, p. 102, c. 103) by changing the mileage from eight to five cents a mile for travel on railroads, and 15 cents a mile when traveling by other conveyance. In 1903 (Laws 1903, p. 71, c. 86) an act was passed under the title and in terms as follows:

"An act fixing the salaries of judges of the district court.

"Be it enacted by the Legislature of the State of Utah:

"Section 1. Salaries of District Judges. That the salaries of the judges of the district court are hereby fixed at four thousand dollars per annum, payable quarterly out of the state treasury; provided, that no mileage or expenses shall be allowed."

At the same session (Laws 1903, p. 64, c. 74) the salaries of the judges of this court were also increased from the amount named in the Constitution by an act the terms and title of which were identical with the act last above set forth, with the sole exception that Supreme Court judges were named in the latter act, while district court judges were named in the former. It will be observed that no mention of the act of 1901 is made in the act of 1903 quoted above except by reference to mileage in the proviso, where it is provided that "no mileage or expenses shall be allowed." The first contention of petitioner is that that part of the act of 1903 called a proviso is not such; that a proviso logically performs the office of either an exception to the thing granted, permitted, or prohibited, or is a condition engrafted thereon. It is further asserted that, since this so-called proviso is not such, it performs no office whatever in the act, and therefore should be entirely disregarded. It may be conceded that naturally and logically the purpose of a proviso is as claimed by the petitioner, but a departure from this rule, in a part of an act called a proviso, is not alone sufficient to require the so-called proviso to be disregarded. It is a well-established principle that a proviso, like all other parts of a statute, must be accorded the natural meaning and purpose intended, and this intention must be ascertained, first, from the whole act; and, second, if the act relates to a particular matter or thing, by a reference to such matter or thing, when necessary, to arrive at the true meaning of the act or proviso. In this connection it is also well to remember that matter set off from other parts of a section by the term "provided" does not always constitute what in legal phraseology is termed and understood as a proviso. This is well illustrated in

Georgia Banking Co. v. Smith, 128 U. S., where, at page 181, 9 Sup. Ct. 49, 32 L. Ed. 377, Mr. Justice Field, in referring to the term "provided," says that it may have no greater signification than would be attached to the conjunction "but," or "and," and may serve only "to separate or distinguish the different paragraphs or sentences."

In *Bank v. Manufacturing Co.*, 96 N. C. 307, 3 S. E. 363, it is held that the rule that a proviso is a limitation upon or an exception to general words is not absolute, but the meaning of the proviso must be ascertained by the same rules as the meaning of other parts of the statute is ascertained. In the case of *Wartensleben v. Halthcock*, 80 Ala. 568, 1 South. 38, 40, Mr. Justice Clifton, speaking for the court, uses the following language: "Generally the appropriate office of a proviso is to restrain or modify the enacting clause, or preceding matter, and should be confined to what precedes, unless the intention that it shall apply to some other matter is apparent. When from the context, and a comparison of all the provisions relating to the same subject-matter, it is manifest that the object and intent were to give the proviso a scope extending beyond the section, and effect beyond the phrase immediately preceding, it will be construed as restraining or qualifying preceding sections relating to the subject-matter of the proviso, or as tantamount to an enactment in a separate section, without regard to its position and connection." For rules of construction of provisos, and the collection of cases upon the subject, see 6 Words & Phrases, p. 5755 et seq., under the title "Proviso."

Recurring now to the history of the legislation upon the subject in question, we find that the framers of the Constitution, in the section above quoted, treated salary and mileage as one subject. We further observe, by having recourse to section 12 of the same article of the Constitution above referred to, that the terms "salary" and "compensation" are treated as synonymous and used interchangeably. Section 20, above quoted, would thus be construed as if it read: "Until otherwise provided by law, the compensation * * * shall be three thousand dollars per annum, and mileage, payable quarterly," etc. The annual compensation to be paid to judges was thus composed of two items, namely, \$3,000, and mileage, payable quarterly. The same language as to salaries and compensation is found in the California Constitution, and it is held by the California Supreme Court that these terms mean the same thing. *Kirkwood v. Soto*, 25 Pac. 488, 87 Cal. 394. The Legislature, also, by the first act passed (Laws 1898, supra), treated the matter as one subject. In the title of that act, which we have quoted above, nothing is said about mileage, and yet mileage is fixed therein; and, so far as we are aware, no difficulty was encountered by

the judges in obtaining mileage. It is only natural, therefore, that when the act of 1903, the act now under consideration, was passed, the Legislature should treat the matter of salary or compensation and mileage as one subject, precisely as this had theretofore been done. In increasing the salary or compensation of the judges from \$3,000 to \$4,000, it was manifestly intended to include mileage in the higher sum provided for. As mileage had, however, been fixed at a specific amount, it was cut off by what is termed the proviso in that act. While the so-called proviso, as we have seen, is not logically such, it, for that reason alone, is not to be left out of consideration in enforcing that act. The meaning of the act is not at all obscure, and this is conceded on all hands. But it is contended by the petitioner that the act should be read as though it ended at the last word preceding the proviso. We cannot assent to this. We think the act should be read as a whole, including the so-called proviso. Thus read, it would mean that the salary or compensation of the judges is fixed at \$4,000 per annum, including mileage. Or, to state it negatively, as it is stated in the proviso, it would in effect mean that the compensation or salaries of the district judges shall be \$4,000 per annum, and no mileage or expenses shall be allowed hereafter. While this is a change in phraseology, it is not a change in the sense nor of the meaning of the act. It would in law simply amount to an "immaterial alteration." All that is added in the foregoing rendering is clearly implied, and what is omitted would not change the sense or meaning in the slightest degree.

Under the Constitution, mileage was not intended as a permanent allowance, any more than was the sum of \$3,000 as salary named therein. It was to continue only "until otherwise provided by law." The Legislature could thus cut off the allowance of mileage when it fixed the permanent salary or compensation of the judges, and that is just what was intended to be done by passing the act of 1903. This intention is manifest, and is conceded. It is urged, however, that if it be conceded that this was the intention of the Legislature, and the act be given the meaning we have given it above, still the matter contained in the so-called proviso is void for two reasons: (1) That the act would then consist of a double subject; or, (2) if this be found not to be so, that the subject of the act is not clearly expressed in the title, and that the first of the foregoing propositions is prohibited, and the second required, by the Constitution of this state. In support of the first ground, it is argued that salary and mileage are two separate and distinct subjects, and hence cannot be joined in one act. We need not discuss at length the reasons why salary or compensation and mileage may be one subject within the purview

of the Constitution. That, as abstract propositions, they may be two subjects, cannot well be questioned. It is equally apparent that, for legislative purposes, in fixing the compensation of officers, they may quite as naturally form but one subject. As we have already pointed out, both the framers of the Constitution and the Legislature combined them as one subject, and hence we have no right nor legal cause for separating them. It is urged, however, that, if we treat them so, then the effect of the act of 1903 is to amend the act of 1901 without setting it forth as amended, and without mentioning the former act in the title of the latter. In support of this contention *State v. Beddo*, 22 Utah, 432, 63 Pac. 96, is cited. We have already had occasion to point out that the decision in the *Beddo* Case, if construed as broadly as contended for, is too sweeping. We therefore modified the *Beddo* Case in the later case of *Mill v. Brown* (Utah) 88 Pac. 609, where we think the true rule, as supported by the overwhelming weight of authority, is stated. The rule, as there stated, is that the constitutional provision forbidding the amendment of statutes without setting forth the section as amended does not apply to new and independent acts which affect existing laws by implication merely. *Coolley's Const. Lim.* (7th Ed.) 216; 1 *Lewis' Stat. Constr.* (2d Ed.) 239, 240; *King v. Pony Gold Min. Co.*, 62 Pac. 783, 24 Mont. 470.

It is argued, however, that, if the so-called proviso is given effect, then it repeals the act of 1901, *supra*, and that this could not be done in that form, and therefore the act of 1901 in respect to mileage is still in force. It must be conceded that the method adopted by the Legislature in passing the act of 1903 in effecting a repeal of the act of 1901 is not the most approved method of accomplishing that result. That, however, is not a matter to be determined here. If the Legislature violated no express constitutional provision in accomplishing that result, then the later act is lawful, although better methods might have been employed. The question, therefore, is: Did the Legislature violate a constitutional provision in passing the act of 1903? As that act is directly opposed or repugnant to the act of 1901 in respect to the allowance of mileage, the former must give way to the latter upon that subject. In this connection, it is argued by the petitioner that, if it was intended to repeal the former act by the latter, in view of the dual nature of the subject, the purpose to repeal should have been expressed in the title of the act of 1903. It is not contended that in all cases the purpose to repeal need be stated in the title, but, as we understand petitioner, he contends that in this case, if it was intended to repeal the act of 1901, the intention should have been manifested in the title of the act of 1903, which became the

repealing act. But we have to deal with the effect of the act of 1903, not merely with its form. The effect was clearly to repeal the act of 1901, and such was likewise the manifest intention of the Legislature. If, therefore, salary or compensation and mileage constituted one Legislative subject, then mileage was included within the general subject of the latter act, and would, by implication, repeal the former so far as they were in conflict. While repeals by implication are not favored, they must be given effect when the intention of the lawmaking power is clear. Two acts upon the same subject inconsistent with each other cannot stand, and the former must give way to the latter. *Judge v. Spencer*, 15 Utah, 242, 48 Pac. 1097; *Furniture Co. v. Furniture Co.*, 10 Utah, 31, 36 Pac. 132; *In re Gannett*, 11 Utah, 283, 39 Pac. 496; *Kepley v. People*, 123 Ill. 376, 377, 13 N. E. 512; *Devine v. Commissioners*, 84 Ill. 590; *Lyddy v. Long Island City*, 104 N. Y. 218, 10 N. E. 155; *Railroad Co. v. Dunlap*, 112 Ind. 93, 13 N. E. 403.

This brings us to the last, and, as we conceive, the most serious, question in the case. Holding, as we do, in view of the past history of legislation, both constitutional and statutory, that the salary or compensation and mileage of the judges constituted but one legislative subject, is that subject expressed in the title of the act of 1903 as required by the Constitution of this state? As may well be expected, upon a subject as intricate as the one under consideration the authorities are not in entire harmony. Some hold to a strict, others to a more liberal, view. It is conceded by all courts that the title may be so framed as to restrict the act itself to matters which, under a proper title, might legitimately have been included therein; that by a restricted title matters may be foreign which otherwise might be closely related to the subject-matter of the act. The authorities, however, make clear one point, and that is that a hard and fast rule governing all cases cannot be formulated. This in the nature of things must be so, since what may be treated as one single legislative subject by both the framers of the Constitution and Legislature of one state may be treated as two distinct and separate subjects in another state. By saying this we do not mean that the Legislature may arbitrarily make one subject out of that which naturally and logically constitutes two; but what we mean is that the Legislature may include a per diem, or other stipend, with mileage as a fixed compensation, and when these are combined as compensation, then this compensation constitutes the legislative subject, and not the stipend and mileage separately considered. This, we think, is a fair deduction from the authorities upon this subject.

After giving a large number of concrete instances, the author, in *1 Lewis' Sutherland's*

Statutory Construction, p. 209, says: "These decisions have been referred to in detail because no general rule on the subject can safely be formulated. This will be manifest when the cases cited in this section are compared with those cited in the following section." Continuing the subject further, same volume, at pages 216 and 217, the same author says: "If the words of a title, taken in any sense or meaning which they will bear, are sufficient to cover the provisions of the act, the act will be sustained, though the meaning so given the words may not be the most obvious or common. The same rules of construction apply to titles or (as) to other parts of a statute, but it is to be remembered that these rules of construction are servants and not masters, and should not be applied to defeat the legislative intent." In *Johnson v. Harrison*, 47 Minn. 575, 50 N. W. 923, 28 Am. St. Rep. 384, *Mitchell, J.*, speaking for the Supreme Court of Minnesota, says: "The connection or relationship of several matters, such as will render them germane to one subject and to each other, can be of various kinds, as, for example, of means to ends, of different subdivisions of the same subject, or that all are designed for the same purpose, or that both are designated by the same term. Neither is it necessary that the connection or relationship should be logical. It is enough that the matters are connected with and related to a single subject in popular signification. The generality of the title of an act is no objection, provided only it is sufficient to give notice of the general subject of the proposed legislation, and of the interests likely to be affected. The title was never intended to be an index to the law." In the case of *Mills v. County Treasurer*, 29 Wis. 410, 9 Am. Rep. 575, the rule is also well stated in the following language: "As already observed, the subjects of legislation are usually expressed with the utmost brevity and conciseness in these titles, and some consideration must be given to this circumstance in determining the question. The court is not to set aside or declare an act void because the subject was not as fully or as unequivocally expressed as it might otherwise have been. A liberal rule of interpretation must prevail in this respect, not only for the reason just stated, but because the proposition is to strike down and defeat the act of the Legislature, which can never be done on slight or untenable grounds. It is a truth which has been often asserted and often acted upon by the courts that to justify the annulling of a statute by judicial sentence the violation of the constitution must be clear and unmistakable." The rule is also well stated in a case entitled *Matter of Application of New York City*, 99 N. Y. 577, 2 N. E. 642. The same thought is inferred, if not expressed, by this court, in the following cases: *Nystrom v. Clark*, 27 Utah, 186, 75 Pac. 378; *State v. Lewis*, 23 Utah,

120, 72 Pac. 388; *State v. Tingey*, 24 Utah, 225, 67 Pac. 33. It is not contended that the Utah cases cited above are decisive of the precise point under consideration, but they do state the rule applicable in passing upon constitutional objections to legislative acts. The following cases are likewise instructive upon the point involved: *In re Pinkney*, 47 Kan. 89, 27 Pac. 179; *Gibbs v. Northampton Township*, 52 N. J. Law, 496, 19 Atl. 975; *Winters v. City of Duluth*, 82 Minn. 127, 84 N. W. 788.

By reference to 7 Words & Phrases, p. 6287 et seq., under the title "Salary," it will be seen that the term "salary" may be and is variously applied. It is usually used as designating recompense, reward, or compensation for services rendered. Mileage may become a part of compensation. If the mileage allowance is limited to the amount actually expended in traveling, then it cannot, of course, add anything to the income of the recipient of the salary. But, if the mileage is not so limited, as where a certain amount is allowed for each mile traveled and this amount exceeds the actual mileage charged, then the balance above such charge becomes a part of the official income or compensation the same as though it were a part of the salary. As a concrete proposition, it is not controlling that such accretions to official compensation are not designated as salary. It is not unusual, as is generally known, to allow large mileage to eke out the compensation of officers. It can make no difference in principle, however, whether the mileage allowance be much or little above the actual charge, so long as it is not limited to the actual cost of mileage, but is fixed by a round sum per mile. In such event the portion of unexpended mileage may be added to the compensation, and hence may be intended as a part of the compensation. It is asserted that to fix the salaries of district judges was the only matter referred to in the act of 1903; that mileage was not mentioned, and hence could not be affected by the act. In a broad sense nothing was done by the act of 1903 except to fix the salary or compensation of the judges. Up to the time of the passage of that act the judges received \$3,000 per annum with a stated amount for each mile traveled (regardless of the actual cost imposed in traveling) as compensation. In the act of 1903 their compensation was fixed at \$4,000 per annum. Before the act was passed the compensation of the judges may have been in excess of \$3,000 per annum, depending entirely on whether there was any difference between the mileage allowed to and the amount expended by them for mileage. This mileage was thus not entirely foreign to the subject of salary or compensation, and in one sense, in view of the previous legislation respecting the allowance and application of mileage, the act of

1903 did no more than fix the salary or compensation at a fixed amount to which nothing should be added.

The petitioner cites numerous authorities, many of which are clearly distinguishable from the case at bar, while others as clearly support his contentions, if we eliminate the history of prior legislation, and treat the act of 1903 as an entirely independent and abstract proposition. Space forbids us from reviewing and pointing out the reasons why we feel constrained to declare a result different from those reached in some of the cases cited by him. We desire, however, to notice one case cited and upon which petitioner seems strongly to rely, namely, the case of *Howard v. Schneider*, 62 Pac. 435, 10 Kan. App. 137, decided by the Kansas Court of Appeals. Petitioner, evidently by inadvertence, has overlooked the fact that that case was disapproved in a later case by the Supreme Court of Kansas, reported under the title of *Stewart v. Thomas*, 68 Pac. 70, 64 Kan. 511. The opinion in the later case clearly illustrates that the history of legislation of the state, or the law upon any subject, may affect the meaning or scope that is to be given to titles as well as such matters may affect the acts themselves. The later case from Kansas will be found in entire harmony with the spirit we invoke in this case upon this subject. The case at bar is a border-line case upon this subject, and as such is not free from doubt. Much can be said in favor of petitioner's contentions, and, were the act in question an independent act, and freed from the complications arising out of the provisions of previous constitutional and statutory enactments, we might feel inclined to arrive at a different result.

In conclusion, in order to avoid a misconception of the scope of this decision, we remark that the Legislature may not disregard the constitutional provision requiring that no act shall contain "more than one subject, which shall be clearly expressed in its title," by simply making the legislative intention clear in the act itself. But when a reasonable doubt exists, as in this case, upon the question whether the subject of the act is expressed in the title, then such doubt will be resolved in favor of the act. While the subject of the act of 1903 is not as clearly expressed as it might have been done, yet we think that the manifest intent of the Legislature as expressed in the act is sufficiently indicated in the title, and that the title is not misleading, and hence sufficient to bring it within the constitutional provision.

As the act is not assailed upon any other ground, we are constrained to hold that the act, by implication, repealed the act of 1901 allowing mileage, and hence the demurrer to the petition should be and accordingly is sus-

tained. In view that the petition cannot be amended so as to allow the relief prayed for, it is ordered that the action be, and the same is hereby, dismissed, with costs.

MCCARTY, C. J., and STRAUP, J., concur.

(32 Utah, 489)

EVERETT v. JONES.

(Supreme Court of Utah. July 16, 1907.)

1. APPEAL—DECISIONS APPEALABLE.

An appeal lies only from a judgment, and not from an order denying or granting a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 740.]

2. JUDGMENT—WHEN BECOMES FINAL.

A judgment is not final while a motion for a new trial made within the time allotted by law is pending and undisposed of.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 329, 330.]

3. APPEAL—TIME FOR TAKING.

An appeal from a judgment may be taken within six months from the overruling of a motion for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1879-1882.]

4. NEW TRIAL — NOTICE OF INTENTION TO MOVE—LIMITATION.

Under Rev. St. 1898, § 3294, providing that one intending to move for a new trial must, within five days after the verdict, or after notice of a decision if the cause were tried without a jury, serve and file a notice of such intention, and section 3330, providing that all notices must be in writing, one intending to move has a right to wait for a notice in writing of the decision from the adverse party before giving notice of intention to move for a new trial, though the movant participated in the final proceedings, objecting to the findings and the signing of a decree.*

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 280.]

5. SAME—WAIVER.

Under Rev. St. 1898, § 3294, providing that one intending to move for a new trial must, within five days after the verdict, or after notice of the decision if the action were tried without a jury, serve and file a notice of such intention, the written notice of a decision may be waived; but, to constitute a waiver, the party must do some affirmative act pointed out in the statute as not necessary to be done until after the notice.†

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 280.]

6. ATTORNEY AND CLIENT—ACCOUNTING—COMPLAINT.

A complaint alleging that plaintiff delivered to defendant, an attorney at law, moneys and notes valued at \$3,042.80, to be loaned and collected for the use and benefit of plaintiff, and defendant neglected and refused to account to plaintiff, but had converted the moneys and pro-

ceeds to his own use, states a cause of action for an accounting.

7. APPEAL—REVIEW—PRESUMPTIONS.

In the absence of a showing to the contrary, it must be presumed, on appeal from an order requiring an attorney to account to his client for notes and moneys received, that the order was properly made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3673.]

8. ATTORNEY AND CLIENT—ACCOUNTING.

That an attorney failed to comply with an order of court requiring him to account to his client did not warrant the court in treating such failure as a confession of the plaintiff's demand and entering a judgment against him for such an amount, in the face of his general denial and of his counterclaims.

9. JUDGES—CHANGE—AUTHORITY OF SUBSTITUTE TO MAKE FINDINGS.

Where, after the taking of evidence in an action by a client against an attorney for an accounting, and after the judge had found that plaintiff was entitled to an accounting and ordered defendant to account on a future day, and, upon defendant's objection to the judge further proceeding in the cause, another judge was authorized to further try the case, the substitute judge could make findings on the whole case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Judges, § 158.]

10. TRIAL—FINDINGS—DUTY TO MAKE.

A court must find upon all the material issues, including those raised by counterclaims, regardless of the insufficiency of evidence to support them, or though no evidence in their support is introduced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 914.]

11. JUDGMENT—NECESSITY FOR FINDINGS ON MATERIAL ISSUES.

No judgment can properly be rendered until there are findings upon all of the material issues.‡

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 355.]

Appeal from District Court, Box Elder County; John E. Booth, Judge.

Action by M. N. Everett against R. H. Jones. From a judgment for plaintiff, defendant appeals. Judgment vacated, and cause remanded.

T. D. Johnson, O. W. Powers, and R. H. Jones, for appellant. J. D. Call, for respondent.

STRAUP, J. This is an action brought by plaintiff against defendant for an accounting. It is alleged in the complaint that the plaintiff delivered to the defendant, an attorney at law, moneys and notes to the amount and value of \$3,042.80, to be by him loaned and collected for the use and benefit of the plaintiff, and that the defendant had neglected and refused to account to her, but had converted the moneys and proceeds to his own use. Defendant demurred to the complaint for want of facts, and on the further ground

*Mercantile Co. v. Glen, 21 Pac. 500, 6 Utah, 139; Burlock v. Shupe, 17 Pac. 19, 5 Utah, 429.

†Burlock v. Shupe, 17 Pac. 19, 5 Utah, 429.

‡Dillon Imp. Co. v. Cleaveland (Utah) 88 Pac. 670.

that the cause of action was barred by the statute of limitations. The demurrer was overruled. The defendant answered, denying all the material allegations of the complaint, and pleading the statute of limitations and counterclaims—one on a note of \$55, executed by plaintiff to the defendant, which, it was alleged, remained unpaid, and upon which judgment was demanded for \$81; one on a note for \$23.44, executed by plaintiff to the defendant, upon which judgment was demanded for \$34.79; and one for \$500 for services rendered and performed by the defendant for the plaintiff as an attorney, and for costs paid out by him on her behalf. The plaintiff replied, denying the allegations of the counterclaims. Upon these issues the case was tried before Hon. Charles H. Hart, judge of the First judicial district court in and for the county of Box Elder, and after the taking of evidence on behalf of both parties for four or five days the court, on the 20th day of November, 1903, made a finding that a trust relation existed between the plaintiff and the defendant, and that in accordance therewith the defendant came into possession of certain funds of the plaintiff, with respect to which she was entitled to an accounting, and thereupon the court ordered that the defendant make an accounting of the funds so received by him before the court on the 8th day of December, 1903. Upon objection made by the defendant to Judge Hart's further proceeding with the case, and upon defendant's request that the case be concluded before another judge, Hon. John E. Booth, judge of the Fourth judicial district, was authorized to further try the case, commencing on the 29th day of December, 1904. On that day the case was regularly called before Judge Booth. The defendant failed and refused to make an accounting, or otherwise to comply with the order of the court made on the 20th day of November, 1903, and objected to any further proceedings being had in the case, claiming that the court had no authority to make the order, and that the court had lost jurisdiction of the case. These objections were all overruled. Plaintiff's counsel then demanded that judgment by default (because of the defendant's failure to comply with the order) be entered against him for the sum of \$3,202, which sum, it was claimed, the defendant admitted to have been received by him, as evidenced by a statement furnished by him to the plaintiff, which statement was attached to the complaint and made a part thereof. The default was so entered. The defendant having declined and refused to make an accounting or to comply with the order, Judge Booth thereupon made findings reciting the order theretofore made by Judge Hart, the defendant's refusal to comply therewith, and the entering of the default, and without hearing further evidence found

that the defendant, on or about the 1st day of January, 1889, received from the plaintiff moneys and notes in the sum of \$3,042.80, which the defendant had agreed to lend and collect for the use and benefit of the plaintiff, and to pay the principal and interest to her from time to time on her demand; that in June, 1896, the defendant rendered plaintiff a statement showing that the defendant held \$3,202 belonging to the plaintiff; and that on or about June, 1897, the defendant paid to the plaintiff the sum of \$100, interest money, but since the date last aforesaid the defendant had not paid anything to the plaintiff, and had failed and refused to account to her, although often requested so to do. As conclusions of law the court found that the plaintiff was entitled to a judgment against the defendant for the sum of \$3,202, less the payment of \$100, together with interest at 8 per cent. per annum from 1896. Judgment was entered accordingly, from which the defendant has prosecuted this appeal.

We are asked to dismiss the appeal because not taken in time. The findings were made and filed, and judgment was entered thereon, on the 29th day of December, 1904. On the 16th day of January, 1905, defendant served and filed his motion for a new trial. This motion was overruled on the 20th day of June, 1906. We have repeatedly held that in this state an appeal lies only from the judgment, and not from an order denying or granting a new trial; that the judgment is not final while a motion for a new trial, made within the time allowed by law, is pending and undisposed of; and that an appeal may be taken within six months from the overruling of the motion for a new trial. If appellant has filed his motion for a new trial within the time allowed by law, his appeal is within time; otherwise, it is not. The statute provides (section 3294, Rev. St. 1898) that a party intending to move for a new trial must, within five days after the verdict of the jury, or after notice of the decision of the court or referee, if the action were tried without a jury, serve and file a notice of such intention. In this case the motion for the new trial was not served nor filed until 19 days after the findings were filed and judgment was entered. The material question here is: When did the five-day period begin to run? The statute provides that the party intending to move for a new trial must within five days after notice of the decision of the court or referee, if the action were tried without a jury, file and serve his notice of intention. Section 3330 of the statute provides that all notices must be in writing. It is not made to appear of record that any written notice was served upon the defendant of the decision of the court. The contention made by the appellant is that the five days did not begin to run until such a notice was served upon

him or his counsel, and, as no written notice was served of the decision, the motion for a new trial was made within time. On the contrary, it is urged by respondent that the bill of exceptions prepared by the appellant shows that on the 29th day of December, when the findings were presented to the court, and before they were signed and filed, the defendant was possessed of the proposed findings, and objected to the court's making findings upon the ground that the court was without authority to do so; that Judge Hart, and not Judge Booth, heard the evidence, and that the latter heard no evidence upon which the alleged findings of fact could be based; that the findings were not warranted nor supported by the pleadings; that the appellant then and there made various other specific objections to each of the proposed findings of fact, and likewise, for the same and additional reasons, the appellant objected to the court's signing the decree as proposed by respondent; that the court then and there overruled all of appellant's objections, to each of which rulings the appellant then and there excepted; that the court then and there, and on the same day, signed and filed the findings and decree as proposed by the respondent; and that because of such proceedings, and of appellant's participation therein, the respondent was not required to serve a written notice of the decision in order to start the running of the five-day period. There is much force to the position taken by counsel for respondent, and, were the question an open one in this jurisdiction, we would be inclined to hold with him. But in the case of *Burlock v. Shupe*, 5 Utah, 429, 17 Pac. 19, followed and approved in *Mercantile Co. v. Glen*, 6 Utah, 139, 21 Pac. 500, and in the case of *Biagi v. Howes*, 66 Cal. 469, 6 Pac. 100, a contrary doctrine seems to have been held. There, in effect, it was held that, under statutes identical with those here in question, a party intending to move has a right to wait for a notice in writing of the decision from the adverse party before giving notice of intention to move for a new trial, and that he is entitled to such notice of the decision before he is called upon to act, although he was present in court when the decision was rendered, and waived findings, and asked for a stay of proceedings on the judgment, and applied to the court for an extension of time in which to give notice of his intention to move for a new trial. It is there said that such a rule is more certain and definite, prevents controversies which under any other construction would be likely to arise, and accords with the evident intention expressed in the statute. Undoubtedly the serving of the written notice may be waived. But, as pointed out in the case of *Burlock v. Shupe*, supra, to constitute a waiver, "the party must do some affirmative act pointed out in the statute as

not necessary to be done until after the notice." Under the authorities, we are constrained to hold that the motion for a new trial was filed within time; and, as the appeal was taken within six months from the time of the overruling of the motion, it follows that the appeal was taken within time. The motion to dismiss the appeal must therefore be denied.

The appellant urges that the court erred (1) in overruling the demurrer; (2) in making the order requiring him to account; (3) that the court presided over by Judge Booth was not authorized to make findings, because the evidence with respect thereto was not heard by him, but was heard by Judge Hart; and (4) that the court failed to find upon the issues tendered by the counterclaims. We think the demurrer was properly overruled. With respect to the second assignment the appellant has not made to appear wherein the court erred in ordering him to make an accounting. The evidence which the court, presided over by Judge Hart, received and heard on behalf of both parties, lasting some four or five days, is not before us. Whether the court was or was not justified in making such an order must largely depend upon the evidence. We can perceive of some phases of the case where such an order might be made with propriety. Nothing having been made to appear to the contrary, we must presume that the order was properly made. Because the defendant failed to comply with the order, the court, however, was not justified in treating such failure and refusal as a confession of the plaintiff's demand, and entering a judgment against him for such an amount, in the face of his general denial and of his counterclaims. 1 Cyc. 413; *Lee v. Abrams*, 12 Ill. 111; *Bishop v. Baldwin*, 14 Vt. 145. But the court did not enter the judgment simply because the defendant failed and refused to comply with the order. The judgment of the court was also based upon the findings of fact as found and filed by the court, and as hereinbefore set forth. Had the court found upon all the material issues raised by the pleadings, we would, on this record, affirm this judgment. We think that the court presided over by Judge Booth was authorized to make findings upon the whole case. But assignment No. 4 must be sustained. It was the duty of the court to find upon all the material issues, including those raised by the counterclaims, regardless of the insufficiency of evidence to support them, or even though no evidence in their support was introduced. If the evidence was insufficient, or if there was no evidence in their support, the findings of fact with respect thereto should have been against the defendant, for on him was the burden of proof on such issues. With respect to these issues the findings are silent, and until they are disposed of no judgment

could be properly pronounced. *Dillon Imp. Co. v. Cleaveland* (Utah) 88 Pac. 670. For this reason the judgment must be vacated, and the cause remanded. We, however, are not disposed to grant a new trial.

The case is remanded to the trial court, with directions to set aside the findings and judgment, to make new and complete findings upon all the issues presented by the pleadings, and to enter judgment accordingly. This order is made pursuant to chapter 161, p. 260, Sess. Laws 1907, passed since the decision of *Dillon Imp. Co. v. Cleaveland*, supra. Neither party to have costs.

MCCARTY, C. J., and FRICK, J., concur.

PUTNAM v. STALKER.

(Supreme Court of Oregon. July 30, 1907.)

1. TRIAL—NONSUIT—DETERMINATION.

On a motion for a nonsuit, every intending and fair and legitimate inference which can arise from the evidence must be made in favor of plaintiff, and the court must assume those facts as true which the jury might properly find under the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 373.]

2. MALICIOUS PROSECUTION—ACTIONS—PRESUMPTIONS AND BURDEN OF PROOF.

That plaintiff, in an action for malicious prosecution, was held by the magistrate on his preliminary examination, wherein witnesses were examined, both on behalf of the state and plaintiff, to answer at the next term of the circuit court, affords a prima facie case of probable cause; such prima facie case being subject to overthrow by evidence that his binding over was procured by fraud or other improper means.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Prosecution, § 54.]

3. SAME—EVIDENCE—SUFFICIENCY.

Evidence, in an action for malicious prosecution, examined, and held to establish that defendant in making the charge complained of acted in good faith, relying on the advice of the prosecuting attorney, who had previously been fully and fairly advised of all the facts within defendant's knowledge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Prosecution, § 152.]

4. SAME—WANT OF PROBABLE CAUSE—ADVICE OF PROSECUTING OFFICER.

Where one before the commencement of a criminal prosecution in good faith discloses to the prosecuting attorney all the facts within his knowledge, or which he has reasonable ground to believe, relating to the offense, and is advised to institute the prosecution, he is not liable as having acted without probable cause, though there were other exculpatory facts which he might have ascertained by diligent inquiry.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Prosecution, §§ 45, 46.]

Appeal from Circuit Court, Grant County; George E. Davis, Judge.

Action by H. N. Putnam against J. L. Stalker. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This is an action for malicious prosecution. On March 27, 1906, defendant caused plaintiff to be arrested at Canyon City, Grant county, on a warrant issued by a justice of the peace, based on an information sworn to by defendant, charging plaintiff with having obtained from defendant on March 9, 1906, the sum of \$37.50, under false pretenses. By reason thereof, plaintiff was confined in the county jail for 41 days. On May 21, 1906, at the regular term of the circuit court for that county, the prosecuting attorney returned into court an information indorsed "not a true bill," and thereupon plaintiff was discharged. In addition to the foregoing facts, plaintiff alleges that the prosecution was without probable cause and was actuated by malice, concluding with proper and usual allegations of damages. By his amended answer, defendant, by general denial, traverses the whole complaint, and, as a further defense, alleges the facts on which the charge was based; that, after making an investigation of all the circumstances, he submitted all the facts within his knowledge, through his attorney, to the deputy district attorney for that county, who advised defendant that there was probable cause for prosecuting plaintiff, and requested defendant to make and file the information on which the warrant was issued; that acting in good faith, and relying upon the advice of the deputy district attorney, he made the information; that on April 25, 1906, a legal preliminary examination of the charge against plaintiff was had before the magistrate, at which evidence was introduced and witnesses were sworn and examined, both on behalf of the state, represented by the deputy district attorney, and on behalf of defendant in said cause, who appeared in person and by his attorney, and, after a full and fair hearing of the cause, plaintiff herein was held by the magistrate to await the action of the grand jury at the next term of circuit court, and was admitted to bail in the sum of \$250, and, being unable to give the same, he was committed to the custody of the sheriff of the county; that these acts of the defendant are the same acts stated in the complaint; and that the charges preferred were true. By the reply there was a general denial of the new matter of the answer. The cause was tried before a jury, and at the close of plaintiff's case defendant moved for a nonsuit, which was overruled by the court. He also requested of the court an instruction for a verdict in his behalf, based upon a claim that he had established by uncontroverted and competent evidence the defense that the prosecution was upon the advice and direction of the prosecuting attorney, which requested instruction was denied. The verdict was for plaintiff in the sum

of \$120, on which judgment was accordingly entered, and from which defendant appeals. Error is assigned upon the overruling of the motion for nonsuit and the refusal of the court to instruct the jury as requested by the defendant, as well as upon admission of testimony objected to by defendant.

Errett Hicks, for appellant. V. G. Cozad, for respondent.

SLATER, C. (after stating the facts). By his motion for nonsuit, defendant invoked the ruling of the court on the legal effect of the evidence of plaintiff to support his cause of action. Upon such motion every intendment and every fair and legitimate inference which can arise from the evidence must be made in favor of plaintiff, and the court must assume those facts as true which the jury can properly find under the evidence. *Wallace v. Railway Co.*, 26 Or. 174, 37 Pac. 477, 25 L. R. A. 663. And if the evidence tends to show facts which will sustain the action, though remote, the motion for nonsuit should not be sustained. *Herbert v. Dufur*, 23 Or. 464, 32 Pac. 302. But if the testimony offered by plaintiff tends to show that the defendant had good reason to believe that the law had been violated, and he acted in good faith, it is the duty of the court to declare the legal effect of the evidence by allowing the motion for nonsuit. "The welfare of society," says Mr. Justice Bean, in *Hess v. Baking Co.*, 31 Or. 513, 49 Pac. 803, "imperatively demands that those who violate the law shall be promptly and speedily punished, and to accomplish that purpose the rule has been firmly established that any citizen who has good reason to believe that the law has been violated may cause the arrest of the supposed offender, and, if in doing so he acts in good faith, the law will protect him against an action for damages, although the accusation may in fact be unfounded. This rule is founded on grounds of public policy to encourage the exposure of crime, and the punishment of criminals, and when, therefore, the act of a citizen in thus enforcing the law is challenged, the court must determine the question when the facts are admitted or established as to whether he had probable cause for so doing, and not leave it to the arbitrament of a jury."

At the outset of his case, plaintiff offered, and there was received, the transcript of the proceedings in the justice court, which contains the information sworn to by defendant before the magistrate on March 27, 1906, and the warrant issued thereon, and upon which plaintiff was arrested on the 27th day of March, 1906, and on the next day was committed by the magistrate to the custody

of the sheriff of the county. But it further shows that on April 25, 1906, a preliminary hearing was had before the magistrate upon the charge, and after an examination duly held according to law, at which the state appeared by the deputy prosecuting attorney for that county, and the plaintiff appeared in person and by his attorney, and after three witnesses has been examined on behalf of the state, and two on behalf of plaintiff, including himself, he was held to answer at the next term of the circuit court for that county, and was admitted to bail in the sum of \$250. This evidence, instead of showing the want of probable cause, the burden of showing which was upon plaintiff, makes, it would seem, a prima facie case of probable cause. "It is quite generally held," says Mr. Justice Wolverton, in *Stamper v. Raymond*, 38 Or. 16, 62 Pac. 20, "that, where proof was offered upon the examination which is deemed sufficient by the committing magistrate upon which to commit, his commitment accordingly will afford prima facie evidence of probable cause." The effect of the commitment as evidence of probable cause, however, may be overthrown by other evidence showing that it was obtained by false pretenses or other improper means. *Sharpe v. Johnston*, 76 Mo. 660; *Giusti v. Del Papa*, 19 R. I. 338, 33 Atl. 525; *Womack v. Circle*, 29 Grat. (Va.) 192. But, unless it is overthrown by testimony of that character, it becomes conclusive, and must prevent the plaintiff from prevailing. We are unable, however, to discover in the record any evidence on the part of plaintiff tending to show, and in fact it does not seem to have been claimed by him, that there was any fraud or other improper conduct on part of this defendant at the preliminary examination which prevented the plaintiff from obtaining a full and fair hearing, or that the conclusion announced by the magistrate was the result of any improper conduct of defendant; nor are we able to find any evidence on part of defendant in this case, after his motion for nonsuit was overruled, by which the prima facie case of a probable cause, made out by the commitment, was overthrown. The court therefore erred in denying the motion.

2. At the close of the testimony, defendant by his counsel requested the court to instruct the jury as follows: "The court instructs the jury that the fact is before you and is not disputed that, before the defendant began the criminal action described in the complaint in this case, he was advised by J. E. Marks, deputy district attorney for the Ninth judicial district of Oregon for Grant county, to institute the said criminal action, and that before receiving such advice there had been laid before the said deputy district attorney all the facts and circumstances in the knowledge of the defend-

ant relating to the charge against the plaintiff, and that the said deputy, district attorney also made an investigation of his own motion of the charge against the plaintiff, and that after making such investigation, and after receiving all such facts and circumstances, advised the defendant to institute said criminal action, and that defendant acted on such advice in good faith; and I instruct you as a matter of law that such fact constitutes probable cause for said criminal action, and I instruct you to return a verdict for defendant." This requested instruction was denied by the court, and, an exception to the ruling having been taken by the defendant, error is assigned thereon. It appears from the testimony that defendant, soon after having given plaintiff the order for the books, and after having paid plaintiff the sum of money charged to have been obtained under false pretenses, became suspicious of plaintiff's good faith and his right to receive the money as an agent for the proprietors of the work, and on that account defendant consulted with his attorney, A. M. F. Kirchelner, in regard to the matter, giving him a full, fair, and correct statement of all that had transpired between the parties. It transpired that this attorney and R. R. McHaley, residents of that neighborhood, also had recently had transactions with plaintiff similar to those which had taken place between him and defendant, and on which the criminal information was based, and under the same circumstances. These three persons, after talking the whole matter over among themselves, becoming convinced that they had been swindled, and that they would never be supplied with the books, made an investigation to ascertain the correctness of the statements and representations made to each of them by plaintiff when taking their orders and receiving their money. To that end communications were addressed to the Bureau of National Literature and Art in Washington, D. C., plaintiff's reputed principal, and to Mr. C. T. Brown, general manager of the Washington Post at Kansas City, Mo., which was, since June, 1905, the successor in interest to all of the proprietary rights in the sale and distribution of the books in question, formerly possessed by said bureau. On March 19, 1906, the Bureau of National Literature and Art, through E. M. Hunt, its assistant treasurer, replied that Putnam had not been in its employ for a long time, and saying: "We have been endeavoring to ascertain his whereabouts. * * * If Mr. Putnam is still in your locality we would thank you to advise our Mr. C. T. Brown, 601 Century Building, Kansas City, Mo., at his expense by wire. Mr. Putnam's work has been very irregular, and we intend to put a stop to it. We should be pleased to receive this information if possible." On March 21, 1906, Kirchelner received a telegraphic message from Brown to have Putnam

arrested; but, fearing to act on such request without further information, Brown was advised by Kirchelner to forward a warrant. On March 25th following, the sheriff of the county received from Brown this telegram: "Arrest H. N. Putnam claiming to be representative of Bureau of National Literature and Art. Charge, collecting and retaining trust fund." Plaintiff was arrested and taken into custody by the sheriff, acting upon this order but without warrant; but he immediately advised Brown that he would not hold plaintiff unless a proper warrant was forthwith furnished, and on March 27th he received from Brown this message: "A. M. Kirchelner of Prairie City, Or., will make charge against Putnam. If not, collect all supplies belonging to Bureau of National Literature and Art and let go." All of these matters were fully disclosed to the deputy district attorney by Kirchelner acting for himself and for the defendant, and by R. R. McHaley. The deputy district attorney had talked with both of these persons, and they testified that they had fully and fairly disclosed to him all of the facts within their knowledge regarding not only plaintiff's transactions with defendant, but also plaintiff's dealings with them concerning the sale of books, and the evidence shows that the defendant had previously disclosed to Kirchelner and McHaley all of the material facts within his knowledge upon which the criminal charge was afterwards based, and that Kirchelner was acting as defendant's attorney and was advising him as to what he should do in the matter. The deputy district attorney also swears that he was made fully acquainted with all of the facts of the case by McHaley and Kirchelner, and that he had in fact been investigating appellant's conduct for a month or six weeks previously, and was well advised concerning his transactions, and based on such knowledge and information he advised Kirchelner to have his client, Stalker, the defendant, swear to the information, because he then believed there was sufficient evidence to hold plaintiff. He preferred that Stalker should make the information, instead of either Kirchelner or McHaley, because Putnam had admitted to McHaley that he had not forwarded Stalker's order, which fact made a stronger case against plaintiff, while they had no evidence as to whether plaintiff had forwarded McHaley's or Kirchelner's orders and money. This testimony is corroborated by both Kirchelner and McHaley. The latter testifies that he expressed his willingness to make the information himself; but, the deputy district attorney advising that Stalker had the stronger case, the latter was the proper person to make the charge, and he was requested to swear to the information. Defendant swears that he was so advised and requested by his attorney, and that relying upon the

advice of the deputy district attorney, conveyed to him through his attorney, and acting in good faith, he appeared before the magistrate and swore to the information.

There is nothing in the record that in any way controverts any of these sworn statements, and it must result that it is established that defendant in making the charge complained of acted in good faith, relying upon the advice of the deputy district attorney, who had previously been fully and fairly advised of all of the facts within the knowledge of the defendant. "The rule seems to be that where one seeking in good faith the advice of a public prosecuting officer about the commencement of a criminal prosecution discloses to such officer all the facts and circumstances within his knowledge, or which he has reasonable ground to believe, relating to the offense, and is advised by that officer to institute the prosecution, his defense of probable cause will be established if he acted in good faith upon such advice, even though there were other exculpatory facts which he might have ascertained by diligent inquiry." *Hess v. Oregon Baking Co.*, supra. An effort was made by plaintiff to challenge defendant's good faith in prosecuting the plaintiff by attempting to show that the prosecution was instituted by him, aided by Kirchner and McHaley, with the object in view to force plaintiff to return to them the several amounts of money he had obtained from them. But it is sufficient to say, without reviewing the testimony in detail, that the attempt wholly failed. There was no testimony offered by plaintiff from which a jury could have drawn an inference of bad faith on part of defendant in that connection. Each of his witnesses, offered for that purpose, testified that the defendant stated that, while he would like to have his money back, he was willing to forego that and to prosecute the plaintiff, because he believed him guilty. The court was in error when it refused the requested instruction.

It follows, therefore, that the judgment should be reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

WOLFER v. HURST et al.

(Supreme Court of Oregon. Aug. 6, 1907.)

1. APPEAL—REVIEW—HARMLESS ERROR.

Plaintiff may not complain on appeal of an order modifying a temporary restraining order without the notice to him expressly conferred by B. & C. Comp. § 422, where he is not entitled to the injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4035.]

2. INJUNCTION—GROUNDS—TRESPASS.

In the absence of a showing that the acts complained of amount to an irreparable injury

to the estate, a court of equity will not enjoin a trespass thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 98.]

3. SAME—REMOVAL OF CROPS.

Plaintiff may not enjoin defendants from disposing of a crop from his farm until the final determination of a forcible entry and detainer action between them pending in the Supreme Court, on the ground of their insolvency, where they have given an undertaking under B. & C. Comp. § 5754, entitling plaintiff to recover, if the judgment is affirmed, double rental value of the property during the pendency of the action.

4. FORCIBLE ENTRY AND DETAINER—APPEAL—SUFFICIENCY OF UNDERTAKING—PRESUMPTION.

Where on judgment for plaintiff in a forcible entry and detainer action defendants give a bond under the express terms of B. & C. Comp. § 5754, guaranteeing payment of twice the rental value of the land should judgment be affirmed, in the absence of objections or exceptions thereto, the undertaking must be presumed sufficient for the objects given, and is effectual for all purposes until the final determination of the cause.

Appeal from Circuit Court, Marion County; William Galloway, Judge.

Suit by George J. Wolfer against W. H. Hurst and another. From a decree dismissing the complaint, plaintiff appeals. Affirmed.

Carey F. Martin, for appellant. A. M. Cannon, for respondents.

KING, C. This is a suit to enjoin defendants from removing or in any manner disposing of a crop of hops from plaintiff's farm until the final determination of a forcible entry and detainer action between the parties herein pending in the Supreme Court of this state. 47 Or. 156, 80 Pac. 419, 82 Pac. 20. At the time of the filing of the complaint a decision, affirming the judgment of the court below in the proceeding referred to, had been filed. The mandate was withheld awaiting the consideration of a petition for rehearing. The complaint alleges, in effect, that plaintiff is the owner of and entitled to the immediate possession of the property involved in the action mentioned; that defendants forcibly and wrongfully took possession of the premises, which possession they wrongfully and unlawfully retain and hold by force, for the purpose of securing and applying to their own use the crop of 1905, consisting of 10,000 pounds of hops, valued at \$1,500, with the intention of selling and removing the same from the land and beyond the jurisdiction of this court, before the mandate of the Supreme Court can possibly be procured; that defendants have been and are cultivating the crops in an improper manner and willfully and maliciously tearing up and injuring the hop vines, thereby and otherwise causing irreparable injury to the estate; that the appeal from the proceedings in the former case was taken, and the petition for rehearing

filed, for the purpose of delay, in order to defraud plaintiff, as aforesaid; that in taking the appeal the undertaking given was only for the sum of \$250; that such sum is insufficient to protect the plaintiff in damages and loss which will result from the acts complained of; that defendants are insolvent and unable to respond in damages; and that the rental value of the premises for the year 1905 was about \$1,500. On the facts alleged a decree is asked to the effect that plaintiff be declared the owner of the alleged crop free from any claims or liens thereon; that defendants be enjoined from selling or disposing of the crop grown on the premises involved in the former action, or in any manner incumbering the same with a mortgage or other lien, or from removing any part thereof from the jurisdiction of this court, until the final determination of this suit, during which time it was prayed that defendants and their agents be enjoined from in any manner molesting plaintiff's property; that pending the final determination herein a receiver be appointed to take possession of the property, with power to employ the necessary help and to harvest and dispose of the crops, as the court might direct. Upon the filing of the complaint, a temporary restraining order was issued, in accordance with the request, except as to the appointment of a receiver. An answer, by way of a plea in abatement, was filed, to which a demurrer was sustained and the plea dismissed. An answer was then filed to the merits, admitting the existence of the former proceeding and that it was in the Supreme Court, alleged the facts leading to the institution of the forcible entry and detainer action; that defendants had occupied the premises during the pendency of the action throughout the different courts in good faith; had expended \$875 in cultivation, growing of the crop, etc., thereon; that the hop crop had been picked by them at the time of the commencement of this suit, and that plaintiff had no right nor title thereto. To the affirmative allegations of the answer a demurrer was filed and sustained, on the ground that they did not state facts sufficient to constitute a defense. On an ex parte motion of the defendants the temporary restraining order was modified, by permitting the removal of the hops from the hophouse on the premises, which were directed to be stored in a warehouse of the Southern Pacific Railway Company at Hubbard, Or., a receipt taken therefor, and immediately deposited with the clerk of the court, awaiting the final determination of this suit. Testimony was taken before the court, and, based upon findings therefrom to the effect that defendants were not insolvent, and that plaintiff has a plain, speedy, and adequate remedy at law, a decree was entered dismissing the complaint. At the time the decree of dismissal was entered, it appearing to the court, b;

affidavit, that the defendants had loaded the disputed hops, for shipment, on cars of the Southern Pacific Railway Company, an order was made by the court, to the effect that defendants return the same to the warehouse of said railway company at Hubbard, Or., to be left there until the final determination of the proceedings on appeal. From the decree dismissing the complaint plaintiff appeals.

It is maintained by the plaintiff that the court erred in modifying the temporary restraining order, without notice having been given to plaintiff in accordance with B. & C. Comp. § 422. The effect of the action of the court in dissolving or modifying an order, under the circumstances named, can only be material when it shall be found that plaintiff is entitled to such relief. The question, then, for determination and the only point urged, necessary to be considered here under the record, is: Had plaintiff a plain, speedy, and adequate remedy at law? If answered in the affirmative, it disposes of the point mentioned, as well as the entire case; for, if plaintiff has such remedy, the error suggested, if it can be termed such, could not have been prejudicial to plaintiff, nor would the action of the court in dismissing the complaint be erroneous. Whatever may be the rule in other states, it is settled here that, in absence of a showing to the effect that the acts complained of amount to an irreparable injury to the estate, a court of equity will not enjoin a trespass thereon. *Moore v. Halliday*, 43 Or. 243, 72 Pac. 801, 99 Am. St. Rep. 724; *Hume v. Burns* (decided July 9, 1907) 90 Pac. 1009.

The evidence does not disclose that any permanent injury was either done or threatened to the premises. The manner of caring for the hops and cultivation thereof is not shown to be such as would result in permanent injury to the estate. The testimony bearing on the subject indicates only a difference of opinion as to the proper manner in which such hops should be handled; and, whatever may have been the proper method of cultivation thereof, no damage of any serious consequence is established, either actual or threatened. It is provided by our statute that, when an appeal is taken in a forcible entry and detainer action, "if judgment be rendered against the defendant for the restitution of the real property described in the complaint, or any part thereof, no appeal shall be taken by the defendant from such judgment until he shall, in addition to the undertaking now required by law upon appeal, give an undertaking to the adverse party, with two sureties, who shall justify in like manner as bail upon arrest, for the payment to the plaintiff of twice the rental value of the real property of which restitution shall be adjudged from the rendition of such judgment until final judgment in said action, if such judgment shall be affirmed upon ap-

peal." B. & C. Comp. § 5754. It could make no difference, therefore, as to the alleged insolvency of the defendants in view of the undertaking provided by the statute, which entitled plaintiff to recover double the rental value of the property for the time during which the action was pending. The undertaking given for that purpose was executed by the defendants and two sureties, and guarantees payment of twice the rental value of the land, in the event of the court adjudging restitution to plaintiff. While the sureties only justify in the sum of \$500 each, no limitation is placed on their liability under the instrument. No objection appears to have been made to the sufficiency of the undertaking, nor is it alleged or attempted to be shown that the sureties are insolvent. In the absence of objections or exceptions thereto, the undertaking must be presumed sufficient for the objects given, and is effectual for all purposes until the final determination of the cause mentioned. 47 Or. 156, 80 Pac. 419, 82 Pac. 20. It is evident that the object of this statute was to protect the owner against loss in a case of this kind, while the proceedings are pending on appeal and until the final

determination of the rights of the parties involved, thereby making an injunction unnecessary to secure him against any loss occasioned during the interim, except where irreparable injury to the estate is shown.

The question as to whether plaintiff is entitled to recover the value of the crop or be left solely to his remedy on the undertaking, or as to whether it is in his discretion to rely upon either, is not necessary to a decision herein. But should it be assumed that plaintiff, after obtaining judgment ousting defendants from the land, upon which the crop was raised, was entitled to the possession of the produce grown thereon, during the pendency of the proceedings, he would still have an efficient remedy at law. *Parsons v. Hartman*, 25 Or. 547, 37 Pac. 61, 30 L. R. A. 98, 42 Am. St. Rep. 803; *Moore v. Halliday*, supra; *Meyer v. Roberts* (Or.) 89 Pac. 1051; *Jones v. McKenzie*, 122 Fed. 390, 58 C. C. A. 96.

It follows from any view that might be taken, under the evidence, that plaintiff has an ample remedy at law, for which reason the decree of the court below should be affirmed.

GAREY et al. v. ST. JOE MINING CO.

(Supreme Court of Utah. June 28, 1907.)
On Rehearing, July 17, 1907.)

1. CORPORATIONS—CHARTER—NATURE OF CONTRACT.

A corporation's charter is a contract between the state and the corporation, between the corporation and the stockholders, and between the stockholders and the state.

2. SAME—AMENDMENT—POWER OF STATE.

In granting charters or authorizing the creation of corporations under general laws, the state may expressly reserve the power of alteration, amendment, or repeal, and such reservation becomes a part of the contract between the state and the corporation, and is binding, not only upon the corporation, but also upon every individual stockholder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 119.]

3. SAME.

Under the constitutional provision that all laws relating to corporations may be amended or repealed, and all corporations doing business in the state may as to such business be regulated or restrained by law, the state may not amend charters of existing corporations, so as to change the fundamental character of the corporation, impair the object of the grant or rights vested thereunder, nor amend them in such way as will impair the contractual relations or rights of the stockholders among themselves, or between the corporation and its stockholders; but the Legislature has the right to amend the charter or laws relating thereto, so far as the state is interested, to modify any right, privilege, or immunity granted by the state, to repeal the charter or all laws under which it was granted, to take away altogether the franchises and privileges granted under it, and to make such reasonable amendments or alterations deemed necessary to carry into effect the purposes of the grant or to protect the rights of the public, of the incorporation, and its stockholders, when such amendments or alterations will not defeat or substantially impair the object of the grant or any vested rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 119.]

4. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—CORPORATIONS.

A statute authorizing majority stockholders to amend the articles of incorporation against the consent of the minority, so as to make non-assessable full-paid capital stock assessable and subject to sale for such assessment, affects the contractual relations of the stockholders among themselves, and is an impairment of the obligation of a contract, within the prohibition of the federal Constitution.

5. CORPORATIONS—ARTICLES—RIGHT TO AMEND—AFFECTING NONASSESSABLE STOCK.

Under Rev. St. 1898, § 338, as amended by Sess. Laws 1903, p. 80, c. 94, providing that articles of incorporation may be amended in any respect conformable to the state laws by a vote representing two-thirds of the outstanding capital stock, provided the personal or individual liability of full-paid capital stock for assessments, etc., shall not be changed without the consent of all the stockholders, such majority stockholders may not amend the articles of incorporation against the consent of the minority, so as to make nonassessable full-paid capital stock assessable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 124.]

Appeal from District Court, Third District;
C. W. Morse, Judge.

Action by Ellen Garey and others against the St. Joe Mining Company. From a judg-

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ment sustaining defendant's demurrer, plaintiffs appeal. Reversed and remanded.

Lawrence & Robertson and E. A. Walton, for appellants. D. H. Wenger and E. B. Critchlow, for respondent.

STRAUP, J. This action is brought by plaintiffs against the defendant, a mining corporation organized under the laws of the state of Utah, to restrain it from selling certain full-paid capital stock of the corporation owned by plaintiffs for the nonpayment of an assessment levied against the stock by the board of directors. It is alleged in the complaint, among other things, that the capital stock of the corporation is divided into 1,000,000 shares, of the par value of \$1 each, of which the plaintiffs are the owners of 149,881 shares; that all the outstanding capital stock is fully paid; that by the terms of the original articles of agreement of incorporation it was agreed by all of the incorporators that "the stock of this company shall be nonassessable"; that under the laws of Utah in force at the time the articles of agreement were made the articles could not be amended so as to make the full-paid capital stock of the corporation assessable without the consent of all the stockholders, and that defendant issued and sold to its stockholders its fully paid and nonassessable shares, represented by certificates signed by its officers, and that each certificate on its face provided that the shares were and are nonassessable; that in pursuance of a call made by the board of directors a stockholders' meeting was held on February 5, 1907, for the purpose of amending the articles so as to authorize the board of directors, for the purpose of paying the expenses, conducting the business, and paying the debts of the corporation, to levy and collect assessments in the manner and form as provided by law, and so that such assessments might be levied and collected before the working capital stock of the corporation was exhausted; that at said meeting 819,636 shares of the outstanding capital stock were represented, of which 635,464 shares voted for the amendment and 184,172 shares voted against the amendment, 122,364 shares of the outstanding capital stock not being represented, the holders of which, it is alleged, withheld their consent to the amendment by not voting for it, and that the holders of the 635,464 shares, in violation of the terms of the articles of agreement of incorporation, wrongfully and illegally assumed to declare the pretended amendment approved and adopted; that in pursuance of the amendment and of the pretended authority conferred upon them thereby, the board of directors, on February 15, 1907, levied an assessment of two cents per share upon all the outstanding full-paid capital stock, payable immediately and declared it delinquent on the 25th day of March, 1907, and directed that delinquent stock be advertised and sold on the 16th day

of April, 1907, unless the assessment was sooner paid; that the levy of the assessment was illegal and wrongful, and that, unless restrained, the defendant will sell plaintiffs' stock for nonpayment of the assessment. The court sustained the defendant's demurrer to this complaint for want of facts. The correctness of this ruling is questioned by this appeal.

It is alleged that the defendant was organized in the year 1897. It was organized under the laws of 1888 and 1894. So far as concerns this case the laws of 1896 relating to corporations are a mere re-enactment of the laws of 1888, and in no manner repealed or affected the laws of 1894. The laws of 1888, as re-enacted in 1896, provided that the name of the corporation might be altered, the number of its directors or officers changed, and that the articles of agreement of incorporation might be otherwise changed or amended, provided such amendment did not alter the original purpose of the incorporation, but no such change should be made except by a vote representing at least two-thirds of the capital stock at a stockholders' meeting called for that purpose. Section 2393 of the Compiled Laws of Utah of 1888 provided that: "Any person who is the holder of full-paid up capital stock, shall not be liable for any assessments or for any indebtedness of the corporation otherwise than by sale of his or her stock, as herein provided, unless distinctly provided for in the articles of incorporation, which articles, or incorporation shall not be changed in this respect without the consent of all the stockholders in writing." This section was amended by the Legislature in the year 1894 (chapter 70, p. 119, Sess. Laws 1894) to read: "Any person who is the holder of full-paid up capital stock of any corporation hereafter organized under the laws of Utah Territory, shall not be liable for any assessments upon such capital stock or for any indebtedness of the corporation, nor shall any assessment be levied upon such capital stock for any purpose whatever, nor shall any such holder be liable for assessments or indebtedness of the corporation, except it shall be provided in the articles of incorporation or the agreement in writing specified in section 2268, subd. 2, of said Compiled Laws, that such capital stock shall be liable for assessments or for the indebtedness of the corporation, then the corporation shall be and is authorized to levy assessments upon such stock, to be collected as in the articles provided. The articles of incorporation, in this respect, shall not be changed without the consent of all the stockholders." The section as amended was not repealed nor modified by the Laws of 1896. This section as amended was substantially incorporated into sections 331 and 354 of the Revised Statutes of 1898, which are as follows: Section 331: "The property of the corporation and the unpaid stock shall be liable for the debts of the corporation; but

the individual property of any holder of full-paid capital stock of any corporation organized since March eighth, eighteen hundred and ninety-four, or that hereafter may be organized, under the laws of this state, except as otherwise expressly provided in this title, shall not be liable for the corporate obligations, nor shall assessments be levied on such stock for any purpose whatever, except to such extent and in such manner as may be expressly provided in the articles of incorporation." Section 354: "The full-paid capital stock of any corporation organized since March eighth, eighteen hundred and ninety-four, or that hereafter may be organized under the laws of this state, shall not be assessable for any purpose whatever, except to such extent and in such manner as may be expressly provided in the articles of incorporation: provided, that if such stock is made assessable and the manner of levying the assessment is not provided for, it shall be levied in the manner and form hereinafter prescribed." Section 338, Rev. St. 1898, provides: "The articles of incorporation of any corporation now existing, or that hereafter may be organized under the laws of this state, may be amended in any respect conformable to the provisions of this chapter by a vote representing at least two-thirds of the outstanding capital stock thereof at a stockholders' meeting called for that purpose, as hereinafter prescribed: provided, that the original purpose of the corporation shall not be altered, nor shall the capital stock be diminished to an amount less than fifty per cent. in excess of the indebtedness of the corporation; and provided further, that the liability of the holder of full-paid capital stock for assessments or for the indebtedness of the corporation shall not be changed without the consent of all the stockholders." In 1903 (Sess. Laws 1903, p. 80, c. 94) the Legislature amended section 338 of the Revised Statutes to read: "The articles of incorporation of any corporation now existing, or that hereafter may be organized under the laws of this state, may be amended in any respect conformable to the laws of this state by a vote representing at least two-thirds of the outstanding capital stock thereof at a stockholders' meeting called for that purpose as hereinafter prescribed: provided, that the original purpose of the corporation shall not be altered, nor shall the capital stock be diminished to an amount less than fifty per cent in excess of the indebtedness of the corporation; and provided, further, that the personal or individual liability of the holder of full-paid capital stock for assessments or for the indebtedness or obligations of the corporation shall not be changed without the consent of all the stockholders." Section 1, art. 12, of the Constitution of Utah, adopted in 1896, is as follows: "Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended or

repealed by the Legislature, and all corporations doing business in this state, may, as to such business, be regulated, limited or restrained by law."

It is contended by the respondent that, under section 338 of the Revised Statutes, as amended by the Session Laws of 1903, two-thirds of the stockholders of the outstanding capital stock were authorized to amend the articles of incorporation against the consent of the minority, so as to make nonassessable full-paid capital stock assessable, and to empower the board of directors to levy an assessment on such stock, and that the Legislature, under the reserved power of the Constitution, was authorized to make such legislation and thereby to affect existing corporations, and hence such legislation was not violative of the federal Constitution, placing an inhibition on the impairment of contracts and the taking of property without due process of law. On the other hand, it is contended by appellant: (1) That neither section 338, as contained in the Revised Statutes, nor as amended by the Laws of 1903, gave any number of stockholders less than the whole the right to make such an amendment; and (2) if it were intended by the Legislature to confer such a power, the right so to do was not within the reservation of the Constitution, for that it was violative of the federal Constitution, prohibiting states from impairing the obligations of contracts and the taking of property without due process of law. The meaning of the phrase in the proviso of section 338 as amended, "that the personal or individual liability" of the holder of full-paid capital stock for assessment or for the indebtedness or obligations of the corporation shall not be changed without the consent of all the stockholders, is not as clear as it might be. It is argued by respondent that the meaning thereof is that two-thirds of the stockholders might so amend the articles as to create what is called a mere stock liability for assessments or for the indebtedness or obligations of the corporation against a dissenting minority, but that no amendment of the articles could be made, so as to create any kind of liability other than one for a sale or forfeiture of stock, without the consent of all the stockholders. On the other hand, it is argued with much plausibility that full-paid capital stock of a private corporation is the individual and personal property of the stockholder to the same extent as is his chattel, and when specific property of his is made liable for a certain thing or things to that extent he is made personally and individually liable, and hence, in order to change the articles, under the laws of 1903, whereby such a liability is created, a consent of all the stockholders is essential. For the purpose of a consideration and a decision of the other question involved, we will assume, without deciding the point, that the meaning of "personal or individual liability," as used in the statute, does not include a

mere stock liability, and that it was the intention of the Legislature, among other things, to confer the power upon two-thirds of the stockholders of a corporation to amend the articles of incorporation so as to make full-paid nonassessable capital stock assessable against a dissenting minority, and therefore the action taken by two-thirds of the stockholders was within the power conferred by the amendment of 1903. This, then, brings us to the troublesome and greatly controverted question as to whether the Legislature had the authority to confer such a power upon any number of stockholders less than the whole, and as to its effect upon corporations existing when the act was passed.

It is a well recognized principle of law that "the charter of a corporation having a capital stock is a contract between three parties and forms the basis of three distinct contracts. The charter is a contract between the state and the corporation; second, it is a contract between the corporation and the stockholders; third, it is a contract between the stockholders and the state." 2 Cook on Corp. (5th Ed.) § 492; 1 Clark & Mar. Priv. Corp. § 271f. It is also the general rule that, in granting charters or authorizing the creation of corporations under general laws, the state may expressly reserve the power of alteration, amendment, or repeal, and such reservation becomes a part of the contract between the state and the corporation, and is binding, not only upon the corporation, but also upon every individual stockholder. 3 Clark & Mar. Priv. Corp. § 631f. In the case of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 629, it was held that the charter from a state to a private corporation created a contract within the meaning of the federal Constitution, forbidding any state to pass any law impairing the obligation of contracts, and hence the federal Constitution prevented a change by legislative enactment of a charter so issued. All of the text-writers and all the cases upon the subject agree that, to avoid the application of the rule laid down in that case, many of the states, either by a constitutional or statutory provision, provided a limitation upon corporate power by reserving the right to alter, amend, or repeal the charters granted to any corporation, or the laws under which it was created. While the language used in the Constitutions or statutes of the various states defining the reserved power is somewhat different, yet all the authorities agree that the purpose thereof was to avoid the application of the rule announced in the Dartmouth College Case. In all these Constitutions and statutes, so far as we have been able to see, the reservation is as comprehensive and sweeping as is contained in our Constitution; all of them containing the words "alter, amend or repeal," or "alter, repeal or suspend," or "alter or repeal," or words of like kind without limitation or condition. Our Constitution is: "All laws relating to corporations may be al

tered, amended or repealed by the Legislature, and all corporations doing business in this state may, as to such business, be regulated, limited or restrained by law." In this respect our Constitution is no broader than that of other states. The important question is: Does the legislative enactment here in question fall within this reserved power?

Without much reflection it might seem that almost any kind of legislation relating to corporations would fall within the reservation of such Constitutions. But, again, all the authorities agree that the power reserved by the various Constitutions or statutes has its limitation, and that thereunder certain acts may be done by the Legislature without violating the federal Constitution, forbidding the impairment of contracts or taking property without due process of law, while certain other things may not be done. It becomes important, therefore, to inquire what power is reserved by these constitutional provisions, and upon this question we find much diversity of opinion in the cases. While it is settled that the power is not unlimited, yet it is very difficult to say what its limitations are. It has well been stated by Clark & Marshall, in their work on Private Corporations (volume 3, § 631f): "The difficulty has been in construing such a reservation and determining what amendments are properly within it, and on this question there has been some difference of opinion. There is no use trying to reconcile all the decisions on this point, for they are irreconcilable." Reference, however, to the text-writers and the cases will aid us in determining whether the legislative enactment in question does or does not fall within the power.

In discussing this question the authors just named, at section 631b, say: "And it is equally clear that, if the state has not reserved the power to alter, amend, or repeal the charter of the corporation, or if, although there is such a reservation, it is to be construed, as is held by most courts, as intended merely for the protection of the public, and not for the purpose of enabling the Legislature to change the contract between the corporation and its stockholders, the Legislature has no power to authorize a majority of the stockholders to bind the minority by accepting such an amendment; for this would be to impair the obligation of the contract between the corporation and the dissenting stockholders, by forcing them into a different contract, and therefore would be within the constitutional prohibition against laws impairing the obligation of contracts. At section 631f it is further observed by them: "The true view is that the power to alter, amend, or repeal charters is reserved by the state solely for the purpose of avoiding the effect of the decision in the Dartmouth College Case, that the charter of a corporation is a contract between the state and the corporation within the constitutional prohibi-

tion against laws impairing the obligation of contracts, and of enabling the state to impose such restraints upon corporations as the Legislature may deem advisable for protection of the public, and not for the purpose of avoiding the effect of the doctrine in *Natusch v. Irving*. Such power is not reserved in any sense for the benefit of the corporation, or of the majority of the stockholders, upon any idea that the Legislature can alter the contract between the corporation and its stockholders, nor for the purpose of enabling it to do so." And at section 275a they say that, under the reserved power, the Legislature may make "any alteration or amendment in the charter which will not defeat or substantially impair the object of the grant, or rights of property which have vested under it, and which the Legislature may deem necessary to secure either that object or any other public or private rights. The power, it has been said, may be exercised in all cases and to any extent to carry out the original purposes of the incorporation, and to secure the due administration of justice in regard to the rights of the creditors of the corporation and the proper disposition of its assets."

At section 501 of Cook on Corporations (5th Ed.) it is said: "The extent of the power of the Legislature to amend a charter where it has reserved that power, is not yet fully settled, and is full of difficulties. There is a strong tendency in the decisions, and a tendency which is deserving of the highest commendation, to limit the power of the Legislature to amend the charter under this reserved power. It should be restricted to those amendments only in which the state has a public interest. Any attempt to use this power of amendment for the purpose of authorizing a majority of the stockholders to force upon the minority a material change in the enterprise is contrary to law and against the spirit of justice. Under such reserved power the Legislature has only that right to amend the charter which it would have had in case the Dartmouth College Case had decided that the federal Constitution did not apply to corporate charters."

* * * The power to make a new contract for the stockholders is not thereby given to the Legislature. The Legislature may repeal the charter, but cannot force any stockholder into a contract against his will.
* * * The best view taken of this reserved power of the state is that under it a fundamental amendment of the charter does not authorize a majority of the stockholders to accept the amendment and proceed, but that unanimous consent of the stockholders is necessary."

Morawetz, in his work on Corporations, at section 1097, says: "It was not intended by any reservation in a charter or a general law to withdraw the Legislature of a state from its properly legislative duties, and make

It the arbiter over private rights. It is not the purpose of a provision of this nature to give the Legislature of a state fatherly control over the affairs of private corporations. The right is reserved for the benefit of the public and can be exercised only for public purposes." And at section 1098, he says: "The nature of a corporation is, therefore, an important consideration in determining the extent of the reserved right of the state to alter or amend its charter. In some corporations the public is interested, and in others it is not; and the right of interfering in their management varies accordingly. The Legislature of a state is authorized to alter the charter of a corporation, or interfere in its management, without the consent of the shareholders, only so far as the welfare and convenience of the public may require."

In 1 Beach on Private Corporations, § 40, it is said that under the reserved right "an amendment must not defeat or substantially impair the object of the grant, or any rights of property vested under it, nor deprive the incorporators of control of the corporate property, nor divest or impair the rights of the shareholders as between themselves, nor alter the relation between the corporation and subscribers to its stock, nor work injustice to the incorporators or to the corporate creditors."

In 4 Thompson's Commentaries on the Law of Corporations, § 5417, it is said: "It may be added that there is a view to the effect that, even where the right to repeal or alter a charter has been reserved to the Legislature, the right cannot be so exercised as to interfere with contract rights subsisting between the corporation and its stockholders. The theory is that, while the Legislature may alter and amend charters, yet it cannot compel dissenting stockholders to accept such alterations and amendments; in other words, it cannot force them into a new contract into which they did not agree to enter."

Black, in his work on Constitutional Law, at page 535, says: "This power may be reserved in the particular charter itself; but it is equally effective if the state Constitution or a statute, in force when the charter is granted, reserves to the Legislature the right to revoke or modify it. In the latter case, the reservation becomes a part of the contract. But the exercise of this power must be reasonable, and must have relation to the original nature and scope of the charter. It cannot be employed as a means of forcing the corporation into enterprises not contemplated by the charter, nor to deprive the corporators of their property, nor to abridge the lawful rights of the stockholders."

Spelling, in his work on Private Corporations, at section 1028, says: "But the effect of such reservations is not as far-reaching and important as might be supposed without due reflection. The contract between the

state and the corporation with respect to the grant of the franchise of being a corporation is of little significance in comparison with the innumerable collateral agreements depending upon the exercise of the franchise and into which the express and implied terms of the charter become incorporated. No reservation of amendment and alteration, however broad and sweeping, will authorize a disturbance of vested rights or take away or divest corporate funds without compensation or due process of law."

In *Looker v. Maynard*, 179 U. S. 46, 21 Sup. Ct. 21, 45 L. Ed. 79, in speaking of the effect of the reservation, the court says the power may be exercised by the Legislature when it will "not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the Legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the incorporation, its stockholders or creditors, or to promote the due administration of its affairs."

In 1 *Rose's Notes on United States Reports*, p. 942, it is said: "In many of the cases, the purpose of the legislation attempted under the reserve power is the taking away of something—whether a franchise, power, privilege or immunity—which the corporation has hitherto enjoyed. * * * Under the reserve power the state * * * may take away or it may modify that which it has granted. But that is all. Property acquired during the exercise of these powers it may not divest, contracts already executed it may not annul, acts lawful when committed it may not afterwards punish, taxes thus remitted it may not afterwards exact, and the legislation thus attempted must be prospective and not retrospective in its operation. This principle has been very clearly stated by several of the most eminent of the members of the Supreme Court of the United States"—citing numerous authorities from that court.

In *Re Newark Library Ass'n*, 64 N. J. Law, 217, 43 Atl. 435, it was held that the power reserved to alter, suspend, and repeal relates to those matters which concern the public, and not to the mode of controlling the affairs of the stockholders inter sese. Thereunder it was held the Legislature may alter or repeal the charter and extinguish the corporate existence of the association, but that the Legislature was without power to take away from the shareholders the property which they had acquired during its existence, or to affect or change the rights of the stockholders as among themselves. To the same effect is *Pronick v. Spirits Distributing Co.*, 58 N. J. Eq. 97, 42 Atl. 586; and in the case of *Intiso v. Loan Ass'n*, 68 N. J. Law, 588, 53 Atl. 206, it was held that the power of alteration, amendment, or repeal, which the state reserved in its grant of permissive incorporation, "has no effect upon contract relations arising from membership,"

and that it was not competent for the Legislature to impair the obligation of such a contract. In the case of *Zabriskie v. Hackensack & N. Y. R. R. Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617, approvingly quoted by all the text-writers, the court, in speaking of the reserve power, says: "The object and purpose of these provisions are so plain, and so plainly expressed in the words, that it seems strange that any doubt could be raised concerning it. It was a reservation to the state, for the benefit of the public, to be exercised by the state only. The state was making what had been decided to be a contract, and it reserved the power of change, by altering, modifying, or repealing the contract. Neither the words, nor the circumstances, nor apparent objects for which this provision was made, can, by any fair construction, extend it to giving a power to one part of the corporators as against the other, which they did not have before."

In the case of *Snook v. Ga. Improvement Co.*, 83 Ga. 61, 9 S. E. 1104, it was said by the court: "It is also held that the charter of a corporation is a contract of a dual character: First, a contract between the state which grants the charter and the corporation; and, secondly, a contract between the corporation and its members. And while the state, if it reserves the power to do so, can alter and amend the charter, and the corporation itself cannot object to the alteration or amendment, yet the state has no power to make any material or essential alteration in the contract between the members themselves and the corporation."

From the texts and the cases it will be seen that under the reservation the state is not only unauthorized to alter or amend charters of existing corporations in such a way as will change the fundamental character of the corporation, impair the object of the grant, or rights vested thereunder, but it is also unauthorized to alter or amend them in such a way as will impair the contractual relations or rights of the stockholders among themselves, or between the corporation and its stockholders; and it will also be seen that under the reserved power the Legislature has only the right to amend the charter, or laws with respect thereto, which it would have had in the event it had been decided in the *Dartmouth College Case* that the federal Constitution did not apply to corporate charters. The *Dartmouth College Case* did not call in question nor involve any right or relation of the corporators among themselves. It involved only the relation of the corporation and the state. Without the reservation it was held that even such relation cannot be changed without doing violence to the federal Constitution. Because of the reserved power the state may now amend or alter the charter, so far as affecting the contract with itself, and so long as it does not change the fundamental character of the corporation or impair any

vested rights acquired thereunder. But, as stated by the authorities, the right is reserved for the benefit of the state and of the public and for public purposes. The power can only be exercised to the extent that the state is interested. It can alter or modify any right, privilege, or immunity granted by it. It cannot, however, reach out and impair the obligations of contracts existing between the corporation and its members, or among the corporators themselves, any more than it can impair the obligations of contracts existing between other individuals. Undoubtedly it may repeal the charter, or all laws under which it was granted, and may take away altogether the franchise and privileges granted under it. The exercise of such powers pertain directly to its contract, and was expressly reserved to the state, and with reference to which every stockholder subscribed for or purchased his stock. So, under the reserved power, the Legislature may make such reasonable amendments or alterations as it may deem necessary to carry into effect the purposes of the grant, or to protect the rights of the public, or of the incorporation and its stockholders, or to promote the due administration of its affairs, when such amendments or alterations will not defeat or substantially impair the object of the grant or any vested rights. Independent of the reservation there are many things which the state may do in the exercise of its police powers towards regulating and restricting corporate powers and functions. When reasonably exercised, such legislative enactments do not fall within the prohibition of the federal Constitution.

Bearing in mind that the corporate charter is a dual contract—one between the state and the corporation and its stockholders, the other between the corporation and its stockholders—and that under the reserved power the state may alter or amend the former, but not the latter, the question is: Under which do the legislative enactment of 1903 and the action taken by the majority of the stockholders fall? We are of the opinion that they do not pertain to any right, privilege, or immunity which the state had granted to the corporation or to its stockholders, and that the action by such stockholders in no wise affected or was related to the contract existing between the state and the corporation. It merely pertains to and affects the contract existing among the stockholders themselves. Neither the enactment nor the stockholders' amendment of the articles purport to be for the benefit of the creditors or for the benefit of the public. Thereunder no right or privilege in favor of creditors or the public is created, and thereunder no creditor could assert any right or claim that could not have been asserted by him prior to the enactment. In the original articles of incorporation each stockholder agreed, one with the other, that his full-paid capital stock should be nonassessable.

This provision might have been omitted or inserted as the corporators saw fit to agree among themselves. Neither the state nor the public were concerned, whether they agreed upon one or the other. No franchise or privilege granted by the state to the defendant or its members was dependent upon this provision. The same grant, franchise, and privileges would have been granted had the provision been omitted. Had it been omitted, no other or greater liability would have been created in favor of creditors or the public than was created by its insertion. Such a stipulation did not, then, in any wise pertain to the contract between the state and the corporation. It was manifestly intended to concern and fix the reciprocal rights of the stockholders among themselves, and to place a limit upon the amount of money or capital that each was required to put into the enterprise and contribute to the corporation. The whole consideration for the agreement that no further contribution of capital to the corporation should be exacted was the mutual promise of the stockholders, the one to the other. Neither the state nor the public had anything to do with it, nor was either in any wise concerned therewith. The corporators had the undoubted right, as among themselves, to stipulate and agree as to the extent of their contributions. Each corporator had the right to determine for himself the amount of money or capital he would contribute to the enterprise and risk in the business. No subscriber or purchaser of stock could legally be made to contribute to the corporation more than he agreed to contribute. Each had the legal right to have such contribution measured by the terms of his agreement and by the laws in force at the time of its execution. To permit the Legislature to confer authority upon any number of stockholders less than the whole to bind a dissenting minority to another and a different agreement in such respect is to force them into a contract which they never made and which they are not willing to make. To do so is to confer the power on the majority to determine the amount of contributions that each stockholder is required to make. If in the face of the contract as here made by the corporators the majority may legally authorize the board of directors to levy one assessment, they may authorize it to levy an unlimited number of assessments, restricted only as such actions may be questioned by bad faith. In that respect a stockholder is placed in a worse position than that arising from a mere partnership, from which he may withdraw at any time and demand a distribution of assets. But here, if the action of the majority shall be upheld, a dissenting minority may be required to contribute additional capital to the corporation indefinitely, or, on their failure so to do, suffer an involuntary alienation of their full-paid capital stock, which is their private property, and for-

felt all right to participate in the distribution of the assets. The exercise of such a power is something which affects the very core of the contractual relations of the stockholders among themselves; and a legislative enactment which confers such a power is, in our judgment, an impairment of the obligation of a contract which is protected by the federal Constitution.

We are, however, cited to cases where it has been held that it was competent for the Legislature, under the reserved power, to impose on the corporators a statutory individual liability for the future debts and obligations of the corporation, when, under the charter as originally granted, no such liability was imposed, and that such legislation does not impair the obligations of contracts, within the meaning of the federal Constitution; and hence it is argued that, if such a change or alteration of the charter by legislative enactment is not forbidden, such legislation as was here attempted and such action as was here taken by the majority are likewise not forbidden. We are not disposed at this time, nor is it necessary, to question the correctness of such rulings. In principle, however, we perceive a marked distinction between the exercise of such power and the one here in question. Undoubtedly, if it were competent for the Legislature to create such an individual statutory liability, it would be competent for it to create a mere stock liability for the future debts and obligations of the corporation. But the exercise of such a power pertains directly to the very franchise and immunity granted by the state, and directly relates to and affects the contract existing between the state and the corporation and its stockholders. Among others, one of the principal objects of persons forming private business corporations is to obtain and have granted to them an immunity from personal or individual liability for the debts and obligations resulting from the conduct of the business carried on by the corporation, and to avoid the personal and individual liabilities usually growing out of the relation of a mere partnership. Such an immunity is generally granted to members of most private business corporations and of some quasi public corporations. As the authorities say, this limited liability is a part of the corporate privilege conferred by the state, and the right to repeal the franchise itself includes the right to repeal any part of, or altogether, the franchise or privilege of limited or nonpersonal liability. The immunity of such liability to the corporators existed in the first instance only because the state had granted it to them, and what it has granted it may, under its reserved power, take away or modify.

But the Legislature has not undertaken to repeal, modify, or alter any immunity or liability of any kind theretofore granted by it to the members of the defendant corporation. No new or different liability in such

respect was created, either by the state or by the amendment attempted to be made by two-thirds of the stockholders. What the Legislature attempted to do was to confer the power upon two-thirds of the stockholders to amend the articles in any particular (restricted only so as not to create a personal or individual liability of the stockholders nor alter the alleged purposes of the corporation, nor diminish the capital stock below a certain amount), even to the extent of changing the very contract existing among the stockholders themselves and by which their reciprocal rights became vested and defined; and what two-thirds of the stockholders did by way of amendment was the making of such a change. What they did was not an alteration or modification of their relation to the state or the doing of something for its benefit, but was an attempt to compel contributions of additional capital to the corporation for the benefit of the corporation itself, and for mere corporate purposes. When the Legislature by law declares that corporators of existing corporations shall individually be liable to creditors for future debts, or their stock shall be liable therefor, or their liability shall be proportional to the extent of stock held by them, such legislation is something which does not affect some mere relation existing among the stockholders themselves, but directly affects their relation to the state, and directly relates to the immunity which the state itself had theretofore granted to the corporators. Such alteration creates a right in favor of creditors which could be enforced by them against the corporators. Of course, with such an alteration of the contract, and with such increased burdens imposed upon the corporators, they would not be compelled to continue the corporate existence, but they would have the right to dissolve the corporation and to have its assets distributed. Whether a majority of the stockholders could accept such an amendment or alteration, though it relates alone to the contract existing between the stockholders and the state, so as to bind a dissenting minority, we need not here consider. The authorities generally are to the effect that a majority of the stockholders are not authorized to accept a fundamental amendment of a charter and proceed, but unanimous consent of the stockholders is necessary. They somewhat differ as to what amendments are regarded as fundamental, and what merely governmental and administrative. But authorizing the levying of assessments to obtain involuntary contributions of additional capital merely for corporate benefit and purposes is something which only affects the relation of the stockholders among themselves, and alone affects their agreement with respect to contributions of capital to the corporation. Such an amendment, therefore, stands upon a different footing. The one, where a statutory liability for the future

debts and obligations of the corporation is imposed upon the corporators, pertains to the contract existing between them and the state, which is within the power of the Legislature to alter or amend, and the other relates only to the contract existing among the corporators themselves, which the state may not materially alter or modify.

We have not been cited to any cases where the specific question before us was directly involved, except the cases of *Enterprise Ditch Co. v. Moffit*, 58 Neb. 642, 79 N. W. 560, 45 L. R. A. 647, 76 Am. St. Rep. 122, and *Gardner v. Hope Ins. Co.*, 9 R. I. 194, 11 Am. Rep. 238. In the Nebraska case, under a constitutional provision reserving to the state the right to alter from time to time and to repeal all laws relating to corporations, it was held that "the fully paid-up stock of a corporation is the personal property of the owner, and the articles of incorporation and laws of the state are elemental of the contract existing between the corporation and the owner of stock, and may not be so amended by Legislative enactment as to make the paid-up stock subject to an assessment or general or specific assessments, and forfeitable, or subject to summary sale by the corporation, for the nonpayment of such assessment." To do so, the court says, "would involve too violent an invasion of property and contract rights." This case is cited by Mr. Cook in his work on Corporations (5th Ed.), at section 497, where he approvingly states the rule, announced in that case, that "a statute which authorizes an additional assessment upon existing paid-up stock is unconstitutional." In the Rhode Island case the court seems to hold a contrary doctrine, though in that case it is not made to appear that the full-paid capital stock was made non-assessable by the original articles of incorporation, and in that respect the case may be distinguishable from the Nebraska case and the case at bar. But, conceding that the holding of the Rhode Island court is contrary to that of the Nebraska court, we think the latter is more in the line with the general principles of law as stated by the text-writers.

In the discussion of the question it has been said by counsel that the rule announced by the Nebraska court deprives the majority of the management of the corporate property and of the control of mere administrative policies, and prevents the Legislature from making needful legislation with respect thereto. We do not think so. The doctrine announced is no infringement of the exercise of such powers. Independently of the reserved power and of the legislative enactment, a majority of a corporation may determine the management of the corporate property, administer the affairs of the corporation, and control the conduct of its business. The amendment was not essential to the proper exercise of such powers. When counsel for respondent in effect concede, as they do, that

the action taken by the majority was unauthorized, but for the legislative enactment of 1903, they in effect concede that the action taken by such stockholders was something more than the exercise of mere administrative functions; and it is quite clear that the action so taken was not administrative. It was not confined to the management of the corporation, or of its property, or to the administration of its affairs; but it extended to the management of the private affairs and property of the corporators. It amounted to a compulsion of contributions for corporate purposes, and to an invasion of the agreement which the stockholders had made among themselves that no further or additional contribution should be exacted beyond the full-paid capital stock, and a fundamental change of their contract in that respect. The amount of capital which the corporators were willing and had agreed to contribute and risk in the enterprise was fundamentally as important under their contract as was the stipulation with reference to the nature of the business to be carried on by the corporation. It cannot be said that changing the nature of the corporation or the character of its business is fundamental and cannot be accomplished without the consent of all the stockholders; but another and equally important stipulation in the articles of incorporation relating to the contributions of capital for corporate purposes to be exacted from the corporate members is nonessential and nonfundamental. It must be conceded that the full-paid capital stock became the private property of the stockholder. As between himself, the corporation, and his co-corporators, he paid the full consideration therefor, and paid all that was agreed by him to be paid. To now say that the Legislature, in face of such an agreement as was here made by the corporators, may authorize a majority to compel a dissenting minority to buy it over again, not only once, but as many times as they may, in good faith, determine, by the enforcement of additional contributions of capital for mere corporate purposes, and to make a sale of their stock, resulting in a forfeiture of all their rights and equities in and to the assets of the corporation, if the unwilling members do not see fit to yield to such compulsion, is conferring a power which gives to the majority the absolute dominion over the private property of the stockholders, permits a disturbance of vested rights, and the impairment of contract obligations, within the protection of the federal Constitution.

A further argument is made by counsel that if a corporation becomes indebted when it has no funds in its treasury to discharge the indebtedness, and if the levy of an assessment such as was here attempted is not permissible, the whole of the corporate property may be sold on execution sale, and that by reason of such involuntary alienation the unwilling members, as well as all other mem-

bers, are forced to part with all their holdings and equities. The argument points to matters of mere utility, not to the rights of the stockholders. Whether an execution sale of the corporate property in satisfaction of corporate debts may or may not produce a more serious result than enforcing contributions from the corporate members is beside the question. Every stockholder has a vested equity in and to the assets of the corporation. The value of his equity is dependent upon the value of corporate assets and the extent of corporate liabilities. Dependent upon such facts, the value of his equity may be much or little. But, whatever it may be, his right to participate in the distribution of the assets, when the corporate property has been sold on execution, is not disturbed, nor is he compelled to personally contribute to the payment of the corporate debts. So, if a corporation becomes insolvent, it may go into liquidation; but the individual members and stockholders are not bound to pay such indebtedness, except out of the assets. In such case a new corporation may be formed, by contribution of new capital, for the purpose of taking over the assets of the insolvent corporation and paying its debts. But it would be entirely optional with each member of the insolvent corporation whether he entered such new corporation. It can at once be seen that he cannot be compelled to do so against his will. Now, the members of the insolvent corporation could in effect accomplish the same result as could be accomplished by the formation of a new corporation and the contribution of new capital, by making voluntary contributions of new capital to the insolvent corporation. But the dissenting corporators cannot, contrary to the agreement as here made by them, be forced to make such contributions against their will, any more than they can be forced against their will into a new corporation. When, therefore, a majority seek to compel additional contributions to a corporation for corporate purposes from a dissenting minority, when by the terms of their original agreement such contributions cannot be exacted, they in effect seek to force them into a new corporation. This neither the Legislature nor a majority are authorized to do.

It may be true, as was suggested by counsel, that in many instances it may be wise and expedient for corporators to make additional contributions of capital to discharge corporate indebtedness, so as to preserve the corporate property, or to make such contributions for the successful conduct of the business. But that is something which the corporators should consider when they make their contracts. Courts are organized to enforce contracts as made, unless they contravene good morals or public policy. They cannot create new contracts, nor can they permit the parties themselves to do so without the consent of all, upon any theory that the original contract was not the most beneficial

or advantageous, or that the enterprise contemplated by the terms of the contract cannot be successfully operated under it. By their solemn agreement the parties have here defined and limited their contributions of capital to the corporation for corporate purposes. Such a fundamental and material stipulation in their contract cannot be changed by the Legislature, nor can it confer power upon a majority of the stockholders to do so without violating the federal Constitution. No one contends that the individual members of a corporation are liable for, nor are they legally bound to assume or pay, the debts or obligations of the corporation. Until the Legislature shall by law declare that such a liability is imposed, which it has not yet done, it does not lie within the power of a majority to reach into the private pockets of a dissenting minority to compel such payments, and then seek to justify such action because a greater calamity may overtake them as a result of an execution sale.

The questions as to whether, under the enactment of 1903, two-thirds of the stockholders, or a majority, under the enactment of 1905, are legally empowered to authorize a levy of assessments on full-paid capital stock against a dissenting minority when the original articles place no prohibition on the levying of assessments, or contain no stipulation on the subject, or the extent that such stockholders of corporations organized since the enactments are legally authorized to amend the articles so as to make such stock assessable, are not now before us. Confined to the question which is before us, we think the demurrer ought to have been overruled.

The judgment of the court below is therefore reversed, and the trial court directed to reinstate the case, to overrule the demurrer, to permit the defendant to answer, if it is so advised, and, pending the action, to restrain the defendant as prayed in the complaint. Costs to appellant.

MCCARTY, C. J., and FRICK, J., concur.

On Rehearing.

FRICK, J. A rehearing is requested in this case upon substantially the following grounds: It is urged that the court erred in its interpretation of the constitutional provision in which the right to alter, amend, and repeal the laws affecting corporations is reserved by the state; that the decision is inconsistent, in that it in effect authorizes a change of the laws with respect to some of the contractual rights of a corporation, while it denies this right as to others; that the court erred in holding that the right to alter and amend the laws is limited to such matters only in which the state is interested; and, finally, that the court erred in holding that neither the state nor the public were interested in the amendment involved in this case.

Viewing the question from the standpoint

of counsel, their argument in support of the petition for a rehearing is a learned and able exposition of that side of the question. We are not persuaded, however, that their conclusions are sound. It is urged that we are inconsistent in holding that under the reservation the state may alter or amend some of the provisions of a charter, but may not do so as to others. In our original opinion we endeavored to make clear that the charter forms the basis of a contract between the state and the corporation, as well as a contract between the corporation and the stockholders. We held that the Legislature, under the reservation, may alter or amend the contract with reference to the state and in which it is interested, but that it may not make a material or fundamental change of the contract which alone concerns the corporation and its members. Upon these premises we reached the conclusion that the attempted legislation, and the action taken by the majority of the stockholders in pursuance thereof, did not fall within the reservation. In so holding we see no inconsistency. What counsel in effect do is not pointing out any inconsistency, but is disputing the premises upon which we reached the conclusion; that is, counsel still assert that the reservation in the Constitution is so broad and illimitable that all the provisions of a charter may be altered or amended by the Legislature, regardless of their character, and whether they concern the state or merely the agreement between the corporation and its members. Among the many cases cited, and many others examined by us, we do not find any of them giving the reservation such a construction. If any one thing pertinent to the question under consideration is well settled by the authorities, it is that the power which may be exercised under the reservation is not without limit, and that there is a strong tendency in the decisions to limit the power of the Legislature to amend the charter under the reservation. We fully appreciate the difficulty in defining the extent of such power, and, while we are well aware of the conflict among the authorities in so doing, yet none of them support the contention of counsel that the extent of the power is unlimited, in the sense and to the degree contended for by them. We think the rule stated by us is supported by the great weight of authority and is founded upon well-established legal principles.

Because of counsel's deductions, we are, however, induced to enlarge somewhat upon what is said in the original opinion. We do this, not because the matter was not covered in the original opinion, but because it was not deemed necessary to fully discuss all the reasons that impelled us to the conclusion reached. The matter we shall discuss is touched upon at page 15 of the typewritten copy of the opinion (91 Pac. 374), and we shall limit ourselves to a further elucidation of the matter there touched upon,

In this connection it is quite true, as counsel contend, that all of the matters that must be set forth in the articles of incorporation, as found in section 315, Rev. St. 1898, as amended by Laws Utah 1905, p. 18, c. 22, are contractual. From this counsel infer that, if it be conceded that the state may alter and amend one provision, it logically follows that it may do so, or authorize such to be done, with respect to all provisions found in the articles; the conclusion being that one provision is no more sacred than another, and, if one must yield to the reserved power, all must do so. The argument is, however, more plausible than sound; and the force of the argument is greatly weakened by the fact that both the text-writers and the courts, including the Supreme Court of the United States, clearly recognize a limitation upon the right of the state to alter and amend the laws affecting existing charters, or to authorize such alterations or amendments by the stockholders without the consent of all that are affected thereby. This is aptly stated in the case of *Miller v. State*, 15 Wall. 498, 21 L. Ed. 98, and in *Looker v. Maynard*, 179 U. S. 52, 21 Sup. Ct. 21, 45 L. Ed. 79. It is of the utmost importance in this connection to keep in mind the fact that this limitation is not merely to prevent the confiscation of property, or to affect or destroy vested rights without due process of law (as these matters are controlled by other constitutional provisions), but the limitation is expressly based upon the narrower ground, namely, the impairment of contractual rights and obligations. As the United States Supreme Court is the ultimate authority upon the question as to when such rights are invaded, we need not again refer to the state courts or the books of the text-writers. We thus see at a glance that the broad conclusion that, since one matter that inheres in contract may be altered, therefore all may be, is not tenable. There, of course, must be some reason for this distinction. Mr. Justice STRAUP gave what to us seemed an adequate reason. This, however, is attacked as being liable to misconception, because the line of demarcation is not defined when the alteration of a contractual matter is or is not within the reserved power. By a thorough examination of the authorities and the reasons advanced by the courts we were forced to the conclusion that, while the precise point of demarcation when an amendment of the charter comes within or falls without the reserved right of the state is not well defined by the authorities, this case, nevertheless, is one that clearly falls within the class that is outside of the reserved power.

In the original opinion the statutory provisions governing assessments on fully paid up corporate stock are set forth at large. From those provisions it is obvious that unless the stock is made assessable by the articles, or agreement, as it is sometimes called,

of incorporation, then it is immune against any assessments. In order, therefore, to levy an assessment, the incorporators, or stockholders, must agree upon this matter specially, since to remain silent is to forbid assessments. If we now examine section 315, supra, we find that that section defines what the incorporators must agree upon and set forth in the articles of incorporation in order to obtain a grant of a corporate franchise from the state. These matters are grouped under eleven heads in the section and comprise the essentials required to obtain a franchise. But there is also subdivision 12 in that section, by the provisions of which the incorporators are permitted to agree upon and insert in the articles any other matter or matters that they may deem necessary or expedient to further the business or enterprise for which the corporation is formed. But these latter provisions are not essential to the grant, and both the right to the franchise from the state and the grant itself are complete without them. The state, therefore, relegates these matters entirely to the judgment and wishes of the incorporators. They may or may not enter into an agreement respecting them, but as to all other matters contained in section 315 the incorporators must agree, and the state bases its grant upon the latter. From this it is only fair to deduce that the state has no interest in these special agreements, but permits them to be made a part of the articles of incorporation as a matter affecting the stockholders only. In this special agreement the stockholders, no doubt, may agree among themselves respecting the conditions upon which the stock shall be issued to and held by them, to the extent, at least, that such an agreement is not in contravention of law. May they not also agree that the stock, issued and paid for in full, shall be entirely free from all subsequent assessments and forfeitures, and to that end may they not, by such an agreement, impose limitations upon the corporation itself? What interest has the state in such an agreement, and in what way does it come within its reserved power? If we concede that the right to issue the stock is an incident to the corporate franchise, and hence within both the law and the grant of the state, still it does not follow, after the condition is agreed to and the stock is issued, that the state may change or affect the condition itself, or authorize this to be done. If we assume that the corporation had entered into an agreement with the subscribers or purchasers of its stock, when they subscribed for or purchased the stock, that if they would pay the par value therefor the stock should be and remain free from all assessments or claims against it, and to that end the corporation had inserted a clause in the articles of incorporation exempting fully paid-up stock from all assessments, could this agreement be changed, so as to place any ad-

ditional burdens upon the stock, without the consent of the subscribers or purchasers?

No one would contend, we think, that this could be done after the subscription or sale agreement had been entered into and before the stock was paid for, so as to add anything to the price agreed upon; and this, we think, would be conceded, although both the law and articles of incorporation had been changed and amended after the agreement was entered into and before the stock was paid for. If this could not be done to the prejudice of the subscribers or purchasers, it must be upon the ground that to do so would impair contractual rights and obligations, in that it would impose conditions contracted against in the subscription or purchase agreement. In what way does the contract above instanced differ from one where the incorporators or stockholders agree among themselves (and make the agreement a part of the articles of incorporation) that the stock shall be issued and paid for upon the condition that it shall be and remain free from assessments and forfeiture? Does not the corporation become a party to this agreement by accepting the charter and by acting under it? And does not the state suspend its right to change it without the consent of all, by authorizing such a contract to be entered into as a matter wholly apart from its governmental supervision over corporations? The state has, in effect, announced to the incorporators or stockholders that, so far as the assessment of corporate stock is concerned, that matter is left entirely with them, to agree upon as they may deem best; that it is not a matter in which the state is concerned. If the instance first mentioned constitutes a condition created by contract which may not be affected, why is not the second precisely the same in principle? In the second instance we have no more than a contractual condition upon which the stockholder relied in subscribing for or purchasing the stock, and which, we think, the state and the corporation are bound to respect. If the stockholders in the original articles had agreed that they might be changed or amended generally, the case would, no doubt, be different, as pointed out in the case of *Nelson v. Keith-O'Brien Co.*, 91 Pac. 30, for the reason that the stockholders thereby consented to amendments of the articles constituting the entire agreement under which the stock was issued to them. But this is not such a case. Here we have an express agreement that the stock is issued and received upon the condition that it shall not be subject to assessment, and therefore be immune against a forced sale or forfeiture. Is it an answer to say that, the reserved power of the state being general, therefore it applies to all changes of every kind and nature that may affect the powers, rights and privileges of the corporation and of the stockholders with regard to their relations with one another? The law no doubt

can be changed with regard to all these matters; but it does not follow that it may be done so as to affect past transactions or vested rights.

As we have attempted to show, the stock was issued by the respondent upon an express condition whereby its rights were limited by the incorporators in a matter which the state did not deem essential to the grant of a corporate franchise and upon which the state permitted the stockholders to agree among themselves. We think, therefore, that in such a case the corporation ought not to be permitted to violate the agreement upon the sole ground that the state has reserved the right to alter and amend all laws relating to corporations. The condition in question is purely voluntary on the part of the incorporators, as contradistinguished from all other provisions in the articles which are made necessary and compulsory. The state simply authorized the incorporators or stockholders to enter into any agreement they saw fit with regard to assessments. Having authorized this to be done unconditionally, the state has suspended its right to affect the agreement entered into by virtue of its authority. This conclusion, we think, is well supported by the case of *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592, as that case is interpreted by Mr Justice Sanborn in *Omaha Water Co. v. City of Omaha*, 147 Fed. 11, 77 C. C. A. 267. In the latter case the state authorized a municipal corporation to enter into certain contracts. After the contracts had been entered into, the city attempted to modify some of the provisions, under the claim that the state had authorized this to be done by subsequent legislation, and that, under this legislation, the modifications were proper, in view of the reserved power of the state to amend the laws in relation to corporations. The court held that, inasmuch as the state had unconditionally authorized the contract, the state could not authorize a modification thereof without the consent of all the interested parties. In what way do the principles involved in that case differ from the one at bar? The state certainly did authorize the stockholders to enter into an agreement among themselves in a matter in which the state disclaimed any governmental interest, by reason of the fact that it relegated the whole matter to the parties themselves, and would have granted them a charter with or without the agreement. The state, therefore, was indifferent in respect to what the agreement was, but authorized any conditions to be made upon which the stock might be issued and held. This being so, and the matter being outside of governmental regulation, why should the state be permitted to interfere or be permitted to authorize this to be done? We think, therefore, that the corporation is bound, and that all the stockholders are likewise bound, to the ex-

tent that any number less than the whole may not amend the articles of incorporation so as to avoid the condition upon which the stock of the appellants was issued.

Neither is it important here that there are other matters contained in the laws affecting the corporation and stockholders that are not contained in the articles of incorporation which from time to time may be amended and which may fall within the reserved power of the state. A complete answer to this is that the state has not specially relegated these matters to the incorporators to agree upon as they deem best. With regard to all these the state simply provided rules or regulations in the form of laws, all of which were subject to change at any time, and they thus were not, nor intended to be, matters inhering in special contracts. But, apart from this, in what way is the state, as such, interested in private contracts, whether made between incorporators or between anybody else? True, the people of the state are interested in having the resources of the state developed, and the state has an interest in promulgating wholesome laws and in having them enforced; but whether money is obtained by one method or another, either to start a new enterprise or continue one already launched, the state has no interest whatever. Neither is it interested in whether a private corporation discharges its obligations with money obtained through assessments of corporate stock or by the sale of its property. Indeed, if the laws of this state are any indication of its policy, then it has manifested that policy in declaring that corporate stock is not assessable, unless made so by the stockholders themselves. True, the state may authorize a certain number of the stockholders to do this as it applies to future charters; but it cannot, after unconditionally authorizing a contract granting the right to hold stock unconditionally, impose limitations upon that right by changing the contract, or authorizing it to be done, without the consent of all the stockholders. Such a contract, being wholly outside of the conditions and agreements required to obtain a corporate franchise, cannot be said to fall within the reserved power of the state to alter and amend the laws governing corporations.

In conclusion, we desire to state that, while the questions involved, in and of themselves, are of great importance to both the state and the citizen, the utility involved in settling them is of still greater importance. Both sides have, with much diligence and earnestness, fully presented all that can profitably be said upon either theory, and they have thus rendered us much assistance in determining the questions. The duty to adopt one or the other theory devolved upon us alone. We have adopted that which, in our judgment, seemed the most just and rea-

sonable under all the circumstances, and in view of the state of the law upon the subject as we understand it. We feel thoroughly convinced that the conclusion reached is correct, and, entertaining this view, it could subserve no practical purpose to grant a rehearing of the case.

The application, therefore, should be, and accordingly is, denied.

MCCARTY, C. J., and STRAUP, J., concur.

(12 Idaho, 556)

MILLS v. AMERICAN BONDING CO. et al.
(Supreme Court of Idaho. July 30, 1907.)

APPEAL — PROSECUTION — BAR OF REMEDY — DISMISSAL.

Where a litigant seeks and procures a removal of a case from the state court to a federal court, and thereafter pursues his remedy in the latter court, and it is finally determined that the federal court has acted without jurisdiction and that the case has never been legally and regularly removed from the state court, and he thereafter takes up his case where he left off in the state court, the bar of the statute and rules of court limiting the time in which to pursue his remedy on appeal will be held to run against him the same as if he had never sought to prosecute his remedy in another forum.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2744.]

(Syllabus by the Court.)

Appeal from District Court, Ada County;
Geo. H. Stewart, Judge.

Action by J. C. Mills, Jr., against the American Bonding Company and others. Judgment for plaintiff, and defendants appeal. Motion to dismiss appeal on grounds that transcript has not been filed in time required by rules of court. Motion sustained, and appeal dismissed.

Morrison & Pence and Neal & Kinyon, for appellants. W. E. Borah, H. L. Fisher, and Frank J. Smith, for respondent.

AILSHIE, C. J. The respondent has moved for a dismissal of the appeal herein on the grounds that it has not been prosecuted with diligence, and especially for the reason that the transcript has not been prepared, served, and filed within 60 days after service of the notice of appeal, as provided by the rules of this court. This is a companion case to that of *Finney v. American Bonding Co. et al.*, 91 Pac. 318, decided at this present term. The same action has been taken in this case in all respects as was taken in that case, and the appellants are guilty of the same degree of negligence, delay, and laches in this case as in that one. On the authority of that case, both the original opinion and that on petition for rehearing, the appeal in this case must be dismissed.

Appellants cite *McIver v. Florida Central & P. R. Co.*, 110 Ga. 223, 36 S. E. 775, 65 L. R. A. 437, as an authority in support of their contention that this court should assume

jurisdiction of the appeal and hear the case on its merits. As we read that case, it does not support the position appellants are obliged to maintain here. It simply holds that where a case has been commenced in a state court and thereafter properly removed to a federal court, and the plaintiff was nonsuited or voluntarily dismissed his case in the latter court, he was not thereby precluded from again commencing his action on the same case in the state court at any time prior to the bar of the statute of limitations. It should also be borne in mind that the McIver Case recognizes the principle that, even though the case be properly removed to a federal court, nevertheless the statute of limitations continues to run against the right of action under the state statutes. If this is true where there has been a proper and regular removal, it must be equally true where the removal eventually proved abortive and without jurisdiction. If under such circumstances the bar of the statute runs against the prosecution of the action in the state court, why should not the bar run in like manner against the prosecution of the appellate remedy for the review and correction of errors? We think the law and reason of the case, as well as the justice and equity thereof, require that the litigant who seeks and procures a removal, and thereafter pursues his remedy in the federal court and is unsuccessful, and then takes up his case in the state court and prosecutes his remedy in the latter court, should be dealt with in all respects the same as if he had never invoked the jurisdiction of another forum for the trial of his case; and if he has abandoned the proper tribunal, and has voluntarily spent a portion of "his day in court" in a forum without jurisdiction, that time should be charged against him when he takes up his cause before the proper tribunal.

The appeal herein is dismissed, with the costs in favor of respondent.

SULLIVAN, J., concurs.

JOHNSON COUNTY SAVINGS BANK v. RAPP et al.

(Supreme Court of Washington. Aug. 17, 1907.)

1. BILLS AND NOTES—SALE—BONA FIDE PURCHASER—EVIDENCE.

Evidence in an action on accepted drafts by the assignee thereof held sufficient to go to the jury on the contention that plaintiff was not a purchaser for value before maturity without notice of defects.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1879.]

2. EVIDENCE—PAROL EVIDENCE—FAILURE OF CONSIDERATION.

Defendants, in an action on an accepted draft by the assignee thereof against the acceptors, for the purpose of showing, as part of their defense of failure of consideration, the condition on which the worthless jewelry, in payment

of which it was given by defendants was sold to them, may show the representations of the salesman, who made the sale; the written order being obscure and subject to interpretation.

3. BILLS AND NOTES—BONA FIDE PURCHASERS—EVIDENCE.

Defendants, in an action by the assignee of a draft against the acceptors, for the purpose of showing plaintiff's knowledge of the character of the paper it was buying, the defense being that the drafts were given for worthless jewelry, to the knowledge of plaintiff, may show that plaintiff had bought similar paper of the same party, to which the like defense had been made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1741.]

Appeal from Superior Court, Spokane County; Miles Poindexter, Judge.

Action by the Johnson County Savings Bank against Victor A. Rapp and another, co-partners doing business as Rapp & Lloyd. Judgment for defendants. Plaintiff appeals. Affirmed.

A. E. Russell, for appellant. Danson & Williams, for respondents.

FULLERTON, J. The appellant is a banking corporation doing business at Iowa City, in the state of Iowa. The respondents are merchants doing business in this state. In the summer of 1904 the Puritan Manufacturing Company, of Iowa City, Iowa, contracted to sell and deliver to the respondents certain jewelry at the agreed price of \$254, to be paid for in four quarterly payments, of \$63.25 each, "if the purchaser gives his four acceptances, each for one-quarter of the amount, to close the account within ten days from the date of delivery; otherwise terms are net cash 15 days, 6% discount cash 10 days." The sale was made by the Puritan Manufacturing Company's traveling salesman. On the receipt of the order given the salesman by the respondents, the jewelry company shipped them certain jewelry, and at the same time drew upon them four drafts payable according to the terms of the contract of sale above quoted. These the respondents accepted on August 3, 1904. On September 30th thereafter the Puritan Manufacturing Company indorsed them and delivered them to the appellant. The drafts were not paid at maturity, and this action was brought to recover thereon. The respondents defended on the ground that the jewelry shipped them was not as warranted by the jewelry company, and was utterly worthless for any purposes for which they could use it, and that there was for that reason no consideration for the drafts. The appellant claimed to be a purchaser of the paper for value before maturity and without notice of any defect therein. On these issues a trial was had to a jury, resulting in a verdict and judgment for the respondents.

It is first assigned that the court erred in refusing to sustain the appellant's challenge to the sufficiency of the evidence; it being contended that the respondents' evidence was insufficient to constitute a defense. But we

think the court properly submitted the matter to the jury. On the question of the value of the goods, the respondents testified that they were not as represented, and that all they were able to sell of them were returned by the purchasers after a short time because of their inferior quality; and other witnesses, called as experts in the jewelry line, testified that the goods were worthless for the purposes of legitimate trade. On the question of the knowledge of the appellant of this failure of consideration the evidence is not so direct. Still we think it sufficient to sustain the verdict. While it is true the president of the appellant bank did testify in his examination in chief that the bank purchased the drafts after they had been duly accepted by the respondents, without notice or knowledge on his part of any defects therein, yet on cross-examination he admitted that he knew the character of the business the drawer of the drafts was engaged in; that the bank had purchased large quantities of their paper, and had had a number of lawsuits over it where the defense was failure of consideration. His evidence, moreover, leaves a doubt whether there was any actual purchase of the paper—whether the pretended purchase was not rather a scheme to aid the seller of the goods than an engagement in ordinary trade. When, in connection with this, it is remembered that the business of the seller was hardly legitimate—that it was, in fact, little better than obtaining money by false pretenses—it is rather too much to say there is no evidence from which the jury could rightfully draw the conclusion that the bank official did not testify truthfully in his direct statement. The evidence was sufficient to go to the jury, and the challenge was properly denied.

It is next assigned that the court erred in admitting, over the objection of the appellant, evidence relating to the representations of the traveling salesman of the Puritan Manufacturing Company. But this was a necessary part of the respondent's case. They were obligated to show the condition on which they purchased the goods, in order to show a failure of consideration. This evidence was directly in point for that purpose. The written order, which the appellant urges represents the entire contract, was at best obscure, and subject to interpretation. The interpretation put thereon by the salesman to induce a sale could be properly put in evidence to show a failure of consideration.

The testimony of the witness Hoyt as to a similar transaction with the appellant bank was admissible as tending to show knowledge on the part of the bank of the character of the paper they were purchasing from the Puritan Manufacturing Company.

The judgment appealed from is affirmed.

HADLEY, C. J., and MOUNT and CROW, JJ., concur.

**BROOKSHIRE OIL CO. v. CASMALIA
RANCH OIL & DEVELOPMENT
CO. et al. (L. A. 1,787.)**

(Supreme Court of California. July 30, 1907.)
**INJUNCTION — TRESPASS — IRREPARABLE IN-
JURY.**

Plaintiff was entitled to a preliminary injunction, where the complaint alleged he owned and had been in peaceable possession of an easement to maintain a pipe line to convey oil; that defendants wrongfully and maliciously tore up 4,000 feet of the pipe, and mutilated and rendered it useless, with intent to wantonly prevent the exercise of the easement; that defendants threatened to, and would, if not restrained, prevent plaintiff by force from relaying the pipe line which was essential in the continued marketing of plaintiff's oil, and that the damage from such wrongful acts would be irreparable; that plaintiff's actual damages already sustained were \$7,500, the answer admitting the tearing up of pipe, and merely raising the issue of the ultimate title and property rights of the parties, showing that plaintiff, if he should finally prevail, would not be irreparably damaged by the acts temporarily enjoined, and it not appearing plaintiff's use of the pipe line pendente lite would be of any serious detriment to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 305, 306.]

In Bank. Appeal from Superior Court, Santa Barbara County; J. W. Tuggart, Judge.

Action by the Brookshire Oil Company against the Casmalia Ranch Oil & Development Company and others. Defendant company appeals from an order denying its motion to dissolve a temporary injunction. Affirmed.

W. H. Chapman and Henley C. Booth, for appellant. Richards & Carrier and McD. R. Venable, for respondent.

McFARLAND, J. This is an appeal by the defendant the Casmalia Ranch Oil & Development Company from an order of the superior court denying said defendant's motion to dissolve a temporary injunction. The injunction was issued upon the complaint in the action, and the motion to dissolve was based entirely upon the complaint and the answer of the defendant filed to the complaint. No showing was made on the motion other than what appeared on the face of the said pleadings.

It is averred in the complaint, which was filed March 2, 1905, that on February 24, 1905, and for more than 30 days prior thereto, plaintiff was the owner and in the peaceable possession of an easement and privilege granted to it by the owner of certain lands subject to said easement "to construct and maintain a pipe line for the conduct of oil" from certain oil lands in the vicinity owned by plaintiff across the said lands subject to said easement to a certain station on the Southern Pacific Railroad, and, being in the peaceable possession of said easement and privilege, the plaintiff prior to February 24, 1905, had constructed a line of oil pipes four inches in diameter across the said lands; that on said February 24, 1905, in the ab-

sence of plaintiff and its officers and agents, the defendants wrongfully, maliciously, and without any right whatever tore up about 4,000 feet of said pipe, and mutilated and rendered the same useless; and that, by reason of said acts, plaintiff suffered actual damage on account of pipe destroyed in the sum of \$2,500, and damage by loss incident to the prevention of the conduct of oil from the oil lands of plaintiff to said railroad station in the sum of \$5,000. It is also expressly averred that in doing these acts defendants were guilty of oppression and malice, and that they did said acts with intent to wantonly, oppressively, etc., prevent plaintiff in the exercise of his said easement, and that plaintiff was entitled to receive as vindictive damages the further sum of \$10,000. It is also averred that defendants threaten to, and will, if not restrained by the court, prevent plaintiff by force from relaying and re-establishing its said pipe line and easement during the pendency of this action, that said line is essential to the continuance of the marketing of the oil products from plaintiff's land which are constantly being produced from wells thereon, and that the damage to plaintiff from said wrongful acts will be irreparable. The prayer is for damages in the sum of \$17,500, and for a final injunction restraining defendants from continuing said unlawful acts, and for a temporary injunction during the pendency of the action. Upon this complaint, duly verified, the court granted the preliminary injunction enjoining defendants from preventing or in any way interfering with, the construction and maintenance of said pipe line, and from removing any part of the same until further order in the premises.

In the answer the ownership and possession of the alleged easement is denied; and it is also denied that defendants "wantonly, maliciously, and oppressively" tore up the oil pipe as alleged in the complaint, but it is not denied, and is admitted, that defendants did actually tear up said pipe, etc., and it is not denied that defendants will prevent plaintiff from relaying said line. There are also denials of the amount and the irreparable nature of the damages suffered, and of some other of the averments of the complaint. It is also averred—and appellant relies greatly on this averment—that on November 25, 1897, George B. Arellanes was the owner in fee of a certain tract of land, which may be called for brevity the "Juan Arellanes Rancho"; that this is the land which plaintiff claims to be subject to its alleged pipe line easement; that on said November 25, 1899, Arellanes, as party of the first part, executed to C. C. Morehouse and others, as parties of the second part, a certain written instrument, of which a copy is attached to the answer marked "Exhibit A"; that this instrument was duly acknowledged and was

on December 2, 1899, duly recorded in Book 2 of Leases in the office of the recorder of Santa Barbara county, in which county said land is situated, and has ever since remained a record in said office; and that afterwards, on December 2, 1899, the said Morehouse and others, parties of the second part to said instrument, by a written instrument executed, acknowledged and duly recorded, assigned to defendants herein, the said Casmalia Company, all the right, title, and interest which said Morehouse and others had by virtue of said instrument of February 25, 1899, which is called a "lease."

It is contended by appellant that said instrument of February 25, 1899, vested the lessees therein named with full possession of all the surface of the Arellanes rancho, so that neither the lessor nor any other person could enter upon any part thereof without the consent of the said lessees except as trespassers, and that, therefore, the plaintiff herein could not subsequently to the execution of said lease acquire the easement asserted in the complaint, or any right or privilege whatever in said land adverse to appellant. Respondent contends that this lease, on its face, gives to the lessees only the right, for a term of years, to produce petroleum and other hydrocarbon substances from said land, and to drill and operate oil and gas wells thereon, and to use such part of the land, and to lay and operate such pipe lines, etc., and to have such rights of way, as should be necessary to carry on said business of producing oil, etc., from said land; but did not give said lessees any possession of any part of said land not used by them in said business. We need not, however, examine into this matter, because it goes only to the question of title which is to be determined on the final decision of the case on its merits, and not to the propriety of the refusal of the court to dissolve the temporary injunction. The verified averments of the complaint show a clear case for the equitable interposition of the court by a preliminary injunction. The answer does not in any way change the basis upon which rested the equitable considerations which led the court to grant the injunction. The answer merely raises the issue of the ultimate title and property rights of the parties in the premises involved in the action. It does not deny the facts upon which the equitable right to an injunction pending the determination of the issue of title rested. It does not show that plaintiff, if it should finally prevail in the action, would not be irreparably damaged by the acts of appellant which are temporarily enjoined. A court will sometimes hesitate to grant a preliminary injunction, even upon a strong showing of the plaintiff, when it appears that the injunction may seriously injure or disturb the use of the property or possession of the defendant; but there is no consideration of that kind in the case at bar. It nowhere appears that, even if appellant

should finally prevail, the continuance by plaintiff of the use of the pipe line during the pendency of the action would be any serious detriment to appellant, or would in any material way interfere with the exercise of whatever rights in the premises appellant has by virtue of said lease, or that it obstructs appellant in anything it has done, or has to do, in carrying out its right of prospecting for and taking oil, etc., from said land. On the other hand, if respondent should finally prevail, it is apparent that, in the absence of the preliminary injunction, it would have unjustly suffered great and irreparable damages. We think that the case presents an exceedingly proper one for the employment of the aid of a preliminary injunction, and that no reason appears for disturbing the ruling of the court in refusing to dissolve it.

The order appealed from is affirmed.

We concur: SHAW, J.; LORIGAN, J.; ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.

151 Cal. 553

TRINITY COUNTY BANK et al. v. HAAS et al. (Sac. 1,463.)

(Supreme Court of California. July 26, 1907.)

1. MORTGAGE—CONSTRUCTION—NONPAYMENT OF INTEREST—PROVISION FOR FORECLOSURE.

A note and mortgage, being parts of one transaction, are to be read together, and the mortgagee may rely on the provision in the mortgage making the principal due for nonpayment of interest at his option, though the note contains no such provision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 214, 215.]

2. SAME—DEFAULT—NOTICE OF ELECTION TO FORECLOSE—NECESSITY.

Where a mortgage provides that, on default in payment of interest, at the mortgagee's option the whole debt shall become due, the mortgagee need not, before commencing a foreclosure action, notify the defaulting mortgagor of his election to declare the principal due.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1209.]

3. SAME.

Where a mortgage provides that, on default in payment of interest, at the mortgagee's option the whole debt shall become due, the principal sum does not become due ipso facto upon default in interest payment, but the clause gives the mortgagee a mere option which he may take or waive, and the option is lost if before it has been exercised the mortgagor pays or offers to pay the overdue interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1209.]

4. PAYMENT—DEPOSIT IN BANK FOR CREDITOR.

Under the express terms of Civ. Code, § 1500, where a mortgagor's tender of interest was refused, a deposit in a bank of good repute of the amount to the mortgagee's credit, with notice thereof to the mortgagee, amounted to payment of the interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, § 24.]

5. SAME—ELECTION TO DECLARE DEBT DUE—SUFFICIENCY.

A mortgagee cannot be held to have exercised an option under the mortgage entitling

him to declare the whole debt due on default in payment of interest until by some outward act beyond a mere mental determination or a direction to his own agents he has manifested an election.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1209.]

6. SAME—PLEADING.

Where the complaint in a foreclosure action alleges that the plaintiffs "elect" to declare the whole debt due for default in payment of interest, proof may not be made of an election made before the commencement of the action.

Department 1. Appeal from Superior Court, Trinity County; James W. Bartlett, Judge.

Action by the Trinity County Bank and another against F. G. Haas and others. Defendants appeal from a decree foreclosing a mortgage and from an order denying a new trial. Reversed and remanded.

William C. Bissell, for appellants. D. J. Hall and H. R. Given, for respondents.

SLOSS, J. The defendants appeal from a decree foreclosing a mortgage, and from an order denying their motion for a new trial.

On January 11, 1904, the defendants F. G. Haas and Emily E. Haas made and delivered to plaintiffs their promissory note for \$5,969.73, payable one year after date, with interest thereon at the rate of 1 per cent. per month from date until paid, said interest payable quarterly, and, if not so paid when due, to be added to the principal and to bear interest at the same rate as the principal sum. On the following day said defendants executed and delivered to plaintiffs a mortgage of real property to secure their note. The mortgage provided that, "In case default be made in the payment of the said principal or any installment of interest as provided, then the whole sum of principal and interest shall be due at the option of the said parties of the second part (the payees), or assigns." On September 6, 1904, the defendants F. G. and Emily E. Haas conveyed to the defendant Joseph Elliott the greater part of the mortgaged premises, Elliott assuming the payment of the mortgage debt.

The first installment of interest, payable on April 11, 1904, was paid when due. This action was commenced October 17, 1904, the plaintiffs alleging in their complaint that no further interest had been paid, and "default having been made in the payment of the sum of interest due July 11th, 1904, plaintiffs, in accordance with the terms of said mortgage, elect to declare the whole of said principal sum and interest thereon from April 11th, 1904, now due and payable." The answers allege that all interest due upon said note or by said mortgage "has been heretofore paid, and that the principal sum of said note and mortgage is not yet due." The court found against the plea of payment, found that plaintiffs had, on or about the 3d day of October, 1904, elected to declare the principal and interest due, and, as has been stated,

granted to plaintiffs a decree of foreclosure. The finding that the interest had not been paid is attacked as unsupported by the evidence. It appears, without contradiction, that on October 11, 1904, six days before the commencement of the action, the defendant Elliott, who had assumed the payment of the note and mortgage, tendered to the plaintiffs the interest then due, comprising the two installments payable, respectively, on July 11, 1904, and October 11, 1904, and amounting to about \$368.20. The tender was refused on the ground that plaintiffs had exercised their option "of considering both principal and interest due on that note and that the [their] money was not sufficient." The defendant Elliott immediately deposited the sum of \$375 in gold coin in the name of plaintiffs in a bank of deposit of good repute and gave notice thereof to plaintiff. Civ. Code, § 1500. There is no evidence that at any time prior to October 11th the plaintiffs notified any of the defendants they had elected to declare the principal of the note due, or that they ever demanded payment of such principal. Evidence offered by defendants to show that plaintiffs had not given such notice or made such demand was excluded. The agent of plaintiffs was allowed to testify, over defendants' objection, that two weeks before the commencement of the suit he had elected to declare the whole note due and payable, and had directed the attorneys of the plaintiffs to proceed to foreclose the mortgage. The note and mortgage, being parts of one transaction, are to be read together, and the plaintiffs may therefore rely on the provision contained in the mortgage, making the principal due for nonpayment of interest at the payees' option, although the note contains no such provision. *Phelps v. Mayers*, 126 Cal. 549, 58 Pac. 1048; *Meyer v. Weber*, 133 Cal. 681, 65 Pac. 1110. The contention of the appellants is that they had the right to pay the accrued interest and defeat the right to exercise this option, at any time before it had actually been exercised, and that it could not be validly exercised by any determination reached in the creditors' own minds, and not communicated in any way to the debtors.

It is settled by several decisions of this court that the holder of an instrument of this kind need not, before commencing his action, give any notice to the defaulting maker of his election to declare the principal due for nonpayment of interest. *Hewitt v. Dean*, 91 Cal. 5, 27 Pac. 423; *Siehler v. Look*, 93 Cal. 600, 29 Pac. 220; *Clemens v. Luce*, 101 Cal. 432, 35 Pac. 1032; *Bank of Commerce v. Scofield*, 126 Cal. 156, 58 Pac. 451. As was said in *Hewitt v. Dean*, supra: "The commencement of the action was notice of the exercise of the option * * * and no previous notice or demand was necessary." But, while a formal notice before suit is not necessary, the principal sum does not become

due ipso facto upon default in the payment of interest. The clause in question gives to the holder of the note a mere option which he may take or waive. *Belloc v. Davis*, 88 Cal. 242. He is entitled to a reasonable time in which to determine whether or not he will claim his right. *Hewitt v. Dean*, supra; *Fletcher v. Dennison*, 101 Cal. 294, 35 Pac. 868. If after a default in the payment of interest the holder accepts the overdue interest (*Belloc v. Davis*, supra), or delays unreasonably before electing to declare the principal sum due (*Crossmore v. Page*, 73 Cal. 213, 14 Pac. 787, 2 Am. St. Rep. 789), the right to exercise the option is lost. And we think it is equally lost if, before the option has been in fact exercised, the defaulting debtor pays or offers to pay the overdue interest. Until such option has been exercised, the principal of the note is not due. Until then the holder has a mere option to declare it due. During this interval he has, by his failure to act, in effect declared that he will not regard the delay already past as sufficient ground for asserting the right given him. The delay to that extent is waived by him. If then, before the exercise of the option, the debtor pays the accrued interest, the condition upon which the holder may declare the whole note not due does not exist. The interest is no longer unpaid, and the creditor cannot take advantage of a prior delay, which he has already waived. Here the debtor, by his tender, followed by the deposit in bank, extinguished the obligation to pay the interest then due. Such tender and deposit constituted a payment (Civ. Code, § 1500), if made before the plaintiffs had exercised their option to declare the principal due. And the offer of payment, without the deposit in bank, was equally effectual to destroy the right of the plaintiffs to declare the principal of the note due. Civil Code, § 1504. The plaintiffs cannot therefore rely upon the commencement of the suit as an exercise of their option. When the complaint was filed, the interest had already been paid. Nor can any effect, as against the defendants, be given to the statement made by the agents of plaintiffs in response to the tender, that the plaintiffs had exercised their option of considering both principal and interest due. Such statement was made after the rights of the defendants had become fixed by their tender. It is true that the court finds that the plaintiffs had on or about the 3d day of October, 1904, elected to declare the principal and interest due.

This finding is based upon the testimony that the plaintiffs had on or about the date last stated directed their attorneys to proceed to foreclose. We think the rights of the defendants could not be cut off by such ex parte determination, not communicated to them. The plaintiffs had a right of election, and, having elected, had the right to proceed without notice to the defendants, but

they cannot be said to have exercised their option until by some outward act beyond a mere mental determination or a direction to their own agents they had manifested their election. Furthermore, the complaint does not allege any election prior to the commencement of the action. The allegation is that plaintiffs "elect to declare the whole of said principal sum and interest thereon from April 11, 1904, now due and payable." This statement, which is in the present tense, must be taken to refer to the time of filing the complaint. It was not denied. The allegation was probably unnecessary, as the filing of the complaint seeking the relief claimed sufficiently evidenced an exercise of the option at the time of such filing. But, under the averment as made, evidence of a prior election was outside of the issues, and was objected to on this ground. For the same reason the finding of an election on October 3, 1904, is entitled to no consideration.

It follows that, in the present condition of the pleadings and the evidence, the action seems to have been prematurely begun, the principal sum sued for not being due when the complaint was filed.

The judgment and order appealed from are reversed, and the cause remanded for a new trial. The plaintiffs, if so advised, should have leave to amend their complaint.

We concur: SHAW, J.; ANGELLOTTI, J.

(151 Cal. 572)

CITY OF OAKLAND v. THOMPSON, City Clerk. (S. F. 4849.)

(Supreme Court of California. July 30, 1907.)

1. MUNICIPAL CORPORATIONS — PARKS — AUTHORITY TO ACQUIRE — INDEPENDENT SCHEMES.

Though no repugnancy exists between St. 1889, p. 361, c. 248, authorizing cities to acquire public parks and boulevards, and St. 1901, p. 27, c. 32, authorizing them to incur indebtedness for and regulating the acquisition of municipal improvements, the 1889 act does not provide the sole method by which land may be acquired for public parks, since the Legislature may provide two independent schemes, to either of which a municipality may resort.

2. SAME.

Under St. 1901, p. 27, c. 32, authorizing cities to acquire or construct any municipal improvement, including street work, etc., and property necessary or convenient to carry out the objects, purposes, and powers of the municipality, and Oakland City Charter, art. 3, § 31, St. 1889, p. 524, authorizing the city to acquire lands for public parks, etc., it may purchase lands for park and boulevard purposes.

3. SAME.

St. 1901, p. 27, c. 32, authorizing cities to acquire land for parks, and providing a proposition to incur debt therefor shall be submitted to the voters, does not contemplate that each price of land desired for a park should be voted upon separately, where there is a single scheme of park improvement, including several parcels of land widely separated, to be converted into separate parks.

In Bank. Petition by the city of Oakland for mandamus to Frank R. Thompson, city

clerk, to compel him to countersign bonds. Peremptory writ ordered to issue.

J. E. McElroy, City Atty., for petitioner. Allen & Walsh and Ben. F. Woolner, for respondent.

HENSHAW, J. This is a petition for mandate against the respondent, who is city clerk of the city of Oakland, to compel him as such official to countersign certain municipal bonds of petitioner. The proceedings, culminating in the voting of the bonds, are set forth in full.

The respondent pleads by demurrer, and admits the due performance of all the acts taken by the officers of the city, and admits likewise the regularity and sufficiency of the election proceedings and of the election. He bases his refusal to countersign the bonds upon two grounds: First, that the proceedings culminating in the special election whereat the bonds were voted were had under a statute not applicable to the purpose; and, second, that the election, calling, as it did, for the acquisition of certain detached pieces and parcels of land for public parks, was irregular and void, in this: that each piece and parcel of land proposed to be purchased should have been submitted to the voters to be voted upon as a separate and distinct proposition; whereas, by the method adopted, it was made necessary for the voters to vote for or against the acquisition of all of these detached parcels as a single unit.

1. Under the first objection, it is contended that the proceedings should have been had, the election called, and the bonds issued, under an act of the Legislature entitled "An act to enable incorporated cities and counties, and towns to acquire, maintain, and improve public parks and boulevards." St. 1889, p. 361, c. 248. In fact, the proceedings were had under the authority of the act of 1901, entitled "An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations for municipal improvements, and regulating the acquisition, construction, and completion thereof." St. 1901, p. 27, c. 32. It is argued that the act of 1889 deals expressly with the subject-matter of the petitioner's bond election; that there is no repugnancy between it and the later act of 1901, which is general in its nature; and that it must be held, therefore, that the Legislature in the act of 1889 has set forth the single and controlling method whereby municipalities may acquire lands for park and boulevard purposes. It may freely be conceded that no repugnancy exists between the act of 1889 and the act of 1901, but it does not necessarily follow therefrom that the act of 1889 provides the sole and exclusive method by which a municipal corporation may acquire land for park purposes. Thus, if it shall be determined that the act of 1901 is in its scope broad enough to include the acquisition of lands for park and boulevard

purposes, there is no constitutional inhibition forbidding the Legislature from providing two independent schemes, to either of which a municipality may have resort as it shall deem expedient. Indeed, the essential difference between the act of 1889 and that of 1901 is in the life of the bonds; the act of 1889 providing for 20-year bonds, and that of 1901 for 40-year bonds. One city might consider it to be more to its advantage to use the longer term bonds, while another might be of contrary opinion, and, as we have said, there is no constitutional or other objection which prevents the Legislature from giving cities their option and choice in this matter. The language of the act of 1901 is certainly general enough to empower a city to purchase lands for park and boulevard purposes. It declares: "Whenever the legislative branch of any city, town or municipal corporation shall, by resolution passed by vote of two-thirds of all its members and approved by the executive of said municipality, determine that the public interests or necessity demands the acquisition, construction or completion of any municipal improvement, including bridges, waterworks, water rights, sewers, light or power works or plants, buildings for municipal uses, school houses, fire apparatus, and street work, or other works, property, or structures necessary or convenient to carry out the objects, purposes and powers of the municipality."

Herein is a declaration empowering a city to bond itself for the acquisition "of any municipal improvement" including the acquisition of any "property * * * necessary or convenient to carry out the objects, purposes, and powers of the municipality." It will not be questioned but that the acquisition of parks is, without any express words of authorization, included, whenever a grant of power is conferred to acquire property for "municipal purposes." *Law v. San Francisco*, 144 Cal. 384, 77 Pac. 1014; *City of Lexington v. Kentucky, etc., Assembly*, 71 S. W. 943, 114 Ky. 781; *In re Mayor, etc.*, 2 N. E. 642, 99 N. Y. 569; *In re North Terrace Park*, 48 S. W. 860, 147 Mo. 259. But in addition to this, the charter of the city of Oakland expressly contemplates the exercise of this power, when in section 31 thereof it declares that "the council shall have power to pass ordinances * * * 40, to acquire lands for public parks and to improve and maintain such lands for the benefit of all the inhabitants of the city." Charter of City of Oakland, art. 3, § 31; St. 1889, p. 524. The effort of respondent to limit the scope of the act of 1901 to enumerated matters under the rules of *noscitur a sociis* and *expressio unius* is untenable. The language, "including bridges, waterworks, water rights, sewers, light or power works, or plants, buildings for municipal purposes, school houses, fire apparatus," is more obviously designed to in-

clude in the phrase "municipal improvement," subject-matters concerning which doubt might be entertained as to their proper place in such a category, than to limit the kind of public improvements to those specifically designated. Thus, to illustrate: While it would be unhesitatingly said that a sewer, or a bridge, or buildings for municipal use, were public improvements, it might be debatable in a town adequately supplied with light by a quasi public corporation whether the acquisition of a lighting plant by a city could, in strictness, be denominated a public improvement, and it was to relieve from any necessity of construction that light works, power works, waterworks, and water rights were expressly enumerated. It was thus not designed to limit the meaning of the phrase "municipal improvements," but rather to broaden its scope to include any of these matters which might otherwise be considered doubtful.

2. The second objection urged by the respondent is equally untenable. The scheme had in contemplation the acquisition of several distinct parcels of land, widely separated, to be converted into separate parks for the enjoyment of all the inhabitants of the city. The scheme is a single scheme, the purpose a single purpose, and came clearly within the authority of the act of 1901, which provides that the proper authorities may "call a special election and submit to the qualified voters of said city, town, or municipal corporation, the proposition of incurring a debt for the purposes set forth in said resolution." The law does not contemplate—much less compel—that each piece and parcel of land which may be desired for a park should be voted upon separately. The plan is a single plan for the acquisition of all of these lands for park purposes, and in recognition of the jealousies which so often arise in wards and sections of a municipality it may easily be believed that it would be disastrous to the municipal scheme if the other course were adopted—the jealousies of the inhabitants of one section prompting them to vote for lands for a park, if it were to be situated in their own district, and to vote against it if it were not—thus rendering it difficult, if not impossible, for the city ever to acquire park lands at all. Certainly the plan adopted was within the discretionary power of the council under the law, and it enabled every voter to express himself as being for or against the whole proposition. More than this was not required.

It appearing, therefore, that the objections of the respondent are untenable, it is ordered that a peremptory writ of mandate issue, directing him forthwith to countersign petitioner's bonds as prayed for.

We concur: BEATTY, C. J.; LORIGAN, J.; McFARLAND, J.; SHAW, J.; SLOSS, J.

151 Cal. 561

DURKEE v. CHINO LAND & WATER CO.
(L. A. 1892.)

(Supreme Court of California. July 30, 1907.)

1. ANIMALS—TRESPASSING—OWNER'S DUTY.

The owner of cattle of known roving and destructive tendencies must take commensurate precautions to prevent their escape to the lands of others.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Animals, § 338.]

2. SAME—ACTION FOR DAMAGE—EVIDENCE—SUFFICIENCY.

Evidence in an action for damage caused by trespassing cattle *held* to sustain a finding that defendant had neither taken sufficient precaution to prevent trespass by its cattle nor exercised due diligence in removing them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Animals, § 360.]

3. DAMAGES—EVIDENCE—SUFFICIENCY.

Evidence in an action for damage caused by trespassing cattle *held* to sustain findings of damage in plaintiff's favor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 511.]

4. APPEAL—PRESENTATION OF OBJECTIONS BELOW—NECESSITY—THEORY OF CAUSE.

Where, in an action for damages, the rule adopted by plaintiff for the measurement thereof was acquiesced in by defendant, who raised no objection to the evidence given, which sustained the findings, defendant is concluded from questioning the sufficiency of the evidence when tested by some other rule.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1054, 1055.]

Department 2. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by Daniel Durkee against the Chino Land & Water Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

J. S. Chapman and Ward Chapman, for appellant. E. W. Freeman and A. D. Laughlin, for respondent.

LORIGAN, J. This action was brought by plaintiff to recover damages from the defendant, claimed to have been sustained by him on account of the defendant wrongfully and negligently allowing its cattle to trespass upon certain grain and pasture lands owned and leased by him in the vicinity of Chino, in San Bernardino county. The complaint stated four causes of action and judgment was rendered in favor of plaintiff upon the first three, but denied upon the fourth.

The first count alleged the trespass of said cattle on 320 acres of land belonging to plaintiff between December 1, 1902, and September 1, 1903, during which time they ate up and injured growing hay and verdure thereon, to the damage of plaintiff in the sum of \$175. The court allowed damages on this count on the sum of \$150. The second count alleged the trespass by the cattle of defendant, between the same dates, on another tract in possession of plaintiff containing 120 acres; that they ate up and destroyed

the grain, hay, grass, and verdure thereon, causing the loss of pasture to the amount of \$1,080; that said cattle broke down the fences on said tract and damaged plaintiff in the further sum of \$150; that as a result of such trespass by the cattle of defendant, and destruction of said fences, 10 head of cows belonging to plaintiff mingled with the trespassing cattle of defendant and with them escaped from said tract of land and were lost, to the further damage of plaintiff in the sum of \$500, making in all a total of \$1,630 damages. On this count the court allowed \$720 for the loss of grass and pasture; for destruction of fences \$50; and for the loss of cows \$500, making \$1,270. It deducted from this, however, the sum of \$105, an installment of rent on a lease of these premises due from plaintiff to defendant. The third count alleged a further trespass of defendant's cattle, between the same dates, upon two other tracts of land in possession of plaintiff, aggregating 1,500 acres, and constituting practically one pasture, whereby the fences of said tract were broken down, and the grass, hay, and verdure destroyed; that, on account of the destruction of said grass, hay, and verdure, plaintiff was compelled to purchase alfalfa hay at the expense of \$1,500, which expenditure would have been unnecessary save for the destruction by said cattle of the hay, grass, and verdure growing on said lands. It was further alleged in this count that, by reason of the destruction of said grass and verdure, 60 head of young cattle belonging to plaintiff, of the value of \$500, were deprived of proper food, and perished. Plaintiff laid his damages resulting from the destruction of said grass, hay, and verdure on said land, and the breaking down of said fences, in the sum of \$2,599.80. The court allowed on this count for the destruction of grass, \$900 damages, and fences \$600, but found against plaintiff for the alleged loss of 60 head of young cattle. In relation to the fourth count, the court found against plaintiff as to its allegations, and it is unnecessary to particularly refer to them. Judgment was given plaintiff for the amounts found in his favor on the three counts, aggregating the sum of \$2,815. The defendant moved for a new trial upon various grounds; the principal claim in support of it being that the evidence was insufficient to support the finding of negligence on the part of defendant in caring for its cattle, and, further, that there was no evidence sufficient to support the findings of the court of the amount of damages suffered by plaintiff, or any of its various items. In disposing of the motion for a new trial, the court ordered a reduction of \$20 to be made from the judgment on the first count and \$180 from the judgment on the second count, and that, if this reduction was accepted by plaintiff, the motion for a new trial be denied. The reduction was accepted by the plaintiff, and the defendant thereupon appealed from the judg-

ment and order denying its motion for a new trial.

The evidence shows that the vicinity in which the trespasses complained of by plaintiff occurred was devoted largely to the cattle business, the people living there being principally engaged in dairying, conducting it with gentle, native, dairy cows. The plaintiff was thus extensively engaged, using the fields upon which the trespass of the cattle occurred for such dairy purposes. The defendant was not engaged in dairying, but in raising cattle for the market. The ranch upon which its cattle were supposed to range consisted of some 46,000 acres, and upon this were carried at the dates involved in this action something over 3,000 head of cattle, of which, by far, the larger number were what is called Sonora or Mexican cattle. It was these Mexican cattle which entered upon the fields of plaintiff, depastured and destroyed the growing crops and natural feed thereon, broke down his fences, and caused all the damage to him which the court found he sustained, and upon which it awarded him judgment. As to the disposition of these Mexican cattle, their roving and destructive propensities, there is a unanimity in the testimony of the witnesses on the subject. They were wild "long horned cattle," which wandered on or off the range at will, and whose roving disposition was not restrained by the presence of any ordinary fence. Excerpts from the testimony of a few of the witnesses called (and the same views are expressed by all who spoke upon the subject) so sufficiently describe the character of these cattle as to make further reference to it unnecessary. One witness, speaking upon the subject, said: "I don't believe there is a ranch in that country that they have not looted, and to do it they would have to break half a dozen fences. It is no more trick to go through half a dozen fences for that band of steers than to go along the road peaceably on a Sunday afternoon." Another: "They would jump and run and go right through the fences." And a third: "The Chino cattle were wild and fences did not stop them. They were monarchs of all they surveyed." And the foreman of the defendant is also credited in the testimony with having summarized the evil tendencies of these animals in the declaration that "a whirlwind isn't in it with these cattle." We refer to the characteristics of these cattle in connection with a claim of appellant that the evidence was insufficient to sustain the finding of the court that defendant was negligent in their care.

It was the duty of the defendant, in view of the roving and destructive tendencies of these cattle, to take commensurate precautions to prevent their escape from the range upon which they were placed. Reasonable care on account of their known disposition required that a greater diligence should have

been exercised concerning them than would be required relative to ordinary range cattle. The evidence on behalf of defendant tended to show that it had, at most, four vaqueros to ride along and repair the fences, which extended eight or nine miles around the ranch, and to look after all the cattle on the range, and that they rode these fences, as one testified, once or twice, another two or three times, a week. No particular attention was given to the fences on the ranch in the vicinity of the premises of plaintiff where these cattle of marauding tendencies were ranging, or to keep them back on the range, and, under the circumstances, the court would be justified in finding that no sufficient care over them was exercised by defendant. Aside from this, the evidence on behalf of plaintiff warranted the court in finding that even the attention claimed to have been given was not sufficient, as that testimony showed that the cattle were constantly in the fields of plaintiff while the feed there lasted, and, when driven out one day, returned the next, and that defendant had information and knowledge of their constant and continued depredations. The plaintiff made frequent complaints from the beginning to the end of the trespassing of these cattle. He testified that he complained at the head office of the company in San Francisco, at the main office at Chino, and to the superintendent of the corporation at the ranch. He told them that these cattle were destroying all the feed in his fields and breaking his fences; that he had kept men riding after them; that his horses were worn out; and that he had to have relief. To these appeals he received only evasive answers, and gives what he terms "a fair illustration" of the result of one of them and the general result of all. He stated: "I went to the office and saw the clerk there in charge—in the Chino office—and I stated the case very thoroughly, that there were 200 or 300 head of their steers there; that they were there for a long time, and that I wouldn't have a thing if there wasn't something done; and the agent asked me what time I could get up in the morning. I told him I could get up in the dead hour of the night if I could get relief. He said: 'You get up tomorrow morning bright and early, and be here about the home ranch, and you will meet the vaqueros, and you state your case to them.' I got up before daylight, and it was very cold, and I drove up about sunrise, and I met Mr. Williams and four others all mounted, coming leisurely from the home ranch, and I stopped the gentlemen and stated my case to them. Mr. Williams was very kind, so far as he had anything to say, and he said: 'Mr. Durkee, we can't do anything for you. We have to go to work at the slio on the east side.' I asked if I could not have one man, and that my horses were worn

out. And he said: 'We can't spare even one man.' I said: 'How long will you be busy?' He said: 'About six days or a week.' I said: 'Isn't there any one who can give me any relief?' And he said: 'You go up to the home ranch and see Mr. Gird.' That is about the way they kept me going from one fellow to another. Mr. Gird was connected with the company. I went to the home ranch, and told the same thing to Mr. Gird, and when I got through I received information that Mr. Steele was the man to see. I inquired where I could find Mr. Steele. The information was that Mr. Steele was in Mexico, and I didn't go any further. After all these complaints occasionally the men would come up and take out a few and put them over the fence, and they would be back before the night, as a rule, and bring some more with them." While this is not all the evidence bearing on the question, it was enough to warrant the court in its finding that the defendant had neither taken sufficient precautions to prevent the trespassing of defendant's cattle upon the premises of plaintiff, or exercised due diligence in removing them when they were doing so.

We approach now the next point urged by the appellant, and to which its argument on this appeal is mainly addressed, namely, that the finding of material injury suffered by plaintiff through the trespassing of these cattle and the amount of damages found to have been sustained are not justified by the evidence. As to the material injury suffered by plaintiff, there cannot be the slightest question under the evidence. It showed, as far as the grain and feed upon the fields of plaintiff were concerned, that such fields were depastured, or the feed thereon destroyed, by the constant incursions of these cattle of defendant upon the premises, and it equally showed that the destruction of his fences was likewise occasioned by them. It would be a waste of time to discuss the evidence in the record upon these subjects, as it completely sustains the findings of the court upon them.

The appellant, however, insists that the evidence showed that other cattle besides those of defendant trespassed upon the fields of plaintiff, and that the owners thereof were responsible for some of the damage occasioned by plaintiff, and that the court was not warranted in finding that the injuries sustained were the result of the trespass of defendant's cattle alone. While some 23 witnesses were called in the case on behalf of both sides—persons in charge of the cattle of plaintiff and those of defendant, men riding the ranges caring for the stock, repairing fences, and driving out the cattle of defendant—only three testified that any other stock save those belonging to either plaintiff or defendant were ever seen in the fields of plaintiff. These witnesses testified that they each on one occasion saw a few head there. When

they were there, how many there were, or how long they remained, the evidence does not show, and, assuming that the court was required to accept this testimony, it was too indefinite and uncertain to be given any serious consideration. If it be conceded that the mere presence of these cattle—which is practically all that was proven relative to them—damaged to some extent the fields of plaintiff, still the court was warranted under the evidence in finding that it was too trivial and inconsequential to affect the substantive damage proven to have been occasioned through the continuous trespassing of large numbers of the cattle of defendant.

Now, as to the next point—the sufficiency of the evidence to sustain the finding of the court as to the various amounts in which the plaintiff sustained damage under the separate counts of his complaint. And first as to the damages allowed for the destruction of the grain and pasturage. Plaintiff, who was a practical farmer, as well as a dairyman, testified as to the first count that the damage he sustained by the trespass of the cattle was the destruction of a nine-acre field of growing barley, and fixed the amount of his damages at \$175, based upon the appearance of the grain and surrounding conditions, and the probable yield of hay per acre, and its value per ton if it had been permitted to mature and had been harvested. He testified that the probable yield of the field in hay would be 15 tons of the value of \$10 per ton. The court originally found on this basis the damage to be \$150, but upon the motion for a new trial, it being called to the attention of the court that hay worth \$20 had been taken from this tract by plaintiff, the damages on this count were reduced to \$180. As to the field described in the second count, plaintiff testified that the grass and verdure there destroyed by the cattle of the defendant was of the value of \$720. Another witness testified that the value of the feed on this 120-acre tract for dairying was worth \$1 per head of stock per month, and that it would sustain at least 60 head of cattle the year round. This would figure \$720 per annum as the value of the pasturage, but, as the plaintiff pastured the tract for three months, the court made a deduction of \$180 from that sum. The 1,500-acre tract, described in the third count, plaintiff had contemplated using for the conduct of his dairy business and for dairy purposes, and, with that object in view, had erected necessary structures thereon. He testified that on this tract was the best pasture feed known in that section. It produced the best milk and the best returns. He was feeding on this tract and milking 100 head of cows, selling the milk from them under contract in Los Angeles at a net profit of \$450 per month. The feed on this range would support these cows for three months, and, after they were pastured there a month, the depredations of

defendant's cattle commenced, resulting in the total destruction of the feed to plaintiff, and he estimated his damages at \$900, on the basis of the net profits which he would have obtained from the sale of milk during these two months—\$450 per month—had the pasturage not been destroyed by the trespass. Another witness testified that the net returns from milk would be \$4.50 per head for the same time, or \$450 per month. The court allowed damages on this basis for \$900.

It is claimed that this evidence afforded no proper basis for the allowance of damages. Upon the record, however, we do not see how the appellant can be heard to raise the question whether it presented the proper basis or not. This case was tried in the lower court by counsel for defendant other than those representing it on this appeal. The complaint set forth in the several counts the nature, character, and amount of damages sustained by plaintiff, and the court found that plaintiff had been damaged by the trespass on his property as alleged and the extent of that damage. The plaintiff presented the evidence as to damages to which we have referred upon the theory that he was adopting and following the proper and legal rule for establishing them. No objection was made by defendant to the introduction of any of the evidence, nor was it suggested by defendant until after judgment and on the motion for a new trial that the rule which was adopted by plaintiff was not the proper or correct one for the measurement of damages. Not only was no objection then made or a different rule suggested, but counsel for defendant, though not introducing any evidence on the subject of damages, cross-examined the witnesses of plaintiff on the matter of damages testified to by them with a view of reducing the amount claimed. The failure of defendant to object to the evidence, and defendant's cross-examination of the witnesses, was equivalent to a concession that the evidence was competent on the question of damages and an acquiescence in the theory of plaintiff that it was presented under a correct rule for proving them. This was in effect an acceptance of the evidence as competent upon the subject of damages and that the correct rule for their measurement was being followed. If, in the opinion of defendant, the rule adopted was not the correct one, it was defendant's duty to have objected to the evidence offered under it and to have insisted upon the proper rule being applied. This would have given counsel for plaintiff, if he was pursuing the wrong course, an opportunity for rectifying his mistake, or, in the event of dispute between counsel as to the true rule, would have afforded an opportunity to the court to declare it. This counsel for defendant did not do, but, on the contrary, tacitly conceded that the correct rule was being followed and competent evidence

was being offered under it. While parties have a right to insist that damages shall be measured by a recognized legal standard, error cannot always be predicated upon failure to do so. There is no rule of practice which precludes them from trying the question of damages on any theory they see fit. They may adopt any rule which they deem proper, and courts will not interfere of their own motion to compel the adoption of a rule contrary to that which the litigants are satisfied to accept. If they are satisfied, the court will be. When they do adopt such a rule, they are bound by it, and neither one will be subsequently permitted to question his own conduct relative to it. This is the situation here. The defendant acquiesced in the correctness of the standard adopted by plaintiff. It is to be assumed that defendant deemed the rule which was followed as favorable to itself as any other which it might suggest. In any event, it made no objection to the evidence presented under it, suggested no other or better rule, and examined the witnesses on the theory that it was the correct one. Under these circumstances defendant is concluded from raising any question as to the sufficiency of the evidence to sustain the damages on the ground that the rule adopted for the measurement of them and under which the evidence was received was not the correct one. The evidence which was presented on behalf of plaintiff was sufficient to sustain the findings of damages under the rule adopted and acquiesced in by defendant for ascertaining them. This being true, the contention of appellant, then, practically amounts to a claim that the evidence did not justify these findings because, if the correct rule for measuring damages had been adopted, the evidence received would not have been competent to prove them. But, if the correct rule was not being followed, defendant should have objected to the evidence and insisted on the true rule being adopted, and, if the objection was overruled, have excepted and assigned the ruling as error, and based his motion for a new trial upon that ground. To claim now, under a specification of insufficiency of evidence, that the evidence did not justify the finding of damages because it was admitted upon an incorrect theory as to the proper rule for measuring them, is, in effect, to assign the admission of the evidence as error of law, a matter which, even had an objection, and exception been taken, could not under any circumstances be presented or considered under a specification of insufficiency of evidence. As the rule adopted by plaintiff for the measurement of damages was acquiesced in by defendant, no objection raised by it to the competency of the evidence given under it, and, as that evidence fully sustains the findings, the defendant is concluded by its conduct from raising any question of the sufficiency of the evidence

when tested by some other and different rule than the one adopted and acquiesced in upon the trial. In this view, whether the rule adopted for the ascertainment of damages was the correct one or not, we are not called upon to consider. It was the one adopted and acquiesced in by both parties and followed by the court, and neither of the litigants can be heard after judgment to question its correctness, or the competency of the evidence introduced under it. *Gooddale v. West*, 5 Cal. 339, 341; *McCloud v. O'Neill*, 16 Cal. 393, 398; *Janson v. Brooks*, 29 Cal. 214, 223; *Bullard v. Stone*, 87 Cal. 477, 482, 8 Pac. 17; *Storey v. Nidiffer*, 146 Cal. 549, 552, 80 Pac. 692.

Appellant attacks the further findings as to the loss of 10 head of cows by plaintiff and the destruction of his fences through the negligent trespass of the cattle of defendant. As to the cows: These were part of a herd of 62 being pastured by plaintiff on the 120-acre tract. There can be no question as to their value as found by the court, and the only question is whether the evidence warranted the court in finding that through the negligence of the defendant in permitting its cattle to trespass on this field the plaintiff lost them. It is not claimed that the defendant would not be liable if the evidence so showed, and we think it did. We have already referred to the evidence which justified the court in finding that the cattle of defendant were negligently permitted to break down the fences and trespass upon the several fields of plaintiff described in the complaint, and no further discussion of that matter is necessary. As to the escape of the cows in question, it appears that they were being pastured with the rest on this tract when the several incursions of defendant's cattle upon it commenced; that defendant's cattle would break in and herd and feed with plaintiff's cows; and when run out would take the cattle of plaintiff with them: that while the cows would run out with the wild cattle they would not herd with them, and usually could readily be got together for plaintiff to put them back in the field. While no one saw the cows leaving the field of plaintiff, still the court was warranted from this evidence, and the other circumstances disclosed, in reaching the conclusion that these cows had mingled and gone with defendant's trespassing cattle, and been lost in the hills of the Chino range. After he missed them plaintiff asked permission of defendant's superintendent to search for them on the Chino ranch, and was refused.

As to the destruction of the fences of plaintiff and the damages therefor as found by the court, the findings in both respects are sustained by the evidence.

The judgment and order appealed from are affirmed.

We concur: **McFARLAND, J.**; **HENSHAW, J.**

151 Cal. 581

MANHA v. UNION FERTILIZER CO.

(L. A. 2,014.)

(Supreme Court of California. Aug. 1, 1907.
Rehearing Denied Aug. 28, 1907.)

1. PLEADING—AMENDMENT OF ANSWER—LEAVE OF COURT.

Code Civ. Proc. § 472, provides that any pleading may be amended once by the party of course and for cause at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereof, by filing the same as amended and serving a copy on the adverse party, who may have 10 days thereafter in which to answer or demur to the amended pleading; that a demurrer is not waived by filing an answer at the same time, and, when demurrer to a complaint is overruled and no answer is filed, the court may allow an answer on terms, etc. *Held*, that such section only permits an amended answer to be filed before a demurrer to the original answer is filed, or while the issue of law raised by the demurrer thereto is undisposed of, and that an amended answer as of course cannot be filed after a demurrer to the original answer has been disposed of, or after the time within which plaintiff might have demurred, but did not, has expired, when the amendment can be allowed only by stipulation or leave of court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 765, 768.]

2. SAME—LEAVE TO FILE—DISCRETION.

A cause was set for trial in June, 1905, on the original pleadings, and continued on defendant's application until August 14th, when defendant promised to be ready for trial. On that day defendant first moved for leave to amend its answer, the result of which would have been to have required a continuance of the cause, because the proposed amendment presented additional issues. There was no showing as to why the application was not made earlier, and it appeared that matters sought to be presented in the amendment were known to defendant in June. *Held*, that the refusal of the amendment was not an abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 601.]

3. SHIPPING—CHARTER PARTY—BREACH BY OWNER.

Defendant chartered a vessel for a voyage to Magdalena Bay and return to San Diego with a cargo of guano, plaintiff, the owner, to accompany the vessel. This requirement was changed, and, when the vessel was off Ensenada, plaintiff boarded her, and directed the captain not to put into that port, as he had been directed by defendant's agent. It was not shown why defendant's agent desired the vessel to enter Ensenada, nor that he had any business there, nor that the captain informed plaintiff that he had orders from such agent to enter that port. *Held*, that plaintiff's orders to the captain not to enter Ensenada did not constitute a breach of the charter.

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Frank Manha against the Union Fertilizer Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

Grant Jackson and George Fuller, for appellant. Powers & Holland for respondent.

LORIGAN, J. This suit was brought to recover the sum of \$590 for work and labor performed by the plaintiff at the request of the defendant, and for the use and hire by

the defendant from plaintiff of that certain boat known as the schooner "May" for a period of 59 days from the 11th day of September, 1904, to the 9th day of November of the same year. From the answer and the evidence it appears that plaintiff's action is based upon the written agreement attached to the answer made between the plaintiff and one Beermaker, agent of the defendant, for the hiring of plaintiff's power schooner May for a voyage to Magdalena Bay, stopping at any place or island designated by said Beermaker, and to return to San Diego with a load of guano. The rental agreed upon was \$10 per day, and by the terms of the contract the plaintiff was to go with the boat as engineer and to furnish one man as sailor; said Beermaker furnishing all provisions, oil for engine, captain, and two sailors. The schooner on the 11th day of September, 1904, cleared from the port of San Diego for that of Ensenada, but on arrival there the plaintiff was arrested by the Mexican authorities for an alleged criminal offense, and the schooner also taken into custody. She was, however, released at the end of five days, and it was found that under an arrangement between the plaintiff and Beermaker, by which the latter waived the defendant's rights to require the plaintiff to accompany the schooner, she proceeded on her voyage, under the terms of the contract as thus modified. The voyage was completed on the 9th day of November, 1904, and it is found by the court that defendant, during the period between the date of her sailing, September 11, 1904, and the date of her arrival, had and used the schooner under said contract for a period of 39 days. Judgment was accordingly rendered for the sum of \$390 less the sum of \$50 already paid, and \$25.75 expenses for repairs incurred by the defendant. The defendant appeals from the judgment, and from the order denying its motion for a new trial.

The first error claimed to have been committed by the trial court was in striking out, on motion of plaintiff, an amended answer and counterclaim filed by defendant. It appears that the defendant filed its original answer and counterclaim on December 24, 1904, and the cause was set down for trial on June 16, 1905, but upon the application of defendant, made on that day, and over the objection of plaintiff, the trial was continued until August 14, 1905, counsel for defendant announcing that he would be ready for trial on that date. On August 4, 1905, without leave of the court, defendant filed an amended answer to which plaintiff demurred. After this demurrer was filed, defendant, still without leave of the court, served and filed a second amended answer, both of which, on motion of plaintiff made on August 14, 1905, the date fixed for the trial, were stricken out. The grounds of the motion were, first, that the amended answer and counterclaim

had been filed without leave of court, and without authority of law; second, that the second amended answer and counterclaim changed the issues made in the action; and, third, that the plaintiff was taken by surprise. As the order striking out the answer and counterclaim was general, it must be sustained if any of the grounds urged in support of it were tenable. We shall not discuss the merits of the last two grounds, because the order was properly based on the first. The position of the appellant is that under section 472, Code Civ. Proc., he had an absolute right to file an amended answer at any time before trial of the cause. This, however, is not a proper construction of the section which only permits an amended answer to be filed before a demurrer to the original answer is filed, or while the issue of law raised by demurrer thereto, is undisposed of. An amended answer "as of course" cannot be filed after a demurrer to the original answer has been disposed of, or after the time within which the plaintiff might have demurred, but did not, has expired. It can thereafter only be allowed upon stipulation, or by leave of the court. This identical question was before this court in the case of *Tingley v. Times Mirror Co.* (Cal.) 89 Pac. 1097, decided since the appeal in the present case was taken. We there construed the section adversely to the position assumed by appellant, and as supporting the view taken by the trial court, and we refer to the decision in that case for a more extended presentation of our views upon the subject.

The amended answer having been stricken out, appellant then moved the court for leave to file it, which was denied, and this ruling is also assigned as error. The original answer, after denying the allegations in the complaint, set up a counterclaim for damages alleged to have been sustained by the failure of plaintiff to make the voyage provided for in the contract. The second amended answer asked to be filed set up the additional defenses that the vessel was unseaworthy, and that plaintiff took forcible possession of it on the high seas, and refused to return it to defendant. Also various counterclaims were set up for amounts paid and expenses incurred by defendant relative to the voyage and resulting from its alleged abandonment by plaintiff. Whether the court should allow this amended pleading to be filed rested in its sound discretion and the order of the court refusing it could only be reversed because of an apparent abuse of it, and the record here discloses no such abuse. The cause was set for trial in June, 1905, under the original pleadings, and continued on the application of defendant until August 14, 1905. No intimation was given then by defendant that any change in its pleadings were contemplated. On the contrary, its counsel stated that he would be ready for trial on the date to which a continuance was

had. On the day for which the trial was last set he moved to be allowed to amend, the result of which allowance would have been as asserted by plaintiff—and which was no doubt true—to work a further continuance in the cause. No showing whatever was made why the application had not been made earlier. The absence of such a showing would of itself have sustained the order of refusal. A party is entitled to have a cause tried at the date for which it is set, unless some satisfactory reason is presented for its postponement. An application for leave to amend a pleading, which, if granted, will warrant a continuance of a trial without any showing why the application was not made earlier, is sufficient ground for refusing to allow it. Not only was there no showing made in behalf of the application, but from an affidavit made by the manager for appellant in support of its application for a continuance of the trial on June 18, 1905, it appears that defendant had knowledge then of practically all the matters set forth in its amended answer and counterclaim, which on August 14, 1905, it asked leave to file. Under all these circumstances, there was no error on the part of the court in refusing to allow the amended pleading to be filed on the day last set down for trial of the cause. Aside from this claim relative to the ruling of the court upon the pleadings tendered by appellant, it is insisted by it that the evidence did not justify the findings in favor of plaintiff. The court found the facts as we have heretofore recited them. Some of them were not denied, and, as to those which were, it is only necessary to say that the evidence was conflicting, and the court accepted that offered on behalf of plaintiff.

It is particularly insisted, however, by appellant that the finding of the court that the voyage under the contract was completed on the 9th day of November, 1904, is not supported by the evidence. The position of defendant in this regard is that, when the vessel was about to proceed on its way back from Magdalena Bay to San Diego, the captain thereof was given instructions by Beermaker to put in to Ensenada; that when the vessel was off that port on the 7th or 8th of November the plaintiff, who had remained in the vicinity of Ensenada while the vessel proceeded to Magdalena Bay, came out in a boat, boarded her, and directed the captain not to put in to Ensenada, but to sail directly for San Diego, which he did, arriving there on November 9th, but, when plaintiff boarded the vessel, it was on its way home, and its voyage had already been long extended beyond the time contemplated in the contract of the parties. Beermaker was not on the vessel. He had remained at some point in the vicinity of Magdalena Bay. No reason was suggested why Beermaker wanted the boat to put in to Ensenada. It does not appear that he had any business there, or was

at all discommoded or inconvenienced by the failure of the vessel to land at Ensenada. She was not returning with any cargo which necessitated her entering or clearing at that port. Neither had Beermaker told plaintiff that he wanted the vessel to put in there on her return; nor does it appear that, when the plaintiff boarded the vessel outside of Ensenada, the captain in charge gave him any information that he had been instructed by Beermaker, or any one else, to enter the port of Ensenada. It appears only that the captain contemplated doing so, but that plaintiff persuaded him to proceed directly to San Diego, her home port, instead. Why the captain wanted to put in to Ensenada does not appear, but, whatever the reason was, the evidence does not disclose that either he, or any one else, informed plaintiff that he had orders from Beermaker to do so. Under the circumstances, it cannot be said that plaintiff broke up the voyage or retook the boat without the consent of defendant before the voyage was completed, or that the evidence did not show that it was completed under the contract as found by the court.

We have considered the points made by the appellants relative to the admission and rejection of testimony, and are of the opinion that no material error was committed in that respect. Other points are made in the case, but we do not think they are of any merit or that they require particular discussion.

The judgment and order appealed from are affirmed.

We concur: SLOSS, J.; SHAW, J.; ANGELLOTTI, J.; HENSHAW, J.; McFARLAND, J.

BEATTY, C. J. I concur. As to the right of defendant to file an amended answer at any time before demurrer filed, it is sufficient for the purposes of this case to say that after an answer has been filed, and the issues so formed have been set for trial on a day certain, with the knowledge and acquiescence of the defendant, he cannot, on the eve of the trial, file an amended answer, raising new issues, without leave of the court. To so much qualification the general language of section 472, Code Civ. Proc., must be subject, and perhaps it is the only qualification we are authorized to impose.

161 Cal. 587

GUTIERREZ et al. v. WEGE. (L. A. 1,848.)
(Supreme Court of California. Aug. 5, 1907.)

1. WATER COURSES — RIPARIAN OWNERS —
RIGHT OF DIVERSION — EVIDENCE — FIND-
INGS.

Where in a contest between riparian owners as to their respective rights in a creek there was evidence that, notwithstanding defendant's diversion of a miners' inch of the waters through a pipe, there was always water flowing down onto plaintiffs' land, the court properly found that defendant had not acquired an adverse right

to all the waters of the creek, and had not diverted or acquired any right to such waters other than to a quantity sufficient to supply the pipe.

2. SAME—DIVISION OF WATER.

Plaintiffs and defendant owned adjoining land. A creek rose from a spring on defendant's land and flowed through the same and through about three-fourths of the length of plaintiffs' land, when it was absorbed. Defendant had never diverted more than one miners' inch of the water, and his land contained only three acres and a fraction that was irrigable and adapted to cultivation by means of such water, while plaintiffs' land contained about 2,000 acres, 50 of which was adapted to cultivation and susceptible of irrigation from the creek. *Held*, that a decree vesting in defendant sufficient water to supply his pipe and dividing the balance of the flow so that defendant should have the entire flow for one day out of every 21 days, and that plaintiffs should have the balance, was a proper division.

In Bank. Appeal from Superior Court, Ventura County; J. W. Taggart, Judge.

Action by Soledad Gutierrez and another, as executors of the will of Benigno Gutierrez, deceased, and another, against Henry Wege. From a part of the judgment in favor of plaintiffs, defendant appeals. Affirmed.

See 79 Pac. 449.

H. L. Poplin, for appellant. G. H. Gould and W. R. Edwards, for respondents.

McFARLAND, J. This action was brought to quiet title to the waters of a small stream called "Casitas creek," and to have the proportionate rights of the parties to said waters definitely determined. The court made findings and rendered a judgment, and from a part of this judgment defendant appeals.

No errors of law are assigned, and the only grounds for a reversal are that certain findings of fact are not supported by the evidence. Each of the parties is the owner of a tract of land riparian to said creek; defendant's land lying immediately above and adjoining the land of plaintiffs. The creek rises in a spring on defendant's land, and flows through his land onto the land of plaintiffs and runs through plaintiffs' land about three-fourths of its length, when it is all finally absorbed by the soil. Defendant having claimed all the waters of the spring and creek and threatened to divert the same unless plaintiffs pay him certain money, plaintiffs commenced this action for an injunction against the infringement of their riparian rights and for a decree settling the proportionate ownership of the parties of the waters of the creek, and also prohibiting defendant from maintaining a certain nuisance, namely, a manure pile, in the creek. Defendant set up his right by prescription to all the waters of the creek, claiming that for more than five years before the commencement of the action he had continuously, notoriously, and adversely to plaintiffs and all the world diverted all of the said water onto his own land and used it there, and prevented any of it from flowing down through the lands of plaintiffs. The

court found that defendant had so diverted one miners' inch of said water through an iron pipe, and had acquired a right by prescription to said one inch of water, and also found that defendant had not diverted or acquired any right to the waters of said creek other than the said one inch. Defendant contends that this finding, except as to said one inch, is unsupported by the evidence, and that the evidence shows that he had adversely diverted all of the water of said creek as claimed by him. This contention of defendant as to the finding of his claim to all the water by prescription substantially includes all of his case on appeal; for it will be found on examination that his other points as to findings not being sustained by the evidence all point to and are based on the contention that the finding as to prescription is unwarranted. But, in our opinion, there was ample evidence to support the finding that there was no adverse diversion of the water of the creek other than the one inch diverted through the iron pipe. There was, no doubt, some conflicting evidence on this point; but there was material testimony that notwithstanding the diversion through the pipe there was always water flowing down the stream onto plaintiffs' land.

Plaintiffs' land contains about 2,000 acres, and the court found that 50 acres of it was adapted to cultivation and was susceptible of irrigation from said creek, and that only 3 acres and a fraction of defendant's land was adapted to cultivation and irrigable from said creek; and it found that a fair proportionate division of the water of the creek, other than the said 1 inch, for irrigation, would give to plaintiffs the entire flow of the creek, other than the 1 inch, for 20 days out of every 21 days; and to defendant, in addition to said 1 inch, the entire flow of the creek for 1 day out of every 21 days; and judgment was rendered in accordance with this finding. Defendant excepts to this finding as not supported by the evidence; but it is not specifically contended that this would not be a fair division, provided all the water other than the 1 inch is to be divided between the parties; and defendant, in arguing this point, reverts to his contention that defendant is entitled to all the water by prescription. We think that the evidence fairly warrants the division of the water decreed by the judgment. The other points made by defendant as to the title to the water of the creek are covered by what has already been said.

As to the nuisance, we think that the evidence amply warrants the findings of the court as to that matter and justifies the judgment.

The part of the judgment appealed from is affirmed.

We concur: SLOSS, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

151 Cal. 340

Ex parte COLLINS. (Cr. 1,374.)

(Supreme Court of California. June 12, 1907.)

HABEAS CORPUS—APPEAL AND ERROR—BAIL.

When, after a habeas corpus hearing, a prisoner has been remanded to the custody whence he came, there is ordinarily no proceeding to be stayed pending a review of that order, since he is not thereafter held by the order of remand, but by the warrant or other process upon which he was held when the writ of habeas corpus was issued, and the power to admit him to bail belongs exclusively to such officer, if any, as had the power to admit him to bail independent of habeas corpus proceeding, and he must make his application for bail in the usual manner as provided by law.

In Bank. Application by George D. Collins for a writ of habeas corpus. Petitioner having been allowed a writ of error to the United States Supreme Court to review an order (90 Pac. 827) remanding him to custody, he requests that the writ operate as a supersedeas. Refused.

George D. Collins, in pro. per. Wm. Hoff Cook and Hiram T. Johnson, for respondent.

BEATTY, C. J. Having allowed the prisoner a writ of error to enable him to secure a review of the record in this proceeding by the Supreme Court of the United States, and having been requested to order that the writ operate as a supersedeas, I desire to state my reason for specially limiting the operation of the order. In certain cases of recent origin in this state in which prisoners in custody under process of the superior court have been remanded after a hearing upon habeas corpus in another court, or before a different judge, upon the ground that the imprisonment was lawful, the judge making the order of remand has allowed a writ of error and ordered a supersedeas which he has construed as empowering him to admit the prisoner to bail. The order which I make in this case is not to be understood by any judge to whom an application for bail may be made as having such effect. When, after a hearing upon his petition for a writ of habeas corpus, a prisoner has been remanded to the custody from whence he came, there is ordinarily no proceeding to be stayed pending a review of that order. The prisoner is not thereafter held by virtue of the order of remand, but by virtue of the warrant or other process upon which he was held at the time the writ of habeas corpus was issued, and the power to admit him to bail belongs exclusively to such officer, if any, as had the power to admit him to bail independent of the habeas corpus proceeding, and he must make his application for bail in the usual manner as provided by the laws of this state.

6 Cal. App. 85

EDDY v. HOUGHTON et al. (Civ. 363.)

(Court of Appeal, Second District, California. July 8, 1907.)

1. VENUE—CHANGE—AFFIDAVITS—ANSWER.

On an application for a change of venue, the affidavit and answer are only available as

affecting the question of residence, and cannot be considered in determining the nature of the cause of action pleaded, which must be found from the complaint alone.

2. SAME—TRANSITORY ACTION.

An action to compel a depository of stock in a mining corporation and the pledgee to deliver the same to plaintiff was a transitory action, and not local as involving a controversy over real property.

3. CORPORATIONS—VENUE—RIGHT TO CHANGE.

Under Const. art. 12, § 16, providing that a corporation may be sued in the county where the contract is made or to be performed, where the obligation or liability arises or breach occurs, or in the county where the principal place of business of the corporation is situated, subject to the power of the court to change the place of trial as in other cases, corporation defendants have no absolute right to a change of venue on account of residence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1943.]

4. VENUE—CHANGE—RIGHT OF DEFENDANT.

A defendant against whom no cause of action is stated is not entitled to a change of venue.

5. SAME—AFFIDAVIT OF MERITS.

An affidavit of merits in support of an application for a change of venue, alleging that the affiant had fully and fairly stated "the case," as distinguished from the "facts of the case," to his counsel, and had been advised that there was a good defense to the action on the merits, was sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, § 113.]

Appeal from Superior Court, Los Angeles; County, N. P. Conrey, Judge.

Action by E. C. Eddy against F. T. Houghton and others. From an order denying defendants' motion for a change of venue, they appeal. Reversed.

J. S. Larew and R. B. Stolder, for appellants. Chas. S. McKelvey, for respondent Eddy. Hugh T. Gordon, for respondent Tennessee-California Gold Mining Company.

TAGGART, J. Appeal from an order denying motion for change of venue.

The action was begun in Los Angeles county and the application for change of place of trial was made by the defendants F. T. Houghton and Merced Security Savings Bank. It was based upon the grounds that the cause of action related to a controversy over real property situated in the county of Mariposa, and the real defendant and party in interest (Houghton) was a resident of Mariposa county. Two demands for a change appear in the record, one by the defendant Merced Security Savings Bank, and the other by the defendant Houghton, and the latter files an affidavit setting out that he is the only real party in interest as defendant in said action, and that all the other persons named as defendants are mere nominal parties. The defendant Tennessee-California Gold Mining Company, which joins the plaintiff in resisting the motion, files a verified answer, presenting its interest in the subject-matter of the action brought by plaintiff.

In determining the cause of action to be

tried neither the affidavit nor the answer can be looked to. The effect of the complaint in this respect cannot be varied by either. Only as affecting the question of residence will they be considered. *Quint v. Dimond*, 135 Cal. 572, 67 Pac. 1034. The only cause of action attempted to be stated in favor of plaintiff is one against the defendants Merced Security Savings Bank and Houghton, and is to compel the bank to deliver to plaintiff certain shares of stock of the defendant corporation, Tennessee-California Gold Mining Company, in which Houghton is interested. The relations of the parties to the transactions involved in the action, as disclosed by the complaint, are: The plaintiff and defendant Guenther were pledgors of the shares of stock—the bank the pledge holder and the defendant Houghton the pledgee. There is no real property involved in the said cause of action attempted to be stated in favor of plaintiff. The extensive allegations of probative facts anticipating the bank's reason for refusing to deliver the stock constitute no part of the statement of a cause of action which the court can consider on this motion.

Neither of the corporation defendants has an absolute right under the constitutional provision (section 16, art. 12) to have the action removed on account of its place of residence. *Trezevant v. Strong Co.*, 102 Cal. 49, 36 Pac. 395. The principal place of business of the Tennessee-California Gold Mining Company is stated in the complaint to be at Los Angeles, Cal., but the complaint states no cause of action in favor of plaintiff to which that corporation is a proper or necessary defendant. The defendant Guenther passed out of consideration by the stipulation of the parties in open court. This leaves but the two moving defendants to be considered. The bank is a resident of Merced county, but its demand for change is to Mariposa county, and may be considered as a consent to the granting of the motion of the defendant Houghton, whose demand on the ground of his place of residence is for a change to Mariposa county. The mining company being neither a necessary nor proper party to the determination of the cause of action therein stated in favor of plaintiff, the defendant Houghton's motion should have been granted, if there was a sufficient showing on the merits. *McKenzie v. Barling*, 101 Cal. 459, 36 Pac. 8. We think there was.

The contention of respondent that the affidavit of merits made by the moving party is insufficient cannot be sustained. The affidavit is substantially the same as the one held good in *McSherry v. Penn. Co.*, 97 Cal. 642, 32 Pac. 711, except that in the case cited the affiant avers that he "has fully and fairly stated the facts of the case" to his counsel, while in the case at bar the statement is that he "has fully and fairly stated the case" to his counsel. There is no

essential difference between these statements. *Rathgeb v. Tiscornia*, 66 Cal. 96, 4 Pac. 987. The order appealed from is reversed.

We concur: ALLEN, P. J.; SHAW, J.

5 Cal. App. 29

PEOPLE v. HARBEN. (Cr. 44.)

(Court of Appeal, Second District, California.
Feb. 18, 1907.)

1. FALSE PRETENSES—FICTITIOUS BANK BILL—INFORMATION.

An information charging that defendant passed a fictitious bill in writing on a bank not in existence, with intent to cheat and defraud the complaining witness, and alleging that defendant had knowledge of the character of the bill and of the nonexistence of the bank named therein at the time he passed such bill, sufficiently charged the offense defined by Pen. Code, § 476, prohibiting the passage of a bank bill of a bank having no existence, with intent to defraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, §§ 34-36.]

2. SAME—FICTITIOUS BILL—STATUTES.

Defendant passed an alleged \$20 bank bill to complainant in payment of room rent. The bill consisted of two bills pasted together; the exposed sides being similar to each other. Both bills were of the denomination of \$20 and purported to be issued by a New Jersey bank which had had no existence since 1865. One of the exposed faces bore the "No. 31.777" and the date 1864, and the other showed the number blank, the date incomplete, the signature by the president, but a blank for the signature of the cashier. *Held* that, though such bills were genuine in so far as they were complete, they were nevertheless false and fictitious, within Pen. Code, § 476, prohibiting the passing of a fictitious bank bill of a bank not in existence, with intent to cheat and defraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, § 4.]

3. CRIMINAL LAW—OTHER OFFENSES—SYSTEM.

In a prosecution of defendant for passing a fictitious bank bill at Long Beach on October 28, 1905, in payment for room rent, evidence was also offered of a similar offense alleged to have been committed by him in San Pedro on the 3d day of November following. Defendant admitted being in San Pedro on the day of the alleged later offense, but tried to establish an alibi as to the principal offense. *Held*, that evidence of the subsequent offense was admissible to identify defendant as the person who passed the fictitious bill at Long Beach, and to show that defendant was operating a system of imposition and fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 833, 834.]

4. FALSE PRETENSES—STATUTES—AMENDMENT.

Pen. Code, § 470, as amended by Acts 1905, relating to the offense of signing the name of a fictitious person with intent to defraud, had no application to section 476, prohibiting the passing of a fictitious bank note of a bank not in existence.

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Steven Harben was convicted of passing a fictitious bank bill with knowledge of its character, and he appeals. *Affirmed*.

E. L. Hutchinson, Henry H. Roser, and H. H. Appel, for appellant. U. S. Webb, Atty. Gen., and E. E. Selph, Deputy Atty. Gen., for the People.

TAGGART, J. This is an appeal from a judgment of conviction, and from an order denying defendant's motion for a new trial upon a charge of passing a fictitious bank bill in violation of the provisions of section 476 of the Penal Code. The information charges that the defendant on the 28th day of October, 1905, passed a certain fictitious bank note of a bank or corporation having no existence at the time, and charges the defendant with knowledge of the false and fictitious character of the bill and of the nonexistence of the bank named in the bill at the time of the passing of the bill.

The note or bill is double; that is, it consists of two bills pasted together, the exposed sides being similar to each other, and the reverse side of each bill being entirely concealed from view. Both bills are of the denomination of \$20, and purport to have been issued by the State Bank at New Brunswick, state of New Jersey. One of the exposed faces bears the "No. 31,777" and the date 1864. The other shows the number blank (No. —) and the date (18 —) incomplete. Both are signed "John B. Hin, Prest.," but the space preceding the word "Cash'r" is blank (—, Cash'r). The bank named in the bill closed its doors, or, as one witness puts it, "busted, about 1864 or 1865." It has had no existence, either as a bank of issue or otherwise, since 1865. The bills constituting the "bill" are worthless, and have had no value since the date last mentioned, except a nominal one given them by curio dealers. The absence of the name of the cashier indicates that they were never regularly issued, and never became current bank notes, or possessed any value as such. These two bills, so made into one, were on the 28th day of October, 1905, tendered by defendant to the complaining witness as \$20 in lawful money, in payment of the sum of \$3, being in part payment for rent of a room in the lodging house kept by such witness at Long Beach. She accepted the bill as such payment, and returned to defendant \$17 in good money in change. Defendant immediately left, and said witness did not see him again until 10 days later, when he was under arrest in San Pedro.

In addition to defendant's said conduct, tending to show his knowledge of the character of the bill in question, the prosecution introduced in evidence two other bank notes or bills, of the denomination of \$10 each (made into one in similar manner), purporting to have been issued by the Merchants' & Planters' Bank of the State of Georgia, at Savannah; also testimony to show the passing of these bills by defendant as a \$10 bank note, in payment for a loaf of bread worth 10 cents, at San Pedro, on the 3d day of November, 1905, and that the bank named in these bills passed out of existence about the time of the close of the Civil War. The testimony shows that in connection with the latter bills defendant received in return as

change the sum of \$9.90 lawful money. The ruling of the trial court in admitting the latter bills to show guilty knowledge and intent is assigned as error.

The record discloses no attack upon the information, either by demurrer or motion in arrest of judgment. The appeal presents three matters for consideration: Does the information state a public offense? Is the evidence introduced sufficient to sustain a verdict of guilty? And did the court err in admitting in evidence the bills passed by defendant in San Pedro, and the testimony in connection therewith introduced to show that he did pass them and to show the character of the bills?

Every essential element of the offense for which punishment is provided by section 476 of the Penal Code is set forth in the information. It charges the defendant with passing a fictitious bill in writing of a bank not in existence, with the intent to cheat and defraud the complaining witness, and alleges that defendant had knowledge of the character of the bill and of the nonexistence of the bank named in the bill at the time he passed the latter. This is sufficient.

Defendant contends that there is no evidence to show that the bills are "fictitious," but that, on the contrary, all the evidence in this respect tends to show that they were "genuine" in so far as they were complete, and that the bank was in existence at the time they bear date. Again, it is urged that, the bill or bills not having been properly executed and this appearing upon the face or faces thereof, it or they could not be the means of committing a fraud. Webster defines "fictitious" as "feigned; imaginary; not real; counterfeit; false; not genuine." If it were the duty of the court to divorce these bills from the circumstances under which they were passed by defendant, separate them from each other, and restore them to the condition in which they probably were when they left the bank whose name they bear, it might find them to have been genuine at that time; but as prepared by defendant, or some one else, with the evident purpose of concealing their real character, and, as passed, they were "not genuine," but were "false," and instruments of fraud and deceit, and the jury were justified by the evidence in so finding.

It is not material to the question that the bills were not complete and legally issued. As appears from language quoted by the Supreme Court with approval in *People v. Munroe*, 100 Cal. 667, 35 Pac. 327, 24 L. R. A. 33, 33 Am. St. Rep. 323: "It is a matter of perfect indifference whether it possesses or not the legal requisites of a bill of exchange, or an order for the payment of money or the delivery of property. The question is whether upon its face it will have the effect to defraud those who may act upon it as genuine or the person in whose name it is forged. It

is not essential that the person in whose name it purports to be made should have the legal capacity to make it, nor that the person to whom it is directed should be bound to act upon it, if genuine, or have a remedy over." The language here used was in relation to forged paper, which might injure either the person imposed upon by its passage, or the person whose name was forged. By the passing or utterance of a bank note of a nonexistent bank, no one would be injured except the person receiving it as a thing of value and those to whom he might deliver it in the same manner. No question of the liability of the person whose signature is attached can arise. It becomes unimportant to know who signed it, or whether or not it was signed at all. As pasted together, the two bills were in effect a simulation of a current bank note, and intended to deceive. They accomplished this purpose with the complaining witness. Being false, fictitious, and "not genuine," the only test of whether or not the passage of this "bill" was a crime was the intent to defraud on the part of the defendant.

The practice of permitting the introduction of evidence to prove other or similar offenses to show knowledge, intent, design, or system in cases of conspiracy, counterfeiting and forgery, false pretenses or representations, receiving stolen goods, embezzlement, etc., has long been recognized by the criminal courts. *Roscoe's Crim. Ev.* (6th Ed.) p. 88; *Wharton's Crim. Ev.* (8th Ed.) § 39 et seq.; *People v. Gray*, 66 Cal. 275, 5 Pac. 240, and cases cited. Some confusion exists in the cases as to the principle upon which such evidence has been admitted. A recent treatise on Evidence (*Wigmore on Evidence*), by a classification of the cases on the basis of the purposes which the evidence is intended to serve, has dispelled some of the fog which envelops the declarations of the courts on the subject. A distinction holding that facts admitted to show knowledge should contain an element of notice or warning, while those to establish intent need only to negative inadvertence or other innocent explanation of the act, appears at first sight purely academic; but in the consideration of apparently conflicting opinions, by ascertaining the viewpoint of the court expressing the opinion, it greatly aids in reducing the apparent inharmony among the cases.

The knowledge to be considered here is that which refers to the character of the bill charged by the information to have been fraudulently uttered. In order that the utterance of another fraudulent bill should be evidence of such knowledge on the part of the defendant, it must have been uttered prior to the time of the passing of the bill in question. The intent with which the bill was passed, as distinguished from the knowledge of the passer, however, opens a broader field. It includes the knowledge of the character of the bill and also the pur-

pose with which the act was done. While the subsequent utterance could not establish notice at the prior date, it might, nevertheless, throw some light upon the intent and purpose which actuated the utterer at the time of the passing of the first bill. The same distinction may also be drawn between the facts constituting design and those establishing system. A design implies a preconceived plan or preparation, while system may be established by any facts showing a general intent coupled with similarity of method or arrangement. While a preconceived plan could not well be inferred from subsequent events, a general system might be deduced from a line of conduct preceding or following the principal event. A system being established, it would matter little whether the act complained of was the first or last individual manifestation of the general plan that could be shown. It cannot be denied that a repetition of utterances of false and fictitious notes tends to negative innocence in particular cases. Mr. Wigmore says the principle applicable to such evidence proceeds upon the doctrine of chances. As to remoteness of time of the utterances sought to be introduced and the similarity of the notes or bills uttered on the several occasions, the rulings exhibit views of all degrees of liberality and narrowness. Wigmore on Ev. § 310.

Conceding that the principle upon which this evidence is introduced is the doctrine of chances or probabilities, the number of the utterances, their remoteness in time, and the similarity of the instruments become matters affecting the weight, rather than the admissibility, of the evidence. In such cases, if the evidence has any application under the rule, whether or not it has sufficient weight to entitle it to be submitted to the jury is a question for the determination of the trial court. *People v. Frank*, 28 Cal. 507, 518. The sameness of the peculiar, if not unique, method of preparation of the two sets of bills, and the similarity of the manner of realizing upon them, warranted the court in permitting the jury to determine from the two transactions whether or not the defendant was operating by a system of imposition and fraud, and to draw therefrom such inference of intent and knowledge as the facts justified.

In the consideration of the case the fact that the record discloses that defendant sought to establish an alibi as to the principal offense, and to prove that he was not in Long Beach on the 28th of October, 1905, while he admitted being in San Pedro on the 3d day of November, has not been overlooked. Under such circumstances there is no doubt that the admission of the evidence as to the San Pedro transaction tended to establish the identity of the defendant as the man who passed the fictitious bill in Long Beach. Conceding, but not deciding, that it was not admissible for that purpose, it was

relevant to the issue of fraudulent intent, and this was sufficient to entitle the evidence to be admitted.

The rules relating to the admission of such evidence were carefully complied with. Ground was first laid implicating the defendant in the case under trial, the defendant was shown to have committed the extraneous crime, the similarity of the offenses was apparent from the evidence, and the jury were properly instructed by the court as to the purpose of the introduction of the evidence. There was no error in the introduction in evidence of "Exhibit B," nor in permitting the prosecution to introduce the testimony given in connection therewith.

Defendant's motion for a new trial, as displayed in the transcript, also relies upon the ground that the court erred in instructing the jury. No particulars are specified in the transcript, and none presented in the brief. An examination of the instructions in the record fails to disclose any error in this respect.

The amendment of section 470 of the Penal Code in 1905 did not affect section 476, and section 470 has no application here. That amendment applies only to the "signing of the name of a fictitious person," with the intent to defraud, while the crime here charged is the passing of a fictitious bank note of a bank having no existence.

The judgment and order of the trial court are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

5 Cal. App. 726

HERCULES WATER CO. v. FERNANDEZ
et al. (Civ. 116.)

(Court of Appeal, Third District, California.
June 17, 1907.)

1. EMINENT DOMAIN—CONDEMNATION—PUBLIC USE—COMPLAINT.

The complaint of a water company to condemn water rights, alleging a necessity therefor, for the purpose of supplying the inhabitants of the town of H. and of the town of P. and of "other places in said county" of C. with water, does not, as it must, show a necessity for condemnation exclusively for a public use, under Code Civ. Proc. § 1238, authorizing the exercise of the right of eminent domain in behalf of canals, ditches, etc., for conducting or storing water "for the use of the inhabitants of any county," city, village, or town.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 512.]

2. SAME—REVIEW—FINDINGS—PUBLIC USE.

Where in condemnation proceedings there is a question of fact, on conflicting evidence, as to whether the use for which the property is sought to be condemned is one of those authorized by the statute, the finding of the trial court thereon is conclusive, to the same extent as the findings of fact in other cases; but its finding that a certain use, not one of those for which the statute authorizes condemnation, is a public use, is not binding; only the uses enumerated by the statute being public uses for the purpose of condemnation.

3. SAME—MEASURE OF DAMAGES.

The measure of damages for condemnation of a riparian owner's water rights is the depre-

ciation in the value of the whole of his tract of land adjacent to the stream, depending as well on the depth of the land as its frontage on the stream.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 250.]

Appeal from Superior Court, Contra Costa County; Wm. S. Wells, Judge.

Condemnation proceedings by the Hercules Water Company against B. Fernandez and others. From a judgment for plaintiff, said defendant Fernandez appeals. Reversed, with directions.

Morrison, Cope & Brobeck, for appellant.
Pillsbury, Madison & Sutro, for respondent.

CHIPMAN, P. J. Eminent domain. The complaint alleges corporate organization of plaintiff under the laws of this state, for the purposes, among others, of acquiring water rights, "on one or more rivers, creeks or streams within the state of California; of acquiring, purchasing, erecting, constructing, holding, owning, improving, and leasing dams, reservoirs, tanks, canals, flumes, aqueducts, ditches, pipe lines, and other waterways or conduits, and securing and impounding springs, streams, and all other waterways; of buying, selling, owning, or otherwise dealing in, water for domestic, irrigation, manufacturing, and all other purposes; of furnishing, supplying, and selling the same to any county, city and county, city, town, and the inhabitants thereof; of acquiring, constructing, and maintaining reservoirs, tanks, canals, pipe lines"; avers the ownership of water rights in the waters of Pinole creek, Contra Costa county, "being the right to divert and use the waters of said creek and to store the same for the purpose of supplying the inhabitants of the town of Pinole and of the town of Hercules and of other places in the said county of Contra Costa, with water for domestic and other necessary and useful purposes"; avers the ownership of a reservoir and pumping plant and pipe line whereby said water is diverted from said creek and pumped into said reservoir; that it owns pipe lines leading from said reservoir to various places in the towns named, "and elsewhere in said county," by means of which "it now supplies water for said purposes to the inhabitants of said town of Hercules and to the inhabitants of said town of Pinole, and by means of which it expects and intends to supply water for like purposes to the inhabitants of other places in said county"; that the uses and purposes for which the property, rights, and easements already acquired have been and are being appropriated are public uses within the meaning of the law of this state; that it is necessary, in order to make effective use of the waters of said creek as aforesaid by means of dams erected across said creek at various places thereon above the lands of defendant, to impound all the waters of said creek in order to facilitate the taking all of the water

of said creek at a point or points above the land of defendant, to wit, at the said pumping station and at other points on said creek, and to store the same in said reservoir of plaintiff; that plaintiff is the owner of all the riparian lands and rights upon said creek which are affected by the diverting of said water, as aforesaid, except the premises hereinafter described. The complaint then describes the lands of defendant Fernandez and other defendants alleged to be affected by the condemnation sought and alleges that said creek flows through each parcel of land thus described to the waters of which defendants are the owners of riparian rights; "that for the purpose of supplying the inhabitants of the town of Hercules and of the town of Pinole and of other places in said county of Contra Costa with water as aforesaid it is necessary that the plaintiff should acquire, have and hold an easement in and to all the waters of said Pinole creek * * * for the aforesaid use and purpose of supplying the inhabitants of the said towns named, and of other places in said county of Contra Costa with water." The defendants other than defendant Fernandez made default, which was duly entered. Defendant Fernandez demurred to the complaint generally for insufficiency of facts, and specially on the grounds of uncertainty, ambiguity, and unintelligibility. The demurrer was overruled, and defendant Fernandez answered, denying specifically the material allegations of the complaint.

The findings follow closely the allegations of the complaint; the court finding, among other facts, that plaintiff at the commencement of the action, was supplying water, and since has been supplying water, as alleged, to the two towns named, and "expects and intends to supply water for like purposes to the inhabitants of said towns and of other places in said county." The court also finds that, in order to make effective use of said water sufficient to supply the inhabitants of said two towns "and of other places in said county with water," it is necessary to impound the waters of said creek as alleged in the complaint; that for the purpose of supplying the inhabitants of said towns "and other places in said county of Contra Costa with water, it is necessary that plaintiff acquire * * * an easement to all the waters of said Pinole creek, to wit," the right by means of dams at various places above defendant's land and store the same, "for the aforesaid use and purpose of supplying the inhabitants of the town of Hercules and of the town of Pinole and of other places in said county of Contra Costa with water." In assessing the damages, the court found the total damages to be \$2,675, as follows: (1) That the rights and easements belonging to defendant Fernandez are fixed at \$1,000; (2) the damage to accrue to the first, second, and third parcels of his land, as described in the

complaint, is fixed at \$25 each, and to the fourth parcel it is fixed at \$1,600, the last three items of damage by reason of the severance of his said riparian rights from said parcels of land. The findings generally follow the allegations of the complaint, and the judgment follows the findings. Defendant Fernandez appeals from the judgment on bill of exceptions.

It is urged by appellant that the general demurrer should have been sustained, for that it is sought by the proceedings to condemn water for the use of places in the county which are not described as cities, towns, or villages or otherwise as required by statute law. The special demurrer also points out that the complaint is ambiguous, uncertain, and unintelligible among other grounds, because it cannot be ascertained therefrom whether it is necessary to condemn the said water rights for the purpose of supplying the inhabitants of the towns named, or for the purpose of supplying the inhabitants of "other places" in said county.

Section 1238 of the Code of Civil Procedure provides as follows: "Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following uses: * * * (3) * * * Canals, aqueducts, reservoirs, tunnels, flumes, ditches or pipes for conducting or storing water for the use of the inhabitants of any county, incorporated city, or city and county, village or town. * * *" Section 14, art. 1, of the Constitution, prohibits the taking or damaging of private property for public use without just compensation having first been made. We are, however, to look to the Legislature to ascertain what constitutes a public use and for the authority to exercise the right of taking or damaging private property for a public use. The only limitation upon this power is contained in the Constitution. *Lindsey Irrigation Co. v. Mehrtens*, 97 Cal. 676, 32 Pac. 802. Section 1241 of the Code of Civil Procedure provides that before private property can be taken it must appear "that the use to which it is to be applied is a use authorized by law," and the uses so authorized are those specified in the statute (section 1238, Code Civ. Proc.), and none others.

The words "the inhabitants of," as used in the complaint, we think should be read in connection with the words "other places in the county of Contra Costa," and it was not necessary to repeat them before the latter words. But these latter words, as used in the complaint, are clearly in addition to and were intended to embrace territory different from that of a town, village, city, or incorporated city and county. Unless, therefore, a construction can be given to these words which would make them equivalent to an averment that the purpose was to supply with water the inhabitants of the county of Contra Costa, we do not see how the complaint can be upheld as seeking to condemn

for a public use. Such construction, however, we think unwarranted. "Other places" cannot mean all places in the county other than the towns of Hercules and Pinole, nor can the complaint be held to mean all the inhabitants of the county other than said towns. The terms are too indefinite to embrace either the whole county or any particular body of the inhabitants who are to be supplied with water. Apparently, the plaintiff is to be the exclusive judge of whom and what places it will supply with water, and no reciprocal right attaches to any particular group of the inhabitants of such places to demand service of plaintiff. "The other places might be," as suggested by appellant, "factories, such as that of the California Powder Works, or they might be farms belonging to one individual, or hotels, stores, shops, residences, or innumerable other private places and establishments." Nor do we think by this illustration "that counsel are sticking in the bark," as replied by respondent. It is true that in supplying these places plaintiff would be engaged in supplying water to some of the inhabitants of the county of Contra Costa, but would plaintiff be under obligation to supply the inhabitants of the whole or any definite part of the county? It was said in *Lindsay Irr. Co. v. Mehrtens*, 97 Cal. 681, 32 Pac. 803: "It is not necessary that the entire public shall enjoy the use, or even that it be capable thereof, but the use must be capable of enjoyment by all who may be within the neighborhood, and there must be within that neighborhood so great a number of the entire public as to destroy its character as a private use."

The statute authorizes the exercise of the right of eminent domain (except as to towns, villages, and incorporated cities), in behalf of canals, ditches, etc., for "conducting or storing water for the use of the inhabitants of any county," not for the inhabitants of places in any county, indefinitely described, or for the inhabitants less than those of the entire county. All may not enjoy the use, but the use must be capable of enjoyment by all. In the *Lindsay Case*, supra, the court said: "Whether the particular region is a farming neighborhood, and whether the supplying of water to that neighborhood constitutes a public use, are questions of fact which must be determined by the court before whom the proceeding is had, and its decision thereon must be held conclusive upon this court to the same extent as in other cases where it is called upon to determine matters of fact." It is hence urged by respondent that, as there is a finding to the effect, as is claimed, that the supplying of water to the inhabitants of the town of Hercules and of the town of Pinole and other places in said county of Contra Costa, constitutes a public use, is conclusive upon this court. The finding of the court was not that to supply water to "other places in said county" was a public use, but that "the rights and easements al-

ready acquired and owned have been, and at the time of the commencement of this action were, and now are being appropriated, are public uses." But had the finding gone to the extent claimed, we do not think it would have been conclusive upon this court. The statute under examination in the case just cited made the supplying of farming neighborhoods with water a public use. The question involved was as to the sufficiency of the evidence to sustain the judgment that the particular land constituted a farming neighborhood. The court did not mean that the trial court could conclusively determine what the Legislature alone can determine. It is not sufficient for the pleader to allege that the use for which property is to be taken is a public use. The complaint must show that the use is one of those enumerated in the statute, and the trial court cannot obviate this requirement by finding the use to be a public use. It was said in the case last cited: "Whoever, under the claim of agency of the state, would deprive the owner of any of the property by virtue of the exercise of eminent domain, must show not only that the use for which he seeks to appropriate it is a public use, but also that the Legislature has authorized the taking of property for that particular use, and in the mode in which he is seeking to appropriate it. The Legislature must designate, in the first place, the uses in behalf of which the right of eminent domain may be exercised, and this designation is a legislative declaration that such uses are public and will be recognized by the courts; but whether, in any individual case, the use is a public use, must be determined by the judiciary from the facts and circumstances of the case." As we understand the decision: If, for example, a question of fact had arisen as to whether or not Hercules is a town or village, it would be for the court to determine that fact, and its finding upon conflicting testimony would be conclusive. But if the Legislature had not provided for the condemnation of riparian rights for the benefit of towns or villages, no right of condemnation could rest upon such finding by the trial court, even with the added finding that the supplying of water to such towns was a public use. A corporation can no more condemn property for purposes not declared to be public uses than for purposes without the power conferred by the corporation charter; and that this latter cannot be done was held in *Chicago & N. W. Ry. Co. v. Galt*, 23 N. E. 425, 24 N. E. 674, 133 Ill. 657, conceded by respondent to be good law. Mr. Lewis says: "The petition should show the use or purpose for which the property is desired, and that it is within the statutory powers conferred. It should show a clear right to condemn the property described." 2 Lewis on Eminent Domain, § 353. See, also, 7 Ency. of Pl. and Pr. p. 526. "Where the proceeding shows upon its face two distinct uses or purposes,

one lawful and the other not, which are so inseparably blended in the petition and orders as not to be severable, it cannot be sustained." *Id.*, p. 527. Here, both by averments of the complaint and by the findings and judgment of the court, a necessity is alleged and found for the condemnation to supply not only the inhabitants of the towns named, but also of other places in the county of Contra Costa.

Nor can the terms "other places" be disregarded as surplusage or stricken out by amendment of the judgment. The court found that the water was necessary not only for the inhabitants of the towns named, but that, in order to make effective use of said waters sufficient to supply the inhabitants of said two towns and other places in said county, it is necessary that plaintiff acquire an easement to all the waters of said creek. We cannot say that the trial court would have found it necessary to condemn all the waters of the creek if plaintiff had not expressed an intention in its complaint to use the waters of the creek elsewhere than in said towns and had asked for a decree to that effect. Mr. Lewis cites cases holding that, where an act combined a private use with a public use in a way that the two cannot be separated, the whole act is void. He adds: "So an application under an act to condemn property for purposes, part of which are within, and part not within, the act, will be bad in toto." 1 Lewis on Eminent Domain, § 206. If plaintiff had no right to condemn the riparian rights of defendant Fernandez to supply water to the inhabitants of other places than the towns named, the complaint was indefinite and uncertain in the particular claimed, as well as seeking the aid of the statute for an unauthorized purpose. A private corporation formed for private gain, under guise of serving the public, should not be permitted to take private property through the extraordinary remedy of eminent domain, and under an assumed agency of the state, upon any strained or doubtful construction of the statute declaring what are public uses.

Error is claimed arising out of the method adopted by the trial court in assessing the damages. As the cause must be remanded for a new trial, we deem it best to notice this point. Over defendant's objection, the court allowed the witness McMahon to testify that the value of water rights all along the banks of Pinole creek was about \$2 per running foot, apparently without regard to the extent of the land at different places lying back of the creek. There were several tracts of land of appellant, marked on the map used at the trial, of various acreage—in all about 182 acres through which the creek flowed for a distance of about 1,190 feet. The damage awarded was \$2,675, made up as shown above. Whether appellant was injured by this particular testimony is not clear, for the court seems to have assessed the damage to all the land, by reason of the severance of

the riparian rights, and in addition allowed a separate sum for the rights and easements belonging to appellant. In the present case the riparian rights alone were sought to be condemned, and the water was to be taken at a point above appellant's land. No part of his land was sought to be taken. It seems to us that the true rule is stated by respondent—that the measure of damage to a riparian owner by the appropriation or diversion of the waters is the depreciation in the value of the property affected by the taking. The question was thus disposed of in *Lee et al. v. Springfield Water Co.*, 35 Atl. 184, 176 Pa. 223, where the court said: "The defendant had seized a part of the waters of Crum creek for the supply of its waterworks. The plaintiffs are mill owners on the same stream, and below the point at which the water is taken. The object of this action is to ascertain the damages sustained by the plaintiffs by reason of the appropriation of a portion of the water of the stream that had previously flowed through their property, and been used by them to aid in propelling their machinery. The true measure of damages to be applied in all cases of a taking by virtue of eminent domain is involved in no doubt. It is easy of application. It is the depreciation in value of the property affected by the taking. Where land is taken, this has been said so frequently that it would be a work of supererogation to cite the cases in which the doctrine has been stated and applied. It was applied in *Miller v. Water Co.*, 23 Atl. 1132, where, as in this case, a water company had appropriated water, and a lower riparian owner complained that he was injured by the appropriation. It is the proper measure of the plaintiff's damage in this case. The jury should inquire what the property affected was fairly worth immediately before the water was appropriated and what it was worth affected by the appropriation. The difference, if any, is the loss actually sustained, and therefore the measure of the plaintiff's right to recover damages." It was also so held in *City of Syracuse v. Stacey et al.*, 62 N. E. 354, 169 N. Y. 231.

Appellant claims that the extent of the riparian right is to be measured by the area of land adjacent to the stream and within the watershed, citing *Alta Land, etc., v. Hancock*, 85 Cal. 219, 229, 230, 24 Pac. 645, 20 Am. St. Rep. 217; and *Wiggins v. Muscupiabe L. & W. Co.*, 113 Cal. 182, 195, 45 Pac. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337. There seems to be but little if any disagreement between counsel upon the rule. The point made by appellant is that the measurement of damage by the running foot was, in view of the facts of the case, an improper method of ascertaining the compensation, and upon the point we agree with appellant. Such method wholly disregards the extent of the land adjacent to the stream and within its watershed and owned by the defendant. The riparian right to a narrow strip of land a

hundred feet wide would thus have the same value as it would have if the body of land had a width of a thousand feet. Then, again, the water frontage in question embraced land lying along a creek of fresh flowing water, and land also whose frontage was on tide water unfit for domestic use. It is not probable that the riparian right was of equal value foot by foot of all this frontage.

The single fact to be determined was the depreciation in the value of the property affected by the taking away from it the water sought to be condemned, to be ascertained, of course, by competent and proper evidence.

The judgment is reversed, with directions to sustain the demurrer; plaintiff to have leave to amend its complaint, if so minded.

We concur: HART, J.; BURNETT, J.

5 Cal. App. 762

LANE v. SUPERIOR COURT OF KINGS COUNTY. (Civ. 404.)

(Court of Appeals, Second District, California. June 19, 1907.)

1. JUSTICES OF THE PEACE—APPEAL—UNDERTAKING.

Code Civ. Proc. § 974, authorizes an appeal from a justice's judgment at any time within 30 days after its rendition. Section 978 provides that an appeal from a justice's court is not effectual unless an undertaking be filed, etc. A party appealing from a justice's judgment filed within 30 days of its rendition an undertaking. The sureties failed to justify, and after the expiration of the 30 days he filed a new undertaking. *Held*, that the superior court acquired no jurisdiction to entertain any proceeding in the case except a motion to dismiss the appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 555.]

2. SAME.

Where the successful party in justice's court moves for the dismissal of an appeal, on the ground that the superior court acquired no jurisdiction for failure of the defeated party to file an undertaking as prescribed by statute, the superior court cannot take jurisdiction on the theory that the issues involve title to or possession of real property.

3. PROHIBITION—GROUNDS FOR RELIEF—WANT OF JURISDICTION.

Where the superior court takes jurisdiction of a cause on appeal from a justice's court, notwithstanding the failure of the party appealing to perfect his appeal as required by statute, the Court of Appeal, on petition of the successful party, may issue a writ prohibiting the superior court from proceeding with the trial of the cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, §§ 37-56.]

Application for writ of prohibition by O. P. Lane against the superior court of the county of Kings. Writ granted.

Robert W. Miller, M. L. Short, and Wheaton A. Gray, for petitioner. T. M. McNamara and R. J. Hudson, for respondent.

TAGGART, J. Application for writ of prohibition. One David Bonham commenced an action in the justice's court of Lucerne township, Kings county, against petitioner to

recover \$200 as money had and received. Judgment was for defendant (petitioner here) for costs, and plaintiff appealed.

The judgment was rendered April 25, 1907, and on May 23, 1907, plaintiff served defendant with a notice of appeal to the superior court from said judgment. The same day he filed an undertaking on appeal reciting that his appeal was "from a judgment entered against him, in said action, in the said superior court," etc., and obligating the sureties in the sum of \$300, instead of \$100. On May 24th, the justice of the peace certified the records and papers in the case and filed them in the superior court. Defendant gave notice of exception to the sufficiency of the undertaking and of the sureties thereon on May 27, 1907, and May 29th notice of intention of sureties to justify was served on defendant without time being fixed in the notice; after oral notice of the time and an adjournment of the hearing to May 31st, counsel for plaintiff in open court, on that date, stated that one of the sureties on the undertaking could not justify and the court adjourned without any justification of any surety on that or any other undertaking. Thereafter, on said 31st day of May, 1907, the plaintiff filed in the office of the clerk of the superior court an undertaking entitled: "In the Justice's Court of Lucerne Township, County of Kings, State of California"—and in the cause mentioned, reciting that he has appealed "from a judgment made and entered against him in said action in the said superior court, in favor of the plaintiff" [himself], etc. Notice of the filing of this bond as a new undertaking, and of the intention of the sureties thereon to justify before the superior court on June 1, 1907, was given to defendant the same day, and the latter appeared by counsel in the superior court at the time named in the notice and objected to the filing of a new undertaking on appeal in the said cause, on the grounds that no notice had been given defendant of the proceedings under which said undertaking was filed, and that the filing of a new undertaking and justification of sureties thereon was not authorized by law. The court overruled the objection, and defendant excepted. At the same time and place, all parties being in court by counsel, and notice being waived, defendant moved the dismissal of the appeal on the ground that the court had acquired no jurisdiction of the case. He specified as reasons: That the original undertaking was fatally defective, in that it described no judgment appealed from; that the sureties had failed to justify, and no other sureties had justified in their stead; that the new undertaking filed in the superior court more than 30 days after the rendition of the judgment in the justice court was ineffective. The superior court overruled this motion and set the case for trial June 20, 1907. Petitioner (as defendant and respondent in that case)

makes application to this court for a writ of prohibition to prevent the superior court of Kings county from proceeding with the trial of said cause.

We have stated the matter at length, since we think the mere statement of the facts give ample reasons for the issuance of the writ as prayed for. Conceding the last undertaking filed to be sufficient in form and to have been filed in the proper court, it was ineffectual to perfect the appeal, as it was not filed within 30 days after the rendition of the judgment. Sections 974, 978, Code Civ. Proc.; *Coker v. Superior Court*, 58 Cal. 178. The justification of the sureties on the first undertaking having been abandoned, the appeal taken was "not effectual for any purpose" after May 25th (30 days from the rendition of the judgment). The proceedings to justify on the only undertaking given within the statutory time extended that time only for the purpose of justification, and did not operate to give additional time within which a new and independent undertaking might be filed. The sureties having failed to justify, the appeal must be regarded as if no such undertaking had been given. *Bennett v. Superior Court*, 113 Cal. 442, 45 Pac. 684, 54 Am. St. Rep. 354. There was nothing before the superior court until the undertaking was filed, and, until the sureties justified, the cause remained in the justice's court. *McCracken v. Superior Court*, 86 Cal. 76, 24 Pac. 845. By the appeal attempted to be taken the superior court acquired no jurisdiction to entertain any proceeding in the case except a motion to dismiss the appeal.

It is unnecessary in ruling upon this application to determine whether or not the verified answer filed in the justice's court raised an issue involving the title or possession of real property. Conceding that it does, it would not give the superior court jurisdiction of the appeal here in question. None of the authorities cited hold that a party can be brought within the jurisdiction of the court against his consent by any other than the statutory method. In the case of *Santa Barbara v. Eldred*, 95 Cal. 378, 30 Pac. 562, an application for a transfer to the superior court was made to the police court on the statutory grounds provided by section 838 of the Code of Civil Procedure, and the application denied, the cause was tried by the police court, and an appeal from the judgment taken to the superior court. The case was tried in the superior court without objection, and the question of whether the jurisdiction exercised by the superior court was original or appellate was under consideration by the Supreme Court on an appeal to that court from the judgment rendered by the superior court. The court says: "The police court had no jurisdiction to try the cause upon the merits, and it necessarily follows that the superior court had no appellate jurisdiction to try the

cause at all. But the superior court had original jurisdiction of the subject-matter, and, * * * having jurisdiction over the subject-matter, the court obtained jurisdiction over the parties when, without objection, they proceeded to trial upon the main issue. * * * The proper procedure would have been for the superior court to have set aside the judgment, and ordered the police court to remand the cause in accordance with section 838." There is nothing in the opinion in *Hart v. Carnall-Hopkins Co.*, 101 Cal. 160, 33 Pac. 633, to modify this statement of the law. See, also, *Arroyo Co. v. Superior Court*, 92 Cal. 47, 28 Pac. 54, 27 Am. St. Rep. 91.

In the case at bar, if a question of title or possession of real property be involved, the parties are not proceeding to trial without objection, and in such a case the superior court has no jurisdiction at all. Neither original by consent, or process, nor appellate because appellant failed to comply with the statutory requirements in attempting to appeal from the judgment in the justice's court.

It is proper, therefore, that a writ issue from this court prohibiting the superior court of Kings county from proceeding with the trial of said cause, and it is so ordered.

We concur: ALLEN, P. J.; SHAW, J.

5 Cal. App. 773

NELSON v. McCARTY. (Civ. 370.)

(Court of Appeal, Second District, California.
June 20, 1907.)

1. WEAPONS—NEGLIGENT USE—PERSONAL INJURY—EVIDENCE—SUFFICIENCY.

Evidence in an action for negligently injuring plaintiff by firing a revolver held to sustain a finding that the shot fired by defendant did not cause plaintiff's injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Weapons, § 34.]

2. APPEAL—REVIEW—CONCLUSIVENESS OF FINDING.

A finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Personal injury action by S. A. Nelson against F. W. McCarty. Plaintiff appeals from a judgment for defendant and an order denying a new trial. Affirmed.

L. E. Dadmun, for appellant. T. L. Lewis and Daney & Lewis, for respondent.

ALLEN, P. J. Appeal by plaintiff from a judgment in favor of defendant, and from an order denying a new trial.

This action is one for personal injuries alleged to have occurred through the wanton, reckless, and negligent act of defendant in firing a revolver toward and in the direction of plaintiff, by reason whereof he was wounded and injured. The answer, among other

things, denies the firing of any revolver or firearm by defendant toward or in the direction of plaintiff, or the wanton, reckless, or negligent firing of a revolver at any time, or in any direction whatever by defendant, and denies that any bullet fired or discharged from the revolver of defendant hit or injured the plaintiff. The cause was tried by the court without a jury, and the court found that the defendant did not at the time alleged in the complaint, or at any other time, or at all, carelessly or negligently fire or discharge any revolver toward or in the direction of plaintiff, or on the date mentioned or at any time carelessly, wantonly, recklessly, or negligently fire or discharge any revolver or other firearm, and that no bullet fired or discharged by the defendant from his revolver, or any other revolver or other firearm, fired by defendant, struck said plaintiff or entered said plaintiff's leg.

From the bill of exceptions, it appears that a horse attached to a buggy, in which was seated a woman, was running at a great rate of speed through the public streets of San Diego; that the bridle of such horse had become disarranged, and the woman had lost all control over the animal; that the defendant was a policeman in the city of San Diego, and fired a shot from a revolver at the horse for the purpose of so disabling it as that it might be gotten under control. It further appears from the record that another shot was fired by another policeman at the same horse about the same time; and there is evidence in the record tending to show that a third shot was fired at the horse within the same block. That plaintiff was injured by a bullet from one of the three shots is not to be questioned. But there is ample testimony in the record to justify the court in finding that the shot fired by defendant was not the cause of any injury to plaintiff. There is some testimony which indicates that, from the very situation of the parties at the time of the firing of the shot by defendant, it was not possible for the shot fired from his revolver to have in any wise affected the plaintiff. The most that can be said in favor of appellant's position is that there is some conflict in the testimony; but the rule is well established that, where the testimony is conflicting, an appellate court in support of the decision of the court below will construe the testimony as favorably as possible for the respondent, and will not disturb a judgment or verdict when there is a substantial conflict in the testimony, even though the appellate court may consider it greatly against the weight of the evidence. Under this rule, it is unnecessary for us to discuss any other questions presented upon the appeal.

The judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

6 Cal. App. 84

DURPHY v. PEARSALL. (Civ. 296.)

(Court of Appeal, Third District, California.
June 25, 1907.)

1. PARTNERSHIP—ACCOUNTING—ISSUES—FINDINGS.

Where, in a suit for a partnership accounting, the complaint alleged that the profits accrued and to accrue to the firm, as would appear on an accounting and settlement of the firm business, would amount to a specified sum, and prayed that an accounting be taken of all of the partnership transactions, the matter of a complete accounting was a material issue, and the failure of the court to find on it in making findings in favor of plaintiff, based on a part of the transactions, was erroneous.

2. APPEAL—REVIEW—DECISION AGAINST LAW.

Where, in a suit for a partnership accounting, the matter of a complete accounting was a material issue, and the court failed to find on it, but made findings in favor of plaintiff based on a part of the transactions of the partnership, the findings were against the law and reviewable on appeal.

Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Action by B. F. Durphy against C. E. Pearsall. From a judgment for plaintiff, defendant appeals. Reversed.

J. N. Gillett, A. W. Hill, W. T. S. Hadley, and Edwin S. Easley, for appellant. J. H. G. Weaver, H. L. Ford, L. M. Burnell, and William Kehoe, for respondent.

BURNETT, J. The action is based upon an alleged partnership between plaintiff and defendant. Among other things, the plaintiff prays "that an account be taken of all of said copartnership dealings and transactions from the commencement thereof and of the moneys received and paid out by plaintiff and defendant for and on account of said copartnership." The judgment was against defendant for \$8,048.91. Defendant has appealed from the judgment, and also from an order denying his motion for a new trial. These appeals are presented in separate transcripts, but we shall consider them together. All the points made by appellant except two seem to be satisfactorily answered by respondent. As to those two propositions, however, respondent has not attempted in his brief to afford the court any assistance, and it cannot be said that the points are unimportant.

The first is that "the court's finding of fact No. 15, to the effect that appellant's net profits from the Henry deal were \$16,196.41, is not justified by the evidence." According to appellant's figures, the gross profits from the sale of the 13,000 acres in the Henry deal were \$38,000 and the expenses were \$33,500, and since admittedly plaintiff was only interested in the sale of 10,040 acres, the proportional net profit in which he is entitled to share is about \$3,500, instead of \$16,196.41, as found by the court. There is undoubtedly some evidence to uphold appellant's contention in this regard, and respondent might

well have called our attention specifically to the evidence upon which he relies to support the finding.

Again, appellant claims "that there is another error in the same finding where the court subtracts \$6,215.10, advanced by defendant to plaintiff from the gross profits, instead of from the net one-half belonging to the plaintiff." Appellant's position would be sound if it appeared that the \$6,215.10 were advanced from the separate funds of defendant, but, on the contrary, the finding shows that it was a part of the partnership funds, as it was realized from the Henry sale. There appears to us, however, to be a mistake in the figures, which seems to have escaped the attention of counsel and the learned trial judge. The said finding 15 discloses that defendant received of the partnership funds the sum of \$16,196.41; that plaintiff received \$6,215.10 advanced by defendant and \$11,000 from the Hammond deal, making a total of \$17,215.10. The total amount received by plaintiff and defendant was thus \$33,411.51. If they were to share equally, each would be entitled, therefore, to \$16,705.75. But, under the agreement of April 3, 1900, defendant, out of his share, was to pay plaintiff \$3,500. Add this amount to \$16,705.75, and we have \$20,205.75, the sum plaintiff should receive. But he had already received \$17,215.10. The difference, or \$2,990.65, is the amount for which he should have judgment, assuming that the record discloses no other defect.

Finding 16, which we must assume is based upon the figures found in finding 15, is "that defendant has received in excess of his share of said partnership funds the sum of \$6,098.41, which said excess belongs to plaintiff herein." It may be that other transactions were taken into account, but the findings do not disclose them. It must be manifest, however, we think, that there ought to have been a complete accounting as prayed for by plaintiff. The judgment might then appear to be correct.

Respondent suggested in the oral argument that a complete accounting was not necessary, as the "Hammond and Henry" deals were the only ones involved in the action. We must look, however, to the pleadings to determine what questions are submitted to the court for decision. To indicate the scope of such inquiry, we refer to paragraph 15 of the complaint: "And the plaintiff alleges, on information and belief, that the profits accrued and to accrue to said copartnership between plaintiff and defendant as will appear upon a true accounting and settlement of said copartnership business, will amount to the sum of \$134,000, one-half of which belongs to and of right ought to be paid to plaintiff herein." Besides, it appears from the findings that there were other transactions of the partnership, but no account is taken of them as far as we are advised; and as emphasizing the importance of considering

them, it is expressly found that the settlement of April 3d was only a partial settlement of the copartnership matter.

It seems clear, therefore, that the doctrine announced in *Albery v. Geis*, 1 Cal. App. 381, 82 Pac. 262, and *Clark v. Hewitt*, 136 Cal. 77, 68 Pac. 303, demands a reversal of the case. The reason for the rule demanding an accounting is stated in *Story on Partnership*, § 221, as follows: "Until all the partnership concerns are ascertained and adjusted it is impossible to know whether a particular partner be a debtor or a creditor of the firm; for, although he may have advanced large sums of money on account thereof, he may be indebted to the firm in a much larger amount." The matter of a complete accounting, therefore, was a material issue, and, the court having failed to find upon it, the decision is against law, and may be reviewed on appeal. *Adams v. Helbing*, 107 Cal. 301, 40 Pac. 422; *Clark v. Hewitt*, supra; *Senior v. Anderson*, 138 Cal. 721, 72 Pac. 349.

The judgment and order are reversed.

We concur: CHIPMAN, P. J.; HART, J.

5 Cal. App. 771

DEMING v. GAMBLE. (Civ. 358.)

(Court of Appeal, Second District, California.
June 20, 1907.)

EVIDENCE—ADMISSIONS AGAINST INTEREST.

Where, in a suit by a husband against the administrator of his wife for a decree adjudging that land standing in the name of the wife is community property, there was no evidence that the husband knew the contents of the petition for administration of the estate of the wife, averring that the land was her homestead and her property at the time of her death, which petition was signed and sworn to by defendant, the petition and a waiver attached by the husband of his right to administration and a request for defendant's appointment were inadmissible as admissions against interest.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 20, Evidence, § 714.]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by H. C. Deming against F. G. Gamble, administrator of Mannie Deming, deceased. From a judgment for defendant and from an order denying a new trial, plaintiff appeals. Reversed and remanded for new trial.

Valentine & Newby, for appellant. Geo.

Adams and Hugh J. Crawford, for respondent.

ALLEN, P. J. Appeal by plaintiff from a judgment and an order denying a new trial.

This action was brought by the plaintiff against defendant as administrator of the estate of plaintiff's deceased wife, the object of which was to have it adjudged that certain premises, to wit, lot 44, Park Villa tract, and lot 45, Angelus Vista tract, in Los Angeles city, all of which stood in the name of the wife at her decease, were community property. The court found that all of the

premises described were purchased by the husband and the purchase money paid by him out of the funds of the community, and that the principal part of the improvements upon lot 45 had been paid for by him after the decease of the wife; that, as to lot 44, the title was in the wife in trust for the community, but that lot 45 was conveyed to the wife by way of gift from the husband, and was her separate estate. From this judgment in favor of defendant as to the said last-mentioned lot, and from an order denying a new trial, plaintiff appeals upon a bill of exceptions.

All of the evidence introduced by defendant tending to rebut that of plaintiff, in his effort to overcome the presumption created by the deeds, was in the nature of admissions of plaintiff against interest made before and after the decease of the wife. The trial judge, under objections and exceptions, permitted the defendant to introduce in evidence a petition for letters of administration signed and sworn to by defendant, in which petition it is stated that lot 45 was the homestead of deceased and was her property at the time of her decease, and of the value of \$11,000. To this petition was attached a written waiver on the part of the husband, plaintiff herein, of his right to administer, and a request for defendant's appointment. There was no preliminary proof tending to show that plaintiff had ever read the petition signed by defendant, or had knowledge of its contents, when he signed the waiver so attached. The appointment and qualification of defendant as administrator was not in issue. The court in overruling the objections made to the introduction of this paper upon the grounds of its immateriality and incompetency must be taken as having considered that the statement of ownership therein made by the defendant was material and competent, and that plaintiff by signing the waiver thereto attached became bound by such declarations. We think the court erred in admitting this paper writing in evidence. The waiver signed by the husband is not a part of the petition, and that it was thereto attached was of no significance. The waiver might well have been upon a separate instrument, in which event there would be no room for controversy in relation to the admissibility of the petition. The mere appending of the waiver to an instrument, the contents of which were unknown, could not have the effect to conclude the party signing the waiver as to the facts alleged in the petition.

The oral evidence appearing in the record is most conflicting, and we cannot say from such record that the findings of the court as to the separate character of this lot 45 would have been the same had this petition not been considered and due weight given it as an admission against interest. The error, therefore, in our opinion, was prejudicial.

The judgment and order are reversed, and cause remanded for a new trial.

We concur: SHAW, J.; TAGGART, J.

6 Cal. App. 35

GUPTILL v. KELSEY. (Civ. 829.)

(Court of Appeal, Third District, California.
June 20, 1907.)

1. TAXATION—DELINQUENT TAXES—ENFORCEMENT.

St. 1891, p. 223, c. 161, authorizing the establishment of sanitary districts with power to levy taxes on property within the districts, providing for the collection of the taxes by the county tax collector in the manner he collects the county taxes, declaring that the laws relating to the collection of taxes and enforcement of delinquent taxes shall apply, and empowering the board to provide a system for the collection of delinquent taxes, etc., points out the manner in which the tax collector of a county shall collect such taxes, but authorizes the board to collect the taxes through its own agent, pursuant to such regulations, consistent with the laws of the state, as it may adopt.

2. SAME—TAX SALE—VALIDITY.

The failure of the tax collector of a county to comply with Pol. Code, §§ 3764-3768, 3769, as amended in 1895 and 1897, and section 3785, as it existed prior to the statutes of 1895 and 1897, relating to the sale of property for delinquent taxes, in collecting delinquent taxes assessed by a sanitary district established under a statute of 1891 is fatal to the validity of a sale made in 1899, and his deed to the purchaser is void.

3. SAME—REMEDY OF OWNER.

An owner whose land is sold for delinquent sanitary district taxes without complying with the law may sue for the cancellation of the unrecorded tax deed purporting to convey the land by proceeding under Civ. Code, § 3412, providing that a written instrument which, if left outstanding, may cause injury to a person against whom it is void may on his application be adjudged void and canceled, and he need not pursue the remedy provided by Code Civ. Proc. § 738, providing for action to quiet title by persons against others claiming interest in real estate adverse to them.

Appeal from Superior Court, Alameda County; W. E. Greene, Judge.

Action by Mary E. Guptill against B. Kelsey. From a judgment for plaintiff, defendant appeals. Affirmed.

Mortimer Smith, for appellant. Gavin McNab, for respondent.

HART, J. The complaint in this action alleges that, at the time of the institution of the suit, the plaintiff was the owner and seized in fee of certain real property situated within the boundaries of "sanitary district No. 2, Fruitvale, county of Alameda, a corporation organized under the laws of the state of California," and that said real property was sold in the year 1899 by the tax collector of Alameda county to the defendant, for unpaid and delinquent taxes assessed thereon by and for said sanitary district No. 2, and that a tax deed to said lands was executed by said tax collector to said defendant on the 13th day of July, 1901. It is alleged that "said deed has never been recorded, and that the plaintiff has never

seen the same," and that "plaintiff is informed and believes, and upon her information and belief alleges, that said tax deed is regular in form, and purports to convey title of all of said described lands to the defendant, B. Kelsey," etc. It is charged in the complaint that several of the statutory provisions prescribing the steps necessary to be taken in order to effectuate a valid sale of property for delinquent taxes were not, in the sale by the tax collector of the property in question, complied with, and that, therefore, such sale was void. It is averred that the price paid for the property to the tax collector by the defendant was the sum of \$3.39, and that prior to the commencement of the action plaintiff "tendered in gold coin the sum of \$3.39, with interest thereon, from the 3d day of July, 1899, and the sum of \$3 additional, the said latter sum being the sum defendant paid to said tax collector for the issuance of said pretended deed, with interest thereon from the 13th day of July, 1901, and plaintiff offered to pay to said defendant the foregoing sums of money, and, in addition thereto, any additional sums that defendant might make known to the plaintiff that he had expended on account of or by reason of said pretended tax deed, with interest thereon, provided defendant would deliver to plaintiff said pretended tax deed, or cancel said pretended tax deed," and that "defendant refused to accept said sums of money and refused to deliver to plaintiff said pretended tax deed, or to cancel the same, and still so refuses." It is further declared that plaintiff is ready and willing to pay into court for the benefit of the defendant the sums of money tendered by plaintiff to defendant before the commencement of the suit, or "any sums of money that this court may find as having been expended by defendant by reason of said pretended tax, or said pretended tax deed, with interest on said sums, and any other sums, or costs or expenses that said defendant may be found by this court to have expended or incurred in the matter of said pretended tax, or said pretended tax deed, with interest thereon." The defendant interposed a general and a special demurrer to the complaint. The special demurrer charges that the complaint is uncertain in several specified particulars. The demurrer was overruled by the court, and, the defendant failing to answer the complaint within the time granted him by the court, a judgment by default was entered against him. The appeal is from said judgment.

The Legislature of 1891 passed a law embracing a scheme for the establishment of sanitary districts throughout the state, the manifest purpose of which is to enable communities consisting of small numbers of inhabitants to exercise, under corporate authority, to a limited extent, certain portions of the police power of the state. The main

object of the law appears to be the authorization of the establishment of sanitary districts in such communities for the purpose of investing them with such corporate rights as will the more effectually enable the residents thereof to promote and maintain healthful sanitary conditions within the boundaries of such districts. Such corporations have no power of course, except such as the Legislature has legitimately clothed them with. While they are public corporations, they are not municipal corporations. In *re Werner*, 129 Cal. 567, 62 Pac. 97. The law from which they derive their right to exist provides, among other things, for the levying of taxes for the accomplishment of their corporate purposes upon all property within their boundary lines, and also provides for the incurring of a bonded indebtedness in a limited amount. The provision with reference to the collection of the taxes levied authorizes two methods, either of which may, in the discretion of the sanitary board, be resorted to for the purposes of such collection. It is this provision which furnishes the principal one of the several reasons upon which the defendant bases his charge in the special demurrer and his contention in argument that the complaint is faulty because of uncertainty. The provision referred to is found in section 12 of the act, and reads as follows: "On or before the first Monday in July of each year, the board shall transmit, or cause the assessor to transmit, a duplicate of the list so made to the tax collector of the county, who shall collect the taxes shown by said list to be due, in the same manner as he collects the county taxes, and all the provisions of the laws of the state as to the collection of taxes and delinquent taxes, and the enforcement of the payment thereof, so far as applicable, shall apply to the collection of taxes for sanitary purposes; and said tax collector, and the sureties on his official bond, shall be responsible for the due performance of the duties imposed on him by this act; provided, that the sanitary board may, in its discretion, direct the district attorney of the county to commence and prosecute suits for the collection of the whole, or any portion, of the delinquent taxes; and it shall be the duty of the district attorney to carry out such directions of the sanitary board, and he, and the sureties upon his official bond, shall be responsible for the due performance of the duty imposed upon him by this act; and provided further, that the sanitary board may, at any time, by order enforced in its minutes, provide a system for the collection of delinquent taxes, or make any change in the manner of their collection, which as to such taxes shall have the force of law. All money collected for sanitary purposes by the district attorney under this act shall be at once paid to the county treasurer." Laws 1891, p. 227, c. 161. The specific contention is that where a law

prescribes two different methods of performing an act, upon the due and proper execution of which depends the legality or validity of the result or product of such act, a party must first clearly disclose by his complaint which of the methods prescribed had been adopted for the performance of such act, and that a failure to so point out the particular method followed is fatal to a proper statement of a cause of complaint. It is claimed that plaintiff's complaint is subject to this objection, for which reason the special demurrer should have been sustained upon the ground of uncertainty.

The complaint, in paragraph 2 thereof, alleges that "defendant, B. Kelsey, is the owner and holder of a certain deed made by the tax collector of the county of Alameda, and issued to and in the name of said B. Kelsey by said tax collector, on the 13th day of July, 1901"; and in paragraph 3 it is alleged that "said tax collector did on behalf of said sanitary district No. 2, a corporation, and at its request, hold a pretended sale of said property for the nonpayment of said pretended taxes," etc. The statute, it will be observed, provides that the tax collector of the county upon the transmission to him by the sanitary board or by the assessor of such district of a duplicate list of the assessments made in the district and for the purposes thereof shall proceed to the collection of the taxes shown by said list to be due, "in the same manner as he collects the county taxes," and that "all the provisions of the laws of the state as to the collection of taxes and delinquent taxes, and the enforcement of the payment thereof, so far as applicable, shall apply to the collection of taxes for sanitary purposes." We think the complaint is sufficiently clear, in its allegations as to the method for the collection of the taxes adopted by the board of trustees under the discretion in that particular conferred upon it by the statute, to successfully resist the force of the special demurrer upon the point. Counsel for appellant does not question the sufficiency of the allegations of the complaint to show that the tax collector of Alameda county was the official to whom the sanitary board, under its power under the law, committed the duty of collecting the taxes, but declares that the tax collector, for aught that is shown by the complaint, might have acted in the matter of the collection of the taxes under the provisions of a system established by the sanitary board itself, and which might be altogether different from those of the system by which the tax collector must be governed in the discharge of his duties as a tax gatherer under the general laws of the state. It is therefore claimed that it was the duty of respondent to have shown by the pleaded facts that the sanitary board did not adopt a system of its own, as it is provided it may do by the law, or that the tax collector was not, if such were the fact, charged with the duty of collecting the taxes in a mode or manner different from that prescribed for the collection of state and

county taxes. This position finds no support in the language of the statute. In the first place, there is, it seems to us, no conceivable ground or reason upon which to rest a successful contradiction of the proposition that the Legislature has absolutely no power to delegate to the sanitary board provided for in the act under consideration the right or authority to confer upon a county officer new or additional official duties. The power of the Legislature to charge the tax collector with the duty of collecting the taxes levied in and for the benefit of a sanitary district in any proper manner it may deem wise to prescribe, or to collect such taxes in the same manner as state and county taxes are collected, cannot be questioned; but to undertake to maintain that the manner or mode of discharging any official duties which the general laws of the state require that officer to perform may be changed by a mere regulation of a sanitary board, or upon the mere whim or caprice of the members of such board, is a proposition which can find no encouragement in any rule of law with which we are familiar under our system of government. In the second place, we think it is manifestly clear that the Legislature, in the enactment of the law governing the organization of sanitary districts, has not attempted nor indicated any intention of attempting to invest such boards with any such power. There is, it is true, a provision in the law that the board may, at any time, by order entered in its minutes, provide a system for the collection of delinquent taxes, or make any change in the manner of their collection, "which as to such taxes shall have the force of law." By this provision the Legislature evidently intended to grant to the board the right and authority to collect the taxes levied for the purposes of the corporation through its own agent, directly appointed by itself, and to enforce the collection of such taxes by such regulations, consistent with the general laws of the state, as it might deem prudent to adopt. The act, as we have seen by express language, provides that if the tax collector is called upon by the constituted authorities of the corporation to collect the taxes, he must conduct and perform that duty "in the same manner as he collects the county taxes," and that "all the provisions of the laws of the state as to the collection of taxes and delinquent taxes, and the enforcement of the payment thereof, so far as applicable, shall apply to the collection of taxes for sanitary purposes," and that he and his sureties on his official bond "shall be responsible for the due performance of the duties imposed upon him by this act." The Legislature itself, it thus clearly appears, has expressly pointed out how and in what manner the tax collector of the county shall gather such taxes when called upon to perform that duty by the sanitary board. The statute contains no language which can be interpreted or construed into giving the board any power whatever to authorize, when the duty of collecting the sanitary taxes is imposed upon

the county tax collector, a departure from the mode prescribed by the statute itself for the collection of such taxes by substituting therefor, through an order or regulation of its own, another and different plan or mode by which that duty shall be performed by that officer. In other words, the Legislature itself having prescribed the method and manner of collecting such taxes by the tax collector of the county, there is no power in the sanitary board to modify, amend, or in any particular change the provisions of the law respecting that subject.

The complaint charges that the proceedings in the matter of the sale of property for the delinquent taxes, which were required to be taken by the tax collector by sections 3764, 3765, 3766, and 3769 of the Political Code, as those sections read in the year 1891, when the Legislature passed the law for the creation of sanitary districts, were not followed or observed by that officer. The sections mentioned provided for the sale of property upon which taxes were delinquent to individuals. See St. 1885, p. 326, c. 218. The Legislature of 1895, however, made a radical change in the system of selling property for delinquent taxes and by said amendment authorized and required that all such property should be sold to the state. It is obvious, from the facts stated in the complaint, that there is no pretense that the property involved here was sold in pursuance of the provisions of the law upon the subject of tax sales as amended by the Legislatures of 1895 and 1897. It is also alleged that the requirements of section 3785 of the Political Code (Deering's Annotated Codes and Statutes), as it existed and read prior to said amendments of 1895 and 1897, making it the duty of the purchaser of property at tax sale, or of his assignee, to serve upon the owner or occupant of the property 30 days prior to the time of the redemption of the property a notice, giving the date of sale, the amount of property sold and the amount for which it was sold, etc., were not complied with. The demurrer of course, admits all the material allegations of the complaint to be true. The failure or omission of the tax collector, as charged in the complaint, to comply with all the provisions of the statute prescribing the proceedings essential to effecting a sale of property for delinquent taxes, is fatally defective to a valid sale thereof. "All proceedings in the nature of assessing property for the purpose of taxation and in laying and collecting taxes thereof, are in invitum, and must be stricti juris." *Weyse v. Crawford*, 85 Cal. 196, 24 Pac. 735; *Hearst v. Eggleston*, 55 Cal. 365; *Shipman v. Forbes*, 97 Cal. 574, 32 Pac. 599; *Gwynn v. Dierssen*, 101 Cal. 566, 36 Pac. 103; *Merced County v. Helm*, 102 Cal. 159, 36 Pac. 399; *Dranga v. Rowe*, 127 Cal. 509, 59 Pac. 944. It will thus readily be perceived that the sale here was no sale at all under the law and it necessarily follows that the purported tax

deed executed by the tax collector to the defendant was and is void.

Counsel for appellant contends that respondent, by proceeding in this action under section 3412 of the Civil Code, is "seeking to enforce the wrong remedy," and that, inasmuch as the facts pleaded show the deed held by defendant to be void and therefore no title under it acquired by appellant, the remedy of respondent was under section 738 of the Code of Civil Procedure. Some authorities are cited by counsel which he contends support this suggestion. But the point is technical in the extreme, even if it be admitted that, strictly viewing the proposition, it might be held that there is some merit in it. There is, however, in our opinion nothing in the contention. Section 3412 of the Civil Code provides that "a written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." Section 738 of the Code of Civil Procedure provides for actions to quiet title by persons against others who claim an estate or interest in real property adverse to them. The remedy here invoked appears to be peculiarly appropriate to the facts as pleaded in the complaint. Besides, an action under section 738, Code Civ. Proc., could accomplish in effect nothing more or nothing less than the object of the present action.

Other points are discussed, which, under the views expressed in this opinion, it is unnecessary to consider.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

5 Cal. App. 562

VISHER v. WILBUR. (Civ. 317.)

(Court of Appeal, Third District, California. June 20, 1907.)

1. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where it is established that an action is barred by the statute of limitations, evidence that may have been offered in response to the issues on the merits becomes of no consequence, and errors in admitting or rejecting such evidence are without prejudice to the party against whom made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4035.]

2. LIMITATION OF ACTIONS—SUFFICIENCY OF ACKNOWLEDGMENT.

A claim filed against a decedent's estate showing that at one time claimant was indebted to decedent, but that through expenditures made by claimant for decedent there was a balance due claimant, was not an acknowledgment of indebtedness to decedent, reviving a barred cause of action for the same, notwithstanding the expenditures may have themselves been barred or constituted a demand otherwise not enforceable against the estate.

3. SAME.

A declaration in writing cannot revive a barred cause of action, unless it contains an express promise to pay the debt or an acknowledgment from which a promise may be implied, and such acknowledgment must be a direct and

unqualified admission of an existing debt the debtor is willing to pay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 599, 600.]

On petition for rehearing. Petition denied.

For former opinion, see 90 Pac. 1065.

HART, J. It is conceived proper in denying the petition for a rehearing herein to add to what has been said in the main opinion that, from our original examination of the record in this cause, we felt justified in concluding that the trust theory of the complaint was adopted for no other reason than to obstruct the successful interposition of the statute of limitations against plaintiff's right of action. We concluded, from what we conceived to be a painstaking examination and careful analysis of the complaint, that the facts pleaded, with the exception of a few general averments amounting to mere conclusions of the pleader, failed to show the transaction between the deceased and the defendant to have been of a fiduciary nature. The evidence, as disclosed by the record, fully sustains this conclusion. We were convinced that the relations, if, indeed, any at all existed at the time of Visher's death, between the defendant and the deceased, were merely those of ordinary debtor and creditor, bearing none of the essential characteristics of a trust, except the bare fact, as alleged, of the possession of money belonging to the deceased by the defendant. Under this view of the record, the evidence, we think, irrefragably established a bar to the action under the terms of section 337 of the Code of Civil Procedure. Upon the theory that the action was for money had and received upon a stated account, any evidence relevantly bearing upon the question of the alleged bar was admissible. Of equal soundness is the proposition that the moment the court finds, upon sufficient evidence, that the claim that an action is barred by the statute is sustained, and that such special plea is therefore well taken, any evidence that might have been offered and received in response to the issues upon the merits of the case, such evidence having no bearing whatever upon the special plea in bar, is, whether improperly admitted or not, of no consequence, and errors in the rulings of the trial court in admitting or rejecting evidence so confined to the merits are without significance or prejudice to any rights of the plaintiff or party against whom such rulings are made. But counsel argues in his petition that the errors of the trial court in the admission and rejection of evidence "become the more apparent" if, as we have held, the action is on an account stated, and adds: "We have already pointed out in the petition that where an account is stated between the parties thereto, it cannot be disputed, questioned, modified, or changed, except for mistake or fraud, which must be set up in the pleadings." This contention goes to the mer-

its of the case, and, as we have suggested, has no force in its application to the evidence bearing upon the special plea in bar. It is only the statement of a cardinal rule of evidence to say that any competent proof was admissible which would show or tend to show that the debt declared upon was created at such point of time with reference to the time of the commencement of the suit as would bar a right of action thereon. And the defendant, if he so elected, could entirely ignore the issues involving the merits of the case, and rely solely upon his special plea in bar. The record in this case discloses no errors in the rulings of the court admitting evidence directed to the issue tendered by the special plea.

The point made by appellant in his original argument, and vigorously renewed in his petition, that the filing by the defendant against the estate of a claim, showing that at one time defendant was indebted to the deceased, but that through disbursements of certain moneys for and on behalf of deceased by the defendant, the latter became a creditor rather than a debtor of the deceased, is an acknowledgment of the debt, and restores to plaintiff a right of action for the same, is, we think, without merit, and so plainly did it so appear to us in our original investigation of the record that we did not feel called upon to give it extended notice in the main opinion. Counsel, however, seems to give the question such serious consideration in his petition for a rehearing that we feel justified in giving it briefly further attention. The argument is that the items set forth in the claim and which show money to have been paid out for the benefit of the deceased by the defendant and which were so set out in said claim as a set-off to any amount which might at one time have been due deceased cannot be considered, because they had not been presented, as required by law, to the administrator of the estate of said deceased for allowance and payment; that "such claims cannot be pleaded in bar of any action, or paid until they have been thus presented, and either allowed or disallowed"; that, therefore, the admission in said claim of the original indebtedness to the deceased constitutes an acknowledgment from which the law will imply a promise to pay the debt, hence the right of recovery thereon in the plaintiff is revived. The view, briefly expressed, as to this point in the original opinion, was that there could be no such acknowledgment of an "outlawed" debt as would restore a lost right of action thereon, where a party files or submits in writing against another a claim, as to which an action could not be maintained for any legal reason, said claim showing a mutual account, according to which it appears that at one time the claimant was indebted to the party against whom it is presented, but that the latter, at the time of the filing or submission of such claim, is indebted to the claimant.

How can such a claim be construed to be an acknowledgment of an old debt when the defendant by the very nature of said claim in effect says: "Instead of being indebted to the plaintiff, the latter is indebted to me?" It must, of course, be clear to the most obtuse understanding that by filing the claim it was the intention of the defendant to convey the notion that the plaintiff's intestate was indebted to him and not he to the estate. There is but one sensible interpretation of the language of the claim filed against the estate by the defendant, and that is that the defendant not only claims but in substance declares that he is in no way indebted to said estate in any sum or amount whatsoever. The contention that the items in said claim purporting to have been expended for the benefit of deceased by defendant are barred, or constitute an otherwise illegal demand upon the estate, cannot affect the determination of the question we are considering. Let it be granted that those items are barred, and that the defendant could not maintain an action upon them. The decision of the question here can in no manner or degree be influenced by that fact. The sole question is as to the effect of the language of the claim so filed. Does it admit an old or any indebtedness, or does it deny it? It seems to us that there can be no two sides to the question. A declaration in writing, in whatever form of language it may be made, cannot revive a right of action once barred, unless it involves an express promise to pay the debt, or an acknowledgment from which the law will imply a promise. And, as we have seen from an examination of the authorities cited in the main opinion, such acknowledgment must be clear, distinct, and direct—not vague, indeterminate, and uncertain. It will not be contended that the claim contains language expressly promising to pay the debt, to recover which the suit is brought, and, as previously suggested, the very nature of the document itself—the very intrinsic character of it, in purpose and effect—completely negatives the idea of an admission of any acknowledgment of an indebtedness to the deceased or his estate by the defendant. The petition for a rehearing is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

6 Cal. App. 113

RICKEY LAND & CATTLE CO. v. GLADER. (Civ. 307.)

(Court of Appeal, Third District, California. July 10, 1907.)

1. COURTS—DISTRICT COURT OF APPEALS—JURISDICTION—EQUITY CASES.

Under Const. art. 6, § 4, conferring exclusive jurisdiction in all cases of appeals in equity on the Supreme Court, a District Court of Appeals had no jurisdiction of an appeal from a judgment in a suit to restrain defendant from diverting the waters of a creek, without reference to whether the judgment involved the merits of the controversy.

2. SAME—TRANSFER.

Where an appeal in an equity suit was erroneously taken to the District Court of Ap-

peals, the appeal was not lost, but would be transferred to the Supreme Court, as authorized by Const. art. 6, § 4.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1303.]

Appeal from Superior Court, Mono County; J. D. Murphey, Judge.

Action by the Rickey Land & Cattle Company against C. P. Glader. From a judgment for defendant, plaintiff appeals. Transferred to Supreme Court.

Jas. F. Peck, Wm. O. Parker, Alfred Chorty, and Chas. C. Boynton, for appellant. Richard S. Miner, for respondent.

CHIPMAN, P. J. This cause was argued and submitted upon the unquestioned assumption that this court had jurisdiction to entertain the appeal. Upon an examination of the record, it clearly appears that the action is in equity, being an action to restrain defendant from diverting the waters of a certain creek. Appellate jurisdiction in all cases in equity is given to the Supreme Court. Article 6, § 4, Const. Cal.

We have no doubt that this court is without jurisdiction to entertain an appeal involving the merits of the action; and it seems to us to be equally clear that we cannot entertain an appeal from any judgment entered in the case whether or not involving the merits of the controversy. Logically it would appear to be reasonable that if an appeal would not lie to this court from the judgment on the merits it cannot lie from any judgment growing out of the case. Otherwise there might be an appeal pending here by plaintiff from the present judgment and an appeal pending in the Supreme Court by defendant from the judgment on the merits.

In this view it becomes our duty to transfer the case to the Supreme Court, under article 6, § 4, of the Constitution. The appeal, though improperly taken to this court, is not lost. *Id.*

The cause and all the papers relating thereto are, under rule 82 (78 Pac. xlii), transferred to the Supreme Court.

We concur: BURNETT, J.; HART, J.

6 Cal. App. 1

AMERICAN COPYING CO. v. LEHMANN et al. (Civ. 371.)

(Court of Appeal, Second District, California. June 20, 1907.)

1. CONTRACTS — CONSTRUCTION — SEVERABLE CONTRACT.

A contract whereby plaintiff agrees to print in its stamp directory the name and business of defendant, and to secure orders from at least 100 persons for portraits to be given free by defendants on presentation of stamps worth \$25, and whereby defendants agree to pay plaintiff \$175 for 100 frames on the completion of the canvass, and to receive from plaintiff stamps to carry out the scheme, paying therefor 50 cents per 100, and which stipulates that it is a part of the agreement that 100 persons shall order 100 frames, is not a severable contract, and plaintiff performing it in part is not entitled to recover, especially where it fraudulently altered orders for portraits procured by it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 754.]

2. SAME—RESCISSION.

Where a party to a contract, bound to procure orders for portraits, only attempted to perform its agreement by procuring orders which it fraudulently altered, the other party was not obliged to rescind to defeat a recovery.

Appeal from Superior Court, Ventura County; Felix W. Ewing, Judge.

Action by the American Copying Company against Leon Lehmann and another. From a judgment for defendants, plaintiff appeals. **Affirmed.**

Shepherd & Barnes, for appellant. I. W. Stewart and Blackstock & Orr, for respondents.

TAGGART, J. Plaintiff appeals from judgment in favor of defendants.

Plaintiff is an Illinois corporation, engaged in supplying trading stamps, and free enlarged portraits, and paid-for frames therefor, to merchants desirous of increasing trade by such methods. Defendants are merchants in the town of Oxnard, Ventura County, Cal.

From the complaint it appears that plaintiff and defendants entered into a contract in writing, whereby the former agreed to print the name and business of defendants in its citizens' stamp directory, to canvass and deliver to the homes of Oxnard and vicinity copies of the stamp directory, explain the use of it, and to secure orders from at least 100 persons for portraits, to be given free by defendants upon presentation of \$25 worth of stamps. In consideration for this the defendants were to pay to plaintiff \$175 for 100 oval frames, upon the completion of the canvass, and to receive from plaintiff a sufficient amount of stamps to carry out the scheme shown in the contract, paying therefor 50 cents per 100 for all stamps used, to make weekly settlements, and to promptly return all redeemed stamps. The contract to continue for two years. Upon the face of the order for frames set out in the complaint appears the words: "This is part of the agreement that 100 persons are to order 100 frames." It is alleged in the answer, and found by the court, that these words were written in at the request of defendants, and were intended to and did obligate the plaintiff to secure orders for 100 picture frames to be purchased from defendants at \$3 per frame, being the same frames which defendants purchased from plaintiff at \$1.75 per frame. The complaint further alleges a full compliance with the contract by plaintiff, the delivery to defendants of 23 stamp books of 5,000 stamps each, to be paid for at the rate of 50 cents per 100, and demands judgment for \$575. The court finds that the plaintiff made a canvass of the town of Oxnard, procured 124 orders for portraits, each including an agreement to trade the amount of \$25 at defendants' store, each person so ordering to receive an enlarged portrait, called a "Demar portrait" in the order. These orders were signed by the respective persons giving them, and near the signature

on each was stamped with a rubber stamp the words, "Reserve for me one frame," and delivered to the defendants by the solicitor for plaintiff as and for the orders provided for in the contract. The defendants thereupon paid said sum of \$175 for the frames, and received the 100 picture frames. The words, "Reserve for me one frame" were not on said orders when signed by the respective parties signing the same, but were stamped thereon between the time they were signed and the time of delivery to the defendants, and the agent of plaintiff represented to defendants that said words were placed thereon prior to signature. The signers of said orders repudiated said orders as altered and refused to take or pay for said frames, and defendants notified plaintiff of such repudiation, but plaintiff did not procure other or further orders or canvass therefor, whereupon defendants ceased to use said trading stamps. The defendants received 23 books of said stamps and used 18 thereof. Judgment was for defendants for costs, and against their counterclaim for damages for loss of trade because of failure of plaintiff to carry out the contract.

Appellant contends that the contract is severable, and that plaintiff is entitled to a judgment for the 18 books at 50 cents per 100 on the findings made. We cannot agree with this contention. An examination of the entire scheme discloses that the purpose and intent of the contract as made was to secure a return to the defendants of all the moneys which they obligated themselves to pay to plaintiff, and thereby receive at no cost to themselves the advertising and patronage resulting from the scheme, while all the money profits went to the plaintiff. By the contract the signers of the orders were to bind themselves to trade \$25 worth at defendants' store, pay \$3 for the privilege, and receive nothing in return but the article which defendants now say was worthless. The merchant was to receive the benefit of the patronage secured by the scheme, and in return was to advance \$175 to plaintiff, which he was in time to collect from the customer, be responsible for the balance of the \$3 per frame, collect the same, and remit it to plaintiff. The reasons upon which the Supreme Court held the anti-trade stamp act unconstitutional would hardly apply to this scheme. *Ex parte Drexel*, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. (N. S.) 588. Conceding, however, that public policy would not prevent a court of justice from enforcing such a contract if carried out in good faith, an examination of the findings requires the consideration of the further fact of the false and fraudulent alteration of the orders by plaintiff after procuring the signatures thereto. One of the moving considerations to defendants to enter into the contract was the sale of the frames at \$3 each, that they might thereby get their money back. No such sales were made by plaintiff. Nothing was done by it to comply

with this provision of the contract. The only attempt to do so was the fraudulent alteration of the orders. In other words, the character of the transaction being left out of consideration, there was not such a compliance with the contract upon plaintiff's part as to permit it to recover. No rescission was necessary. *Field v. Austin*, 131 Cal. 379, 63 Pac. 692. Courts are not vigorous in compelling an accounting by the person defrauded at the request of the party guilty of the fraud. *More v. More*, 133 Cal. 493, 65 Pac. 1044. "Parties so engaged are not the objects of the special solicitude of the courts." *Neblett v. Macfarland*, 92 U. S. 101, 23 L. Ed. 471.

Judgment of superior court affirmed.

We concur: ALLEN, P. J.; SHAW, J.

5 Cal. App. 740

BAILEY v. ÆTNA INDEMNITY CO. OF HARTFORD, CONN. (Civ. 353.)

(Court of Appeal, Second District, California. June 18, 1907.)

1. ATTACHMENT—UNDETTAKINGS — LIABILITY OF SURETY.

An undertaking given to release property attached under a writ of attachment, which shows the title of the court and cause in which it was given, which recites the amount of plaintiff's claim against defendant, the issuance of the attachment and levy on "certain property and effects of" defendant, the desire of defendant to release the property, and which declares that the surety, in consideration of the premises and the release of the property, undertakes in a specified sum and promises that, in case plaintiff recover judgment in the action, defendant will pay the amount thereof with costs, substantially conforms to Code Civ. Proc. § 540, relating to undertakings on attachment, and, if voluntarily given to secure a redelivery of the property, is valid at common law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 638.]

2. SAME—RECITALS—CONCLUSIVENESS ON SURETY.

The recitals in an undertaking given to procure the release of property attached under a writ of attachment are conclusive against the obligor therein, whether the undertaking is a statutory or a common-law bond.

3. SAME—VALIDITY.

Where a writ of attachment directs the sheriff to take an undertaking, and either not attach the property or release the same, as the circumstances require, an order for the release of the property attached on the giving of an undertaking to procure the release thereof is not necessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 637.]

4. SAME—RECITALS—CONCLUSIVENESS.

The surety, in an undertaking given to release property attached under a writ of attachment, is estopped by the recitals therein from asserting that no property was levied on by virtue of the writ.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 1243, 1244.]

5. SAME.

The recitals, in an undertaking given to procure the release of property attached under a writ of attachment, that the writ of attachment was issued and property levied on thereunder, etc., are conclusive on the surety on the ques-

tions of the sufficiency of the affidavit on which the attachment was based and of the writ itself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, §§ 1243, 1244.]

6. SAME—ACTIONS—TIME TO SUE.

Under Code Civ. Proc. § 552, providing that, where an execution be returned unsatisfied, plaintiff may prosecute any undertaking given pursuant to sections 540 and 555, relating to the giving of an undertaking on attachment, an action on an undertaking given to procure the release of property levied on under a writ of attachment may be brought immediately on the return of the execution against the judgment debtor unsatisfied, and it is not necessary to postpone the bringing of the action for six months from the date of the judgment.

7. TRIAL—FINDINGS—CONSTRUCTION.

A finding that each and every allegation contained in plaintiff's complaint is true is but the express finding of that which is impliedly found by judgment for plaintiff on the pleadings.

8. JUDGMENT—JUDGMENT ON PLEADINGS.

Under Code Civ. Proc. § 581, prescribing when an action may be dismissed or a nonsuit entered, and section 582, providing that in every other case judgment must be rendered on the merits, a judgment on the pleadings is a judgment on the merits, so far as its conclusiveness is concerned.

9. ATTACHMENT—UNDETTAKING—ACTIONS—DEFENSES—PLEADING.

A surety, when sued on his undertaking given to procure the release of property attached under a writ of attachment, cannot avail himself of the defense that the judgment in the attachment action was rendered without a fair trial, without alleging the particular facts not presented on the trial, and a surety, claiming that there was a collusive failure to introduce available evidence constituting a defense to the action, must plead the details and his ability to supply on a new trial the evidence willfully suppressed.

10. APPEAL—REVIEW—IMMATERIAL QUESTIONS.

Where a judgment was properly rendered on the pleadings, questions relating to the introduction of evidence and of the weight thereof are immaterial on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3331.]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by C. C. Bailey against the Ætina Indemnity Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Drew Pruitt, Charles L. Batcheller, and Thomas C. Ridgway, for appellant. Sidney J. Parsons and O. P. Widaman, for respondent.

TAGGART, J. This is an action to recover from the surety, on an undertaking given to release an attachment, the amount of the judgment rendered against the attached debtor. Judgment was for plaintiff, and defendant appeals from the judgment, and from an order denying its motion for a new trial.

Plaintiff brought an action in the superior court of Los Angeles county against the Pacific Furniture & Lumber Company to recover judgment on two promissory notes with interest, and attorney's fees as provided therein, and on an account for work and labor. He caused an attachment to be issued

and levied on the property of the said Pacific Furniture Company at the time the action was begun. On the same day (April 14, 1904) the defendant herein, the Aetna Indemnity Company, executed and delivered to the sheriff, who held the attached property of the furniture company, the instrument here sued on, and the attached property was released and the attachment discharged. On the trial in the attachment suit the indebtedness was admitted by the defendant furniture company, but it was claimed that it was not due by reason of the execution by plaintiff and certain other creditors of the furniture company of a certain contract for forbearance extending the time of payment to September 23, 1903. Findings on this issue were for plaintiff, and on the 15th day of June, 1905, judgment in his favor was rendered against the Pacific Furniture Company for the full amount claimed. The present action was begun July 24, 1906, to recover from defendant herein, as surety on the undertaking given to release the attachment, the amount of such judgment. Defendant set up the same defense pleaded in the attachment suit, and alleged that the issues so raised were not fairly tried because of collusion between plaintiff and the defendant in the attachment suit, and asks that they may be tried on its answer in this action.

In support of the appeal, it is urged that it appears from the complaint that the action was prematurely brought because the judgment was not final under section 1049, Code Civ. Proc.; that there is no allegation of indebtedness from defendant to plaintiff; that the writ of attachment was void; that it was not alleged that any property was levied upon by virtue of said writ of attachment; and that, if the writ of attachment was not void, the property was not shown to have been released as required by law. The instrument sued on is attached to and made a part of the complaint. The allegations as to the manner of its execution and delivery would justify the assumption that it was given pursuant to the provisions of sections 554 and 555 of the Code of Civil Procedure, although these sections are not named. Some of appellant's objections to the pleading are based upon the instrument being so given, and upon this theory it is urged that the complaint fails to state a cause of action because it does not allege a compliance with all the steps and proceedings taken under those sections. To avoid these objections respondent claims the instrument to be an undertaking given under section 540 of the Code of Civil Procedure. An examination of the instrument itself shows that it is not strictly in the form required by either section 540 or section 555. The former section applies where the intention is to prevent the levy of an attachment, and the sheriff may accept an undertaking "in an amount sufficient to satisfy such demand (plaintiff's), besides costs, or in an amount equal to the value of

the property which has been, or is about to be, attached." The latter section (555) provides for the release of an attachment by the court; in which event the court must require an undertaking, "to the effect that in case the plaintiff recover judgment in the action defendant will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of the judgment, or, in default thereof, that the defendant and sureties will, on demand, pay to the plaintiff the full value of the property released."

The instrument pleaded shows the title of the court and cause in which given, recites the claim and amount of plaintiff's claim against defendant, the issuance of the attachment, and levy thereof on "certain property and effects of said defendant," and that defendant desires to release said property from the attachment; that the surety (defendant herein), in consideration of the premises and the release of the property attached, undertakes in the sum of \$4,350, "and promises that in case the plaintiff recovers judgment in the action defendant will pay to plaintiff the amount of whatever judgment may be recovered in said action, together with the percentage interest and costs."

The bond is not a forthcoming or delivery bond, but, as shown by its own provisions and the allegations of the complaint as a whole, was given to the sheriff under section 540 for the purpose of preventing a continuance of the levy upon or further holding of property which had already been attached. It is not strictly such an undertaking as that section directs him to take, but is an indemnity bond given for the benefit of plaintiff to secure the release of the property of defendant, and it accomplished that purpose. The condition of it is that the obligors will pay the judgment in consideration of the release of the attachment. It substantially conforms to the requirement of one clause of section 540 and the fair presumption, aided by the allegations of the complaint, is that it was executed with reference to that section. It would be immaterial here under which section it was given, if it were not that the meaning and intentions of the parties are to be ascertained by the light of the statute. *Heynemann v. Eder*, 17 Cal. 434. Such an undertaking may be given either to prevent or to release an attachment. Section 540; *Curiac v. Packard*, 29 Cal. 200. If voluntarily given to the sheriff to secure a redelivery or release of the property attached, it would be valid at common law (*Palmer v. Vance*, 13 Cal. 553), and its recitals are conclusive as against the obligor whether it be a statutory or common-law bond. *McMillan v. Dana*, 18 Cal. 339, p. 347. Quoting approvingly from the opinion in the case last cited, the Supreme Court says, in *McCormick v. National Surety Co.*, 134 Cal. 513, 66 Pac. 741: "Nor does it matter whether the property was subject to the attachment or not,

That matter cannot be tried in this collateral way. It is enough that the plaintiff had this property levied on as subject to his debt, and that the sureties procured its release upon the stipulation that in consideration of such release they would pay the amount of the judgment to be recovered by the plaintiff in the attachment suit." The same rules apply if the bond be considered as a common-law bond. Speaking of a bond given to release an attachment which was held not to have been given pursuant to either section 540 or section 555, Code Civ. Proc., the Supreme Court says: "Whatever the obligor recites in a bond to be true may be taken as true against him, and need not be averred in a complaint on such bond, or proved on the trial." *Smith v. Fargo*, 57 Cal. 157. Whether the undertaking be in statutory form or good only as a common-law bond is immaterial. *Gardner v. Donnelly*, 86 Cal. 372, 24 Pac. 1072.

Considering the points urged by appellant in the reverse order of their mention, its contention that the attachment was not released as required by law is based upon the assumption that the undertaking was given under section 555 and an order of the court necessary for the release of the attached property. No order was required, as the writ of attachment itself directed the sheriff to take such an undertaking and either not attach, or release the property attached, as the circumstances required. The allegation of the complaint that the Pacific Furniture Company "appeared in said action" may be treated as surplusage. The defendant is estopped by the recitals in its own written obligation, the bond, from saying that no property was levied on by virtue of the writ of attachment.

The complaint alleges an indebtedness from defendant to plaintiff with sufficient clearness, and the case of *Provident Mutual, etc., v. Davis*, 143 Cal. 253, 76 Pac. 1034, cited by appellant, has no application here. The recitals in the bond also conclude the defendant here as to the sufficiency of the affidavit upon which the attachment was based, and of the writ itself. That the former was false, or the latter did not state the amount of the plaintiff's demands in conformity with the complaint, cannot be questioned by defendant. If these matters, or either of them, were open to question at this time and in this manner, the rulings of the trial court in this connection would still have to be sustained. *Porter v. Pico*, 55 Cal. 173; *Scrivener v. Dietz*, 68 Cal. 1, 8 Pac. 609; *Harvey v. Foster*, 64 Cal. 296, 30 Pac. 849.

This is an action on a bond, and not on the judgment rendered in the action of *Bailey v. Pacific Furniture Co.* The bond was given to take the place of the security obtained by attaching certain personal property of the defendant in that action. The attachment issued and the property was

seized that it might be available for the execution of the judgment which plaintiff expected to and did subsequently obtain against the Pacific Furniture Company in the superior court. Unless an appeal had been taken at once, and a stay bond given, the plaintiff could, and no doubt would, have proceeded to sell the property attached to satisfy the judgment of the superior court. This, it is admitted, could have been done, but it is claimed that it is so only because of express statutory authorization. It is provided by section 552 that, if the execution be returned unsatisfied in whole, or in part, the plaintiff may prosecute any undertaking given pursuant to either section 540 or section 555; and the complaint alleges an execution was issued on the judgment and returned wholly unsatisfied.

The attachment proceeding is merely auxiliary to the main action (*Porter v. Pico*, 55 Cal. 173), and the latter would go forward to execution whether the sheriff held the attached property or the undertaking given for its release. There is nothing in the statute to suggest that the bond given to release attachment shall operate as a stay bond to prevent execution on the judgment for six months after its entry. For the protection of the surety, it is required that an effort shall be first made to execute against the judgment debtor. Failing in this, the substitute for the attached property is immediately available, and the bond may be enforced at once.

In *Cook v. Ceas*, 143 Cal. 221, 77 Pac. 65, claimed by appellant to be decisive of this case, the Supreme Court, on page 226 of 143 Cal., page 67 of 77 Pac., says: "The question, then, is reduced to this: When did the order settling the account of the guardian become a binding order?" The answer to this question was: "Not until the time for appeal had passed." The question here is: "When was execution on the judgment in the attachment suit enforceable? The answer is: As soon as entered (Code Civ. Proc. § 681), unless an appeal was taken at once and stay bond given. As well could it be said that it would be necessary to await the six months within which an appeal might be taken before a demand for the return of the property taken from the sheriff on a forthcoming bond could be made, or the redelivery of the property compelled. We think the case of *Cook v. Ceas* is easily distinguishable from the case at bar.

The findings and judgment recite: A trial of the cause before the court on its merits; the introduction of evidence by the plaintiff and by the defendant; that the latter sought to introduce testimony which was objected to on the ground that the answer failed to state a defense, and that the defendant thereupon announced that it elected to stand upon the answer as framed and declined to amend or offer further testimony. The transcript of the proceedings at the trial support these recitals in every particular. This, appellant

contends, shows that the judgment was on the pleadings, and that therefore a new trial should be ordered, that the findings on the evidence introduced may be stricken out and the judgment be made to declare on its face that it is based on the pleadings. Considering the judgment as one rendered on the pleadings (which it is), the conclusion suggested by appellant does not necessarily follow. There is but one finding of fact by the court, and that is the general one that "each and every allegation contained in the plaintiff's complaint are true." This is but the express finding of that which is impliedly found by a judgment for plaintiff on the pleadings. A judgment on the pleadings is a judgment on the merits under our Code. Sections 581, 582, Code Civ. Proc.

The ruling of the trial court as to the sufficiency of the answer was correct. The denials therein are of conclusions of law and of those matters as to which defendant is concluded by the recitals in the bond. The facts alleged in the affirmative defense are not sufficient to constitute either a defense or counterclaim. An answer claiming the relief here sought by defendant must show not only the facts constituting the fraud which prevented a fair judgment from being rendered in the former action, but it must also show that there was a good defense to the original action upon the merits, and that the defendant will be able to present this defense upon a new trial. These matters must be alleged, not in the form of conclusions, or ultimate facts, but in the same manner as the facts constituting the fraud. That is, the particular facts which were not presented upon the trial of the original action, by reason of the fraud complained of, must be set out, and accompanied by an allegation that the complaining party has the ability to produce evidence upon any new trial that may be granted to establish such facts as alleged. In reaching this conclusion we recognize the rule invoked by appellant that each case of fraud must be determined upon its own circumstances. Here it is claimed that there was a collusive failure to introduce available evidence constituting a defense upon the original trial. The details of this failure should be pleaded and the ability of the defendant in this action to supply, upon a new trial, the evidence which was willfully suppressed upon the former trial should be clearly alleged. This is required to support a bill in equity to set aside a decree for fraud, or because of newly discovered evidence. The same rule is proper here. *Mulford v. Cohn*, 18 Cal. 46, concurring opinion, *Harrison, J.*; *Whitney v. Kelley*, 94 Cal. 153, 29 Pac. 624, 15 L. R. A. 813, 28 Am. St. Rep. 106.

The other objections to the court's rulings assigned as error need not be considered, as they relate to the introduction of evidence and its sufficiency. The judgment being on

the pleadings, the introduction of evidence becomes mere surplusage, and questions of its weight and admissibility are immaterial.

Judgment and order appealed from affirmed.

We concur: ALLEN, P. J.; SHAW, J

6 Cal. App. 131

DOHERTY v. CALIFORNIA NAVIGATION & IMP. CO. (Civ. 358.)

(Court of Appeal, Third District, California. July 12, 1907.)

1. SHIPPING—INJURY OF PASSENGER—EVIDENCE.

In an action for injuries to a steamship passenger by the negligence of the captain in letting plaintiff stand unsupported while helpless from intoxication, after the captain had lifted him from the floor, so that plaintiff fell and broke his arm, evidence held to sustain a finding that the captain, with knowledge that plaintiff was intoxicated to a helpless degree, lifted him to his feet from the floor where he had been discovered asleep, and left him standing without any support, by reason of which plaintiff fell to the floor and broke his arm, without contributory negligence on his part, and that by reason thereof he suffered pain and loss to the amount of \$575.

2. SAME—CARE REQUIRED.

Where the captain of a steamship discovered a passenger lying in a drunken and helpless condition on the floor, and, with knowledge of his helplessness, lifted him to his feet, and left him without any support, whereupon he fell and broke his arm, the captain did not exercise the full degree of care required by rendering assistance sufficient in the case of a sober man, but was bound to exercise such care as he could to avoid an accident in the situation presented to him.

3. APPEAL—REVIEW—MATTERS OF DISCRETION—AMENDMENT.

Under Code Civ. Proc. § 473, authorizing the court to grant amendments in the interest of justice, the exercise of the court's discretion in that regard will not be disturbed on appeal except where abuse of discretion is shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 8525.]

4. PLEADING—AMENDMENT—CONFORMITY TO PROOF.

Where, in an action against the owners of a vessel for injuries to a drunken passenger, the case was submitted without argument, whereupon the trial judge stated what facts he regarded as proven, and called for authorities on the duty which the officers of the boat owed to a drunken man, it was a proper exercise of discretion to permit plaintiff then to amend his complaint to conform to the facts so proven.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 603.]

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by Barney Doherty against the California Navigation & Improvement Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

Arthur L. Levinsky, for appellant. D. M. Young and W. N. Rutherford, for respondent.

CHIPMAN, P. J. Action for personal injury. The cause was tried by the court sitting as a jury. Findings and judgment were for plaintiff, and the damages for the injury received by him were assessed at \$575. Defendant appeals from the judgment and from the order denying its motion for a new trial.

Plaintiff paid his fare and took passage on defendant's steamer at San Francisco bound for the city of Stockton. The circumstances attending the injury and the facts upon which the judgment rests are concisely set forth in the following findings:

"Fourth. That after the payment by said plaintiff to the defendant of said fare, and while plaintiff was on said steamer as a passenger on his way from said city, of San Francisco to said city of Stockton, and before the completion of said trip, the servants and agents of the defendant, employed by said defendant in and upon said steamboat, 'T. C. Walker,' and in the operation thereof, and who were at said time in charge of and in the management and control of said steamer, 'T. C. Walker,' to wit, the captain of said boat, carelessly and negligently raised plaintiff from the floor of said steamboat where plaintiff was lying in an intoxicated condition, and placed plaintiff upon his feet, and carelessly and negligently turned plaintiff loose, and left him standing upon the floor of said boat unsupported while intoxicated and unable to stand without support, and that by reason of thus being raised from the floor and left standing without support when intoxicated, and being unable to stand without support, plaintiff was caused to fall upon the floor of said steamboat, and by reason of said fall plaintiff's left arm was broken.

"Fifth. That at the time the said captain of said boat raised plaintiff from the floor of said boat and left him standing unsupported plaintiff was intoxicated to a degree of helplessness and was unable to stand unsupported, was asleep or apparently asleep, and was limp and made no attempt to get on his feet, or to either assist or resist being placed upon his feet, and that before placing plaintiff upon his feet and turning him loose the said captain had knowledge of plaintiff's drunken and helpless condition, and of the fact that he was asleep or apparently asleep, and knew that he was liable to fall and sustain injury if placed on his feet and left standing unsupported.

"Sixth. That plaintiff was intoxicated when received as a passenger by defendant as herein found, and that at and before the time plaintiff was so received the said captain of said boat knew that plaintiff was intoxicated to such an extent as rendered it necessary for him to have support to enable him to stand upon his feet; and said captain knew that plaintiff continued to drink after taking passage on said boat and before he was injured.

"Seventh. That plaintiff's said injury was not proximately caused by his own carelessness or negligence or contributory negligence, or by his drunkenness, but was proximately caused by the negligent act of the captain of said boat in placing him on his feet and turning him loose unsupported when drunk to a degree of helplessness and asleep or apparently asleep.

"Eighth. That, by reason of the breaking of plaintiff's arm as above found, he suffered physical pain, and was for five months incapacitated from working, and that his arm is still sore and painful, and will be for some time, when employed at labor, by reason of all of which plaintiff has been damaged in the sum of \$475, and that plaintiff was compelled to and did employ a physician and surgeon to treat his said arm and incurred an indebtedness therefor of \$100, and that he was thereby further damaged in the sum of \$100."

Appellant's main contention is that the decision and judgment are not supported by the evidence. There is evidence that plaintiff was intoxicated when he came aboard the steamer. The captain testified: "When I first saw him on the dock, he was drunk, but he was able to walk; that is, by steadying himself against the passenger gangway. He always steadied himself. I did not see him walk without any support. I was apprised of the fact by what I saw that he needed support to stand alone." Plaintiff found his way to the cabin, and not long after the steamer was under way he was found lying on the cabin floor in the smoking room. An unsuccessful effort was made to arouse him and set him onto a seat, but he soon resumed his sprawling position on the floor. The attention of the captain was called to him by Mr. Fraser, the purser. The captain testified: "I went with Mr. Fraser, and told him to get off the floor, and he never paid any attention to me. He was asleep. I picked him up off the floor; that is, I picked him up off the floor and stood him on his feet. When I got him on his feet, he was standing very nearly erect, and I let go again, and when I let go of him he stood for a second, and then fell backwards." Again he testified: "I saw the cabin watchman lift him off the floor previous to the time I saw him there, which was after I had collected the tickets. I would say he was drunk. He was not beastly drunk. He didn't know hardly what he was doing, anyhow. I had already seen it was necessary to pick him up when he was down." It further appeared from the captain's testimony that, when he lifted plaintiff to his feet, he made no effort to support him or prevent his falling or attempt to catch him as he was falling; that plaintiff did not help himself in being put up on his feet, but was "perfectly helpless" in the captain's hands. "He looked like he was asleep—apparently asleep. * * * Q. You were watching him? A. Yes, sir. Q. To

see what he would do? A. Yes, sir. Q. You knew he was drunk? A. I knew he was drunk; yes, sir. Q. You wanted to see if he would fall down or not? A. Yes, sir. Q. You stood him on his feet to see whether he could stand or fall down? A. No, sir; I did not. I picked him up to take him downstairs. Q. The first time, though, you wanted to see whether he could stand up or not? A. Yes, sir; I stood him up; yes, sir." There was much testimony as to the condition of intoxication in which plaintiff was suffering at the time and as to his treatment by the captain at the time of the injury. We are satisfied that there was sufficient evidence to justify the fourth, fifth, sixth, seventh, and eighth findings. Of the sixth finding it should be remarked that there is no direct evidence that the captain knew that plaintiff had been drinking after he came aboard the steamer, although there is evidence that the purser knew it, as is conceded by appellant. The fact is not material in view of the findings as to the drunken condition of plaintiff.

The seventh finding being a finding savoring of both fact and conclusions of law raises the question most seriously urged by appellant, and will next receive attention. Appellant's position is thus stated by its learned counsel: "It is our contention that the servants of the defendant were called upon to give the plaintiff, who was in a state of intoxication, no other or further care than they would have to, when called upon, under the law, to give him sober." "The cases," it is further contended, "all support the following rule, 'Intoxication does not excuse the omission to use the same care and prudence which are required of a sober man under the same circumstances to protect himself against injury'"—citing *Fisher v. W. Va. & P. R. Co.*, 42 W. Va. 183, 24 S. E. 570, 33 L. R. A. 69; *Price v. Pha. W. & R. R. Co.*, 84 Md. 506, 36 Atl. 263, 36 L. R. A. 218. In further support of its contention appellant cites *Milliman v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 643; *Beach on Contributory Negligence*, § 151; 1 *Thompson on Negligence*, p. 450; *Shearman & Redfield on Negligence*, § 25. There was evidence that plaintiff was lying near the cabin door, and so that, when being opened, it would strike his head, and that in lying on the floor plaintiff was violating a rule of the vessel. We cannot see that these additional facts are material in determining defendant's liability under the circumstances disclosed. Conceding that the captain was discharging a duty in removing plaintiff from a place of danger which plaintiff occupied in violation of a rule of the vessel, still the captain had no right, knowing as he did the helpless condition of plaintiff, to remove him in such a manner as he must have known would in all probability, and in fact did, cause the injury. We cannot subscribe to the doctrine contended for by appellant, that

no greater duty was cast upon defendant in dealing with plaintiff drunk than with plaintiff sober. In discussing the effect of plaintiff's drunkenness as contributory negligence, the court, in *Wheeler v. Grand Trunk Ry. Co. of Canada*, 50 Atl. 103, 70 N. H. 607, 54 L. R. A. 955, correctly stated the law as follows: "For an injury resulting from prior or concurrent negligence contributed he could not recover; but, if the defendants with knowledge of the plaintiff's danger in the performance of the duty owed by them could have prevented the injury, they were bound to do so, and their breach of duty would be the legal cause of the injury, unless at the time of the injury the plaintiff by the exercise of due care could have avoided it. If the plaintiff could not have prevented the injury to himself and the defendants could by the care the situation required of them they are liable if they did not, although the plaintiff's inability resulted from his prior negligence or intoxication. 'If due care on the part of either at the time of the injury would prevent it, the antecedent negligence of one or both parties is immaterial, except it may be as one of the circumstances by which the requisite measure of care is to be determined. In such a case the law deals with their behavior in the situation in which it finds them at the time the mischief is done, regardless of their prior misconduct. The latter * * * is the cause of the danger, the former is the cause of the injury. (Citing numerous cases.) * * * The defendants' answer is that the plaintiff's incapacity was produced by his voluntary intoxication. But, if it were established that the plaintiff's incapacity and irresponsibility were known to the defendants, the cause of his condition is entirely immaterial.'" The true principle is enunciated by our Supreme Court: He who knows of a danger and can avoid it as against one who does not in fact know the danger, or as against one within whose power does not lie the ability to avoid the accident, is responsible for the injury. *Esrey v. S. P. Co.*, 103 Cal. 541, 87 Pac. 500; *Lee v. Market St. Ry. Co.*, 135 Cal. 293, 67 Pac. 765; *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85. Or, as is otherwise stated: "One having an opportunity by the exercise of proper care to avoid injuring another must do so, notwithstanding the latter has placed himself in a situation of danger by his own negligence." *Lee v. Market St. Ry. Co.*, supra.

Appellant calls attention in his brief to several exceptions taken in the course of the trial. We find no prejudicial error in any of the rulings of the court. Exception numbered 19 is the only one noticed in appellant's brief, and calls only for passing comment. At the conclusion of the evidence counsel for both parties stated that they would submit the case without argument. The trial judge then stated what facts he

regarded as proven in the case, and called for authorities "upon the duty which the officers of the boat owe to a man that is drunk." In view of the statement made by the judge, as to the facts, counsel for plaintiff asked and obtained leave to amend the complaint to conform thereto. Defendant objected to leave being granted and took exception to the ruling of the court. Under section 473, Code Civ. Proc., the power to allow amendments in the interest of justice is within the discretion of the trial court, and its action will not be disturbed, except where an abuse of discretion is shown. *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955.

There are no facts disclosed in the present case of which an abuse of discretion may be predicated.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

6 Cal. App. 101

NORTHUP v. ALTADENA MINING & INVESTMENT SYNDICATE et al.
(Civ. 344.)

(Court of Appeal, First District, California.
July 10, 1907.)

CONTRACTS—AGREEMENT FOR BENEFIT OF THIRD PERSON—RIGHT TO SUE.

Where a syndicate executed a note to plaintiff for part of the price of a business, which the syndicate thereafter transferred to a corporation in return for stock and the corporation's agreement to pay the syndicate's debts, including the note, plaintiff was entitled to sue the corporation on its agreement to pay the note, under Civ. Code, § 1559, providing that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties rescind it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 798.]

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by E. J. Northup against the Altadena Mining & Investment Syndicate and another. From a judgment for plaintiff against both defendants, and from an order denying their motion for a new trial, they appeal. Affirmed.

A. A. Caldwell, for appellants. W. A. Beasley and H. Ray Fry, for respondent.

KERRIGAN, J. This is an action upon a promissory note. Plaintiff had judgment against both defendants, and from this judgment and an order denying their motion for a new trial defendants appeal.

In June, 1903, plaintiff, who for several years prior to that time had been a piano and music dealer in the city of San Jose, conducting business under the name of the "Northup Piano House," sold that business to the Altadena Mining & Investment Syndicate (hereinafter called the Altadena Syndicate), and took from it in consideration therefor the note in suit, payable August 27, 1904.

September 19, 1903, the business conducted under the name of the Northup Piano House was incorporated. December 29, 1903, the business of the Northup Piano House, including all accounts, leases, books, fixtures, etc., by an instrument in writing, was transferred from the Altadena Syndicate to the newly organized Northup Piano House, a corporation. The latter corporation, as a consideration for the transfer, gave the Altadena Syndicate 3,000 shares of its capital stock, and agreed to pay its debts, including the promissory note in suit here of \$2,000. The Northup Piano House corporation has paid all the debts of the Altadena Syndicate thus assumed except this note, and it has paid part of that. The Northup Piano House business was the principal asset of the Altadena Syndicate.

The question for decision is whether the appellant Northup Piano House, a corporation, is liable to respondent on this contract; respondent claiming that it was made for his benefit. To recapitulate the terms of the contract, appellant corporation Northup Piano House accepted a transfer from the Altadena Syndicate of the Northup Piano House business, and as a part of the consideration therefor agreed to pay the debts of the latter, including respondent's note. This contract was made for the benefit of respondent, and he has a right of action founded on it. See section 1559, Civ. Code; *McLaren v. Hutchinson*, 22 Cal. 190, 83 Am. Dec. 59; *Sacramento Lumber Co. v. Wagner*, 67 Cal. 295, 7 Pac. 705; *Malone v. Crescent M. & T. Co.*, 77 Cal. 44, 18 Pac. 858; *Tevlis v. Savage*, 130 Cal. 411, 62 Pac. 611; *Washer v. Independent M. & D. Co.*, 142 Cal. 702, 76 Pac. 654. In the case of *McLaren v. Hutchinson*, 18 Cal. 180, *Hutchinson* purchased land from Beach, and as a part of the consideration therefor agreed to pay the debts due to McLaren from Beach. It was held that McLaren, the plaintiff, was not a party to the agreement, and the action could not be maintained. Speaking of this case, the Supreme Court, in *Lewis v. Covillaud*, 21 Cal. 189, said: "Since the case of *McLaren v. Hutchinson* has been decided the matter has frequently been called to our attention, and we are by no means satisfied with the rule laid down. The agreement was founded upon sufficient consideration, and the modern doctrine in such cases seems to be in favor of the maintenance of the action." In the case of *Sacramento Lumber Co. v. Wagner*, supra, it is said: "We are satisfied that an action like that described in *McLaren v. Hutchinson* may be maintained."

This disposes of the principal point in the case. Other matters discussed in the briefs do not merit attention.

It follows that the judgment and order appealed from should be affirmed; and it is so ordered.

We concur: COOPER, P. J.; HALL, J.

6 Cal. App. 111

McGINN v. WILLEY et al. (Civ. 286.)
(Court of Appeal, Third District, California.
July 10, 1907.)

SCHOOLS AND SCHOOL DISTRICTS—CONTRACT WITH TEACHER—VALIDITY.

Where school trustees in their individual capacity agree with one to employ him as a teacher and afterwards in regular session as a board repudiate or disregard the agreement, such person is without redress, since the agreement was void, as against public policy.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by Annie McGinn against Charles Willey and another. From a judgment of dismissal upon failure to amend the complaint after order sustaining a demurrer, plaintiff appeals. Affirmed.

J. F. Rooney, for appellant. E. W. Holland, for respondents.

BURNETT, J. The action is for damages for the violation by defendants of their agreement to employ plaintiff as teacher in the primary department of the public school of the Poverty Hill school district, Tuolumne county. The appeal is from a judgment of dismissal upon failure to amend the complaint after order sustaining a demurrer.

The complaint alleges "that the said defendants, as trustees of the said Poverty Hill school district, on the 1st day of July, 1905, and at other times prior thereto, promised and agreed to employ this plaintiff to teach the pupils who might attend the primary department of the public school of the said Poverty Hill school district for the ensuing term, commencing on or about the 11th day of September, 1905, and ending on — day of June, 1906, at the salary of \$60 per month." Then follow the averments that plaintiff agreed with said defendants to teach said school upon said terms, and that she made her application on said date to the board of trustees to be appointed to said position, and "that the said defendants on the said 1st day of July, 1905, without any cause or justification, disregarded and violated their said agreement made with this plaintiff as aforesaid, and refused to appoint this plaintiff as the teacher to teach said department, and the said defendants then and there appointed Laura Hartvig to teach said primary department." It is clear that the court below properly sustained the demurrer to the complaint. The agreement upon which plaintiff relied is against public policy, and void. If the trustees of a public school district in their individual capacity agree with a person to employ him as teacher and afterwards in regular session as a board of trustees they repudiate or disregard their agreement and employ some one else, the former person is without redress. The matter is well stated in *McCortie v. Bates*, 29 Ohio St. 419, 23 Am. Rep. 758: "Clothed with such powers, and charged with such duties and such responsibilities, it will not be per-

mitted to them to make any agreement among themselves, or with others, by which their public action is to be, or may be, restrained or embarrassed, or its freedom in anywise affected or impaired. The public for whom they act have the right to their best judgment after free and full discussion and consultation among themselves of, and upon, the public matters intrusted to them, in the session provided for by the statute. This cannot be when the members, by pre-engagement are under contract to pursue a certain line of argument or action, whether the same be conducive to the public good or not. It is one of the oldest rules of the common law that contracts contrary to sound morals, or against public policy, will not be enforced by courts of justice, and the court will not enter on the inquiry, whether such contract would, or would not, in a given case, be injurious in its consequences if enforced. It being against the public interest to enforce it, the law refuses to recognize its claim to validity." The party who brings an action for damages for the violation of such an agreement is in no better position than one who should sue for specific performance. In either case the law leaves the parties where it finds them.

The judgment is affirmed.

We concur: **CHIPMAN, P. J.; HART, J.**

6 Cal. App. 83

CODONI v. DONATI. (Civ. 352.)
(Court of Appeal, Second District, California.
July 8, 1907.)

1. HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—DESERTION.

Desertion of a wife by her husband is a necessary element of an action by her against another for alienation of her husband's affections.

2. SAME—DESERTION—EVIDENCE.

That plaintiff's husband went to an adjoining county without her knowledge, where he remained for seven days, was insufficient of itself to establish desertion sufficient to entitle her to maintain an action for alienation of affections.

3. DOMICILE—SELECTION OF HOME—RIGHT OF HUSBAND.

It is the right of a husband to select the home and the duty of the wife to go to him at his request, when he furnishes the means for that purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Domicile, § 25.]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Rufina Codoni against V. L. Donati. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Reversed and remanded.

A. E. Campbell and W. H. Spencer, for appellant. Louis Lamy and Wm. Mallagh, for respondent.

PER CURIAM. An action for damages claimed by reason of defendant having alien-

ated from plaintiff the affections of her husband.

The principal matter relied upon by appellant relates to the sufficiency of the evidence to support the findings. An examination of the record indicates that there is no testimony in support of the implied finding that the affections of plaintiff's husband were actually alienated. There is in the record that which may be said to be sufficient to establish an antipathy upon the part of defendant to create dissatisfaction upon the part of the husband, and had such effort been followed with desertion, or with proof of facts tending to show that the affections of the husband had been actually alienated, we would not be inclined to disturb the verdict. It appears, however, from the record that the relations between plaintiff and her husband were pleasant up until his departure from this country on a visit to his native land; that while the husband was on such visit defendant wrote a letter to him which might well have had the effect to induce a separation, but, notwithstanding this letter, the husband returned to his wife, brought back with him presents, resumed marital relations, and on the 26th day of September, in company with his wife, attended a picnic near their home. After their return from the picnic, the husband accepted an invitation from defendant to attend a dinner at the house of defendant, to which function the plaintiff was not an invited guest, for the admitted reason that she and the wife of defendant were not on friendly terms. The husband, however, returned to his home on the day following, spent the night of the 27th of September with his wife, and everything was pleasant and agreeable between them, on which occasion he opened his valise and distributed the presents to his wife and daughter. On the 28th of September the husband went to Salinas, from which point he wrote two letters to his wife, and also telephoned her. On the 31st of October he inclosed in one of the letters written the sum of \$5 with which to pay the railroad fare of the plaintiff and her child to Salinas. Neither of these letters was answered, nor did the plaintiff go to her husband. She used the money for another purpose, and her reason for not going to him upon his demand was that she thought he might be playing her a trick, and for the reason that he had published a card in the newspaper, after this suit was brought, in which he stated that he had not abandoned his wife and did not intend so to do. There is not a particle of testimony in the record from which it may be inferred that the husband ever intended to abandon his wife, or that he had lost affection for her.

This action was brought on the 5th day of October, within a week after the husband went to Salinas, and the record shows that after this action was brought the husband made all reasonable efforts to induce the

wife to go to Salinas and live with him. We are satisfied that the facts of this case bring it within the rule announced by Mr. Justice McFarland in the case of *Driscoll v. Cable Railway Company*, 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203: "When a jury catches at a mere semblance or pretense of evidence for the purpose of somewhat equalizing financial conditions by taking money from one party and giving it to the other without legal cause, the trial judge should, without hesitation, set the verdict aside; and, in the event of his not doing so, this court will grant a new trial." In our opinion there was no evidence of desertion, without which the verdict was unwarranted. The mere fact that the husband without his wife's knowledge had gone to an adjoining county where he had remained for a period of seven days is not sufficient to establish desertion within the meaning of the statute. It was his right to select the home, and it was the duty of the wife to have gone to him when he sent her the money with which to come. The verdict in this case seems to have been rendered upon what, at most, is "a mere semblance of evidence." The court should have granted a new trial.

The judgment and order are reversed, and cause remanded for a new trial.

(6 Cal. App. 80)

STOWER v. KAMPHEFNER. (Civ. 350.)

(Court of Appeal, Second District, California. July 8, 1907.)

1. PARTNERSHIP — DISSOLUTION — CHARACTER OF ASSETS—FINDINGS.

Where, in a proceeding for the dissolution of a partnership, the referee's report found that the assets at the date of the report consisted of "unsold personal property, wagon scales, barn, two tanks, one coalhouse, one oilhouse," the report sufficiently found that the oilhouse, coalhouse, and barn were personal property.

2. SAME—INTERESTS IN REALTY.

Where a referee's report in proceedings for the dissolution of a firm purported to cover all its assets, but did not include any interest in land on which certain buildings belonging to the firm were located, it was immaterial that the court failed to find what interest, if any, the firm had in the lands.

3. APPEAL—REVIEW—PRESUMPTIONS.

A store building occupied by a firm was destroyed by fire in June, 1903, at which time the walls of the building belonged to the firm. A referee's report in dissolution proceedings failed to include the walls of the building as a part of the assets, but showed that a valuation had been placed thereon, and that defendant had been charged with "building" at the amount of such valuation. Held sufficient to justify a presumption on appeal that the walls had been legally disposed of, and that the proceeds had been applied in reduction of liabilities.

4. PARTNERSHIP — DISSOLUTION — ACCOUNTING—FINDINGS—DESCRIPTION OF REAL ESTATE.

In a proceeding for the dissolution of a firm, findings as to the assets of the firm were not objectionable for failure to specifically describe certain real estate owned by it.

5. SAME—PERSONAL DECREE.

No personal decree should be rendered in partnership dissolution proceedings against in-

dividual partners until the assets have been converted into money.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by A. C. Stower against Rosa Kamphefner. From a judgment for plaintiff, defendant appeals. Affirmed.

John E. Daly, A. D. Laughlin and R. B. Bidwell, for appellant. E. A. Miller and Bowen & Miller, for respondent.

SHAW, J. Action for accounting and dissolution of copartnership. The appeal is from the judgment. The issues were referred to a referee, and upon the filing of his report the court adopted the same as its finding, and rendered an interlocutory decree dissolving the partnership and ordered the referee to sell the assets then belonging to the firm and pay the proceeds received from the sale thereof to the creditors. The referee, after making the sale and disbursement of the proceeds in accordance with the order, so reported to the court, which thereupon rendered its final decree, from which this appeal is taken.

Appellant contends for a reversal of the judgment upon the ground that there is no finding as to whether or not certain buildings belonging to the partnership constituted real or personal property. The buildings in question consisted of an oilhouse, coalhouse, barn, and walls of a store building. The objection as to all of said buildings, other than the walls of the store building, is fully answered by that part of the report wherein it is found: "The assets at this date are * * * unsold personal property, wagon scales, barn, two tanks, one coalhouse, one oilhouse."

It is further contended the court failed to find what interest, if any, the partnership had in the lands upon which such buildings were located and in whom the title in said lands vested. The real estate upon which the buildings were erected was not included in the report of the referee, which purports to cover all the assets of the firm, and, as the assets did not include the land, it was immaterial in whom the title vested, inasmuch as it was not a partnership asset. The store building was destroyed by fire on July 16, 1903. The report of the referee was filed November 22, 1904. Among other assets, it was found that the firm at the time of the fire owned "walls of store building." These walls were not included in the assets at the time of making the report, and we must, therefore, conclude that, like other assets of the copartnership, they had been legally disposed of and the proceeds arising from such disposition applied in reduction of the liabilities. The valuation placed upon these walls is \$400. Appellant is charged with "buildings" in the sum of \$400, and it is apparent that the "walls of store building" reported among the assets after the fire and thereafter

charged to appellant as "building" are identical.

It is further objected that the findings do not describe the lot in Glendora, and hence there was no finding to support the description of this lot as set forth in the interlocutory decree. We can see no reason for giving a particular description of the lot any more than to particularly describe other of the assets belonging to the copartnership; nor does appellant cite us to any authority requiring such description.

There is no ground for the contention that the findings are inconsistent. The "sundry unpaid accounts, amounting to \$392.80," added to the "balance due A. C. Stower," separately found, constitute the "present liabilities" of \$1,610.26. "No personal decree is to be rendered against individual partners until the assets have been converted into money." *Clark v. Hewitt*, 136 Cal. 77, 68 Pac. 308; *Rosenstiel v. Gray*, 112 Ill. 282. It sufficiently appears there was a full and complete accounting of the copartnership affairs before the rendition of the final decree, and that all the partnership assets had been marshaled and converted into money before the decree was rendered.

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

8 Cal. App. 58

DENNIS v. CROCKER-HUFFMAN LAND & WATER CO. (Civ. 285.)

(Court of Appeal, Third District, California. June 26, 1907.)

1. WATERS AND WATER COURSES—IRRIGATION—OVERFLOW—ACTION FOR INJURIES—COMPLAINT—SUFFICIENCY.

A complaint alleging that defendant owned and operated a canal through which water was conducted for irrigation purposes, and, in connection therewith, at a place near plaintiff's land, a headgate, that the water washed out the headgate and portions of the bank and overflowed plaintiff's land, and that the damage thus caused was due to defendant's gross and willful negligence in failing to properly construct the canal and headgate, and in failing to properly maintain the headgate and to control the water in the canal, was sufficiently specific as to the manner in which defendant was guilty of the negligence charged.

2. APPEAL—REVIEW—HARMLESS ERROR—RULING ON DEMURRER.

Error, if any, in overruling a demurrer to a complaint on the ground of uncertainty, was cured where the answer denied all the material averments, and issues involving all the important questions which could arise were fairly made and squarely presented.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4093.]

3. SAME—DISCRETION OF COURT—ALLOWANCE AND PERFECTING OF APPEAL.

Code Civ. Proc. § 661, provides that where a motion for a new trial is made on the minutes of the court, the judgment roll, and a statement to be subsequently prepared, with a copy of the order, shall constitute the record on appeal, such statement to be proposed within 10 days of the entry of the order, or such further time as may be allowed, and to be served on the adverse party. *Held*, that where an

order for an extension of the time within which to prepare and serve a statement was signed at his home county within the 10 days by the judge who tried the case, and who resided in another county, at a considerable distance from that in which the action was tried, but through inadvertence on his part was not forwarded by him to the clerk of the court until after the expiration of 10 days, it was not an abuse of discretion to thereafter settle and allow the statement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2503-2505.]

4. EVIDENCE—BEST EVIDENCE—DESTRUCTION.

Plaintiff, a part of whose land was overflowed by water from defendant's canal, thereafter in gathering the potatoes grown on the land mingled those gathered from the unflooded portion with those from the flooded portion, so that it was impossible to state which part of the entire crop was from the portion not flooded and which was from the flooded portion. There was testimony that the portion not flooded was not as well adapted to raising potatoes as the flooded portion, and that a comparison of the potatoes gathered on the two portions of the land showed that those from the unflooded portion were larger in size and more extensive in yield. *Held*, that the fact that plaintiff did not keep the potatoes separate did not prevent him from showing the yield on adjoining lands, on the ground that by mingling the potatoes he destroyed the best and most accurate evidence on the questions of quantity and quality.

5. SAME—SIMILAR FACTS—SHOWING VALUE.

In an action for the destruction of a crop of potatoes caused by the overflow of the land where same were raised, other potato raisers in the neighborhood, whose lands were similarly situated and of the same character of soil, and who were raising their potatoes under the same conditions, were properly permitted to testify as to the yield from their lands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 401.]

6. DAMAGES—GROWING CROPS—DESTRUCTION.

The measure of damages for the destruction of a growing crop is the value of the crop in the condition it was at the time and place of destruction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 276½.]

7. EVIDENCE — COMPETENCY — WATERS — OVERFLOW—INJURIES—DAMAGES.

In an action for the destruction of a crop of potatoes caused by the overflow of land where they were planted, a witness was properly permitted to testify as to the crop gathered by him from the same land several years before the flood.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 434.]

Appeal from Superior Court, Merced County; Geo. E. Church, Judge.

Action by Howard Dennis against the Crocker-Huffman Land & Water Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank H. Farrar and James F. Peck, for appellant. J. K. Law and H. S. Shaffer, for respondent.

HART, J. This is an action for damages claimed to have been sustained by plaintiff by the destruction, through the alleged negligence of the defendant, of certain crops of sweet potatoes and beans while the same were under cultivation and growing on the

land of the respondent, and also for alleged injury to said land. It is alleged that the plaintiff, after all the necessary preparations therefor, in the year 1903, planted 10 acres of his land, situated in Merced county, in sweet potatoes and 3 acres thereof in beans; that "said crops grew well, and were cultivated, tilled, irrigated, and cared for by plaintiff at great expense, and were in fine growing condition and in high state of cultivation, and of great value until the damage thereto and destruction thereof caused by defendants as herein alleged, and would but for said damage and destruction have produced large and valuable crops of beans and sweet potatoes." The defendant is a corporation created, organized, and existing and operating its business under the laws of the state of California, and it is averred that it is and was, at and before the time at which this action was brought, the owner of and maintained, operated, and controlled, in the said county of Merced, in close proximity to the said land of plaintiff, a "canal or ditch into which and through and by means of which water has been conducted, collected, flowed, and carried and furnished to farmers and others by defendants, and in conjunction and connection with said canal or ditch defendant has during all of said times owned, operated, maintained, and controlled, at a place thereon near plaintiff's said land, a headgate constructed and used to control and regulate the flow of water in and through said canal or ditch." It is alleged that in the month of July, 1903, and while the crops of potatoes and beans mentioned were growing on said land of plaintiff, the water in said canal washed out said headgate and portions of the banks of the canal, and flowed therefrom upon and over the said land and through and over the said crops of plaintiff, washing out and carrying away a large quantity of said land and the soil thereof, and damaging and destroying the said crops growing thereon. It is alleged that the damage to and destruction of plaintiff's said property in the manner and by the means thus charged was through "the gross and willful negligence of the defendant in failing to properly construct said canal or ditch and said headgate, and its gross and willful negligence in failing to properly maintain, care for, and control said headgate, and to care for, manage and control the water in said canal." The specific damages alleged to have been thereby suffered by the plaintiff are: (1) Because of the washing out and carrying away of a certain part of the land and soil thereof, \$350. (2) For the damage to and destruction of the growing crop, \$1,200, the total amount being \$1,550, for which sum plaintiff prayed for judgment. A general and special demurrer to the complaint was overruled by the court. The answer makes general and specific denial (the complaint was verified) of all the material averments of the com-

plaint. The cause was tried by a jury, and a verdict returned for the plaintiff for the sum of \$500, and thereupon judgment entered in his favor for that amount. The appeal is from the judgment, accompanied by a statement of the case.

1. It is insisted that the court should have sustained the demurrer to the complaint on the ground of uncertainty. The particular objection to the complaint in this particular is that the allegations charging the defendant with the negligence in the management, control and operation of its ditch and the headgate thereto, and through which it is claimed the destruction of plaintiff's crops and damage to his freehold was caused, are not sufficiently direct and specific. The rationale of the rule requiring certainty in pleading is that the opposing party may be made fully cognizant of the facts upon which the plaintiff relies and which the defendant must meet by denial or in avoidance. The complaint might perhaps have been more particular and direct in its averments as to the manner in which the defendant was guilty of the negligence charged against it, yet we think its allegations are sufficient, and that by them the defendant was fully notified of the facts it was required to answer or otherwise combat, as the exigencies of its defense might demand. Moreover, the answer specifically denies all the material averments, and thus the issues involving all the important questions which could arise were fairly made and squarely presented. Therefore, even if it were conceded that the court erred in its ruling on the demurrer, the same was cured by the full and complete denials of the answer. Besides, it is not every erroneous ruling of the trial court in this regard that demands a reversal of the judgment. Substantial injury to defendant must have resulted from the action of the court. *Holland v. McDade*, 125 Cal. 353, 58 Pac. 9; *Jager v. Cal. Bridge Co.*, 104 Cal. 542, 38 Pac. 413; *Stephenson v. Deuel*, 125 Cal. 656, 58 Pac. 258; *Williams v. Casebeer*, 126 Cal. 77, 58 Pac. 380; *Rooney v. Gray Bros.*, 145 Cal. 753, 79 Pac. 523; *Code Civ. Proc.* § 475. The issuable facts having been tendered in such manner by the pleadings as to present for trial a clear-cut issue upon the two important questions of damage and negligence, the defendant could have suffered no injury, and, as the answer and the trial clearly attest, did not suffer any injury.

2. The defendant made a motion for a new trial upon the minutes of the court, and the same was denied. No appeal was taken from the order refusing a new trial. Objection is made by counsel for the respondent to the consideration upon this appeal of the statement of the case for the alleged reason "that the same was not served within the time allowed by law, and was received too late." It appears from the transcript that the motion for a new trial was denied by the court on the 28th day of December, 1905. On the 4th

day of January, 1906, the defendant prepared and forwarded to Hon. George E. Church, a judge of the superior court of the county of Fresno, who presided at the trial of this cause, a blank order and application for an extension of the time within which to prepare and serve his statement to and including the 29th day of January, 1906. Said blank order was received by Judge Church on the 5th day of January, 1906, and on that day signed by him; but through inadvertence on the part of the judge the order was not forwarded to the clerk of the court in which the cause was tried until the 9th day of January, 1906, on which day the order was received by said clerk, and thereupon filed with the other papers as a part of the record of the case. It will thus be observed that while the order extending the time was signed by the judge before the expiration of the time within which, under the statute, the statement may be proposed and served, it did not become a matter of record until two days after the lapse of that time. It is contended by the respondent that, because the statement was not served within the ten days allowed by the express mandate of the statute, the judge lost jurisdiction to settle and allow the same, and that appellant should, in order to have been relieved of the default, have made application for such relief under section 473 of the Code of Civil Procedure, upon the ground of "mistake, inadvertence, surprise or excusable neglect." Several cases are called to our attention which, it is claimed, support the contention of respondent. But the cases cited, upon the facts, are not precisely in point, nor have we been directed to any cases where exactly the same state of facts marks the proceedings involving the proposal, service, settlement and allowance of the statement. In *Vinson v. L. A. Pac. R. R. Co.*, 147 Cal. 483, 82 Pac. 53, where the defendant failed altogether to propose and serve the statement within the statutory time, and the court upon a showing of excusable neglect relieved him of his default by granting him further time within which to propose and serve such statement, the Supreme Court, speaking through Mr. Justice Angellotti, *inter alia*, says: "Whether or not the circumstances of a particular case are such that the mistake or inadvertence should be excused is a question the determination of which must of necessity be left largely to the court to which application is made, and it is well settled that this court will not interfere with the exercise of the discretion of that tribunal, except in a case where a clear abuse of discretion is apparent. Particularly is this so where the discretion is exercised in favor of the granting of the relief sought, as such action tends to bring about a conclusion on the merits, which is always to be desired" —citing *O'Brien v. Leach*, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105. In the case at bar it is patent that the failure to file the order

extending the time with the clerk of the court before the expiration of the time for the proposal and service of the statement expressly prescribed by the statute (section 681, Code Civ. Proc.) was not due to negligence on the part of the appellant or his counsel. Application for the extension was made and the order signed by the judge in ample time for the filing of the same before the lapse of the statutory period of 10 days. The fact, of which we are authorized to take judicial notice, that the judge who tried the case and to whom application was made for the extension of time resides in another and different county and a considerable distance from that in which the action was tried, and the further fact appearing in the record that he was at the time of such application at his own home, should also be considered in determining whether there was an abuse of discretion in the settlement and allowance of the statement. The statute in terms does not require an order extending the time within which to propose and serve a statement of the case to be filed, and, while we do not hold that the filing of such an order should not be made, we feel justified in declaring that, under all the circumstances shown by the record upon this point, there was no abuse of discretion by the judge in the settlement and allowance of the statement, but that under the principles announced in *Vinson v. L. A. Pac. R. R. Co.*, supra, it was properly settled and allowed. Besides, we cannot see how the appellant could have based an application for "relief," if the circumstances with reference to the proposal and service of the statement show that "relief" of any kind was necessary, upon "accident, surprise, inadvertence or excusable neglect" upon his part, in view of the fact that the delay in filing the order was imputable to the oversight or inadvertence of the judge himself. Without attempting to decide what would be the proper legal course in such a case, it may be suggested that it would, indeed, be rather a severe rule which would prevent a litigant from exhausting every means made available to him by the law for a full and final determination of questions involving what are at least claimed to be his rights through a circumstance over which it is impossible for him to exercise the least control. There are some other technical objections to the consideration of the statement which we think need not be noticed.

3. According to the evidence, the banks of the defendant's ditch broke opposite the land of plaintiff and flooded all said land, except a small piece in the southwest corner of the lot, and embracing about one-half of an acre planted in sweet potatoes. The land had been irrigated twice, and cultivated the same number of times. The plaintiff testified that "there was a good average stand of potatoes" growing on the land at the time it was flooded. The plaintiff harvested the potatoes growing on the small portion untouched and

uninjured by the water, and also gathered a few potatoes from that part of the land inundated. After gathering the potatoes he mingled them together; that is, he placed the potatoes from the unflooded land with those gathered from the flooded portion, so that it was impossible for him when testifying to definitely state which part of the 44 crates he succeeded in harvesting was from the land not injured by the water and which part was gathered from the land thus injured. Plaintiff testified, however, that there were about three times as many potatoes to the hill grown upon and harvested from the land not flooded than were taken from the flooded land, and that they were much larger than those taken from the flooded portion. It is contended by the appellant that it was the duty of respondent to have kept the potatoes harvested from the flooded and unflooded portions, respectively, in separate and distinct lots, because approximately the exact quantity and quality of the damaged potatoes could then have been determined by the quantity and quality of the potatoes not damaged. It is argued that in thus mingling the potatoes respondent destroyed the best and most accurate evidence which could have been offered upon the questions of quantity and quality, and therefore should not have been permitted by the court to introduce evidence as to the quantity or extent of the harvest upon adjoining lands for the purpose of establishing the probable yield upon his land had the same been unimpaired or uninjured by the overflow water from the ditch. The contention is without substantial merit. The fractional portion of the land undisturbed by the overflow waters from the ditch is not, according to the testimony, as well adapted to sweet potato culture as the other or flooded portions, because the latter is lower in altitude and possesses a sandy soil peculiarly suitable for the growing of such crops. Therefore, to take the crop gathered from the higher land, not so productive as the other, as the criterion, would, of course, have been unfair and unjust. Besides, the testimony shows that the plaintiff, after the water had receded and disappeared from the land, harvested about $2\frac{1}{2}$ acres of the potatoes, the least damaged by the water, on the flooded land, and that a comparison in quantity and quality of the potatoes harvested on the two portions of the land—the part flooded and the part not flooded—showed that those from the latter portion were, as before stated, larger in size and more extensive in quantity. Other witnesses—farmers growing sweet potatoes on land in the neighborhood of the plaintiff's land, and which land is similarly situated and of the same character of soil and cultivated under the same conditions—were permitted to give testimony, without objection, as to the number of sacks of potatoes grown on their lands the year in which the damage here complained of was sustained, and also as to the average weight

of the sacks. This testimony was competent and relevant, because it tended to show what, under ordinary circumstances, would have been, in all probability, the yield of the crop but for the damage sustained by the overflow of the water from the ditch.

4. It is claimed that the court erred in admitting testimony as to the market value of sweet potatoes raised in the neighborhood of the plaintiff's land in the year in which the alleged damage was suffered. This testimony was, of course, directed to the question of the ascertainment of the value of the growing crop at the time of its alleged destruction. In the recent case of *Teller v. Bay & River Dredging Company* (Cal. Sup.) 90 Pac. 942, the Supreme Court declares that the true rule upon the point under consideration, as well as upon the character of the evidence generally which is admissible for the purpose of determining the amount of compensation which should be awarded in cases like the one at bar, is stated in the case of *Lester et al. v. Highland Boy Gold Mining Company et al.* (a Utah case), reported in 78 Pac. 341, 27 Utah, 470, 101 Am. St. Rep. 988, as follows: "In cases of destruction of growing crops, it is proper and important to introduce and admit evidence showing the kind of crops the land is capable of producing, the kind of crops destroyed, the average yield per acre of each kind on the land not destroyed and other similar lands in the immediate neighborhood, cultivated in like manner, the stage of the growth of the crops at the time of injury or destruction, the expense of cultivating, harvesting, and marketing the crops, and the market value at the time of maturity, or within a reasonable time after the injury or destruction of the crops, and, while all such evidence may be considered by the jury in determining the amount of damages, if any, still the true measure of compensation is the value of the crops in the condition they were in at the time of their injury or destruction." And the rule is so declared in *Teller v. Bay & River Dredging Company*, 2 Cal. App. Dec. 224; *Shoemaker v. Acker*, 118 Cal. 239, 48 Pac. 62, and *Ellis v. Tone*, 58 Cal. 289. The rule as thus enunciated answers many other objections urged by the appellant against the record in the case at bar, both as to evidence admitted and instructions given and refused by the court.

5. Evidence was offered and received for the purpose of showing that the land of respondent was peculiarly adapted to the cultivation of sweet potatoes. The appellant, in his answer, denies that the land in question ever produced at any time "any crops or crop of beans or sweet potatoes of any value whatever." The witness James was allowed to testify that several years previously to the year in which the alleged damage occurred he had planted a portion of said land in sweet potatoes, and had harvested therefrom seventy or eighty sacks to the acre. It is objected that this testimony related to a

time too remote from that at which the alleged injury was inflicted to render it admissible in any view. The objection goes rather to the weight than to the competency and relevancy of the evidence. We think it was clearly proper as showing or tending to show that the soil of the land was of a nature which rendered it peculiarly suitable for the cultivation of potatoes, and for that purpose the land had special value. The fact that the land was profitably used for potato growing five or six or eight years previously to the year in which the damage was done bore directly upon its value for such purpose at the time of the injury or destruction.

Errors are assigned in the giving and the rejection of certain instructions by the court. We have examined with solicitous care the instructions presented to the jury by the court, and are of the opinion that the law upon all the vital points involved was fully and clearly declared.

We do not regard it necessary to notice all the points urged here involving criticism of the rulings of the court in the admission and rejection of evidence. It is sufficient to say that we have given the record careful consideration, and are convinced that it discloses no errors prejudicial to the defendant. The case seems to have been carefully and fairly tried, and the judgment is, in our opinion, just, and should not be disturbed.

The judgment is, therefore, affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

6 Cal. App. 5

Ex parte ACKERMAN. (Cr. 48.)

(Court of Appeal, Third District, California.
June 20, 1907. On Rehearing, July
18, 1907.)

1. ANIMALS — LICENSES — ORDINANCES — DOGS—REPEAL.

An ordinance imposing a license tax on the keeping of dogs is not repealed by implication or a subsequent ordinance imposing a license tax on every kind of business authorized by law, all shows, etc.; no reference being made to the keeping of dogs.

2. MUNICIPAL CORPORATIONS—ORDINANCES—REPEAL—HOW ACCOMPLISHED.

To accomplish the repeal of an ordinance, there must either be language employed expressly declaring such intention, or there must exist in the subsequent ordinance language so inconsistent with the provisions of the former as to necessarily effect a repeal by implication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 268.]

3. STATUTES—REPEAL—HOW ACCOMPLISHED.

To accomplish the repeal of a statute, there must either be language employed expressly declaring such intention, or there must exist in the subsequent statute language so inconsistent with the provisions of the former as to necessarily effect a repeal by implication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 220.]

4. MUNICIPAL CORPORATIONS—ORDINANCES—LICENSES—DOGS.

An ordinance imposing a license tax on and regulating the keeping of dogs is not incon-

sistent with Pol. Code, § 3366, as amended in 1901, authorizing cities to license any kind of business not prohibited by law; the ordinance being one of police regulation, and the evident object of the Code being to restrict the power exercisable by municipalities to impose license taxes to the purpose of regulation only.

5. SAME—POLICE POWER—NECESSITY FOR LEGISLATIVE AUTHORITY.

Municipalities need not look to the Legislature as the source of their power to enforce local, police, sanitary, and other regulations deemed needful for their welfare and that of their inhabitants, since Const. art. 11, § 11, expressly vests in them plenary power to enforce such police, sanitary, and other regulations as they may determine shall be necessary for health, peace, comfort, and happiness of the inhabitants, provided such regulations do not conflict with general laws; and the Legislature may not limit the exercise of such power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1308.]

6. ANIMALS—LICENSES—ORDINANCES—DOGS.

An ordinance imposing a license tax on the keeping of dogs is not invalid for unreasonableness or uncertainty in not fixing any particular time at which the tax must be paid, and in not defining the term "current year."

7. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—LICENSES.

An ordinance imposing a license tax on the keepers of dogs is not invalid for unreasonableness and as providing for the taking of property without due process of law, because providing for the destruction of a dog upon which no license tax has been paid two days after the dog had been impounded unless it has been redeemed, without notifying the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 831.]

8. ANIMALS—LICENSES—DOGS.

An ordinance requires keepers of dogs to pay the town marshal an annual license tax, and to attach a seal or device to the dog's collar, provides that the marshal shall seize and impound any dog upon which a license shall have not been paid, and that at the end of two days no person claiming such dog and paying the license therefor, the marshal shall destroy such dog, and provides that every person violating the ordinance shall be guilty of a misdemeanor, etc. *Held*, that the ordinance is not objectionable as uncertainly stating what specific acts shall constitute a violation thereof, as not certainly showing whether one accused must violate all or only a part of the provision of the ordinance before he can be adjudged guilty, as authorizing the marshal to commit a trespass by going on the premises of a citizen without a warrant or other process.

On Rehearing.

9. MUNICIPAL CORPORATIONS—POWER TO IMPOSE LICENSE TAX ON DOGS.

A municipality may impose a license tax upon dogs as an incident of the regulation of their management or control.

10. SAME—ORDINANCE—CONSTRUCTION.

An ordinance providing that the owner of a dog upon the payment of a required license tax shall attach to a collar to be worn by the dog a seal or device as evidence of the dog's ownership and of the payment of the tax, providing for destruction of dogs upon which the tax has not been paid, and providing a penalty for noncompliance with its terms, is an exercise of the police, and not the taxing power.

11. ANIMALS—DOGS—REGULATION—POWER OF STATE.

The power of the state to regulate the control or use of dogs is not dependent upon the question whether they are property.

Application of Walter Ackerman for a writ of habeas corpus. Petitioner remanded.

J. W. Preston, for petitioner. A. J. Thatcher, for respondent.

HART, J. The petitioner was arrested and is detained in custody by the city marshal of the town of Ukiah, under a warrant of arrest issued upon a complaint filed in the recorder's court of said town, charging him with a misdemeanor under the provisions of an ordinance designated and known as "Ordinance No. 15" of said city of Ukiah, passed by the board of trustees thereof on the 14th day of November, 1887. It is alleged in the petition for the release of petitioner upon habeas corpus that the complaint upon which the warrant of arrest was issued against the prisoner "does not state a public offense or any offense whatever either against the laws of the state of California or against any or either of the ordinances of the town of Ukiah City." Among the particular objections urged against the ordinance, the provisions of which petitioner is charged with having violated is the contention that said ordinance "is invalid and void for the reason that the same has been repealed by section 3366 of the Political Code and also by the provisions of Ordinance No. 119 of said Ukiah City," and, furthermore, that said ordinance "is illegal and void for the reason that the same is ambiguous and uncertain upon its face and is also uncertain in its terms." The ordinance reads as follows, after the title and enacting clause:

"Section 1. Every person who owns or harbors a dog within the limits of the town of Ukiah City, shall pay to the marshal of said town an annual license therefor of two dollars.

"Sec. 2. It shall be the duty of the marshal to collect the same, and to deliver to the person paying the same a license, which shall describe said dog, together with a seal or device impressed thereon, which the owner shall attach to a collar to be worn by said dog.

"Sec. 3. It shall be the duty of the marshal to seize and impound any dog owned or harbored within the corporate limits of such town on which such license shall not have been paid.

"Sec. 4. At the end of two days, no person claiming said dog, and paying the license therefor, or producing a license showing previous payment for the then current year, the marshal shall destroy and bury such dog.

"Sec. 5. Every person who shall wilfully and knowingly violate this ordinance shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than ten, nor more than fifty dollars, or by imprisonment not exceeding fifty days, or by both such fine and imprisonment."

The sixth and last section of the ordinance provides that certain fees shall be paid to the

marshal as compensation for the services which the ordinance requires him to perform in the matter of the enforcement of its provisions.

Section 3366 of the Political Code, as amended by the Legislature of 1901, with whose provisions it is claimed that the ordinance under which the petitioner is held in custody is at cross purposes, authorizes "boards of supervisors of the counties of the state, and the legislative bodies of the incorporated cities and towns therein, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise," to license "all and any kind of business not prohibited by law, and transacted and carried on within the limits of their respective jurisdictions," etc. The purpose of Ordinance No. 119 of the city of Ukiah, which was passed by the board of trustees of said city on the 20th day of June, 1904, and which, it is contended, repealed the ordinance under consideration, may be shown by its title, which is as follows: "To license, for the purpose of revenue and regulation, of every kind of business authorized by law and transacted and carried on within the town of Ukiah City, and all shows, exhibitions and lawful games carried on therein. To fix the rate of license tax upon the same and to provide for the collection of the same by suit or otherwise." This ordinance then prescribes the amount of the annual license tax which shall be paid for carrying on and conducting the various kinds of businesses and occupations prosecuted within the corporate limits of said town of Ukiah. There is no attempt made in the last-mentioned ordinance to license or regulate the ownership of dogs within the municipal limits of said town, nor is there any reference whatever therein to those animals. As Ordinance No. 15 and Ordinance No. 119 deal with entirely and widely different subjects, we are unable to appreciate the force, if any it possesses, of the suggestion of counsel for the prisoner that the former ordinance has been repealed by the latter. There is no language to be found in Ordinance No. 119 expressly repealing Ordinance No. 15, nor are the subject-matters of the two ordinances so correlated or connected as to impart to Ordinance No. 119 the effect of repealing by implication Ordinance No. 15. The general object of the two ordinances is, it is true, the same—the regulation of certain matters of local concern to the municipal corporation and its members—but the particular subjects of regulation treated by the two ordinances are so diverse that if one of them should, in fact, be repealed, and the other omitted to expressly provide for the licensing and regulation of the subject-matters or occupations dealt with by the abrogated measure, such matters or occupations would be immune from interference by the local authorities (unless, of course, they should become nul-

sances by the manner of their operation) and could be maintained and prosecuted without a municipal license or other authorization from the corporation. It is scarcely necessary to suggest that the adoption of an ordinance licensing and regulating the business of a banker or a baker or a laundry could not operate, per se, to repeal an ordinance, previously passed, licensing and regulating the retail sale of intoxicating liquors. To accomplish the repeal of an ordinance or of a statute, there must either be language employed expressly declaring such intention, or there must exist in the subsequent ordinance or statute language so inconsistent with the provisions of the former as to necessarily effect a repeal by implication. The salient parts of the two must, in other words, be so incongruous and wanting in harmony as to make it impossible for the two to stand together.

Nor is there anything inconsistent between the provisions of the ordinance in question and those of section 3366 of the Political Code. Ordinance No. 15 was undoubtedly designed as and is one of police regulation, and the evident object of the section of the Political Code referred to, as amended by the Legislature of 1901, is to restrict the power exercisable by boards of supervisors and of the legislative bodies of the incorporated cities and towns of the state, to impose license taxes, to the purposes of regulation only. But counties, cities, and towns are not required to seek in any legislative enactment for the source of their power to make and enforce within their respective limits all local, police, sanitary, and other regulations which they may deem needful and requisite for their welfare and that of their inhabitants. The Constitution has, by direct grant, vested in them plenary power to provide and enforce such police, sanitary, and other local regulations as they may determine shall be necessary for the health, peace, comfort, and happiness of their inhabitants, provided such regulations do not conflict with general laws. Article 11, § 11, Const. And the Legislature has no authority to limit the exercise of the power thus directly conferred upon cities, counties, and towns by the organic law. The only test is, therefore: Do such regulations conflict with any general law of the state? If they do not, then they have binding authority upon all inhabitants of the city or county or town for which they are established upon all the subjects to which they relate and which legitimately come within the scope of the power granted by the Constitution. Ex parte McClain, 134 Cal. 111, 66 Pac. 69, 54 L. R. A. 779, 86 Am. St. Rep. 243; Ex parte Lacey, 108 Cal. 326 et seq., 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93. Our attention has been directed to no general law, with the provisions of which the ordinance, whose validity is here challenged, is in conflict.

But the learned counsel for petitioner de-

clares that the ordinance is unconstitutional because it is unreasonable and uncertain, and therefore oppressively burdensome. The argument in support of this contention is that the ordinance does not fix any particular time at which the tax must be paid; that the words "current year," as used in the ordinance, are indefinite and uncertain as to the time when the tax shall be paid, and it is said that, if it be meant by those words that the tax is to cover the period "from January 1st to December 31st, any person who became the owner of a dog on the 31st day of December, 1907, would be liable for the full amount of the tax, although he owned the dog less than a day, whereas, another person who owned the dog on January 1st, 1907, would pay no more than he would." The unreasonableness of the ordinance is also found in the fact that it provides for the destruction of a dog upon which no license tax has been paid two days after the animal has been impounded, unless he has been redeemed, without notifying the owner of such contemplated destruction, and this is said to be the taking of property without due process of law. Other objections to the reasonableness of the ordinance are that it does not with certainty provide what specific acts shall constitute a violation thereof to thus render the violator amenable to the punishment prescribed therein; that it is uncertain in that it does not appear clear whether the accused must violate all or only a part of the provisions of the ordinance before he can be adjudged guilty of a misdemeanor thereunder; that the ordinance authorizes the city marshal to commit a trespass by going upon the premises of a citizen without a warrant or other process and capture and take to the pound a dog upon which a license tax has not been paid. In short, no conceivable ground or reason upon which an objection could be urged against the validity of the ordinance has been overlooked. But a careful examination of the provisions of this local regulation does not, in our opinion, bear out or sustain any of the points which counsel has rather ingeniously attempted to maintain against the constitutional soundness of the measure, or against its validity for any reason. It is not only not ambiguous and uncertain in its terms, but its language is clear and unmistakable and easy of comprehension, nor are its provisions and terms characterized by unreasonableness. On the contrary, the ordinance appears to represent only a wholesome and salutary exercise of the power of police. The purpose sought to be attained by the ordinance is not only commendable in the highest degree, but is of paramount importance to all communities possessing a considerable number of inhabitants. Common experience justifies strenuous opposition to (and wisely sanctions the curbing of) unbridled, and, it may be added without facetiousness, unmuzzled, liberty in the canine species, particularly in urban communi-

ties. Much has been written and spoken of the dog and his many noble qualities. It may truthfully be admitted that innumerable instances of the unflinching loyalty and faithfulness of that quadruped to his master or to a friend to whom he has become attached are recorded, and have justly inspired writers of intense and ardent natures and of vivid and lively imaginations to soar to supernal heights of eloquence and of poetic fancy in their descriptive song of the noble attributes of the dog. There can be nothing farther from the purpose or disposition of the writer of this opinion to detract from or underestimate the worth of a good, conscientious, law-respecting dog—a canine content to remain at all times within the limits of his own balliwick and there regale himself in an atmosphere of perfect ease and comfort, with frequent delightful excursions to the land of Hypnos, and at the same time ever alert to the highest interests of his master, and, generally speaking, scrupulously faithful to all the pacific and innocent pursuits which have come within the curriculum of his education. There can be no doubt that many dogs, for their acts of heroism in saving human life or preventing injury to their masters when surrounded by appalling circumstances of danger, deserve a conspicuous place in poetry and song; but there is no inconsistency between this observation and the suggestion that when the poet, as, under the entrancing spell of ethereal dreams, in winged boat, he flits "from mount to mount through Cloudland," permits fancy to get the upper hand of fact, and thus unconsciously wanders from concrete cases to abstractions in his perfervid panegyrics upon the canine, he slips far over and beyond even the boundary line established and tolerated by poetic license. It is, we think, safe to say that those writers who have written such glowing tributes to the dog in the abstract have never had any actual experience with a monstrous canine of the bull family, to which they were strangers. There is neither poetry nor sentiment in the dog, as a rule, especially when one meets him upon what he conceives to be his own preserves, for such an occasion is generally conceded to be an appropriate time to cast song and sentiment to the winds and to get busy by moving with all possible haste a comfortable distance beyond the danger line. But it must be admitted that there are really some good-tempered, well-behaved dogs, which are, it may be granted, quite useful in their way. But the other kind become good dogs only when they have ceased to be able to exercise the power of respiration.

At the common law, the dog was classed in the category of animals *feræ naturæ*, and many of them should be so classed now. We are safe in going further and declaring that the very best of them can, with less effort and in a shorter space of time, make themselves more of a nuisance to the square inch

than any other domestic quadruped of which we have any knowledge. Even those having the good fortune to have received the fullest measure of civilizing care, nursing, petting, and general disciplinary domestication, from puphood to the danger point of maturity, have not had the instincts of savagery inherited from their distinguished ancestral relative and implacable enemy of the human race, the wolf, so mollified as to render them altogether disposed to maintain uniformly peaceful relations with the human family. For it may be accurately declared that nearly all dogs are friendly only with their masters and immediate family, and that strangers, however honest and peaceful their intentions may be, are almost invariably treated by them as intruders, having no rights that a dog is compelled to respect. In these observations, though rather *dog-matically* asserted, we think no one of ordinary experience in the common, all-around affairs of this mundane sphere will hesitate to concur. If the killing by the marshal of a dog, without formally notifying the owner of the time and place of the proposed execution, is violative of the injunctions of our constitutions against the taking of property without due process of law, how much more flagrantly is that sacred fundamental principle outraged in the vicious act of an ill-tempered, snapping dog, which, without previous warning or other due notice and without provocation, wantonly deprives a human individual, who has never trespassed upon or otherwise invaded his rights, of a quantity of his avoirdupois! This suggestion is offered only in illustration of one of easily a hundred available reasons which could be advanced in support of a local legislative measure whose object is to regulate the ownership and consequently, as far as it can be done, the behavior of dogs. To effectually accomplish this end, the owner of the dog, by the provisions of the ordinance under review, for the privilege of such ownership, is required to pay a license tax, or, in default thereof, must bear the penalty prescribed; or, in case the dog has no owner, or his owner does not think enough of him to pay the license, then the marshal may destroy him.

Many other reasons than those already suggested could be given why the ordinance here is not only reasonable, but an important, regulation. The dog is subject to hydrophobic fits, and the laceration of the flesh of a human by a dog thus afflicted will almost invariably inoculate such person with the poison of the malady, usually with a fatal result. And, too, as some of the cited authorities suggest, if a dog commits damage for which his owner may be held liable, such an ordinance as the one here would materially aid in the identification of the owner, assuming that he has paid the tax, and would therefore the better enable the injured party to invoke the rule of *respondet superior*! But it is unnecessary to enumerate all the

excellent and unanswerable reasons, any one of which is sufficient to sustain the policy and the necessity of such an ordinance. Every city, town, and county should have such a measure and give its provisions full, hearty, and complete enforcement.

Certain of the complaints urged against the validity of the ordinance before us necessarily assume that the officers, in the enforcement of its provisions, will themselves commit infractions of the law. No such assumption or presumption can be indulged. Two modes of executing the terms of the ordinance are prescribed: (1) Where, because of failure or refusal to pay the license tax, the owner of the dog may be complained of in the city court, arrested upon a warrant and prosecuted in the manner prescribed by the law in all such cases. (2) Where the dog is found upon the public streets, bearing no proper evidence of the tax having been paid, the animal may be impounded, and after two days from such impounding may, unless redeemed by the owner, be by the marshal destroyed. The marshal would, of course, have no right to go upon the private premises of a citizen upon an official mission without being "armed with process," except where, upon such premises, he might himself witness the commission of a crime. The objection as to the time at which and the exact period for which the license is to be paid has no merit. As we understand the terms of the ordinance, the license tax of \$2 is to cover a calendar year, and it is, so far as the proposition may affect the validity of the ordinance, immaterial at what particular time it is paid. The illustration submitted by counsel in his effort to sustain his contention of the unfairness and unreasonableness of the ordinance of where a person might become the owner of a dog on the 31st of December, 1907, and is forced to pay the license tax for the entire year just closing, suggests nothing militating against the reasonableness of the measure. The new owner or master of the dog in that case would have no license to pay for the year about to terminate if the previous owner had already paid the tax. If the previous owner had not done so, it would only be reasonable and just that the subsequent owner should do so, not only because the tax upon the dog is due from somebody, if there is and has been an owner, but also for the reason that a person who becomes, by purchase or gift, the owner of a dog upon which an authorized license tax remains unpaid assumes, in acquiring rights under such ownership, the burden of any duty with reference thereto, which the government, under its power, may have seen fit to impose. There is nothing in the point that it is difficult to determine from the ordinance how much thereof—whether all or only a part—an accused person must violate before he may be adjudged guilty of a misdemeanor. It is as clear as language can make it that a refusal by a citizen owning or harboring a dog within the

corporate limits to pay the license as required would bring his conduct within the penal purview of the ordinance. The regulation requires nothing else at the hands of such citizen than the payment of the license. There are certain provisions prescribing the duties of the marshal under the ordinance. The willful failure of that official to perform those duties would undoubtedly subject him to the penalty of a misdemeanor under the terms of the measure.

Counsel questions the purpose of the ordinance to be that of regulation because it contains no provision prohibiting the ownership of dogs within the corporate limits of the town. A conclusive answer to this unique suggestion is, first, that there is no power in municipal or other authorities to prohibit the ownership of dogs, no more than there is such power to prohibit the ownership of any other species of property; second, if such power existed, there certainly would be a striking incongruity between the clause prohibiting such ownership and the one licensing it.

The ordinance is, as we have declared, a reasonable and appropriate exercise of the power vested by the Constitution in the cities, towns, counties and townships of the state.

The petitioner will be remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Rehearing.

HART, J. In his petition for rehearing counsel for petitioner suggests that in the decision of the case we overlooked the main point upon which he relied, and misconceived his point "as to the force of section 3366, Pol. Code." The main point referred to, although stated by counsel in his petition in the nature of a number of queries, is briefly this: That the ordinance in question represents the taxing rather than the police power, because the license provided for therein amounts to a per capita tax upon dogs, and therefore there is imposed by the ordinance a restriction upon the ownership of those animals. In other words, his contention is that the ordinance authorizes a tax upon the ownership of dogs and not an attempt to regulate their use. We think that perhaps in one part of the main opinion we unhappily used language which might imply that we held that a license for regulatory purposes might be imposed upon the ownership of dogs. What we intended to say then and what we do say now is that a license tax upon dogs may be imposed as an incident of the regulation of their management or control, or, as counsel prefers to express it, of their use. The very terms of the ordinance before us show it to be a regulatory measure. It provides that the owner of the dog, upon the payment of the required license tax, shall attach to a collar to be worn by said dog a seal or device as evidence of the ownership of the dog and

of the payment of said license tax. It further provides for the enforcement of a penalty for a noncompliance with the law, or "for the doing of some prohibited act." And in that manner the power of police is exercised. *Merced County v. Helm*, 102 Cal. 163, 36 Pac. 399. The ordinance also provides for the destruction of a dog upon which a license tax has not been paid, and which does not, therefore, bear a collar to which is attached the seal or device referred to. All these provisions, in their very nature, demonstrate that the ordinance is intended as an exercise of the police and not of the taxing power. No American court has ever questioned the right under the police power to regulate the control, management or use of dogs. The dog became a domestic animal originally by virtue of legislative enactments, and but for statutes imparting to him the status of property in all the states and countries where the common law is the foundation of their jurisprudence the dog would now have no standing before the law, except where, as in the case of other wild animals, he was reduced to possession, and even then, should he depart from his possessor without animus revertendi, he thus placed himself again beyond the protection of the law. As illustrative of some of the reasons upon which laws regulating property in dogs are founded, we shall here present extracts from some of the many authorities upon the subject. In 67 Am. St. Rep. p. 298, the editor, in an extended note upon the subject, says: "That property in dogs may be subjected to regulation by the state in the exercise of its police power cannot be questioned. * * * Such regulation usually runs in the direction of imposing license taxes upon the keeping of dogs, and it is well settled that the summary destruction of dogs may be authorized when such regulations are not complied with." In *Jenkins v. Ballantyne*, 8 Utah, 245, 30 Pac. 760, 16 L. R. A. 689, it is said: "The police power of the state has been used to regulate and control property in dogs to a greater extent than property in any other class of domestic animals. It is a peculiar kind of property. Such animals increase rapidly. They are usually of but little expense to their owners when allowed to run at large, and in a domestic state they retain to a considerable degree their wild, mischievous, and ferocious natures. Their trespasses and invasions of rights not belonging to their masters are often such as are impossible to prevent and when the mischief is done sometimes it is impossible to identify the dog or his owner, and when found the latter is sometimes as irresponsible as the former. In fact, judicial process and inquiry is altogether inadequate to redress such wrongs. Hence such laws and ordinances as those in question are adopted, requiring the owner of dogs to register and collar them. By such means the owner is ascertained and made responsible.

and all dogs not deemed worth the trouble and expense of registration are outlawed when at large and liable to be killed."

Counsel undertakes to discover a distinction between the law as expounded by the courts in certain other jurisdictions and the law in California because in the former the dog is only qualified or base property, whereas, in this state the statute impresses him with the full status of property. So far as the vital question involved in this discussion is concerned, it can make no difference whether the dog is property or not. The power in the state to regulate its control or use is not dependent upon that proposition. The dog is not, because of having been constituted property by legislative enactment, hedged about by a sacredness or surrounded by a halo that will prevent the police power from extending to him if the governing or other duly constituted authorities of an incorporated city or town deem it necessary for the peace and comfort of the community to regulate its use or control within the limits of such city or town. Ordinances prohibiting the running at large within the limits of towns and cities of horses, cows, sheep, hogs, and other useful domestic animals, and authorizing their impounding when found so running at large and even their sale, if not redeemed, might be said with equal reason to restrict in effect the ownership of those animals within the limits of such cities and towns, and such ordinances have been upheld as a wholesome exercise of the police power. Of course, such ordinances are designed only as a regulation of the use and management of those animals, and do not, in fact restrict or interfere with ownership. The ordinance here does not, it will be readily noted, either expressly or by implication, attempt to interfere with the ownership of dogs. As stated in the main opinion, the authorities could not by ordinance or otherwise disturb the right of ownership of those animals. Any person ambitious to own a dog of any kind which may best suit his fancy may not only exercise the right of such ownership, but may keep and maintain the animal within the limits of Ukiah City, if he complies with the regulations as to its management, control, or use prescribed by the ordinance. The owner of a cow must, in order to maintain and keep that useful animal within the limits of a city or town, obey the regulations of such city or town with reference to such animals, or be subjected to the penalties of the ordinance. And his ownership of the cow is thus in no manner or degree interfered with. In short, the terms of the ordinance only involve the application of the familiar principle that every person shall so use his own property as not to injure the rights of other persons or of the public.

We do not think we misconceived counsel's position as to the effect of section 3366 of the Political Code. His argument upon

this point is that that section at the time of its enactment declared the full power of a municipal corporation to license for regulation. What we said in the main opinion was: "Nor is there anything inconsistent between the provisions of the ordinance in question and those of section 3366 of the Political Code," and then declared that incorporated cities and towns derived their power to make all needful police regulations from the Constitution itself. Our position in the main opinion was, and we know of no reason for changing it, that section 3366 of the Political Code does not, nor has the Legislature the right to do so at all, limit the power granted by the Constitution to counties and to cities and towns to which that section may be applicable to adopt such police regulations as they may decide to be requisite for their welfare, and, if a license tax be deemed to be essential to the full accomplishment of the purposes of such regulations, any attempted legislative inhibition against it is absolutely void. The only qualification to be found in this constitutional grant of power to counties and incorporated towns and cities is that such local regulations shall not conflict with general laws. By this is clearly meant that the Legislature may itself, by general laws, exercise the power thus conferred upon such cities and towns and upon counties, and that local regulations adopted by municipal boards not in harmony with such general laws would, of course, be void and inoperative. In other words, the Legislature may itself exercise the power granted by the Constitution, but cannot limit the exercise of such power either by itself or by the local governing bodies. As we understand counsel, his contention is that the section of the Code referred to limits the power of licensing for regulation to a "business" of some character, and that a dog is not a "business" in contemplation of that section; hence any attempt to license a dog as an incident of a regulatory measure is contrary to the section named. The statement of the proposition operates as its own refutation. Moreover, when counsel admits, as he appears to do, the right of a municipal corporation to regulate property in a dog or the use thereof, he necessarily admits that such regulation may take the form of a license, for it has never been doubted for a moment, either by the text-writers or the courts, that when a business or other matter which may be the subject of police regulation is so regulated a license may be required as a condition to carrying on such business or to the maintenance of whatever may be the subject-matter of such regulation, and a license fee imposed. The fee exacted for such license is not, as we think we have shown, intended for purposes of revenue, but is designed to cover the expense of supervision or the proper enforcement of the ordinance. In a case like the one at bar, the fee is directed to the ac-

compleishment of a double object: (1) To meet the expense of enforcing the ordinance. (2) The discouragement of the keeping of dogs within the limits of incorporated cities and towns, etc.

Counsel appears to be at a loss to understand what privileges a dog owner receives in return for the license fee. The obvious answer to the suggestion is that a dog upon which the license tax has been paid is, under the special protection of the law suffered to run at large with impunity. The paramount consideration in the adoption of such a regulation, however, is in the protection it affords the citizens of the city or town against the indiscriminate running at large of dangerous and nuisance-producing dogs without responsible sponsors.

A rehearing is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

5 Cal. App. 400

CORDINER v. LOS ANGELES TRACTION CO. et al. (Civ. 336.)

(Court of Appeal, Second District, California.
April 16, 1907. Rehearing Denied
June 13, 1907.)

1. DAMAGES—PERSONAL INJURY—FUTURE CONSEQUENCES—EVIDENCE.

To justify a recovery for future consequences resulting from a personal injury, the evidence must show with reasonable certainty that such consequences will follow from the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 505, 506.]

2. SAME—ADMISSIBILITY.

Where, in an action for personal injury, the evidence showed that plaintiff sustained a fracture at the base of the brain, the testimony of physicians that in a majority of cases, where the injury consisted of a fracture at the base of the brain, epilepsy, paralysis, or mental deterioration would result in the future, was admissible to prove future suffering on which the jury could award damages for future injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 479-481.]

3. CAUSES—INJURY TO PASSENGER—JOINT LIABILITY—DEFENSES—LAST CLEAR CHANCE.

Where a passenger on a street car injured in a collision between the car and a car operated by another company sued both companies, and showed that the collision was due to the joint or concurrent acts of negligence of the two companies, an instruction confining a recovery against the company having the last clear chance to avoid the collision and neglecting to act on it was properly refused; the rule of last clear chance being only applicable to cases where the defense is contributory negligence.

4. SAME.

One having a right to recover against either of two joint wrongdoers or both cannot, in an action against both, be involved in litigation to determine the question of the respective rights of the wrongdoers as against each other.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Margaret Cordiner, a minor, by Melissa Cordiner, her guardian ad litem,

against the Los Angeles Traction Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Bicknell, Gibson, Trask, Dunn & Crutcher (N. S. Sterry, of counsel), for appellant Los Angeles Railway Co. Harris & Harris and Byron L. Oliver, for appellant Los Angeles Traction Co. Hunsaker & Britt, for respondent.

SHAW, J. This is an action to recover damages for personal injuries sustained by plaintiff while lawfully riding on a street car operated by the Los Angeles Traction Company, one of the defendants. The Los Angeles Traction Company owned a street car line on Sixteenth street, in Los Angeles, over which it was running its cars in carrying passengers. The Los Angeles Railway Company owned and operated a street car line on Grand avenue, in said city. On January 31, 1903, a collision occurred at the intersection of West Sixteenth street and South Grand avenue between the car of the Los Angeles Traction Company, on which plaintiff was a west-bound passenger on said Sixteenth street, and a north-bound car of defendant Los Angeles Railway Company on said Grand avenue, which collision, it is charged, was due to the negligence and want of care of the servants of said defendants, and wherein, as a result of said collision, plaintiff was violently thrown from the car of the Los Angeles Traction Company, on which she was riding as a passenger, by reason whereof she sustained injuries, for which, upon the trial, she had judgment against defendants for damages in the sum of \$5,000. Both defendants appeal from orders of the court denying their motions for a new trial. Defendants ask for a reversal, first, upon the ground of error in the admission of testimony of medical experts as to future consequences of the injury; second, in the refusal of the court to give certain instructions requested by defendant Los Angeles Railway Company.

Appellants concede plaintiff's right to recover, but contend that the amount of recovery should be limited to the loss that she was "reasonably certain" to sustain. We are in full accord with counsel's view of the law, which appears to have been embodied in an instruction (No. 4) given to the jury by the trial court, wherein they were instructed: "In case you find for the plaintiff, you can allow plaintiff as damages only fair and reasonable compensation for such harm or damage as flows naturally from the injury complained of, and as a natural result of the injury; and the evidence must show to a reasonable certainty that such harm or damage has or does exist, or will result, before you can allow compensation therefor. No damages can be allowed that are merely conjectural, or flow from sympathy." No attack is made upon this instruction, but counsel contend that the evidence of the phys-

clans who testified as experts, over objections made by appellants, was of a character from which no certainty could be deduced, and that the testimony consisted of mere speculation and conjecture as to possible future consequences of the injury, which was calculated to, and did, influence the minds of the jury, and resulted in their rendering a verdict for a sum unsupported by the evidence, except upon the theory that plaintiff would at some future time be subjected to the conditions which might follow as a result of the injury sustained.

The evidence tended to show that plaintiff had sustained a fracture at the base of the brain; and, referring to this fact and other conditions shown to exist, Dr. Dukeman, a witness on behalf of plaintiff, was asked: "Would there be any danger of a relapse on the part of the patient after a considerable period of time during which the patient had apparently made a complete recovery?" To which he answered: "There is some danger." And in reply to, "What is the occasion of the danger?" stated: "After a fracture there is always more or less thickening due to the reparative processes that go on in the recovery of a fracture. That thickening may produce pressure on the brain and produce various symptoms. * * * One of the main symptoms may be convulsions; may be paralysis of some form." Referring to his answers in regard to the probability of future trouble, the witness said there would be danger of a recurrence of such symptoms as he had indicated for a period of days, weeks, months, or years. On cross-examination the witness further stated: "I should look for more serious and fatal results from a fracture at the base of the brain than at any other place. I should look for this after apparent recovery, apparent recovery so far as anybody can tell. I would always be looking for something. * * * The doctor is frequently mistaken in the diagnosis of a case. I think he is more often correct than incorrect. * * * In the majority of cases I would look for future trouble. I can't tell what will happen in this case. My experience and knowledge as a physician has taught me that in a majority of cases of this kind, where there has been, to even the eye of a doctor, a complete recovery, convulsions or paralysis, or some other symptoms, various symptoms, would happen. I should look for convulsions in the majority of cases of that kind where there had been a complete recovery, to the eye even of a doctor." Dr. H. G. Bralnard, another physician called as a witness on behalf of plaintiff, and having reference to the condition of plaintiff after an apparent recovery, was asked: "What results are still likely, or what injury is a patient still likely to experience as a result of the injuries received?" And replied: "The condition would show that the patient had not thoroughly recovered from the effect of the injury, and we might expect from the in-

jury the symptoms that rise frequently from a case of suffering from a fracture at the base of the brain. There is danger of convulsions or epilepsy, danger of mental deterioration, danger of paralysis."

To justify a recovery for future consequences, the evidence must show with reasonable certainty that such consequences will follow. The fact that in the minds of the jurors the disability indicated may follow, or is likely to or will probably follow as a result of the injury, will not warrant a verdict for damages. This, however, does not mean that the testimony of a witness should be excluded unless he is reasonably certain that the indicated results will follow, nor that isolated portions of his testimony should, standing alone, or considered with other evidence, extend to the degree of strength required to establish reasonable certainty as to future resulting consequences. It is the province of the jury to weigh and determine its value as proof. The evidence here tended, in an appreciable degree, to prove the ultimate fact—that is, the reasonable certainty that future evil consequences would result from the injury—and was properly admitted for the consideration of the jury; it being its function, upon a consideration of the evidence as a whole, to determine its sufficiency as proof of the ultimate fact. Its competency should not be confounded with its sufficiency; nor should the technical definition of words constitute a controlling factor in determining the question of admissibility. But, as stated in *Ballard v. Kansas City*, 86 S. W. 479, 110 Mo. App. 391: "The main object is not to draw fine distinctions based upon accurate definitions of words, but to ascertain the real idea expressed." See, also, *Block v. St. Ry. Co.*, 61 N. W. 1101, 89 Wis. 371, 27 L. R. A. 365, 46 Am. St. Rep. 849. It is often impossible to show by positive proof whether or not an impairment of health or faculties will follow as a result of injury. Hence, of necessity, in determining the question, courts and juries must rely upon the testimony of properly qualified physicians for such testimony as will in the minds of the jury establish the fact in issue to a reasonable certainty. Such evidence must be clearly distinguished from conjecture, or that which merely establishes a possibility of future trouble. As a rule, the physician whose opinion is most reliable is loath to give an opinion as to what consequences will or will not follow as a result of an injury in a certain case, but at the same time willing, as here, to state the result of his own professional experience and observations in treating cases where like injuries have occurred, and as a result of that experience say that we might or might not expect like results to follow in this case. Testimony of duly qualified experts which shows that in a majority of cases, where the injury consists of a fracture at the base of the brain, such injury results in future epilepsy, paralysis,

or mental deterioration, tends to prove the reasonable certainty that such consequences will follow in any given case of like injury.

In this view considered, the evidence, while it may not have been by the jury considered sufficient proof, nevertheless tended to establish to a reasonable certainty that, notwithstanding the apparent recovery of the plaintiff, she would in the future suffer from the effects of the injury. Dr. Dukeman testified that there was some danger of a relapse, and gave his reasons for so stating. That after apparent recovery he should look for serious results; that in the majority of such cases he would look for future trouble; that in a majority of such cases where there was an apparent complete recovery to the eye of a doctor, convulsions, paralysis, or other conditions of disease followed as a result of the injury; that he should look for convulsions in a majority of such cases. Dr. Brainard testified that epilepsy and mental deterioration might be expected to follow (not that they might follow), and that there was danger of such conditions.

In *Peterson v. Chicago, etc., Ry. Co.*, 39 N. W. 485, 38 Minn. 511, and *Nichols v. Brabazon*, 69 N. W. 342, 94 Wis. 549, the court held that questions which called for the opinion of the witness as to the probability of the patient recovering was not subject to the objection made here; the court in the latter case observing: "Certainly the effect of the whole testimony must be to establish to a reasonable certainty that the effects of the injury will be suffered in the future." In *Block v. St. Ry. Co.*, 61 N. W. 1101, 89 Wis. 371, 27 L. R. A. 365, 46 Am. St. Rep. 849, a question asked as to the reasonable probability of the ultimate recovery was sustained; the court saying: "While it is true that the whole testimony must establish, in the minds of the jury, more than a mere 'reasonable probability,' and must amount to proof to a 'reasonable certainty,' this ultimate fact is susceptible of proof by items of testimony which do not separately fully establish it." *Mitchell v. Tacoma Ry. & M. Co.*, 43 Pac. 528, 13 Wash. 560; *Ballard v. Kansas City, supra*; *Peterson v. Chicago, etc., Ry. Co.*, 39 N. W. 485, 38 Minn. 511; *Filer v. N. Y. C. R. Co.*, 49 N. Y. 42; *Hallum v. Village of Omro*, 99 N. W. 1051, 122 Wis. 337. We have carefully examined the great number of authorities submitted by counsel for appellants. Many of them relate to the form of instructions given for the guidance of the jury where damages for future results of injuries were sought. Others are clearly distinguishable from the case at bar. In *Lentz v. Dallas*, 72 S. W. 59, 96 Tex. 258, an objection was sustained to an abstract question upon the ground that it was not confined to the probable effects of the injury. *Yaeger v. Railway Co. (Cal.)* 51 Pac. 190, falls within the same rule. The case of *Strohm v. Railroad Co.*, 96 N. Y. 305, has been frequently cited in support of the propo-

tion that consequences which are contingent, speculative or merely possible are not proper to be considered in ascertaining the amount of damages sustained by reason of personal injuries. In that case the court recognizes the rule that, "to entitle a plaintiff to recover present damages for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury." In the *Strohm Case* the questions and answers upon which the court based its ruling were: "You said it [the injury] might develop into worse signs or conditions? What do you refer to?" To which the witness answered: "A patient * * * may develop," etc. Both question and answer related to what conditions might develop, not to conditions that might be expected to develop, as a result.

Neither of the defendants questioned the right of plaintiff to recover such damages as she had sustained in the collision, but each contended that the other should be held responsible therefor, and, with the view of having the jury pass upon the question, the Los Angeles Railway Company asked the court to instruct the jury, in effect, that notwithstanding the negligence of its motorman in driving his car upon the crossing, still if the traction motorman could, after he saw that it was beyond the power of the motorman of the Los Angeles Railway car to avoid the accident, have, by proper care, prevented the collision, then the negligence of the defendant Los Angeles Traction Company was the proximate cause of the injury. In other words, while admitting that plaintiff's injury resulted from the collision due to the joint or concurrent acts of negligence of defendants, she must be confined in her recovery for such damages to a judgment rendered against the defendant who had the "last clear chance" to avoid the collision and neglected to act upon it. Appellant seeks to apply the well-established principle that "he who last has a clear opportunity of avoiding the accident, by the exercise of proper care to avoid injuring another, must do so." *Esrey v. S. Pacific Co.*, 103 Cal. 541, 37 Pac. 500. This rule is only applicable to cases where the defense is based upon the contributory negligence of plaintiff, due to his want of care in placing himself in a position of danger, and where he may, notwithstanding his negligence, recover from a defendant, who by the exercise of proper care could have avoided the injury. We are unable to perceive why this rule should apply to plaintiff, who was in no way chargeable, by imputation or otherwise, with negligence, nor are we referred to any authority which supports the proposition. Indeed, all the authorities recognize the right of recovery against either or both of the defendants whose concurring acts of negligence united in producing the injury. 1 *Shearman & Red-*

field on Neg. p. 122; 1 Thompson on Neg. p. 75; Doeg v. Cook, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171; Tompkins v. Clay St. Ry. Co., 66 Cal. 163, 4 Pac. 1165; Pastene v. Adams, 49 Cal. 87.

Plaintiff, having a right to recover against either or both defendants, could not, while in pursuit of her rights, be involved in a litigation having for its purpose the determination of questions involving the respective rights of defendants as against each other.

It follows that the orders appealed from must be affirmed; and it is so ordered.

We concur: ALLEN, P. J.; TAGGART, J.

5 Cal. App. 786

DILLON v. CROSS. (Civ. 203.)

(Court of Appeal, First District, California.
June 20, 1907.)

1. PLEADING — COMPLAINT — SUFFICIENCY — FAILURE TO DEMUR—EFFECT.

A complaint which alleges an essential fact only inferentially or as a conclusion of law is good, in the absence of a demurrer or an objection to evidence offered under it.

2. SAME—AIDED BY JUDGMENT—COMPLAINT—SUFFICIENCY.

A complaint in an action for an accounting of moneys alleged to have been delivered by plaintiff to defendant in trust, which alleges that plaintiff handed to defendant various sums of money aggregating a specified sum, "to be kept deposited and invested by him" for plaintiff, "and to be returned to plaintiff on demand," and that defendant deposited of the sums so received in trust for plaintiff a specified sum in a bank, sufficiently alleges the existence of a trust as against an objection raised for the first time after judgment.

3. SAME—OBJECTIONS—SUFFICIENCY.

A demand that a suit for an accounting of moneys alleged to have been delivered by plaintiff to defendant in trust, to be held and invested for plaintiff, be tried by a jury, is not sufficient to point out a defect in the complaint arising from its alleging merely inferentially or as a conclusion of law the existence of a trust.

4. LIMITATION OF ACTIONS — ACCRUAL OF RIGHT OF ACTION—CONTINUING TRUSTS.

Where the pleadings and the evidence established a continuous trust, limitations did not commence to run until demand and a refusal to account for the property delivered pursuant to the trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Limitation of Actions, §§ 506-510.]

5. EVIDENCE—SUFFICIENCY.

Where the evidence sustains a finding for plaintiff as to all the relief demanded by him, it is sufficient to sustain a finding awarding relief only in part.

6. LIMITATION OF ACTIONS — ACCOUNTING—COUNTERCLAIM.

Where, in a suit for an accounting of moneys alleged to have been delivered by plaintiff to defendant in trust, to be held and invested for plaintiff, the latter testified that, at a time defendant claimed to have advanced money to plaintiff, defendant held large sums of money belonging to plaintiff, for which he was asking defendant to account, the right of defendant to require the court to credit the amount advanced by him to plaintiff could not be defeated by limitations; Code Civ. Proc. § 440, providing that, where cross-demands have existed between persons under such circumstances that, if one had sued the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other.

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Patrick F. Dillon against Patrick F. Dillon continued after his death against his executor, C. W. Cross. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Judgment modified and affirmed, and order denying motion for new trial affirmed.

See 87 Pac. 379.

C. W. Cross and Robert Harrison, for appellant. J. F. Riley and Crittenden Thornton, for respondent.

HALL, J. Appeal from judgment and order denying defendant's motion for a new trial. Plaintiff, Patrick F. Dillon, brought this action against Patrick Dillon, the father of plaintiff, for an accounting of moneys claimed to have been delivered to said defendant by plaintiff in trust to be held and invested for plaintiff, and for general relief. The cause was tried, and judgment rendered for plaintiff, during the lifetime of defendant, who subsequently dying, the executor of his last will was substituted as party defendant. By the term "defendant," when used in this opinion, we refer to the original defendant.

The action was tried upon the issues raised by the amended complaint and the answer thereto; no demurrer having been filed to the amended complaint. Before the case came on to be tried defendant made a demand that the cause be tried by a jury; but the court, taking the view that the action was one in equity, refused the demand for a jury, but allowed a jury as advisory to the court only, and made findings in favor of plaintiff, and gave judgment accordingly. Acting upon the same theory as to the nature of the action, the court found that the action was not barred by the statute of limitations. Appellant contends that the court erred in refusing a jury trial, and in finding that the action was not barred. Whether the court erred or not depends upon whether or not the complaint alleges a trust by defendant for plaintiff.

It is insisted that no trust is alleged. Although it is alleged that plaintiff handed to defendant various sums of money, aggregating \$2,542, "to be kept, deposited, and invested by him, the said Patrick Dillon, for this plaintiff, and to be returned to plaintiff on demand," and "that the said defendant, Patrick Dillon, did deposit of the said sums of money so received by him in trust for this plaintiff in the Hibernia Savings & Loan Society in the City and County of San Francisco * * * the sum of about \$1,100," it is contended that it does not appear from the complaint that defendant accepted the money, or agreed to keep, deposit, or invest it for plaintiff. It certainly is not alleged in direct terms that defendant accepted the money, or agreed to keep, deposit, or invest

if for plaintiff, and, if the complaint had been attacked by demurrer, it must have been held bad. In the face of an attack by demurrer, especially by a special demurrer, it is not sufficient that essential facts be alleged inferentially or as a conclusion of law; but such facts must be directly stated. On the other hand, it has been uniformly held that, in the absence of a demurrer or an objection to offered evidence, a complaint that alleges an essential fact only inferentially or as a conclusion of law is good. *Russell v. Mixer*, 42 Cal. 475; *Hill v. Haskin*, 51 Cal. 175; *City of Santa Barbara v. Eldred*, 108 Cal. 294, 41 Pac. 410; *Kimball v. Richardson-Kimball Co.*, 111 Cal. 336, 43 Pac. 1111; *Estate of Behrens*, 130 Cal. 416, 62 Pac. 603; *Cushing v. Pires*, 124 Cal. 663, 57 Pac. 572; *Penrose v. Winter*, 135 Cal. 289, 67 Pac. 772. In *City of Santa Barbara v. Eldred*, supra, the complaint was attacked by a general demurrer, which was overruled. The court said: "He now specifies a great many alleged defects in the complaint. Many of them are, in effect, that the complaint is ambiguous or uncertain. Such objections cannot be reached by general demurrer. Nor can the other objections, which merely amount to criticisms upon the sufficiency of the statement, as that the essential facts appear only inferentially, or as conclusions of law, or by way of recitals, prevail on such demurrer. There must be a total absence of some material fact to justify us in sustaining a demurrer of this character."

In the complaint before us, after alleging that plaintiff handed to defendant moneys to be kept, deposited, and invested by him, the said Patrick Dillon, for plaintiff, it is alleged that defendant did deposit in a bank \$1,100 "of the said sums of money so received by him in trust for this plaintiff." It is thus inferentially alleged that defendant received the money in trust for plaintiff. In paragraph 5 of the complaint the money is repeatedly referred to as money held in trust for plaintiff by defendant. It thus appears that plaintiff was attempting to charge defendant as a trustee; and while the complaint is uncertain for not alleging directly what is alleged inferentially, it is not a case of a total absence of allegations of essential facts going to charge a trust. It should have been attacked by demurrer, when it doubtless would have been amended. The mere demand that the case be tried by a jury was not sufficient to point out the defect now complained of, and the court was justified in treating the action as one in equity, and defendant was not entitled to a jury trial. The case made by the pleadings and the evidence was a continuous trust, and the statute of limitations did not commence to run until demand and a refusal to account for the money, which occurred shortly before the action was begun. *Baker v. Joseph*, 16 Cal. 173.

Appellant concedes that the evidence sup-

ports the findings save in one respect. The court found that as to money delivered by plaintiff to defendant prior to the 2d day of December, 1892 (during the minority of plaintiff), defendant never relinquished the right he had thereto by reason of the minority of plaintiff, but also found, as to the money delivered by plaintiff to defendant subsequent to said date, that the same was delivered to defendant in trust, to be kept, invested, and deposited for plaintiff. Appellant urges that the only evidence of any agreement whereby defendant promised or agreed to keep, or deposit, or invest any money for plaintiff was of an agreement entered into in 1888. He argues that the finding of the court in favor of defendant as to the money delivered prior to plaintiff's majority necessarily determines that the evidence of such agreement was false, and that as a result no evidence is left to support the finding in favor of plaintiff as to the money delivered to defendant after plaintiff's majority. In other words, the appellant admits that, if the court had found in favor of plaintiff as to all the money delivered to defendant, such finding would have been supported by the evidence; but, because the court in part found in favor of defendant, the finding in favor of plaintiff cannot stand. We cannot agree with this contention. It requires too nice an examination into the mental processes by which the trial court arrived at its conclusions. If the evidence was sufficient to sustain a finding in favor of plaintiff as to all the money in question, it was sufficient to sustain such finding as to a part thereof.

This disposes of the principal points in the case, and leaves but one other question to be considered. Defendant pleaded in his answer, "by way of counterclaim and otherwise," that during the years 1900 and 1901 "defendant loaned, gave, and intrusted to the said plaintiff various sums of money, aggregating, to wit, \$390, none of which sums have been returned or repaid to said defendant." Upon the objection of plaintiff, however, the court struck out the evidence of defendant tending to support this allegation, upon the theory, apparently, that it was a counterclaim, and as such was barred by the statute of limitations. In this we think the court erred. The plaintiff claimed, and had testified, that, at the time defendant claimed to have advanced money to plaintiff defendant held large sums of money belonging to plaintiff, for which he was asking defendant to account in this action, and the court was then engaged, in effect, in taking an account between these parties. If defendant, during the existence of this trust, had advanced money to plaintiff, either out of the trust moneys or out of his own money, the plainest principles of justice and equity require that in such accounting he should be allowed credit therefor. "When cross-demands have existed between persons under

such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other. * * * Code Civ. Proc. § 440.

Plaintiff at the oral argument stipulated in open court that, if this court should be of the opinion that the evidence should have been allowed we might order such a modification of the judgment as should give the defendant the full benefit of the matter alleged and attempted to be proved. The amount alleged by defendant to have been by him advanced to plaintiff is \$390. The court charged defendant with interest at varying rates to February 19, 1902, and from that date to entry of judgment at 7 per cent. With the aid of counsel we have calculated the interest on \$390 from January 1, 1901, to February 1, 1902, at 3½ per cent., the highest rate charged against defendant up to the latter date, and find that the principal and interest then amounted to \$405.85, which, at 7 per cent. up to the date of the entry of the judgment, would make the principal and interest amount to \$455.91.

The judgment is therefore modified, by deducting therefrom the sum of \$455.91 as of the date of the entry thereof, and, as so modified, it is affirmed; and the order denying the motion for a new trial is likewise affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

STATE v. CARMODY.

(Supreme Court of Oregon. Aug. 20, 1907.)

CRIMINAL LAW—JUDICIAL NOTICE.

A precinct being a subdivision of a county, set off and established by the county court under B. & C. Comp. § 2762, with power in that tribunal to biennially change its boundaries, courts cannot take judicial notice that a certain precinct is in a certain town.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 705.]

Appeal from Circuit Court, Marion County: Geo. H. Burnett, Judge.

Henry Carmody appeals from a conviction. Reversed, and new trial ordered.

W. H. Holmes, for appellant. John H. McNary, Dist. Atty., for the State.

BEAN, C. J. The defendant was tried and convicted of selling intoxicating liquor to one Joe Heenan in Horeb precinct, in Marion county, in violation of an order of the county court prohibiting the sale of such liquor in such precinct, made in pursuance of the provision of the local option law adopted by the people June 6, 1904. The proof tended to show that defendant sold intoxicating liquor to the person named in the information in the town of Gates, Marion county; but there is no proof that Gates is in Horeb pre-

inct. The court, however, assumed to know judicially that such is the case, and so instructed the jury.

This, we think, was error. "Courts will generally take notice," said Greenleaf, "of whatever ought to be generally known within the limits of their jurisdiction." 1 Greenleaf Ev. (14th Ed.) § 6. They will, therefore, know judicially whatever is established by law (B. & C. Comp. § 720), and as a consequence the location of counties, towns, precincts, or other local subdivisions, so far as they may be disclosed by public statute (16 Cyc. 859; 17 Am. & Eng. Ency. [2d Ed.] 911), but not where such local subdivisions have been created and their boundaries established by some court, board, or commission. Thus a court will not judicially notice a county created by county commissioners under a general law (*Buckinghouse et al. v. Gregg*, 19 Ind. 401), or a township formed by a board of county commissioners (*Bragg et al. v. Board of Commissioners of Rush County et al.*, 34 Ind. 405), or a town incorporated under a general law (*City of Hopkins v. Kansas City, St. Joseph & Council Bluffs R. R. Co.*, 79 Mo. 98), or that an incorporated town is within a certain township, the boundaries of which were established by the county court (*Backenstoe v. Wabash, St. Louis & Pacific Ry. Co.*, 86 Mo. 492). Horeb precinct is a subdivision of a county, set off and established by the county court. B. & C. Comp. § 2762. Its boundaries are subject to change by that tribunal biennially, and the court cannot take judicial notice of such boundaries at any given time, or that a particular town is within such precinct. These are matters of fact, and, when material, should be proved.

Judgment reversed, and new trial ordered.

DAVIDSON v. COLUMBIA TIMBER CO.

(Supreme Court of Oregon. Aug. 20, 1907.)

1. APPEAL—FILING TRANSCRIPT—TIME—EXTENSION—STIPULATION.

The time fixed by law for the filing of the transcript on appeal cannot be extended by stipulation of the parties without an order of court based on such stipulation, filed before the time fixed by law has expired.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2741.]

2. SAME—ORDER NUNC PRO TUNC.

Where no order was granted by the trial judge on a stipulation extending the time for the filing of a transcript on appeal until after the time fixed by law had expired, the court had no power thereafter to grant an order extending such time to the date fixed in the stipulation by directing that the same be entered nunc pro tunc as of the date of the stipulation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2741.]

Appeal from Circuit Court, Columbia County; Thomas A. McBride, Judge.

Action by E. L. Davidson against the Columbia Timber Company. From a judgment

for plaintiff, defendant appeals. On motion to dismiss. Granted.

J. F. Boothe, for appellant. T. J. Cleeton, for respondent.

PER CURIAM. On November 3, 1906, plaintiff recovered judgment against defendant in the circuit court of Columbia county for \$2,400 and costs. Defendant appealed, by giving notice in open court at the time the judgment was rendered. The transcript was not filed in this court until April 15, 1907. The parties stipulated in writing for an order extending the time until that date, but no order of the court was made in accordance with such stipulation. The defendant moves to dismiss the appeal.

The filing of transcript within the time allowed by law, or an extension thereof which may be granted by the trial court or judge thereof, or by this court or a justice thereof, within the time allowed to file such transcript, is jurisdictional, and cannot be dispensed with by consent of the parties; nor can the court permit the transcript to be filed after expiration of the time, whatever reasons may have occasioned the neglect. *Kelley v. Pike*, 17 Or. 330, 20 Pac. 685; *McCarty v. Wintler*, 17 Or. 391, 21 Pac. 195; *Nestucca Road Co. v. Landingham*, 24 Or. 439, 33 Pac. 933; *Connor v. Clark*, 30 Or. 382, 48 Pac. 364.

The defendant produced at the hearing and asked permission to file a certified copy of an order of the trial court, made on July 20, 1907, as follows: "It appearing to the court that on the 20th day of March, 1907, a stipulation was signed by the plaintiff and defendant's attorneys extending the time in which to file a transcript on appeal in the Supreme Court until April 15, 1907, and it further appearing that no order was entered by the court at that time upon said stipulation, it is now ordered that the time in which to file the transcript in said cause in the Supreme Court be and the same is hereby extended until April 15, 1907, and it is further ordered that this order be entered on the journal of this court as on March 20, 1907." This record does not show that an order enlarging the time was in fact made "within the time allowed to file the transcript." It recites the stipulation of the parties, and that no order was entered by the court in accordance therewith, and then continues, "It is now (July 20, 1907) ordered that the time be extended," etc., clearly indicating a previous date, but which the clerk had failed to enter of record. It should be entered as of the date when made. If an order extending the time in which to file the transcript had actually been made, but not entered of record, it would have been proper for the court to have directed an entry *nunc pro tunc* as of the proper date; but it had no authority to make such an order after the time for filing the transcript had expired, and direct it to be entered as of a previous date. An extension of time in

which to file a transcript must be secured before the time has expired. *Tallmadge v. Hooper*, 37 Or. 503, 61 Pac. 349, 1127.

It follows that we have no alternative but to allow the motion; and it is so ordered.

KRAUSE v. OREGON STEEL CO.

(Supreme Court of Oregon. Aug. 20, 1907.)

APPEAL—JUDGMENT OF SUPREME COURT—ENTRY—JURISDICTION OF TRIAL COURT.

Where, after findings and decree by the trial court, the suit was appealed and tried anew in the Supreme Court on the law and the facts, and the Supreme Court rendered its own decree, which on mandate was entered in the circuit court for enforcement, the original decree of the circuit court became *functus officio*, and the decree of the Supreme Court was final, and not subject to modification or change by the circuit court.

Appeal from Circuit Court, Clackamas County; Thomas A. McBride, Judge.

Action by August Krause against the Oregon Steel Company. From an order denying an application to recall an execution and correct the decree, defendant appeals. Affirmed.

S. B. Linthicum, for appellant. C. M. Idleman, for respondent.

EAKIN, J. This cause was tried in the lower court in June, 1901, and appeal taken from the decree therein, and on August 8, 1904, decree was rendered in this court (*Krause v. Oregon Steel Co.*, 45 Or. 378, 77 Pac. 833) which, upon mandate, was entered in the lower court. Afterward, on May 12, 1905, the defendant, by motion and affidavits, applied to the lower court to have an execution theretofore issued on said decree recalled, and for an order interpreting and modifying, or correcting, said decree in accordance with equity and the intention of that court. The lower court denied the motion, for the reason that it was without jurisdiction to entertain it, from which this appeal is taken.

Counsel for the defendant insists that the lower court had jurisdiction to hear and determine the motion, as it only called for a correction of the decree of that court. The vice of this position is: Counsel assumes that, as the decree below was affirmed in this court, it rests now upon the original decree entered by the lower court; but it is not now the decree of the lower court, except for purposes of enforcement. The cases cited by counsel for defendant in support of its motion only discuss the power of the court over its judgments after the adjournment of the term at which they were rendered, viz., corrections of clerical errors and *nunc pro tunc* entries to make the judgment conform to that pronounced by the court; but they can have no application in such a case as this, and are not authority as to the power of the circuit court to modify a decree of the Supreme Court, which, upon mandate, is entered there.

In *Welch v. Keene*, 21 Pac. 25, 8 Mont. 305, cited by defendant, the appeal was dismissed, which left the original decree rendered in the court below the decree in the case unaffected by the appeal, and is therefore not in point. Elliott, App. Procedure, § 576, says: "No modification of the judgment or decree directed by the appellate tribunal can be made by the trial court. No provision can be ingrafted upon it, nor can any be taken from it." And in section 579, in speaking of affirmation of judgments at law, he says: "This confirmation operates to a limited extent as a merger, inasmuch as it concludes the trial court and the parties, and absolutely precludes them from modifying or abrogating the judgment affirmed. The authority of the trial court as to all matters involved in the appeal and adjudicated by the judgment there rendered is at an end."

In the case at bar, after findings and decree by the lower court, the suit was appealed, and the cause tried anew here upon the law and facts. This court rendered its own decree thereon, which, upon mandate of this court, was entered in the lower court for enforcement, and the original decree rendered by the circuit court thereby became *functus officio*; and the decree of this court is final, and not within the power of the lower court to change or modify.

Therefore the lower court was without jurisdiction to entertain the motion, and the order denying it is affirmed.

WILLIAMS et al. (LEONARD, Intervener), v.
COMMERCIAL NAT. BANK OF
PORTLAND et al.

(Supreme Court of Oregon. Aug. 20, 1907.)

LIMITATION OF ACTIONS—ACCRUAL OF CAUSE OF ACTION—CREDITORS' SUIT.

Where a corporation made a transfer to defendant, valid as between them and only constructively fraudulent as to plaintiffs, creditors of the corporation, because it deprived it of means to pay its debts, plaintiffs' remedy against defendant, which is equitable, is not primary; but judgment against the corporation and execution thereon returned *nulla bona* are prerequisites to its suit against defendant, so that limitations against the suit commence to run, not from the time of the transfer, or even from the time of plaintiffs' discovery of the property, but only from the return of the execution *nulla bona*.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 336.]

On motion for rehearing. Denied.

For former report, see 90 Pac. 1012.

EAKIN, J. By the motion for a rehearing defendant insists that, as plaintiffs are not seeking to be subrogated to the right of defendant bank, but are proceeding upon a liability in their own favor, they need not reduce their claims to judgments against the defendant bank, but may bring suit against the defendant company directly, and there-

fore the statute of limitations commenced to run from the time of the taking over the property of the defendant bank. In the opinion we have treated this transfer as a valid one between the defendant bank and defendant company, and only constructively fraudulent as to plaintiffs, because it deprived defendant bank of the means with which to pay its debts, and the remedy of the plaintiffs is not in the right of defendant bank, but in their own right, by reason of the equitable lien existing in favor of the creditors of the corporation bank. This is fully discussed in the opinion.

Counsel cite authorities in the motion to the effect that, where plaintiffs' remedy is primary and direct, the creditor need not procure judgment and return of execution before suing the transferee, but may bring suit in the first instance against it. But these are cases in which the primary liability is created by statute, and are therefore not in point. We believe that *Case v. Beauregard*, 101 U. S. 688, 691, 25 L. Ed. 1004, states the rule correctly, viz.: "Whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies. * * * Indeed, in those cases in which it has been held that obtaining a judgment and issuing an execution is necessary before a court of equity can be asked to set aside fraudulent dispositions of a debtor's property, the reason given is that a general creditor has no lien; and, when such bills have been sustained without a judgment at law, it has been to enable the creditor to obtain a lien, either by judgment or execution. But when the bill asserts a lien, or a trust, and shows that it can be made available only by the aid of a chancellor, it obviously makes a case for his interference." But in the case at bar, although the creditor has an equitable lien, it is not specific, and he has no remedy upon it if the debtor has property subject to execution, and, as said in *Case v. Beauregard*, supra: "In some cases, also, such an averment (of judgment and execution returned) is necessary to show that the creditor has a lien upon the property he seeks to subject to the payment of his demand." And that is the case here. This equitable lien is not available to the creditor until he has disclosed that the debtor is insolvent; and, further, one of the first requisites in maintaining a creditors' bill is that the creditor has established his claim or debt by judgment at law. 12 Cyc. 9. This court has frequently held that the debt cannot be litigated in equity, but before the creditor can maintain such suit he must reduce his claim to judgment at law. *Fleischner v. Bank of McMinnville*, 38 Or. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345. This was not a debt for which the defendant company was primarily liable, nor may the plaintiffs look primarily to this lien. This right is upon a

liability dependent upon whether the defendant bank is without property available to plaintiffs.

Upon the statement of facts in this complaint, plaintiffs had no standing without the allegation of judgment and execution returned nulla bona against defendant bank. *D. A. Tompkins Co. v. Catawba Mills (C. C.)* 82 Fed. 780. We understand that the case of *Taylor v. Bowker*, 111 U. S. 110, 4 Sup. Ct. 397, 28 L. Ed. 368, is directly in point upon this question. In that case, prior to 1867, the insurance company had wrongfully, as to creditors, made a division of a portion of its property among stockholders, and afterward surrendered its charter. Bowker obtained judgment on April 4, 1868, against the insurance company upon a suit commenced prior to the surrender of the charter. Execution was returned nulla bona July 8, 1868, and on April 11, 1874, being more than six years after the judgment, but less than six years from the return of execution, Bowker commenced this suit to reach property in the hands of the defendants, received by them prior to the surrender of the insurance company's charter; and it was held that judgment and execution were essential to Bowker's remedy against defendants to reach equitable assets, regardless of the statute, which dispensed with a return of the execution. Although the question was not raised in *Bartlett v. Drew*, 57 N. Y. 587, cited in the opinion, it is held that, before there is a remedy to follow the equitable lien of a creditor upon the assets of a corporation, the legal remedy must be exhausted. In *Christensen v. Quintard*, 36 Hun. (N. Y.) 334, the bridge company distributed to its stockholders, including Quintard, a large amount of mortgage bonds without consideration. Plaintiff recovered judgment for his debt against the defendant company, and had execution returned nulla bona, and he brought this suit against defendant to recover the value of said bonds received by him. Defendant insisted on the statute of limitations, claiming that, if the debtor was barred, defendant also was barred. The court holds that plaintiff's right does not depend upon the right of the bridge company to recover from the defendant, but upon his own right to enforce the creditor's equitable lien upon the assets of the corporation, and that his remedy does not arise, or the statute begin to run, until judgment and return of execution, citing *Bartlett v. Drew*, *supra*, *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968, and *Taylor v. Bowker*, 111 U. S. 110, 4 Sup. Ct. 397, 28 L. Ed. 368.

The foundation of the proceeding by a creditor to follow the property of an insolvent corporation in the hands of a third party is not identical with such a proceeding to reach property of an insolvent individual fraudulently conveyed. The authorities clearly maintain a distinction. The quotation in the opinion from 10 Cyc. 1265, which was

prepared by Seymour D. Thompson, author of *Thompson on Corporations*, we think states the law correctly as gathered from the cases. In *Clapp v. Peterson*, 104 Ill. 26, 31, the corporation had bought in its own stock, giving in exchange therefor certain city lots, and the creditor, after the judgment obtained and execution returned nulla bona, brought suit against the former stockholder to follow the property so conveyed by the corporation. The court say: "We see nothing to show that the transaction in the present case was not in good faith, that there was any element of fraud about it, or that there was anything in the apparent condition of the company to interfere with the making of the exchange that was had. It is only as injuriously affecting the interests of creditors, we think, that the transaction can be questioned, and it is in that view that it must be considered and passed upon. In *Sanger v. Upton*, 91 U. S. 60, 23 L. Ed. 220, it is laid down: 'The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims.'" Therefore we conclude that although the plaintiffs are not suing in the right of the defendant bank, but in their own right to follow the property of a corporation under this equitable lien, yet they cannot pursue that remedy until the claims have been reduced to judgment and the insolvency of the defendant bank is disclosed; and the statute of limitations will run not from the time of the discovery by the plaintiffs of the transfer of the property, but from the time that they are in a position to institute the suit, viz., from the date of the return of the execution nulla bona.

Motion for rehearing is denied.

STATE v. LUPER.

(Supreme Court of Oregon. Aug. 20, 1907.)

1. CRIMINAL LAW—CONTINUANCE.

In a trial for perjury in swearing to the complaint upon which defendant procured a divorce, there was no abuse of discretion in denying a continuance until the wife's application to open the decree could be disposed of; the manifest purpose being to obtain delay until by the opening of the decree the marriage relation should be restored, thus disqualifying her to testify against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1311.]

2. WITNESSES—HUSBAND AND WIFE—COMMUNICATIONS.

B. & C. Comp. § 724, providing that neither husband nor wife may be examined, during the marriage or afterwards, as to any communication made by the one to the other, is inapplica-

ble in a criminal trial; and, in a trial for perjury in swearing to a complaint upon which defendant obtained a divorce for the wife's alleged desertion of him, he could testify concerning statements made to him during the marriage respecting her intent to desert him.

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

T. J. Luper was convicted of perjury, and he appeals. Reversed and new trial ordered.

In July, 1906, the defendant commenced a suit for divorce against his wife, Lizzie R. Luper, in department No. 2 of the circuit court for Marion county, alleging that she deserted him in 1904 without cause or provocation and against his will and consent, and had continued her desertion ever since. Service of summons was had upon her by publication, and, as she did not appear within the time required, her default was regularly entered, and after trial a decree of divorce was rendered as prayed for in the complaint. A short time thereafter Mrs. Luper learned of the decree, and immediately came to Oregon and caused the arrest of defendant for perjury in swearing to the complaint, and at the same time she made an application to open the decree, on the ground that she had a meritorious defense to the suit and had never received a copy of the complaint or summons. Pending her application to open the decree, the district attorney filed an information in department No. 1 of the circuit court for Marion county against defendant, charging him with perjury in verifying the complaint in the divorce suit. When the application to open the decree came on for hearing in department No. 2, defendant, by his attorneys, appeared and consented to the allowance of such motion; but the district attorney interposed, and on his suggestion the court declined to make the order, but took the matter under advisement. The defendant thereupon moved for a postponement of the criminal case until his wife's application to open the decree in the divorce suit could be disposed of; but this motion was denied, and the defendant tried and convicted. From a judgment sentencing him to the penitentiary, he appeals, assigning, among other errors, the overruling of his motion for a continuance and refusal of the trial court to permit him to testify as to statements made to him by his wife regarding her intention to desert him.

W. H. Holmes and Carey F. Martin, for appellant. John H. McNary, Dist. Atty., for respondent.

BEAN, C. J. (after stating the facts). There was no abuse of discretion in denying the motion for a continuance. The application therefor did not set out a single fact to entitle defendant to a postponement. Its manifest purpose was to secure a delay until the decree theretofore granted in the divorce suit could be set aside, and the relation of husband and wife between defendant and

Mrs. Luper restored, thus disqualifying her from testifying against him in the criminal action without his consent. Certainly such a state of facts did not entitle him to a continuance as a matter of right. Whether the ends of justice would have been subserved thereby was a question for the trial court, and with its conclusion we must decline to interfere.

While the defendant was on the stand, testifying in his own behalf, his counsel offered to interrogate him concerning statements made to him by his wife during the marriage regarding her intention to desert him; but the court, on the objection of the state, refused to allow him to do so, for the reason that evidence of any communications between defendant and his former wife, during their marriage, was incompetent. Section 724 of the Civil Code provides that a husband and wife cannot be examined, during the marriage or afterwards, as to any communications made by the one to the other. Whether this section includes all communications between husband and wife, or only such as are confidential, it is not necessary now to consider, because it does not apply to criminal prosecutions. *State v. McGrath*, 35 Or. 109, 57 Pac. 321. The Criminal Code is complete within itself as to the competency of the husband or wife to testify in criminal prosecution against the other, and contains no provision governing the proof of communications made by the one to the other. It simply provides that when a husband is the party accused the wife shall be a competent witness, and when the wife is the party accused the husband shall be a competent witness; but neither shall be compelled or allowed to testify, unless by the consent of both, except in cases of personal violence (B. & C. Comp. § 1401), leaving the question of the competency of their testimony either during or after the marriage to be determined by the common law. It is a rule of law, founded upon public policy, the object of which is to secure domestic happiness and tranquility, that "all confidential communications between husband and wife, and whatever comes to the knowledge of either by reason of the hallowed confidence which that relation inspires, cannot be afterwards divulged in testimony" (Greenl. Ev. § 337), even after the marriage is dissolved by death or divorce.

But the rule which renders incompetent proof of communications between husband and wife, like that which preserves inviolate communications between attorney and client, is subject to some exceptions dictated by natural justice, and among these is that whenever it becomes necessary to disclose such communications, in order to protect the personal rights or liberty of the party to whom they were made, he is relieved from the obligation of secrecy which the law otherwise imposes. Thus, when a disclosure of communications by a client to his attorney is necessary to protect the personal rights of

the attorney, as Mr. Justice Selden says, "he must of necessity and in reason be exempted from the obligation of secrecy." *Rochester City Bank and Lester, Agt., v. Suydam and Others*, 5 How. Prac. 254; *Mitchell et al. v. Bromberger*, 2 Nev. 345, 90 Am. Dec. 550. Also, in a trial of a husband for homicide, it is competent for defendant to testify that his wife told him, immediately before the shooting, that the deceased had threatened to kill him. *Shepherd v. Commonwealth*, 85 S. W. 191, 119 Ky. 931. And other similar cases will readily suggest themselves upon a moment's thought.

Now in this case defendant was on trial for perjury in swearing that his wife had deserted him. The truth of this oath, or that it was honestly made, may have depended largely, if not entirely, upon the declarations the wife made to him concerning her intention and characterizing her acts. It would be a hard and unjust rule to deny him the right to protect his personal liberty, and we think the law does not require us to so hold, by giving such declarations in evidence.

Judgment reversed, and new trial ordered.

(50 Or. 1)

STATE v. CARMODY.*

(Supreme Court of Oregon. Aug. 20, 1907.)

1. INTOXICATING LIQUORS—LOCAL OPTION—PRIMA FACIE EVIDENCE.

Under Local Option Law (Laws 1905, p. 47, c. 2), § 10, providing that the order of the county court declaring the result of an election under the act and prohibiting the sale of intoxicating liquors within the prescribed territory "shall be held to be prima facie evidence that all the provisions of the law have been complied with in giving notice of and holding such election, and in counting and returning the votes and declaring the result thereof," such order is prima facie evidence of the legality of all previous proceedings in the matter of the election, so that it is unnecessary, on a prosecution for a sale in violation of the act, to allege or prove that a valid election was held, or that a majority of the voters was in favor of prohibition, otherwise than to allege and produce such order.

2. CRIMINAL LAW—EVIDENCE—BEER—INTOXICATING QUALITIES—JUDICIAL NOTICE.

A charge of unlawfully selling intoxicating liquor is sustained by proof of sale of "beer," without any further description or testimony that it was intoxicating.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 716.]

3. SAME—AIDING AND ABETTING.

An instruction, on a prosecution for an illegal sale of intoxicating liquors, that defendant would be guilty if he aided or assisted B. in effecting the sale in violation of law, is not error; B. & C. Comp. § 2153, declaring one who aids and abets in the commission of a crime to be a principal.

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

Henry Carmody appeals from a conviction. Affirmed.

On October 6, 1906, the district attorney of the Third judicial district filed in the circuit court for Marion county an information charging defendant with the crime of selling

intoxicating liquors. The material parts of the information are as follows: "That at the general election held in the county of Marion, state of Oregon, on the 4th day of June, 1906, the question whether there should be prohibition of the sale of intoxicating liquor for beverage purposes for Horeb precinct, Marion county, state of Oregon, was submitted to the legal voters of said precinct, county, and state, and then and there duly determined by a majority of the legal voters of said precinct at said election in favor of prohibition, and that the sale of intoxicating liquor should be prohibited in said precinct. That thereafter, on the 15th day of June, 1906, the county court of Marion county, state of Oregon, duly made and entered of record an order declaring the result of said vote and absolutely prohibiting the sale of intoxicating liquors as a beverage in said Horeb precinct as a whole, and declaring it to be unlawful to sell, exchange, or give away any intoxicating liquor for beverage purposes within said Horeb precinct until such time as the qualified voters therein by a majority vote declared otherwise. That thereafter, to wit, on the 2d day of September, 1906, in the precinct of Horeb, county of Marion, state of Oregon, Henry Carmody, then and there being, did then and there wrongfully and unlawfully sell and give to one Royal Shaw and William Quinn jointly six bottles of intoxicating liquor, of the value of \$1.50, with an intent and purpose then and there had by him, the said Henry Carmody, of evading the provisions of the local option law of the state of Oregon, proposed by the people of initiative and enacted by the people of the state of Oregon by a majority of the votes cast thereon at the general election held in said state on the 6th day of June, 1904, contrary to the provisions of said law in such cases made and provided, and against the peace and dignity of the state of Oregon."

A demurrer to the information was filed on the grounds: (1) That it does not state facts sufficient to constitute a crime; (2) that it does not show any violation of the law by defendant; (3) that it does not show that the question of prohibition in Horeb precinct was submitted to the legal voters of such precinct; (4) that it does not show that the legal voters of such precinct determined by their vote or at all that intoxicating liquor should not be sold or given away in such precinct; (5) that it does not show that the county court had power or authority to make the order of prohibition stated in the information. This demurrer was overruled, and defendant pleaded not guilty. Thereupon a trial was had before the court and a jury.

The testimony for the state tended to show: That in September, 1906, two men, Shaw and Quinn, went to the house of defendant, in the precinct of Horeb, Marion county, and inquired if they could buy some beer from

* For opinion on rehearing, see 91 Pac. 1081.

him. Defendant told them he had none, but could get some for them, and went away, returning in a short time. That a few minutes later a man by the name of Baty brought six bottles of beer in a sack and laid them on the floor just inside of defendant's door and went away. Shaw and Quinn had no conversation with Baty about the beer, or the purchase or payment therefor. After Baty had gone they paid defendant \$1.50 for the beer and took it away with them. There was no evidence adduced by the state tending to show the character of the beer, other than it was in bottles having thereon the label of the Albany Brewing Company. The defendant in his own behalf testified: That when Shaw and Quinn came to his house they asked him if he had any beer, and he answered in the negative. That thereupon they inquired of him if beer could be procured in the town, and he told them that Baty had a barrel, and they requested him to purchase some from him, as they were not acquainted with Baty. That he went to where Baty was, and told him that Shaw and Quinn wanted six bottles of beer, and soon after he returned Baty brought the beer in a gunny sack and placed it on his porch. That one of the men paid him \$1.50 for the beer, and he handed the money to Baty in their presence. That he did not own the beer, and was acting merely as an accommodation to the purchasers. The state to sustain the issues on its part introduced, and there was admitted over defendant's objection, a certified copy of the order or judgment of the county court of Marion county, declaring that a majority of the votes cast in Horeb precinct, in the June election in 1906, was in favor of prohibition, and prohibiting the sale of intoxicating liquor in such precinct until the legal voters thereof should otherwise determine.

The court instructed the jury that, as a matter of judicial knowledge, beer is an intoxicating liquor; that it was not necessary for the state to prove that defendant owned the beer, or was interested in the money received therefor; but that if the beer belonged to Baty, and the money was received by him, the defendant would be guilty if he aided or assisted Baty in effecting the sale in violation of law. The defendant was convicted, and appeals, assigning error in overruling his demurrer to the information, in the admission of the record of the county court prohibiting the sale of intoxicating liquor in Horeb precinct, and in the giving and refusal of the instructions referred to.

W. H. Holmes, for appellant. John H. McNary, Dist. Atty., for the State.

BEAN, C. J. (after stating the facts). The objection to the information, and to the competency of the record of the county court declaring the result of the election and prohibiting the sale of intoxicating liquor in Horeb precinct, is, in substance, that it is

not alleged in the information, nor was it shown at the trial, that a legal and valid election to decide whether the sale of intoxicating liquor should be prohibited in such precinct was ordered or held as required by law. Section 10 of the local option law (Laws 1905, p. 47, c. 2) provides that the order of the county court declaring the result of an election held under its provisions and prohibiting the sale of intoxicating liquor within the prescribed territory "shall be held to be prima facie evidence that all the provisions of the law have been complied with in giving notice of and holding such election, and in counting and returning the votes and declaring the result thereof." The plain purpose of this provision is to make the order of the county court prima facie evidence of the legality of all previous proceedings in the matter of the election. It is therefore unnecessary, in a prosecution for a violation of the act, for the state to allege or prove that a valid election was held, or that a majority of the voters in the county, subdivision, or precinct, as the case may be, was in favor of prohibition. The order of the county court is prima facie evidence of these facts, and the production of such an order is all that is required by the state to make out its case. It is thereafter open to the defense to overcome such prima facie case by proving that the essential steps provided by the statute were not taken. This is the interpretation given a similar provision in a local option law by the courts of Missouri and Michigan. *State v. Searcy*, 46 Mo. App. 421; *Id.*, 111 Mo. 236, 20 S. W. 186; *People v. Whitney*, 105 Mich. 622, 63 N. W. 765.

2. The courts are not in accord as to whether a charge of unlawfully selling intoxicating liquor is sustained by proof that the liquor sold was "beer," without anything giving to it a particular description, or evidence that it was intoxicating. In a number of decisions it is held that the word "beer" is a generic term, including both a class of alcoholic liquors and a class of nonintoxicating beverages, such as "root beer," "ginger beer," "spruce beer," and the like, and therefore it cannot be said in its ordinary meaning to imply an intoxicating drink, unless such import has been given it, either by statute or by decisions of the courts. *Blatz v. Rohrbach*, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669, is a leading example of this class of cases. But Mr. Black says that this is not the approved rule. "On the contrary, the preponderance of authority is to the effect that when the word 'beer' is used, without any restriction or qualification, it denotes an intoxicating malt liquor; that when thus occurring in an indictment or complaint, or in the evidence, it is presumed to include only that species of beverages; and that, being taken in this sense, it will be sufficient, unless it is shown by evidence that the particular liquor so described is nonalcoholic." *Black on Intoxicating Liquor*, § 17. Mr. Mc-

Clain is of the same opinion (2 McClain, § 1220), and so are the editors of Am. & Eng. Ency. of Law (volume 17, p. 201). The adjudications on both sides of this question are collated and cited by these authors, and it is sufficient to say we concur in the views expressed by them.

The reasons which impel us to this conclusion are so clearly and forcibly stated by Mr. Justice Orton, in *Briffitt v. State*, 58 Wis. 39, 16 N. W. 39, 46 Am. Rep. 621, that we quote from his opinion at some length: "As long as laws for licensing the sale of intoxicating liquors have existed, brandy, whisky, gin, rum, and other alcoholic liquids have been held to be intoxicating liquors per se; and why? Simply because it is within the common knowledge and ordinary understanding that they are intoxicating liquors. By this rule of common knowledge courts take judicial notice that certain things are verities, without proof; as, in *Chambers v. George*, 5 Litt. [Ky.] 335, the circulating medium in popular acceptance was held to mean 'currency of the state,' and in *Lampton v. Haggard*, 3 T. B. Mon. [Ky.] 149, the circulating medium was held to mean 'Kentucky currency,' and in *Jones v. Overstreet*, 4 T. B. Mon. [Ky.] 547, the word 'money' was held to mean paper currency. If a witness on the stand were asked whether whisky is intoxicating, he would be apt to smile as at a joke; and an intelligent witness, when asked the same question in relation to beer, might smile with equal reason. Words in contracts and laws are to be understood in their plain, ordinary, and popular sense, unless they are technical, local, or provincial, or their meaning is modified by the usage of trade. 1 Greenl. Ev. § 278. When the general or primary meaning of a word is once established by such common usage and general acceptance, we do not require evidence of its meaning by the testimony of witnesses, but look for its definition in the dictionary. Whisky, according to Webster, is 'a spirit distilled from grain'; and beer, according to the same authority, is 'a fermented liquor made from any malted grain, with hops and other bitter flavoring matter.' It is true that to a limited extent there are other kinds of beer, or of liquor called 'beer,' such as 'small beer,' 'spruce beer,' 'ginger beer,' etc.; but such definitions are placed as remote and special, and not primary or general. So it may be said of other substances having a common name and meaning, such as milk or tea. Milk, according to Webster, is 'a white fluid secreted by female mammals for the nourishment of their young.' There are other kinds of milk, however, such as 'the white juice of plants,' which is the remote definition, or milk in the coconut, or that in the Milky Way. Tea is defined to be 'leaves of a shrub or small tree of the genus *Thea* or *Camellia*. The shrub is a native of China and Japan.' There are other kinds of tea, such as sage tea and camomile tea, etc. The

latter are the restricted uses of the word. When asked to take a drink of milk, or a cup of tea, it would not be necessary to prove what is meant. Why is it more necessary to prove what is meant by a glass, or drink, of beer? When beer is called for at the bar, in a saloon or hotel, the bar tender would know at once, from the common use of the word, that strong beer—a spirituous or intoxicating beer—was wanted; and, if any other kind was wanted, the word would be qualified, and the particular kind would be named, as root beer, or small beer, etc. When, therefore, the word 'beer' is used in a court by a witness, the court will take judicial notice that it means a malt and an intoxicating liquor, or such meaning will be a presumption of fact, and in the meaning of the word itself there will be *prima facie* proof that it is malt or intoxicating liquor that is meant. When the witnesses in this case testified that the defendant sold to them beer, the prosecution had sufficiently proved that he had sold to them a malt and intoxicating liquor, for both qualities are implied in the word 'beer.' This, as a logical conclusion and principle of law, would seem to be well established by common reason, and we think it would be difficult to find a single good reason against it." See, also, *United States v. Ducournau* (C. C.) 54 Fed. 138.

3. The instruction, that if defendant aided and assisted Baty in committing the crime of selling intoxicating liquor he was guilty as charged in the indictment, was but stating a rule of statutory law, and was not error. B. & C. Comp. § 2153.

Judgment affirmed.

KAMM v. NORMAND et al.

(Supreme Court of Oregon. Aug. 20, 1907.)

1. NAVIGABLE WATERS—DAMS.

While dams and embankments may be constructed in or along floatable streams to facilitate their use, they may not be constructed to the extent of injuring a riparian proprietor by retarding the flow of water or sending it down in increased volume, to his injury or at times when the stream would not be otherwise navigable.

2. SAME—FLOATAGE OF LOGS.

In a suit to enjoin the use of a stream for the floating of saw logs, evidence held to show that they could not be floated in the natural condition of the stream, except at extreme high water, continuing for a few hours at a time, and then only small logs.

3. SAME.

Where a stream was such that in its natural condition saw logs could not be floated therein, except at extreme high water, continued for a few hours at a time, and then only small logs, it was not a navigable stream for the purpose of floatage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Navigable Waters, § 9.]

Appeal from Circuit Court, Clatsop County; T. A. McBride, Judge.

Suit by Joseph Kamm against Alex Normand and others, to restrain defendants from using a certain stream for the flowage

of saw logs. From a decree in favor of plaintiff, defendants appeal. Reversed and rendered.

This is a suit to enjoin defendants from using the North Fork of Klaskanle creek for floating saw logs. The complaint alleges that the stream in question runs through plaintiff's land for a distance of about one-half mile, and that it is not navigable or floatable for rafts, logs, lumber, or timber; that the defendants cut and put into the channel above plaintiff's premises large quantities of saw logs, and, in order to cause them to float down such stream, constructed a splash dam, whereby a large volume of water was accumulated and suddenly released and permitted to flow down the stream, forcing the logs on plaintiff's land in great numbers, cutting and breaking the banks, and otherwise damaging his premises; and that, unless enjoined and restrained, defendants will continue to so use the stream, to plaintiff's irreparable damage. Defendants admit, by their answer, that they are engaged in the logging business on the stream above the lands of plaintiff, and that they have constructed therein a splash dam for use in their logging operations. But they allege that the stream is navigable and suitable for the floatage of saw logs and other timber products where it runs through, and for several miles above, plaintiff's lands; that they are the owners of large tracts of valuable timber lands on the stream, and the only way the timber can be marketed is by floating it down such stream; that the stream is not navigable at all stages of the water, but has well-defined banks on either side; that in October, 1903, they constructed, at great expense, about two miles above the premises of plaintiff, a splash dam for the purpose of aiding and assisting the floatage of logs; that such dam is so constructed and operated as to be a benefit to plaintiff, since it is possible thereby to control the water and prevent it from overflowing the banks or reaching the height of ordinary freshets; and that logs floated down stream by use of the dam do less injury to plaintiff's premises than if floated without such dam. Upon a trial the court found the averments of the answer to be substantially true, and dismissed the suit, and plaintiff appeals.

J. M. Gearin and Frank J. Taylor, for appellants. C. F. S. Wood and G. C. Fulton, for respondent.

BEAN, C. J. (after stating the facts). The questions for determination on this appeal are: (1) Whether the Klaskanle, where it flows through the lands of plaintiff, is a navigable or floatable stream; (2) to what extent, if any, the defendants may render it navigable or assist the navigability thereof by means of a splash dam.

The common law of England, that the only streams which are navigable are those in which the tide ebbs and flows, has never been

adopted in this country. Rules which reason and convenience may have approved in reference to the streams of that country are wholly inapplicable to our waterways, natural resources, and conditions, and it is now considered here that any stream which can be used in its natural state for commercial purposes is navigable. The existence of immense bodies of timber in Maine, Michigan, and other states, which could be transported to market only by use of adjacent streams, influenced the courts to early hold that any stream which is capable in its natural condition of being commonly and generally used for floating saw logs at periods of high water is navigable or floatable for the transportation of the timber along its banks. This doctrine has been accepted and declared by this court, and the courts of this country generally, until now it may be regarded as settled that streams, which in their natural condition are useful for the transportation of saw logs during the whole or part of each year, are highways for that purpose. *Brown v. Chadbourne*, 31 Me. 9, 1 Am. Rep. 641; *Moore v. Sanborne*, 2 Mich. 520, 59 Am. Dec. 209; *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621; *Shaw v. Oswego Iron Co.*, 10 Or. 371, 45 Am. Rep. 146; *Haines v. Welch et al.*, 14 Or. 319, 12 Pac. 502; *Haines v. Hall*, 17 Or. 165, 20 Pac. 881, 3 L. R. A. 609; *Nutter v. Gallagher*, 19 Or. 375, 24 Pac. 250; *Hallock v. Sultor*, 37 Or. 9, 60 Pac. 384; 27 Cyc. 1566; 21 Am. & Eng. Ency. 428. But streams which are not of sufficient size and capacity to be profitably so used are wholly and absolutely private. *Munson v. Hungerford*, 6 Barb. (N. Y.) 265; *Wadsworth v. Smith*, 11 Me. 278, 26 Am. Dec. 525. "The true test, therefore to be applied in such cases," says the Supreme Court of Maine, in *Brown v. Chadbourne*, supra, "is whether a stream is inherently and in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts or logs." It is not necessary that the stream should be floatable at all seasons of the year. It is sufficient if it has that character at different periods, recurring with reasonable certainty, and continuing for a sufficient length of time to make it commercially profitable and beneficial to the general public. But every small creek or rivulet in which logs can be made to float for a few hours during a freshet is not a public highway. To make a stream a highway, it must at least be navigable or floatable in its natural state, at ordinary recurring winter freshets, long enough to make it useful for some purpose of trade or agriculture. *People v. Elk River M. & L. Co.*, 107 Cal. 221, 40 Pac. 531, 48 Am. St. Rep. 125; *Rowe et al. v. Granite Bridge Corp.* 21 Pick. (Mass.) 344; *Morgan v. King*, 18 Barb. (N. Y.) 277; *Id.*, 35 N. Y. 454, 91 Am. Dec. 67; *Banks v. Frazier*, 64 S. W. 983, 111 Ky. 909; *Commissioners of Burke Co. v. Catawba Lumber Co.* et al., 115 N. C. 590, 20 S. E. 707, 847; *Lewis*

v. Coffee Co., 77 Ala. 190, 54 Am. Rep. 55; Hubbard v. Bell, 54 Ill. 110, 5 Am. Rep. 98; Carlson v. St. Louis River Dam & Improv. Co., 73 Minn. 128, 75 N. W. 1044, 72 Am. St. Rep. 610, 41 L. R. A. 371 (note); 1 Farnham on Waters, 121; Gould on Waters, §§ 107-109. "The true rule is," says the Supreme Court of New York, in *Morgan v. King*, supra, "that the public have a right of way in every stream which is capable, in its natural state and its ordinary volume of water, of transporting, in a condition fit for market, the products of the forests or mines or of the tillage of the soil upon its banks. It is not essential to the right that the property to be transported should be carried in vessels, or in some other mode, whereby it can be guided by the agency of man, provided it can ordinarily be carried safely without such guidance. Nor is it necessary that the stream should be capable of being thus navigated against its current, as well as in the direction of its current. If it is so far navigable or floatable, in its natural state and its ordinary capacity, as to be of public use in the transportation of property, the public claim to such use ought to be liberally supported. Nor is it essential to the easement that the capacity of the stream, as above defined, should be continuous or, in other words, that its ordinary state at all seasons of the year should be such as to make it navigable. If it is ordinarily subject to periodical fluctuations in the volume and height of its water, attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water or navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement. These general views are in harmony with those maintained by the Supreme Court of Maine in *Brown v. Chadbourne*, 31 Me. 9, 1 Am. Rep. 641, and by the Supreme Court of Michigan, in *Moore v. Sanborne*, 1 Gibbs, 519." And this is the rule adopted in this state. In *Welse v. Smith*, supra, it is said "that if a stream is in fact capable, in its natural condition, of being profitably used for any kind of navigation, its use is to that extent subjected to the general rules of law relating to navigation applicable to the circumstances of the case." And in *Haines v. Welch*, supra, Mr. Justice Thayer says: "If it [Anthony creek] is capable of serving an important public use as a channel for commerce, it should be considered public; but if it is only a brook, although it might carry down saw logs for a few days during a freshet. It is not, therefore, a public highway." And in *Haines v. Hall*, supra, in speaking of the same stream, the court said: "Whether the creek in question is navigable or not for the purposes for which the appellant used it depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public. If its location

is such and its length and capacity so limited that it will only accommodate a few persons, it cannot be considered a navigable stream for any purpose. It must be so situated as to have such length and capacity as will enable it to accommodate the public generally as a means of transportation."

The doctrine then, which we derive from the authorities, is that a stream, to be a public highway for floatage, must be capable, in its natural condition and at the ordinary winter stages of water, of valuable public use, and, if not, it is private property. Ordinary stages of water or natural conditions, within this rule, do not mean a continuous state of floatage or an average volume of water. The term has reference to the natural flow of the water, and is applied to the stream in its natural condition, without the application of artificial means, and is used in contradistinction to extraordinary or unusual floods. That which occurs with reasonable certainty, periodically, can hardly be said to be unusual, and much less extraordinary, and may be properly characterized as ordinary. A stream, therefore, that is capable of floating logs, unaided by artificial means, during freshets or stages of water occurring with reasonable frequency and continuing long enough to make its use of commercial value, is a public highway for that purpose. But a stream which is not such a highway cannot be made one, by the use of dams or other artificial means, without first acquiring the rights of riparian proprietors. 1 Farnham on Waters, § 139. Nor can a stream, navigable in its natural condition at certain stages of the water, be made so at other times by artificial means, such as flooding and the like. No one has a right to store water, and then suddenly release the accumulation, and thus increase the natural volume of the stream, and overflow, injure, or wash the adjoining banks, or otherwise interfere with the rights of riparian owners. The riparian proprietor is entitled to the enjoyment of the natural flow of the stream with no burden or hindrance imposed by artificial means. *Brewster v. Rogers Co.*, 169 N. Y. 73, 62 N. E. 164, 58 L. R. A. 495; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184; *Witheral v. Booming Co.*, 68 Mich. 48, 35 N. W. 758, 13 Am. St. Rep. 325; *Koopman v. Blodgett*, 70 Mich. 610, 38 N. W. 649, 14 Am. St. Rep. 527; *Matthews v. Belfast Mfg. Co.*, 35 Wash. 662, 77 Pac. 1046; *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 77 Pac. 813, 70 L. R. A. 272, 102 Am. St. Rep. 905; *Ford Lumber Co. & Mfg. Co. v. Clark* (Ky.) 68 S. W. 445; *Ky. Lumber Co. v. Miracle*, 101 Ky. 364, 41 S. W. 25; *De Camp v. Thomson*, 16 App. Div. 528, 44 N. Y. Supp. 1114.

Dams, dikes, embankments, and the like may be constructed in or along floatable streams to facilitate their use (*Union Power Co. v. Lichty*, 42 Or. 563, 71 Pac. 1044), but not to the extent of injuring the riparian pro-

prietors by retarding the flow of the water or sending it down in increased volumes, to his injury or at times when the stream would not otherwise be navigable. And this rule is not changed by the fact that a stream cannot be successfully used for logging purposes without such artificial aids to navigation on the ground of necessity. In *Booming Co. v. Speechly and Koopman v. Blodgett*, supra, the Supreme Court of Michigan had occasion to consider the right to make a stream, which is navigable only at certain seasons of the year, navigable at other times by impounding the water until a flow sufficient to float logs could be caused. In the former case, Mr. Justice Cooley, after reviewing the Maine and Michigan cases, quoting with approval what is said to be the true rule by the New York Court of Appeals, noting the fact that all the cases carefully restrict, within the bounds of capability for use in their ordinary and natural condition, the public easement in streams navigable only at certain seasons of the year, and holding that a stream is navigable during the period the water in its natural condition is sufficient to permit of a public use, he says: "During that time the public right of floatage and the private right of the riparian proprietors must each be exercised with due consideration for the other, and any injury which the latter receives in consequence of a proper use of the stream for floatage he must submit to as incident to his situation upon navigable waters. *Middleton v. Booming Company*, 27 Mich. 533. But at periods when there is no highway at all there is no ground for asserting a right to create a highway by means which appropriate or destroy private rights. The doctrine that this may be done without compensation to parties injured is at war with all our ideas of property and of constitutional rights. The most that can be said of this stream, during the seasons of low water, is that it is capable of being made occasionally navigable by appropriating for the purpose the water to the natural flow of which the riparian proprietors are entitled. It is highly probable, in view of the large interests which are concerned in the floatage, that the general public good would be subserved by so doing; but this fact can have no bearing upon the legal question. It is often the case that the public good would be subserved by forcing a public way through private possessions; but it neither should be nor can be done under any circumstances without observing the only condition on which it can be permitted in constitutional government, namely, that the private proprietor be compensated for the value which he surrenders to the public. * * * As was remarked in *Morgan v. King*, 35 N. Y. 460, 91 Am. Dec. 67, the question of public right in a case like this is to be decided without reference to the effect which artificial improvements have had in the navigable capacity of the river; in other words, the public right is measured by the capacity

of the stream for valuable public use in its natural condition, and any attempt to create capacity at other times at the expense of private interests can be justified only on an assessment and payment of compensation." *Monroe Mills Co. v. Menzel*, supra, was a suit to enjoin the defendant from using the West Fork of Woods creek for floating shingle bolts and from maintaining a splash dam thereon. The court held the stream to be navigable or floatable during the freshets which occur with periodic regularity in the spring and fall of each year, but that the detention of the water by means of a dam, and the release thereof at irregular intervals, causing the stream to overflow and washing the lands of the lower riparian proprietor, was such an interference with the natural flow of the water as would be enjoined. And in *Matthews v. Belfast Mfg. Co.*, supra, it was held that the floating of logs down a stream, by means of dams and artificial freshets, at the time of the year when it is not navigable in its natural state, is an abuse of the right of navigation for which an injunction will lie at the suit of riparian owners injured thereby, and that a private corporation which is not a boom company is not entitled to exercise the right of eminent domain against a lower riparian owner, for the purpose of facilitating the floating of logs down a stream by means of dams and artificial freshets, which damages the lower proprietor and interferes with his use of the stream. In fact, our attention has not been called to a case, nor have we been able to find one, sustaining the right to maintain dams or other artificial structures in a stream whereby the water is impounded and let down in such a head or volume as to make the stream navigable, when it would not otherwise be so, unless it be in the states of Maine, Wisconsin, and Minnesota, where the construction of dams in floatable streams to facilitate their use is authorized by statute. *Brooks v. Cedar Brook*, etc., Imp. Co., 82 Me. 17, 19 Atl. 87, 7 L. R. A. 460, 17 Am. St. Rep. 459; *Kretzschmar v. Meehan*, 74 Minn. 211, 77 N. W. 41; *Field and Others v. Apple River Log Driving Co.*, 67 Wis. 569, 31 N. W. 17.

Having thus ascertained that a stream, to be navigable or floatable for saw logs, must be capable in its natural condition at ordinary recurring freshets of being successfully and profitably used for that purpose, and that a stream not navigable or floatable in its natural condition cannot be made so by artificial means, nor can the capacity of a navigable stream be increased by such means to the injury of a riparian proprietor without compensation, we are now prepared to consider the facts of the particular case before us and determine the respective rights of the parties litigant. The plaintiff is the owner of 480 acres of land, most of which is bottom or meadow land and has been extensively improved and used as such. Through this

land, from the north and east, flows the North Fork of the Klaskanie, for a distance of about one-half mile, to a point a short distance west of plaintiff's land, where it joins another stream from the southeast, called the "South Fork" of the Klaskanie, and the two streams united flow to the west, forming the Klaskanie river. The tide ebbs and flows in the Klaskanie from its mouth up to or about the confluence or junction of the two streams referred to, and is conceded by the plaintiff to be navigable to that point. From the junction of the two streams towards its source, the North Fork is a shallow tortuous stream, from 40 to 60 feet wide. For about half the distance through plaintiff's land it consists of riffles or shoals, and the water is but a few inches deep in the summer time, and from $1\frac{1}{2}$ to 2 feet deep during the ordinary winter freshets. At places the banks on one side are from 4 to 6 feet high; the opposite bank gradually sloping back to the meadow land. The soil is alluvial, and easily eroded in time of high water, and plaintiff has expended large sums of money in constructing embankments and other improvements to preserve the banks. In the fall of 1903 the defendants went upon the stream, about 2 miles above plaintiff's land, and constructed a dam 28 feet high for use in their logging operations, which dam is provided with four gates—three trip gates, each 8 feet wide and 16 feet high, and one slide gate, 6 feet wide and 24 feet high. By means of this dam the defendants are enabled to impound a large volume of water, which they suddenly release and allow to flow down the channel to suit their convenience.

Many witnesses were called and testified in behalf of both parties as to the character and capacity of the stream. They differ as to whether logs can be floated down it without the aid of dams. The witnesses for plaintiff, most of whom are farmers or landowners along the stream or in the vicinity, all concur in opinion that it cannot be so used; while the witnesses for defendants, most of whom are loggers or mill men, are equally positive that it can. But, while the witnesses differ in their opinions, there is no substantial conflict in the facts as testified to by them. They all agree that the stream is not floatable except in times of winter freshets, and that such freshets do not ordinarily occur more than three or four times a year, and continue but a few hours at a time. Christian Peterson, who was plaintiff's foreman, and lived upon his farm for 24 years prior to 1902, testified that during the ordinary winter freshets the water was from $1\frac{1}{2}$ to 2 feet deep in the riffles and shoal places, and would not float logs, but there might be two or three days in the year during which small logs would float down the stream; that the freshets would continue sometimes a couple of hours, and sometimes a half a day, and the water would fall as rapidly as it came up; that some years ago

Gilliam and Warnstaff put 80,000 or 90,000 feet of logs in the stream above plaintiff's land, and that only five or six of them had come out, and the remainder were scattered along the banks at the time he left the farm in 1902. John Leahy, who for 20 years has lived about $1\frac{1}{2}$ miles above plaintiff's premises, testified that the water is from $1\frac{1}{2}$ to 2 feet deep in the winter, except in case of unusually high water, which may occur once or twice a year and continue for a few hours at a time; that logs could not be floated at ordinary high water, but they would stop on the bars and along the banks; that more damage was done to the banks during the winter of 1903 by the operation of defendants' splash dam than in the entire 20 years he had lived on the stream, and that logs had been left higher on the banks than by the winter floods; that within three weeks prior to the trial in July, 1904, defendants had flushed down the stream, by means of their dam, about 100,000 feet of logs, which had lodged above his place, and there was great danger of their carrying away his house. James Leahy, who had lived on the stream above plaintiff's place for more than 20 years, testified that during the winter of 1903 and 1904 there was but one freshet sufficient to float logs, and then only small ones, and that it did not continue for more than three hours; that some years there would be three or four freshets, depending upon the rainfall, but they would only continue two or three hours; that the running of logs by defendants during the winter of 1903 and 1904 caused more damage than the natural wash of the stream for the previous 20 years. Michael Leahy and Charles Gilliam, who live on the stream, say that the water is from $2\frac{1}{2}$ to 3 feet deep during the ordinary winter freshets, and not sufficient to float any but small saw logs. Gilliam testified that some 12 or 15 years ago he put 137 logs in the stream and got one out the first year, and that six or seven of the smaller ones came down to plaintiff's place; that he tried to get the logs out, but could not do so for want of water, and had to abandon the enterprise; that logs would go down from a quarter to a half mile during a freshet, and then the water would recede and leave them in the channels of the stream or along the banks; that some of the logs were still in the stream, and others came out during the winter of 1903, when defendants were operating their splash dam; that logs which had laid in the stream for 15 or 16 years and were not carried out by ordinary winter freshets were floated out by water from the splash dam. Stephen Thies, who had charge of plaintiff's farm from April, 1902, to date of trial in July, 1904, testified that during the winter of 1902 and 1903 there were two or three freshets, one of which was extremely high, and continued from 10 to 12 hours; that during ordinary winter freshets the water was from 2 to 3

feet deep in shoal places, and not that during the winter of 1903 and 1904; that in June, 1904, the defendants were running logs down the stream by use of their splash dam; that they opened the dam and allowed the accumulated water to come down the stream, bringing logs with it, perhaps 20 times during the winter; that they were not able by this means to get all the logs out, but many of them were left on the banks and lowland along the stream, and there has been no time since defendants commenced the operation of their dam that plaintiff's land has been free of logs. Frank Buxton, who was employed on plaintiff's farm, testified that the stream was flushed by defendants during the winter of 1903 and 1904 from 25 to 30 times, raising the water 2 or 3 feet above its natural stage; that there was a rise of water during the winter from natural causes sufficient to float small logs.

Most of the witnesses for defendants do not live on the stream and have no actual knowledge of its conditions, but testified as to their opinion from an examination of the stream and their general knowledge of the climatic conditions of the surrounding country and its waterways. They generally agree that not more than from two to five freshets, sufficient to float logs, may reasonably be expected in the streams of that vicinity each year, continuing, as a rule, from 6 to 12 hours, but there were no such freshets during the winter of 1903 and 1904. Wallace and J. C. Dunkin, who were employed by defendants, testified that there was not more than one logging freshet during the winter of 1903 and 1904, and that the splash dam, operated by defendants, would raise the water as high as an ordinary freshet. Fred Normand, one of the defendants, says there are ordinarily from three to five freshets a year, depending upon the amount of rainfall, and last from 3 to 5 hours; that defendants' splash dam was constructed in the fall of 1903, and there was once during the succeeding winter that logs would float down the stream in its natural stage; that defendants were careful not to open the dam so as to overflow the banks of the stream and carry the logs out on the meadow, nor in the summer time, "because we do not want to overflow the bottom land." Alex Normand, the other defendant, said that four or five freshets may be reasonably expected each year, and they usually last from 5 to 6 and 10 to 12 hours, and that, by assisting them, "we can run logs for a day and a half or two days"; that their dam will raise the water in the stream about four feet, when a full head is turned down, but hardly as high as an ordinary freshet; that defendants used the dam for scattering logs along the stream, and "to assist them on down, so we can market them and not have to wait for freshets, as we would otherwise have to do"; that during the winter of 1903 and 1904 they were able, by use of their dam, to float

down to tide water from 1,700,000 to 2,000,000 feet of logs, for about four miles, which they expected to splash out during the succeeding winter.

We have made this extended reference to the testimony because whether a given stream is, in law, navigable or floatable, depends upon the facts, and a decision in one case cannot be regarded as a precedent in another, unless the facts are the same. From the testimony of the witnesses, both for plaintiff and defendants, it is apparent, we think, that the Klaskanle, where it flows through plaintiff's land, is not, in its natural condition, floatable for logs, because it is not capable of serving any important public use. Logs cannot be floated therein except, perhaps, at extreme high water continuing for a few hours at a time, and then only small logs. It would be going beyond any precedent of which we have knowledge to hold that such a stream is a public highway; and, since it is not such highway in its natural condition, it cannot be made so, by means of a splash dam or other artificial structures, without first acquiring the rights of the riparian proprietors.

It is suggested that, in view of the great lumber interests in the state, the public good would be subserved by holding that streams like the North Fork of the Klaskanle are public highways for the floating of saw logs; but this argument can have no bearing whatever upon the question. The magnitude or importance of any business or industry will not justify the slightest encroachment upon the rights of the citizen, and, unless a stream is in fact navigable or floatable, it cannot be taken or used without the consent of the owner, except by due process of law, however beneficial it might be to private interest or the public itself. It is often the case that the public good would be subserved by taking one man's property for the benefit of the community; but, as already quoted from Judge Cooley, "it neither should be nor can be done under any circumstances without observing the only condition on which it can be permitted in constitutional government, namely, that the private proprietor be compensated for the value which he surrenders to the public."

The decree will be reversed, and one entered here for plaintiff.

(50 Or. 233)

LEAVENGOOD v. MCGEE et al.

(Supreme Court of Oregon. Aug. 20, 1907.)

1. APPEAL—DISMISSAL—DEFECTS IN RECORD.

Where, in a suit to set aside a conveyance as in fraud of creditors, a transcript was filed on appeal, including copies of the findings, the decree, notice of appeal, and appeal bond, a motion to dismiss the appeal, on the ground that the original testimony and other papers on which the decree was based had not been transmitted to the clerk of the Supreme Court, as required by B. & C. Comp. § 553, subd. 1, and rule 1 of the Supreme Court (37 Pac. v.), was without merit, as the filing of the testimony was

not necessary to confer jurisdiction, and there might be questions arising on the pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3126.]

2. BANKRUPTCY—ACTION BY TRUSTEE—CONDITIONS PRECEDENT.

In order for a trustee in bankruptcy to maintain a suit to set aside a conveyance by the bankrupt as fraudulent, he must show by the record of the referee in bankruptcy that he has followed the procedure pointed out by the bankrupt act and that the claims on which he bases his action have been ascertained and established.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 421.]

3. APPEAL AND ERROR—RECORD—SUPPLYING DEFICIENCIES.

Where the record on appeal is deficient in any respect, it may be supplied on order at any time before the final disposition of the cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2816.]

4. FRAUDULENT CONVEYANCES—PLEADING—COMPLAINT.

In a suit to set aside a conveyance as in fraud of creditors, the facts upon which the suit is predicated must be specially pleaded.

5. SAME—EVIDENCE—SUFFICIENCY.

In a suit to set aside a conveyance as in fraud of creditors, evidence considered, and held insufficient to warrant a decree for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 867-908.]

6. CORPORATIONS—DE FACTO CORPORATION.

Where a corporation has attempted to do the business which it was authorized to do by its charter, it is, irrespective of defects in organization, a corporation de facto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 70.]

7. SAME—ATTACKING VALIDITY OF INCORPORATION.

The legality of the organization of a corporation, which appears to be at least one de facto, cannot be inquired into in any action other than one by the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 77-80.]

Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Suit by C. J. Leavengood, as trustee in bankruptcy of P. T. McGee, against James T. McGee and others. From a decree in favor of plaintiff, defendants appeal. Reversed.

Plaintiff sues, as a trustee in bankruptcy of P. T. McGee, a bankrupt, to set aside, as fraudulent as to his creditors, two deeds ultimately conveying to J. T. McGee certain lots in the town of Myrtle Creek, Douglas county. James T. McGee and Ruth, his wife, Frances, wife of P. T. McGee, and the McGee Company, a corporation, are made defendants. The first of these deeds is alleged to have been made on November 29, 1897, by P. T. McGee and his wife, for the expressed consideration of \$2,600, to the McGee Company, which was incorporated on that date by P. T. McGee, his wife, and son Hugh, with a capital stock of \$5,000, for the purpose of carrying on a general merchandise business at Myrtle Creek. But it is alleged that no stock was subscribed or paid for; that the corporation was not organized, and for that reason had no power or authority to make or enter into a contract for the purchase of

real property; that, in fact, no contract was made by and between P. T. McGee and the corporation for the purchase of real property described in the deed; but that the conveyance was voluntary, and wholly without consideration, and made with the intent and purpose of putting the title in such a condition that it could not be reached by McGee's creditors. The second deed is alleged to have been made on March 2, 1902, by the McGee Company, conveying the same property to James T. McGee, also a son of P. T. McGee, for the expressed consideration of \$1,000, when the company was in failing circumstances and unable to meet its liabilities, and was in fact insolvent; that the execution of the deed was not authorized by any acting board of the corporation, and was without consideration, and was made for the purpose of putting the property beyond the reach of the creditors of P. T. McGee and of the corporation, with the intent and for the purpose of defrauding them. It is also further alleged that since the making of this conveyance P. T. McGee has had the management and control of the property thereby conveyed to James T. McGee, and has collected the rents, and has assumed to be, and is in fact, the owner of the property; that claims amounting to about \$1,500 have been presented and allowed against the estate of P. T. McGee, and that the debts which are the basis of these claims were incurred at divers dates between January 1, 1897, and December 1, 1904; that the assets of the estate amount to no more than the sum of \$60. A demurrer to the complaint was interposed, assigning all of the grounds allowed by statute, which being overruled, J. T. McGee answered separately, with a general denial of the complaint, and alleging affirmatively that about March 1, 1898, P. T. McGee and his wife sold and conveyed the real property mentioned in the deed, together with some store fixtures and a stock of goods, to the defendant company for the consideration of \$2,600; that the corporation held the title and the possession of the lots until December 14, 1900, when it sold and conveyed the lots to him for the sum of \$1,000, which he paid, and that his transaction with the company was in good faith, without notice or knowledge of any intended fraud by P. T. McGee or by the company upon his or its creditors. The remaining defendants answered jointly to the same effect. Plaintiff replied, denying the new matter of the separate answers. The cause was referred to a referee for the taking of testimony, and, on his report coming in and being considered by the court, findings were made in plaintiff's favor, and thereon a decree was entered, setting aside each of the deeds, and the property ordered sold and the proceeds applied to the payment of the indebtedness of P. T. McGee, as allowed in the administration of his estate as a bankrupt. From this decree all of defendants appeal.

C. S. Jackson, for appellants. J. C. Fullerton, for respondent.

On Motion to Dismiss.

SLATER, C. (after stating the facts as above). At the hearing in this court a motion to dismiss the appeal was entered by plaintiff on the ground that the original testimony, and other papers in this cause, on which the decree of the circuit court was based, had not been transmitted to the clerk of this court as required by section 553, subd. 1, B. & C. Comp., and by rule 1 of this court (37 Pac. v). Before argument thereon defendants filed a counter motion, supported by an affidavit, for an order on the county clerk of Douglas county requiring him to complete the record by forwarding all the testimony and exhibits produced at the trial in the court below. A transcript in this case was filed in this court on June 15, 1906, which, besides the pleadings, includes copies of the findings, the decree, notice of appeal, and undertaking on appeal. No question is made by plaintiff that any of the necessary steps to perfect the appeal were omitted or were not taken in the time required by law to confer jurisdiction upon this court of the cause, and the filing of such a transcript here did confer jurisdiction. The filing of the testimony was not necessary to confer jurisdiction, and its absence would not destroy that jurisdiction, for there may be questions arising upon the pleadings to be tried on appeal, as well as whether the decree is supported by the pleadings and the findings; but the absence of the testimony would prevent this court from trying the case *de novo* on the facts. The plaintiff's motion, however, amounts to a suggestion of a diminution of the record, and the deficiency may be supplied on order at any time before the final disposition of the cause. B. & C. Comp. § 445. The motion, therefore, must be denied, and, the testimony having been received by the clerk since the submission of the case, it should be ordered filed.

On the Merits.

It will not be necessary to separately consider the questions raised by the demurrer, but it will be considered and disposed of along with the merits. On behalf of defendants the contention is made that, before a creditor can maintain a suit to set aside as fraudulent a conveyance of his debtor, he must either establish his claim by judgment or acquire a lien by attachment; and such is the rule in this state. *Dawson v. Coffey*, 12 Or. 513, 8 Pac. 838; *Dawson v. Sims*, 14 Or. 561, 13 Pac. 506; *Bennett v. Minott*, 28 Or. 339, 39 Pac. 907, 44 Pac. 288; *Matlock v. Babb*, 31 Or. 516, 49 Pac. 873; *Fleischner v. Bank of McMinnville*, 38 Or. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345. And they further contend that a trustee in bankruptcy, having no greater authority, is bound by the same rule, citing 30 Stat. 506, c. 541 (section

70, subd. "e," Bankr. Act Cong. July 1, 1898 [U. S. Comp. St. 1901, p. 3452]), which is as follows: "The trustee may avoid any transfer by the bankrupt of his property, which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value." This rule that a creditor must reduce his claim to a judgment before he will be allowed to attack in a court of equity a conveyance of his debtor for fraud is based upon two reasons: (1) That the claim must be a liquidated claim, so that an equity court will not be required to stop and inquire into the validity of the claim. The object of a creditors' bill is not to ascertain or determine the amount and validity of the claim or debt, but that is the province of the law. (2) A judgment and the issuance of an execution and its return *nulla bona* is required as an evidence that all of the remedies at law have been exhausted before resort is made to equity. This is the reason of the law, but there are exceptions to the general rule. Note to section 1415, Pomeroy's Equity. A judgment is not necessary to enable a trustee in bankruptcy to maintain a suit to set aside transfers of property by the bankrupt in fraud of creditors, since under the bankruptcy act neither the trustee nor the creditor whom he represents could obtain such a judgment. *Mueller v. Bruss*, 112 Wis. 406, 88 N. W. 229. But a method is provided by the procedure in bankruptcy whereby the claims of creditors may be legally adjudicated and before the trustee should be permitted to attack by a suit in equity the conveyance of the bankrupt he shall allege and prove by the record of the referee that such procedure has been followed and that the claims on which he bases his contention have been ascertained and established. In this case the claim of Edwin Weaver, amounting to \$97, dated January 8, 1901, is, according to the contention of plaintiff, of some importance, because of the close proximity of the date of its occurrence to the date of the deed from the McGee Company to James T. McGee. But the rightfulness of it is assailed by the defendants, who claim the note upon which the claim is based has been paid in full and \$3.72 overpaid. The claim has not been acted upon by the referee, and hence it cannot be made a basis for a suit of this character.

It is difficult, however, to determine from the averments of the complaint upon what particular ground of fraud plaintiff relies to avoid the deeds. It is alleged that the deed by McGee and wife to the corporation was made with the intention of putting the title beyond the reach of his creditors, and that it was in fraud of his creditors; but it is not

alleged that McGee at that time had any creditors, nor that he was then in failing circumstances or insolvent, and that the property conveyed was all of the property possessed by him at that time—facts necessary to be alleged to make a case of constructive fraud. It is alleged that P. T. McGee was adjudged a bankrupt on December 1, 1904, in the District Court of the United States for the District of Oregon, and "that the debts which are the basis of said claims filed against said bankrupt estate were made and incurred at divers dates between the 1st day of January, 1897, and the 1st day of December, 1904"; but, while that allegation may be true, it does not follow therefrom that any of the debts presented and allowed were incurred or existed on or prior to March 1, 1898, the date of the first deed. There must be alleged and proven facts out of which a constructive fraud will arise by force of law, or facts constituting actual or expressed fraud. "And the rule is that the facts upon which fraud is predicated must be specifically pleaded. A mere general averment of fraud is nothing but the averment of a conclusion, and will not suffice. It presents no issue for trial, and is bad on demurrer. Such an averment not only renders the bill or complaint demurrable, but it will not even sustain a decree." 20 Cyc. 734; *Leasure v. Forquer*, 27 Or. 334, 41 Pac. 665. To avoid a deed as to future creditors, constructive fraud will not be sufficient, but express fraud is essential. "If a creditor assails a conveyance made before the debt was contracted, he must as a rule allege and prove that the conveyance was made with the intent to put the property beyond the reach of creditors with whom the grantors intended to deal upon the faith of his owning the property transferred, and that upon that faith he did contract debts which he did not intend to pay" (20 Cyc. 738), or that "the transfer was made with a view of entering into some new and hazardous business, the risk of which the grantor intended to be cast upon the parties having dealings with him in the new business. Such conveyance is fraudulent as to subsequent creditors and may be attacked by them. However, a mere expectation of future indebtedness, or even an intent to contract debts, if it be only an intent, not coupled with a purpose to convey the property in order to keep it from being reached by the creditors, will not make the deed invalid as against such future creditor." 20 Cyc. 425.

We do not find such averments in the complaint, nor any evidence in the record tending to prove any of such requirements. The facts which we gather from the record are about as follows: For many years prior to March 1, 1898, the date of the first deed, P. T. McGee had been engaged in a general merchandise business at Myrtle Creek, with his son Hugh as an associate. In 1895 their store was destroyed by fire, at which time

they had a stock of goods estimated in value by them at about \$20,000, all of which was destroyed. They had insurance to the amount of \$8,000; but, payment being resisted, they compromised for \$4,000 and received that amount. With this sum, to which was added \$2,000 borrowed by P. T. McGee from the state school fund upon a mortgage of his and his wife's farm, they paid all of their debts and resumed business in a small way. Desiring to change the manner in which they had previously been doing their business, they incorporated the McGee Company on November 19, 1897, with a capital of \$5,000; P. T. McGee, his wife, and son Hugh being the incorporators—the former being the main stockholder, while his wife and son had only a nominal interest. The stock of goods, store fixtures, and the lots described in the deed were turned in to the corporation in payment for his interest in the stock; and to accomplish the transfer of the lots he and his wife, on March 1, 1898, made the first deed to the corporation which is assailed. This deed was recorded on March 2, 1898. The store business was then conducted in the name of the corporation for some three or four years. On the 14th day of December, 1900, the corporation conveyed the lots by deed to James T. McGee, another son. This deed was acknowledged January 14, 1901, and was recorded January 17th following. The consideration expressed therein is the sum of \$1,000, which the grantee swears he paid the corporation in money, by having loaned to it at some time previous thereto the sum of \$200, and at another time \$400, which amounts the corporation was owing him at the date of the making of the deed, and the balance of the consideration, namely \$400, he paid the corporation at the time of receiving the deed. This testimony is corroborated by P. T. McGee, and we do not find anything in the record tending to rebut it. P. T. McGee continued to occupy the premises, living in one of the old buildings thereon, and renting and collecting and receiving the rent from the other buildings, giving the receipts, sometimes in his own name, and at other times in the name of James T. McGee, his son. In one instance he executed a lease to another in his own name for a portion of the premises. The rents were used by P. T. McGee in making repairs and for his personal expenses; but for a short time James used and occupied a part of the premises for a blacksmith shop and built a shed or addition to one of the buildings, in which he stored for a time some farm machinery. James and his father both swear that the latter was allowed to occupy a portion of the premises, which had always been his home, and to manage and rent the remainder, and to keep the rents as an offset and exchange for the rent of the farm belonging to P. T. McGee and his wife, which James was living

upon without the payment of any other rent; and it also appears that James always paid the taxes upon the property in controversy. Some time after the conveyance by the corporation to James of these lots it ceased to do business, and P. T. McGee resumed business in his own name, and it was during that time that most of the debts now claimed against him were incurred. On the 9th day of November, 1904, he filed his voluntary petition in bankruptcy in the United States District Court of the District of Oregon. Plaintiff was appointed his trustee and qualified. Claims to the amount of about \$1,500 were presented to the referee, and most of them were allowed; but of these none were incurred prior to March 1, 1898, the date of the insolvent's deed to the corporation, and the only debts which were incurred by McGee before January 21, 1901, the date on which he acknowledged for the corporation its deed to James, are as follows: The claim of the Acme Harvesting Company for \$57, which was incurred September 29, 1900, and the claim of Edwin Weaver, dated January 3, 1901, already referred to as not having been ascertained and allowed by the referee in bankruptcy at the time of the commencement of this suit and at the time of the taking of the testimony. All of the remaining claims were incurred by McGee from one to three years after the date of the corporation deed to James. It also appears from the testimony that during all this time, and up to March 11, 1902, he owned his equity of redemption in the farm and four other lots in Myrtle Creek, which were of considerable value; for on that date he mortgaged them to Kate Miller to secure the sum of \$200. So that it does not appear from the evidence that there were any facts from which a presumption of constructive fraud could arise, nor any tending to establish express fraud by McGee, when making his deed to the corporation on March 2, 1898. So that, if the corporation was such a legal entity as to be capable of receiving and conveying title to another, plaintiff must fail, unless a case may be made of a reservation by P. T. McGee of some secret interest or title in the property in fraud of his creditors.

Plaintiff alleges and contends that the McGee Company was not legally organized as a corporation; that no stock was taken or subscribed, and no officers were elected; and hence, he concludes, as a corporation it could not contract for or purchase or take the title to real property, nor could it convey the title to another. But plaintiff offers in evidence a certified copy of articles of incorporation of the McGee Company, which appear to have been properly executed on November 29, 1897, and were filed with the county clerk and recorded December 5, 1897, with power therein conferred upon the corporation, among other things, to run and operate a general

country merchandise store and to buy and sell real property. The offering of the certified copy of the articles of incorporation makes a prima facie case of the legal existence of such corporation and of its right to do the business mentioned in the articles. Sess. Laws 1905, p. 111. P. T. McGee swears that the corporation was fully organized, with a full complement of officers, and that it conducted a general merchandise business for several years. This, taken with the fact that the corporation executed, by Hugh McGee, as its president, and P. T. McGee, as its secretary, the deed conveying the premises to James, shows that it has attempted to do the business which it was authorized by its charter to do, and this established it at least as a corporation de facto, so that the legality of its organization cannot be inquired into in any action other than by the state. *Marsters v. Umpqua Valley Oil Co. (Or.)* 90 Pac. 151. And it is well settled that a conveyance of property to or by a corporation de facto will be binding and valid as against all parties except the state. *Finch v. Ullman*, 105 Mo. 255, 16 S. W. 863, 24 Am. St. Rep. 383. The corporation, then, having taken the title to the lots in question by the deed to P. T. McGee and wife, executed on March 1, 1898, free from any fraud of the grantor, its title would not be affected by any of his subsequent creditors, unless the conveyance is made with the intent to defraud future creditors; but, as we have already seen, there is no averment in the complaint that P. T. McGee, when he and his wife made the conveyance, intended to deal with these creditors in the future and to incur these subsequent debts on the faith of his ownership of the property in question, nor is there any proof to that effect; nor is there any averment that when the conveyance was made he was about to engage in a hazardous enterprise, and that it was made so as to throw the burden of loss on his anticipated creditors, but the proof shows that, by conveying the property to the corporation and the business being thereafter conducted in the name of the corporation, the property was exposed to all the hazards of the business of the corporation, and hence it could not have been that such fraud was intended. The evidence, we think, shows quite clearly that, when James T. McGee took the title from the corporation by its conveyance, he paid the consideration expressed in the deed, and that there was no secret reservation of any interest therein by P. T. McGee. The explanation of the subsequent possession of the premises by P. T. McGee is sufficient to satisfactorily rebut any possible inference that might otherwise arise from such facts that P. T. McGee had retained a secret interest in the property.

For these reasons, it follows that the decree should be reversed, and one entered here dismissing the complaint.

BRATTAIN et al. v. CONN et al.

(Supreme Court of Oregon. Aug. 27, 1907.)

WATERS AND WATER COURSES—OBSTRUCTION OF FLOW—MAINTENANCE OF DAM.

Where complainants and their predecessors in interest for more than 20 years had asserted and exercised a right each year to construct and maintain, whenever necessary, a temporary dam or obstruction in the main channel of a river to divert water into a creek for irrigation purposes, without any intimation from defendants or their predecessors in interest that complainants' right to maintain the dam was questioned, complainants acquired a prescriptive right to maintain it, notwithstanding defendants clandestinely and without complainants' knowledge at various times forcibly destroyed the works so maintained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 195.]

Appeal from Circuit Court, Lake County; Henry L. Benson, Judge.

Suit by T. J. Brattain and others against George Conn and another. From a judgment for complainants, defendants appeal. Affirmed.

C. A. Cogswell, for appellants. L. R. Webster and Joseph Simon, for respondents.

PER CURIAM. This suit is brought by T. J. Brattain and nine other landowners in the Chewaucan valley, for themselves and others similarly situated, to establish the right to maintain a temporary dam or obstruction in the Chewaucan river, at the head of Small creek, during low-water seasons, for the purpose of diverting a portion of the water of such river into Small creek for irrigation purposes, and to enjoin defendants from interfering with such right. The Chewaucan river is quite a large stream flowing northeasterly through the town of Paisley. Just above the town it divides, and one fork thereof, called "Small Creek," flows in a southeasterly direction, and from which plaintiffs irrigate about 2,000 acres of land. Prior to 1880, and while the 40-acre tract at the head of Small creek, and through which the main river flows, belonged to the state, plaintiffs or their predecessors in interest entered upon and improved Small creek, for the purpose of conducting water through it for irrigating purposes; and, as the natural flow was not sufficient for their needs during the low-water seasons, they constructed and maintained, each year during that time, a temporary dam in the main river for the purpose of diverting a portion of the water into Small creek, thus augmenting the natural flow thereof. While they were so using Small creek and maintaining their dam, the land was conveyed by the state to one Riggs, who subsequently sold it to Hanchett, who conveyed it to Drinkwater in August, 1882. From the time of the conveyance by the state to Riggs, in 1880, and up to 1886, plaintiffs used Small creek as a part of their irrigation system, and maintained the dam referred to without objection from the landowner, so far as the evidence discloses; but

in 1886, some question arising between them and Drinkwater, Brattain and others purchased the right to use the natural channel of Small creek from him as a conduit through which to convey water from the main channel of the river, through and across his lands, with the right to enter thereon for the purpose of enlarging or clearing the stream from obstructions and placing and maintaining headgates therein and such other work or works as may be found necessary to maintain and control the desired flow of water. A few days after making this conveyance to Brattain and his associates, Drinkwater conveyed the premises to Virgil Conn, who in October, 1889, sold and conveyed to defendant George Conn, who has ever since been the owner thereof. After the Drinkwater deed, plaintiffs or their predecessors in interest continued to use Small creek and to maintain the dam in the main stream as before, without any expressed objections or protest from defendants or their predecessors in interest, until 1902, when defendants tore out the dam and by force prevented plaintiffs from rebuilding it, whereupon this suit was commenced. It resulted in a decree in favor of plaintiffs, and defendants appeal.

The only question involved is the right of plaintiffs to construct and maintain a temporary dam or obstruction in the Chewaucan river at the head of Small creek to increase the flow to 2,500 inches of water in such creek during the low-water seasons. They claim this right by virtue of a grant from Drinkwater and by prescription. The deed from Drinkwater to Brattain and his associates conveyed the use of Small creek as a conduit for water from the main channel, with the right to place and maintain a headgate therein, and "such other work or works as may be necessary to maintain and control the desired flow of water through said creek channel"; and it can be fairly argued, in view of the circumstances, this language was intended to, and did, include the right to construct a dam in the main river, as the grantees had theretofore done. But, however that may be, we think a prescriptive right to maintain such dam is shown by the testimony. It clearly appears that for more than 20 years the plaintiffs and their predecessors in interest have asserted and exercised the right each year to construct and maintain, whenever necessary, a temporary dam or obstruction in the main channel of the river to divert from 2,000 to 2,500 inches of water into Small creek for irrigation purposes, and without any intimation from defendants or their predecessors in interest that their right was questioned. It is true that defendant George Conn testifies that he often tore out and removed the dam, but there is no evidence that plaintiffs knew of this fact, or that it was done at a time when they needed the water. It was a clandestine and secret invasion of their rights, and we

do not understand that an entry by stealth and without the knowledge of the party in possession is sufficient to break the continuity necessary to constitute an adverse possession or to establish a right by prescription.

It is unnecessary for us to further review the testimony. It is sufficient that we have examined the record with care and find no reason why the decree of the court below should be disturbed.

Decree affirmed.

DUTRO v. LADD et al.

(Supreme Court of Oregon. Aug. 27, 1907.)

1. PLEADING—ANSWER—DEFENSES.

Under B. & C. Comp. § 73, providing that an answer may contain any new matter constituting a defense, and section 74, that defendant may plead as many defenses as he has, defendants, sued on an account for legal services, having pleaded a general denial, were entitled also to plead limitations as an affirmative defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 184-194.]

2. STATUTES—CONSTRUCTION.

Where the sections of a statute involved are all included in the same act, they must be construed together, and such construction be given, if possible, that each section may be effective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 283.]

3. SAME.

Where the language is clear and unambiguous, it leaves no room for construction, and it becomes the duty of the court to adopt the meaning which it imports.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 266.]

4. LIMITATION OF ACTIONS—COMMENCEMENT OF ACTION—FILING COMPLAINT—SERVICE.

B. & C. Comp. § 6, provides that an action on contract must be brought within six years from the time the cause of action accrues. Section 51 provides that actions at law shall be commenced by filing a complaint with the clerk of the court, and that sections 14 and 15 shall only apply for the purpose of determining whether an action has been commenced within the time limited. Section 14 declares that an action shall be deemed commenced when the complaint is filed and the summons served, and section 15 provides that an attempt to commence an action shall be deemed equivalent to its commencement, when the complaint is filed and summons delivered with the intent that it shall be served by the sheriff or other officer of the county in which defendants or one of them usually or last resided, if such attempt be followed by the first publication of the summons or service within 60 days. *Held*, that where, in an action on an account, the complaint was filed and the summons delivered to the sheriff for service 2 days before the expiration of the statutory period, but no service was had or publication begun until 10 months thereafter, the action was barred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 530.]

Appeal from Circuit Court, Multnomah County; J. B. Cleland, Judge.

Action by Thomas C. Dutro against William M. Ladd and others, as executors of the estate of W. S. Ladd, deceased, and another. From a judgment for defendants, plaintiff appeals. Affirmed.

This is an action to recover \$5,000, attorney fees, alleged to be due plaintiff from defendants for legal services furnished between

December 15, 1896, and May 9, 1898. The complaint was filed May 7, 1904, at which time a copy of the summons was placed in the hands of the sheriff, but not served until March 9, 1905, when personal service was had and the summons filed. Defendants answered, denying the allegations of the complaint, and as an affirmative defense pleaded the statute of limitations. A reply being filed, placing the cause at issue, on June 28, 1905, a trial was had before a jury, resulting in a nonsuit. From a judgment thereon, plaintiff appeals.

C. M. Idleman, for appellant. S. B. Linthicum, for respondents.

KING, C. (after stating the facts). It is urged by counsel for plaintiff that defendant, by appearing and answering to the merits and denying the allegations of the complaint is not entitled to maintain his affirmative defense. It is settled that, where it does not appear from an inspection of the complaint that the remedy is barred, the same may be averred in the answer. *Hawkins v. Donnerberg*, 40 Or. 97, 66 Pac. 691, 908. B. & C. Comp. § 73, provides that the answer may contain any new matter constituting a defense; and section 74, that the defendant may set forth by answer as many defenses as he may have. While this cannot be done where it appears that the defense is clearly inconsistent, there is nothing inconsistent in the defendant asserting he owes the plaintiff nothing and at the same time averring that the claim sued on is barred by the statute. The object of the law on the subject is to prevent the assertion of stale claims, whether with or without merit, thereby avoiding the oppressive results which would otherwise often follow after witnesses are unavailable, or after unavoidable events have transpired precluding the assertion of what might have otherwise been a good defense. It would therefore not be in harmony with the reason and spirit of the law to hold the statute unavailable merely because it may be alleged in the answer that the claim is without merit. Defenses may be deemed inconsistent only when they are so contradictory to each other that one of them must necessarily be false. In this case, if the defendant did not owe plaintiff, yet, under the affirmative allegations in the answer, the statutory bar is urged against him; while, if the claim is in fact meritorious, such time has elapsed since plaintiff's rights thereto matured as to constitute a bar to his remedy. Both may be true, and, if so, defendant should be permitted to frame his answer accordingly. *Snodgrass v. Andross*, 19 Or. 236, 23 Pac. 969.

The next question for determination is as to whether, under the facts admitted by the pleadings, plaintiff's claim is barred under B. & C. Comp. § 6, which provides that an action upon a contract or liability, express or implied, must be brought within six years from the time the cause of action accrues.

It is admitted by the pleadings, in effect, that, while the complaint was filed 2 days before the expiration of the statutory period, the summons was not served nor filed until 10 months thereafter. It is provided by section 51 that "actions at law shall be commenced by filing a complaint with the clerk of the court, and the provisions of sections 14 and 15 shall only apply to this subject for the purpose of determining whether an action has been commenced within the time limited by the Code." It is also added that summons may be served on the defendant at any time thereafter. Section 14 states that an action shall be deemed commenced when the complaint is filed and the summons served; and in section 15 it is provided that an attempt to commence the action shall be deemed equivalent to its commencement, when the complaint was filed and summons delivered with the intention that it shall be actually served by the sheriff or other officer of the county in which the defendants or one of them usually or last resided; "but such an attempt shall be followed by the first publication of the summons or service thereof within 60 days." It is conceded here that no service in person or attempted publication of summons was made within that time, but argued by plaintiff's counsel that there is a distinction between the "limitation" of actions and "commencement" of actions; that sections 14 and 15 apply only for the purpose of determining whether the action has been commenced within the time limited by the Code, and designates the relations only that exist between the defendants, specifying the respective rights as between themselves; and that these sections in no manner place any restrictions on section 51. The sections of the statute alluded to are all included in an act entitled "A bill to provide a Code of Civil Procedure," adopted in 1862. Being included in the same act and adopted at the same time, they must necessarily be considered together, and such construction be given thereto, if possible, that all the provisions of each of the sections may be made effective. *State v. McGuire*, 24 Or. 366, 33 Pac. 606, 21 L. R. A. 478. We think, however, that the language is plain and unambiguous, leaving no room for construction; and when the language is clear we have no discretion but to adopt the meaning which it imports. *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140. Section 51 clearly states that sections 14 and 15 of B. & C. Comp. can apply only for the purpose of determining whether the action has been commenced within the time prescribed by the Code, and not for any other purpose. In any other case it is manifest that the filing of a complaint is sufficient, and the summons may be filed as there stated, provided it be filed within the time limited, where the question arises as to whether the action is barred by section 6 of the statute, in which event it is expressly provided that the service must be made within 60 days from the filing of the complaint. It

being admitted the summons was not served, filed, or in any manner attempted to be served or filed, nor publication thereof attempted, until 6 years and 10 months after the cause of action matured, it necessarily follows that the action was not commenced within the time required. 1 Enc. Pl. & Pr. p. 136; *Burns v. White Swan Mining Co.*, 35 Or. 305, 57 Pac. 637; *Smith v. Day*, 39 Or. 531, 64 Pac. 812, 65 Pac. 1055.

Other points are suggested in the record, but not urged here; nor do we deem them material.

The judgment of the court below should be affirmed.

WOLF v. CITY RY. CO.*

(Supreme Court of Oregon. Aug. 20, 1907.)

1. TRIAL—WITHDRAWAL OF TESTIMONY.

Where the undisputed circumstances show the testimony of a witness cannot by any possibility be true, it is the duty of the court to withdraw such testimony from the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 334.]

2. STREET RAILROADS—INJURY TO PERSONS ON TRACK—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action for the death of plaintiff's intestate, caused by his being struck by a street car, evidence examined, and that of a certain witness for plaintiff held not so opposed to all reasonable probabilities as to require its exclusion, as a matter of law, from the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 251-257.]

3. SAME—CONTRIBUTORY NEGLIGENCE OF PERSON INJURED.

A person about to cross a street at a crossing is not bound to wait because a car is in sight; but if the car is at such a distance that he has time to cross, if it is run at the usual speed, it is not negligence, as a matter of law, to attempt to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 257.]

4. SAME—QUESTION FOR JURY.

Whether a speed of 20 or 29 miles an hour by a street car at a much-used crossing is reasonable is for the jury.

5. SAME—CARE REQUIRED IN OPERATION.

It is the duty of a street railway company, in operating its cars at street crossings, to use ordinary care to avoid injury, regardless of whether the rate of speed has been limited by statute or ordinance, or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 172.]

6. SAME—EVIDENCE—SUFFICIENCY.

That at the time a pedestrian was struck by a street car there were seven persons at or near the crossing authorized a finding that the street was much used.

7. SAME.

Principles of law governing the management of trains propelled by steam power and those propelled by electricity are not identical.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 172.]

8. APPEAL—EXCESSIVE VERDICT—QUESTION OF FACT.

The refusal to set aside a verdict as excessive cannot be reviewed on appeal; the question being one of fact, and not of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3864.]

Appeal from Circuit Court, Multnomah County; Alfred F. Sears, Jr., Judge.

* Rehearing denied October 22, 1907.

Action by Mollie Wolf, administratrix of the estate of Isaac Wolf, deceased, against the City & Suburban Railway Company Judgment for plaintiff, and defendant appeals. Affirmed.

W. P. Lord and E. B. Seabrook, for appellant. A. Bernstein and D. S. Cohen, for respondent.

MOORE, J. This is an action by Mollie Wolf, as administratrix of the estate of her husband, Isaac Wolf, deceased, against the City & Suburban Railway Company, a corporation, to recover damages resulting from his death, which was caused by his being struck by one of the defendant's cars, August 26, 1902, in the city of Portland. The negligence alleged as a basis for the recovery is that the car causing the injury was being run down a steep incline on First street, from Montgomery to Mill street, at a reckless, dangerous, and excessive rate of speed, and without any warning being given of its approach to the crossing at Mill street, by reason of which carelessness, and without any fault on his part, Wolf sustained the injury, at the intersection of First and Mill streets, a public crossing, which resulted in his death. The answer denies the material allegations of the complaint, and avers that at the time of the accident the defendant's agents and servants were exercising due care and caution in conducting and managing the car, and that the hurt complained of was caused by the contributory negligence of plaintiff's intestate. The reply put in issue the allegations of new matter in the answer, and, the cause being tried, judgment was rendered against the defendant for the sum of \$5,000, and it appeals, assigning as error, *inter alia*, the action of the court in refusing to grant a judgment of nonsuit at the conclusion of plaintiff's case, and in denying a request to direct the jury to return a verdict for the defendant when all the testimony had been submitted.

A former judgment in this action for the sum of \$500 was reversed in consequence of the court's refusal to grant a nonsuit. *Wolf v. City Railway Co.*, 45 Or. 446, 72 Pac. 329, 78 Pac. 668. The testimony produced at the last trial is substantially the same as that given at the prior hearing, except that one S. Price, who had not theretofore been called by either party, appeared as plaintiff's witness; and hence a determination of the errors alleged must rest upon a consideration of his declarations under oath, when examined in connection with other evidence. Before reviewing his testimony, however, it is deemed proper to call attention to the locus in quo where the injury occurred. The testimony shows that First street, in the city of Portland, extends northerly on a downgrade from Montgomery to Mill street, which highways cross it at right angles, and the blocks situated between the intersecting cross-streets are 200 feet in length, and the streets mentioned 60 feet in width; that the defend-

ant owns two parallel tracks on First street, the rails of each of which are placed 3 feet and 6 inches from center to center, and the space between the two tracks is 5 feet and 8 inches from center to center, of the rails; that the cars, which are operated by electricity, in going north run on the east track, and those proceeding in an opposite direction pass over the west line; that double-track car No. 64, which struck the decedent, is 28 feet long, and 34 persons can be seated therein, but at the time of the injury there were on the car 53 passengers, a motorman, and a conductor.

Price's testimony is to the effect that at the time of the accident he was standing, with others, at the northeast corner of First and Mill streets, awaiting the approach of a car going north, to become a passenger thereon; that he first saw Wolf going south on the west side of First street and thence nearly across Mill street, where he turned southeasterly to the south cross-walk on the latter street, and as he reached the west line of the rails the witness first saw the car up the hill coming down fast; that he did not hear any bell rung, nor was the speed of the car slackened; that when Wolf reached the east line of rails the car was about 50 feet south of Mill street, and before he could cross the track he was struck and injured by the car, which passed entirely across the street before it was stopped. On cross-examination the following questions were asked, and responses thereto made: "Q. Where was the car when you first saw it? A. I saw it about Montgomery street, as soon as it came up the hill. * * * Q. Was it at Montgomery street when you saw it first? A. That is something I could not tell you. Q. Will you swear it was as far up as Montgomery street when you first saw it? A. I could swear it was a block away when I seen it. Q. Where was Mr. Wolf when you first saw the car? A. He was on the first track—on the west track. Q. When you first saw the car, Mr. Wolf was then on the west track, the one the cars run up on? A. Yes; on the west track. Q. And where was the car then? How far up? A. A block. Q. Up at Montgomery street, one block away? A. Yes. Q. Was Mr. Wolf walking at a tolerably brisk speed, or was he going very slowly? A. He was walking pretty briskly. Q. And he walked right along all the time and did not stop? A. Yes. Q. You looked at him all the time? A. Yes. * * * Q. When Mr. Wolf came up the track, did you notice whether he looked up or down to see whether there was any car coming? A. I noticed that he kind of looked in the beginning of his going on Mill street. I noticed that when he went in on Mill street—I noticed that when he went in to cross on Mill street—he turned in and looked a little to see if any car was coming. * * * Q. Was there anything to obstruct his view, if he looked up the street from where he was? A. Nothing in the way. It was uphill. Q.

There was nothing in your way? A. Nothing in my way."

It is argued by defendant's counsel that Price's testimony is so opposed to all reasonable probabilities as to require its exclusion as a matter of law from the jury, leaving the case as it stood at the former appeal; and, this being so, errors were committed as alleged. There are certain facts of such general notoriety that they are assumed to be known by a court without any proof thereof (B. & C. Comp. § 719) and if the testimony of a witness transcends the laws of nature it is undoubtedly the duty of a court to withdraw such testimony from the consideration of the jury (*Smitson v. Southern Pacific Co.*, 37 Or. 74, 60 Pac. 907). Thus, in *Blumenthal v. Boston & Maine Railroad*, 97 Me. 255, 54 Atl. 747, it was ruled that, when the undisputed circumstances show that the story told by a witness upon a material issue cannot by any possibility be true, it is incumbent upon the court to take such testimony from the jury. In that case the plaintiff was hurt by a collision with the defendant's train, after he had successfully crossed two of its tracks; and in referring to the circumstances of the injury, as detailed by the party suffering therefrom, Mr. Chief Justice Wiswell makes the following observation: "The plaintiff, according to his own testimony, was driving at a fast walk, and witnesses for the plaintiff testified that in their judgment the speed of the freight train was from 15 to 20 miles an hour. Assuming these estimates to be correct, when the plaintiff was upon the first track, with an unobstructed view of the railroad easterly for a distance of between 300 and 400 feet, the train was only from 125 feet to 150 feet distant from the crossing, because the speed of the train was only five or six times that of the plaintiff, and they came into collision after the plaintiff had traveled a distance of 25 feet. Consequently, when the plaintiff was upon the first track, 25 feet distant from the place of collision, he had an unobstructed view of the approaching train, which was not more than 150 feet distant on the track from the crossing. If the relative speed of the freight train was not as great as the witnesses have estimated, then, of course, the train was still nearer the crossing at the time the plaintiff was upon the first track. There is no controversy about these facts. They are shown by the testimony introduced by the plaintiff, and by the plan which the plaintiff used and which is made a part of the case. From these facts one of these two conclusions is irresistible: Either the plaintiff failed to take such precautions as to looking and listening before attempting to cross the third track as have been laid down by all authorities as indispensable to his right of recovery, or else he did look and saw the approaching train, and took his chances of safely crossing in front of it. In either event his negligence contributed to the accident, and in accordance with the settled

law of this state that negligence will prevent his recovery." In *Spiro v. St. Louis Transit Co.*, 102 Mo. App. 250, 76 S. W. 684, Mr. Justice Goode, discussing the legal principle under consideration, remarks: "Verdicts resting on evidence which looks contrary to the ordinary course of nature are not infrequently set aside, and retrials directed, by appellate courts, as a proper precaution against an unjust outcome of litigation. While it is fundamental that juries must weigh evidence and trial judges revise their findings, instances happen in which, from one cause or another, this practice so obviously failed to work out a right result that an imperative call is heard to supplement it by an exceptional procedure in order that justice, the end of all procedure, may not be frustrated. This prerogative of courts of error is sparingly employed; but that it exists, as an emergency expedient, for the correction of verdicts palpably wrong, is certain. The appropriate use of it does not require a court to be convinced that the jury found an event to have occurred that was physically impossible or miraculous. It is enough if the event found was so improbable according to the ordinary operation of physical forces, or was so overwhelmingly disproved by credible witnesses, as to compel the conviction that the jury either failed to weigh the evidence carefully, or drew unwarranted inferences, or yielded to a partisan bias." So, too, in *Stafford v. Chippewa Valley Electric R. Co.*, 110 Wis. 331, 85 N. W. 1036, Mr. Justice Marshall, commenting upon the claim respecting the relative speed of a car and of a vehicle in which the plaintiff was riding, says: "The idea that the car moved from a point where it was out of sight from plaintiff's point of view when she looked to where it was when the horses became frightened, a distance of some 275 feet, while the horses traveled but about 20 feet, making the speed of the car somewhere about 50 miles per hour, or twice as great as the most extravagant testimony of plaintiff's witnesses puts it, is as well within the bounds of the ridiculous, we venture to say, as anything that has heretofore received serious consideration by a trial court or jury. We cannot believe for a moment that the learned trial court or the jury believed that such a thing could be within reasonable probabilities, or that the case was submitted to the jury upon any such theory."

The defendant's counsel, invoking the rule enunciated in the cases from which the foregoing excerpts have been taken, insist that, as it appears from Price's sworn statements Wolf passed from the west rail of the west track to a point about 12 inches east of the east rail of the east track, a distance of 13 feet and 8 inches, where he was struck by the corner of the car, while it was going from Montgomery street to Mill, a space of 200 feet, shows that the car must have traveled more than 14 times faster than he did; and, assuming that Wolf walked at the moderate rate of 3 miles an hour, when the

witness said, "He was walking pretty briskly," demonstrates that the car was going at a greater rate of speed than 42 miles an hour, which conclusion is so improbable as conclusively to show that the testimony given by Price, as an attempt to establish a probative fact, is worthless, and should have been rejected as false, and hence an error was committed in denying the motion for a judgment of nonsuit. It was admitted at the trial that, though the streets where the accident occurred are 60 feet wide, the distance from curb to curb of such highways is only 36 feet, and, as Price was standing at the northeast corner of First and Mill streets, he must at least have been more than 36 feet north of where Wolf was at the time the latter was injured. It will be remembered that Price testified that when he first saw the car Wolf was by the west track, and that the car was then about at Montgomery street. On cross-examination he was asked, "Was it at Montgomery street when you saw it first?" and answered, "That is something I could not tell you." He further said, "I could swear it was a block away when I seen it." In reply to the inquiry, "Up at Montgomery street, one block away?" he said, "Yes." If Price's last answer can be construed as definitely locating the car at Montgomery street when Wolf had reached the west track, the inference which the defendant's counsel seek to establish from the testimony of this witness would seem to be deducible. The jury, however, who heard Price testify, may have observed that he did not give proper attention to that inquiry, and, if so, they had a right to compare and weigh his entire testimony, and were warranted in concluding that he intended to convey the idea that when he first saw the car it was about 200 feet from him, and therefore at least 36 feet nearer Wolf. If it were conceded that the car passed over 164 feet of track while Wolf was walking 13 feet and 8 inches, the car would necessarily have attained a velocity 12 times greater than that of the deceased, or 36 miles an hour, if he walked 3 miles in that time. Price's frequent use of the word "about," when employed to qualify the distance to which he referred, convinces us that he did not intend definitely to locate the position of the car at any particular time with reference to Wolf's movements. If the rate of speed which the car acquired as it ran heavily loaded down an incline was definitely known, and Wolf's relative position with reference to it certain at all times until he was injured, it might be possible to determine whether or not Price's testimony violated the laws of nature; but in the absence of such information we believe a fair construction of his sworn statements shows that they are not so improbable as to have warranted a declaration by the trial court, as a matter of law, that his testimony was unworthy of belief.

In *Blumenthal v. Boston & Maine Railroad*

and in *Stafford v. Chippewa Valley Electric R. Co.*, supra, to which cases reference has hereinbefore been made, there was no conflict of testimony as to the rate of speed of the train and car respectively causing the injury, while in the case at bar that question is controverted. In order clearly to understand this branch of the subject, a statement of the defendant's theory of the cause and manner of the injury is deemed appropriate. No witness was called at the last trial by the defendant, but its counsel read to the jury the testimony given on behalf of their client at the prior hearing. This evidence is set out with some particularity in the former opinion (*Wolf v. City Ry. Co.*, 45 Or. 448, 72 Pac. 329, 78 Pac. 668), and may be thus summarized: As the car was going north about 10 o'clock in the forenoon of August 26, 1902, which was a dry day, Wolf was seen crossing First street, at the south line of Mill, whereupon the motorman immediately rang the bell and applied the brakes, checking the speed of the car from 8 or 10 miles an hour to 3 or 4, during that period of time; that when Wolf reached the west track, where his view was unobstructed, he halted as if to permit the car to pass, and the motorman then released the brakes and the car started ahead, but when it was within about 7 or 8 feet south of the crossing Wolf suddenly attempted to pass in front of it, whereupon the brakes were firmly applied, but the motorman was unable to stop the car in time to prevent the accident, or until the front trucks had just passed over the north crossing of Mill street. C. F. Swigert, who was, and for several years prior to the accident had been, the manager of the defendant corporation, testified, as its witness, that he was acquainted with the practical working of an electric car and knew the manner of stopping one, and that, in his opinion, the shortest distance in which such a car could be stopped that was running at the rate of 6 miles an hour was 30 feet, at 8 miles an hour 40 feet, and at 10 miles an hour 50 feet. Joseph Friedman, as plaintiff's witness, testified that after striking Wolf the car was not stopped until its rear end was about two lengths of the car, or 56 feet, north of Mill street. Joseph Ruvenky, testifying for the plaintiff, said the car passed entirely across that street before it was stopped. Mrs. Alice Walker, as a witness for the same party, testified that the car was stopped below the crossing. Mrs. Mary Park, as the defendant's witness, testified that she was a passenger on the car at the time Wolf was injured, and on cross-examination, in referring to the place where the car was stopped after the accident, she stated, "I think it was about the middle of the block, or across over the crossing."

Assuming the fact most strongly against the plaintiff, that her husband was struck while he was at the extreme north line of the south cross-walk of Mill street, the car ran across the remainder of that highway, or 45

feet, and if Friedman's testimony is to be believed the front end of the car, which was the line of contact, was not stopped until it had gone three times the length of the car, or 86 feet, below the crossing, thus making the entire distance, according to his estimate, 132 feet over which the car passed before it was stopped after causing the injury. If Mrs. Park's opinion is accepted, however, the intervening space over which the car passed after the accident, before it could be stopped by the motorman, who testified that he set the brakes as hard as he could, was 148 feet. As the speed of a car may reasonably be determined by the distance which it covers on the rails before it can be stopped, when the brakes are properly applied, and as the rate per hour is ascertained, as explained by Swigert, who is an expert in such matters, to be equivalent to one-fifth of such distance, the jury were authorized to infer from the testimony admitted that the car was running at the rate of 26.4 or 29.6 miles an hour when the injury occurred, and that in the management of the instrumentality the defendant's agents and servants were negligent. *Marden v. Portsmouth, etc., Street Ry. Co.*, 100 Me. 41, 60 Atl. 530, 69 L. R. A. 300, 109 Am. St. Rep. 476; *Chisholm v. Seattle Electric Co.*, 27 Wash. 237, 67 Pac. 601. Such deduction, when compared with Price's testimony, convinces us that no error was committed in submitting his sworn statements to the jury for their consideration. We are confirmed in this view by the testimony of Joseph Ruven-sky, who, having stated that, at the time of the accident, he was on the west side of First street going north; that he heard the car back of him, and at the same time saw Wolf crossing the south side of that street, was asked, "When you first saw Mr. Wolf at that time, how far up the street were you on the west side?" and he replied, "I was about half a block." On cross-examination, the defendant's counsel, referring to Wolf, inquired, "How far was he from the curb on the west side when you first saw him?" and the witness answered, "The first time I saw him, he was at the first track, passing. * * * Q. How many steps did he take before the car came in sight? A. He was crossing. He was in the middle of the track, and crossing the tracks. Q. That is the position he was in when the car passed you? A. When the car passed me I did not see him. Q. You did not see the car pass you? A. I saw the car pass, but I did not see Mr. Wolf at that time. Q. How far was the car from the crossing when it passed you? A. The car was about three houses from the baker shop. Q. Then that was three houses above the baker shop, and the baker shop and another house on the corner, so that would make it about five houses. The car was about five houses away? A. Yes."

In referring to the testimony last quoted, the defendant's counsel make the following

statement in their brief, to wit: "The usual width of houses is 16 feet, which would place him (Ruven-sky) 80 feet from the corner, where he saw Wolf crossing the track, when the car was so far behind him and up the street that he could not see it without looking around, nor did he see it until it afterwards passed him. Now, if the car was running at the rate of speed to which he testified, it must have been at least 30 feet further back, which would place the car not less than 100 feet from the crossing where Wolf was seen by Ruven-sky in the act of crossing." No testimony was offered tending to show the width of the houses mentioned, nor did Ruven-sky indicate the rate of speed which the car attained, except to state that it was going fast, and that it was about two seconds after it passed him before Wolf was struck by it. It is impossible accurately to determine from Ruven-sky's testimony how far south of Mill street the car was when he first saw Wolf, or how far the witness was at that time from the street corner, except his estimate as to the latter distance, that it was about half a block, or 100 feet, and the car still further behind him. "A person about to cross a street at a regular crossing," says Mr. Justice Fell, in *Callahan v. Philadelphia Traction Co.*, 184 Pa. 425, 39 Atl. 222, "is not bound to wait because a car is in sight. If a car is at such a distance from him that he has ample time to cross if it is run at the usual speed, it cannot be said as a matter of law that he is negligent in going on." So, too, in *Philbin v. Denver City Tramway Co.* (Colo.) 85 Pac. 630, Mr. Justice Maxwell, in speaking of the measure of care demanded from a traveler on a public highway, asserts: "It is not negligence per se for one to cross a street railway track in front of an approaching car, which he has seen and which is not dangerously near." If the jury believed the testimony of Ruven-sky and of Price, they had the right to conclude that the approaching car was not dangerously near when Wolf attempted to cross the tracks in front of it, and they also had the right to find, from the testimony of plaintiff's witnesses, that the gong was not sounded, nor any effort put forth to check the speed of the car.

No ordinance limiting the rate of speed of a street car in Portland having been offered in evidence, nor any testimony produced tending to show what is the standard of legitimate speed for an electric car on First street in that city, Mr. Seabrook, of counsel for the defendant, called attention at the trial to the case of *Yingst v. Lebanon, etc., Ry. Co.*, 107 Pa. 438, 31 Atl. 687, as establishing the rule governing the case at bar. In that case the plaintiff was injured by the upsetting of a wagon in which she was riding, occasioned exclusively by the fright of the horse which was drawing the vehicle. The negligence alleged was that the car was

running at an excessive rate of speed, which caused the fright of the animal and thereby occasioned the injury. In rendering the decision, Mr. Justice Green, speaking for the court, in referring to the plaintiff's witnesses, says: "Not one of them was even asked the question whether the speed of the car was greater than was allowable for an electric car to run, or whether they had any knowledge upon that subject. No experts in such matters were called to testify as to what would be a reasonably prudent rate of speed for such a car over such a street, and, in short, no evidence whatever was given upon that subject. Nor was any evidence given for the plaintiff as to the actual rate of speed at which this car was run, and therefore the plaintiff did not furnish any proof which could guide the jury in considering whether the defendant was guilty of any negligence in this regard." Further in the opinion it is observed: "Electric cars have a lawful right to go 'fast'—to go with 'speed.' The fact that they can do so is one of the great reasons of their being. When a witness says, therefore, in a given case, that the car ran swiftly or with speed, he says nothing to the purpose when the inquiry is as to negligence in the rate of travel. Such testimony is altogether too uncertain for judicial action, and most especially so when there was no collision, but only the fright of a passing horse." In *Harkins v. Pittsburg, etc., Traction Co.*, 173 Pa. 149, 33 Atl. 1045, it was held that the rule thus announced was not applicable where a person was injured by being struck by a car. The court, referring to the legal principle invoked, say: "The circumstances of the two cases are not alike, and the degree of care required was not the same. In one case the speed of the car was wholly unimportant, except as it contributed to causes which produced an unexpected result, the fright of the horse; in the other, the rate of speed was of primary importance, as indicating the degree of control which the motorman exercised over the movements of the car in a crowded street, and when in a position demanding a high degree of care."

It is incumbent upon a street railway company, in operating its cars at public crossings, to use ordinary care to avoid injury; that is, such a degree of solicitude for the welfare of others as persons of average prudence would exercise, in view of the danger reasonably to be apprehended and of the consequences of accidents resulting therefrom. Excessive speed at such places augments the danger of collision with travelers, and, as it might reasonably have been inferred from the testimony produced at the trial that at the time of the accident the car causing the injury was running at a rate of 26 or 29 miles an hour, the court could not say, as a matter of law, that the speed was reasonable, and hence it was its duty to submit that question to the jury for their con-

sideration. *Davis v. Concord & Montreal Railroad*, 68 N. H. 247, 44 Atl. 388. The rule thus announced is applicable in thickly populated or much-used districts, regardless of the fact whether or not a statute has been enacted or a municipal ordinance adopted limiting the rate of speed. *Sundmaker v. Yazoo, etc., Ry. Co.*, 106 La. 111, 30 South. 285. Though the accident occurred in the city of Portland, no testimony was offered tending to show the number of people who lived in the vicinity of First and Mill streets, or to estimate the persons who might reasonably be expected to cross the defendant's tracks at that intersection. It does appear, however, that at the time of the injury seven persons were on the street at or near the crossing, and from that number the jury had the right to infer that the highway was much used. In *Gollinvaux v. Burlington, etc., Ry. Co.*, 125 Iowa, 652, 101 N. W. 465, it was ruled that, in the absence of an ordinance regulating the rate of speed, a train running in the suburbs of a city across a street at the rate of 60 or 65 miles an hour was not of itself negligence, but was a circumstance to be submitted to the jury, with other evidence tending to show that the view of a traveler was obstructed at that crossing and that no bell was rung. Whether or not such excessive velocity of a train in the outlying districts of a city is not per se negligence, even in the absence of a municipal ordinance regulating the rate of speed, need not now be considered; for the principles of law governing the management of trains propelled by steam power and regulating cars operated by electricity are not identical. *Marden v. Portsmouth, etc., Street Ry. Co.*, 100 Me. 41, 60 Atl. 530, 69 L. R. A. 360, 109 Am. St. Rep. 470. In that case it was determined that the rule promulgated in *Blumenthal v. Boston & Maine Railroad*, 97 Me. 255, 54 Atl. 747, hereinbefore noted, was not applicable. We conclude, therefore, that the rule invoked is not appropriate to the case at bar, and that Wolf, when he attempted to cross the street, had the right to assume that the car, which was at such a reasonable distance, would permit him to do so, if run at the usual rate of speed (*Hamilton v. Consolidated Traction Co.*, 201 Pa. 351, 50 Atl. 946); and hence no error was committed in refusing to instruct the jury to find for the defendant.

It is maintained by defendant's counsel that the judgment given is excessive, and for that reason an error was committed in refusing to set the verdict aside and to grant a new trial. In *Lindsay v. Grande Ronde Lbr. Co.* (Or.) 87 Pac. 145, it was ruled that the refusal of a trial court to set aside a verdict as excessive could not be reviewed on appeal, as the question presented was one of fact, and not of law.

Other errors are assigned; but, deeming them unimportant, the judgment is affirmed.

LOOMIS v. MacFARLANE et al.

(Supreme Court of Oregon. July 30, 1907.)

1. GUARANTY—CONSTRUCTION—PARTICULAR WORDS—EARNINGS.

A contract providing that, whereas guarantor had sold all the tools used in operating a log boom, together with the management thereof, and guaranteed that vendee should be secure in continuing the management thereof until the sum specified should be earned to vendee, that therefore guarantor and his surety agreed to pay vendee such sum less the amount earned, and signed by guarantor and his surety alone, meant that the net earnings of the management of the log boom and not the gross earnings were guaranteed to amount to the sum specified.

2. CONTRACTS—CONSTRUCTION AGAINST PARTY USING WORDS.

Where the true import and meaning of a written instrument is doubtful, it should be construed most strongly against the party using the doubtful language.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 736.]

3. GUARANTY—CONDITION PRECEDENT—COMPLIANCE.

The condition of a guaranty that the earnings from the management of a log boom shall amount to a sum specified provided that the guarantee should conduct the same in a faithful, business, and workmanlike manner, was complied with, where the guarantee gave to the management of the boom his personal attention and rendered such reasonable personal services as he was able and qualified to render.

Appeal from Circuit Court, Multnomah County; Alfred F. Sears, Jr., Judge.

Action by L. E. Loomis against Fred MacFarlane and another. From a judgment for plaintiff, defendants appeal. Affirmed.

This is a suit in equity to reform a written contract and to enforce it when reformed. For about two years immediately prior to December 1, 1904, defendant MacFarlane had been operating a log boom at Ilwaco, state of Washington, where logs were formed into rafts for the purpose of being towed by the owners to Portland in this state. The boom was owned and had been kept in repair by the Ilwaco Railway & Navigation Company, a corporation, which brought logs by its railroad from the forests to the river bank where the boom was located. MacFarlane, by the consent of the company, had been exercising the exclusive management of the boom, and had been collecting from the owners of the logs 20 cents per 1,000 feet of the logs rafted, which sum he retained as his compensation for his trouble and expense. Desiring, however, to quit the business, and to go elsewhere and engage in other business, he agreed to sell to plaintiff, on the date mentioned, his rights and privileges in the rafting of logs in this boom, and his tools and appliances used in that business, for the aggregate consideration of \$500, and in pursuance thereof gave to plaintiff the following contract of guaranty, with defendant Colwell as a surety: "This contract note and guaranty made and entered into by and between Fred MacFarlane and George L. Colwell, as parties of the first part, and L.

E. Loomis, as party of the second part, witnesseth: That, whereas, Fred MacFarlane, one of the said parties of the first part, has sold unto the said L. E. Loomis, the said party of the second part, all of the tools and appliances used in operating the Ilwaco log boom, at Ilwaco, Washington, together with the management thereof, and the handling and rafting all of the logs put therein from and after the 1st day of December, 1904, at the rate of 20 cents per thousand, including all emoluments from the said 1st day of December, 1904, in consideration of the sum of \$500.00, and guaranteed to the said second party that he, the said second party, shall be secure in continuing the said management thereof, at the same rate until the said amount of \$500.00 less the sum of \$25.00, the value of said tools and appliances, is earned to the said second party, said sum of \$500.00 having been advanced and paid down cash in hand by said second party to said Fred MacFarlane, one of said first parties. Now, therefore, in consideration of said sum, or balance of \$475.00 advanced as aforesaid by said party of the second part to said Fred MacFarlane, one of the said parties of the first part, and the further consideration that said party of the second part shall conduct the said management of said log boom in a faithful, business and workmanlike manner, we, the said Fred MacFarlane and George L. Colwell, the said parties of the first part, do hereby promise and agree to pay to the said L. E. Loomis, the said \$475.00, if he is prohibited from taking charge of and managing said log boom; or in case that he takes charge and manages said log boom and earns therefrom then to pay him such part of said \$475.00 less such amount as is earned therefrom. And it is further understood that, in case that the present rate of 20 cents per thousand feet, board measure, for rafting logs therefrom, is cut, then this guaranty to become payable on demand for any unearned portion of said amount advanced, and in case suit or action is brought to collect any balance, then we further agree to pay in addition such amount as the court may adjudge reasonable as attorney's fees. Dated this 19th day of December, 1904. [Signed] Fred MacFarlane. George L. Colwell. Signed in the presence of J. J. Brumbach."

After setting out the foregoing contract, plaintiff alleges, in effect, that it was a part of the agreement of sale that the earnings therein referred to should be net earnings made out of the business by August 1, 1905, and that, in case the amount specified should not have been so earned by that time, MacFarlane was to pay to plaintiff that amount or the deficiency, whatever it may be; that by inadvertence and mistake of the parties that part of their agreement was omitted from the writing evidencing their contract; that plaintiff had fully performed his part of the contract; that the necessary expense of conducting the business exceeded the in-

come up to August 1, 1905, and plaintiff had derived therefrom no income whatever; that he has demanded of defendants the payment to him of the sum of \$475, which has been refused, and that \$75 is a reasonable attorney's fee to be allowed him, under the terms of the contract. He prays for a decree reforming the instrument in the two particulars mentioned, and, when reformed, that it be enforced by granting him a money judgment against defendants. Defendants by their answer admit the execution and delivery of the written contract set out in the complaint, and also that it was a part of the agreement of sale that the amount of the earnings mentioned was to be ascertained by the parties on August 1, 1905; but they deny that the earnings were to be net earnings, as well as deny all other allegations of the complaint. They affirmatively allege that the written instrument set forth in the complaint evidences the exact agreement had and entered into by the parties in every particular, excepting that it was understood that the \$475 mentioned should be earned on or before August 1, 1905, and that, from the business sold him, plaintiff had earned and collected between December 1, 1904, and August 1, 1905, more than the sum of \$500, and by reason thereof he has received fulfillment of the terms of the contract sued on; that plaintiff was inexperienced and incompetent and intrusted his business to others when he should have managed the same himself, and give the business his personal attention; and that he was grossly extravagant and made large and unnecessary expenditures of money for the hire of labor, and that the loss which he may have sustained was due to his now incompetent and extravagant management. The reply traverses all the affirmative matter of the answer, except as alleged in the complaint. Upon the taking of testimony the court found in accordance with plaintiff's allegations, decreed the reformation of the instrument, and entered judgment accordingly, from which defendants appeal.

G. A. Johnson, for appellants. Thomas N. Strong, for respondent.

SLATER, C. (after stating the facts). The answer admits the necessity of reforming the instrument set forth in the complaint so that it will require the amount of earnings therein guarantied shall be ascertained on August 1, 1905; but it denies that the \$475 guarantied by the contract were to be net earnings, and also denies that the business was carried on by plaintiff in a faithful, business, and workmanlike manner, as required by the contract. The equitable jurisdiction to reform the instrument in that respect is, therefore, admitted, but it remains for us to determine the extent of the relief to be otherwise granted. In order to determine the rights of the parties and grant the relief to which we think they are en-

titled, in the view we take of the matter in controversy, it will not be necessary to reform the instrument further than to the extent admitted by the pleadings.

The word "earnings" may mean either gross or net receipts of a business, or of the income of a laborer, according to the connection in which it may be used, and which of these two meanings is to be given the word as used in this contract is a question of construction. If the meaning to be given it is not ascertainable from the context, and if it is doubtful what was meant and intended by the parties, resort may be had to parol testimony to ascertain the surrounding circumstances and from such facts ascertain the intention of the parties, which must prevail. The instrument on which the suit is based recites: (1) That MacFarlane has sold some tools and appliances in operating the Ilwaco log boom, and the handling of all logs put therein after December 1, 1904, in consideration of \$500 paid to him; but it does not appear from the testimony of the parties that MacFarlane had any rights of property in the boom, which were subject to assignment and transfer to another, and the only rights of property transferred were the tools and appliances, valued by the parties in the sum of \$25. (2) That MacFarlane guarantied to plaintiff that he should be secure in continuing the management of the boom at the same rate of compensation the former had been receiving, until the amount of \$500 less the sum of \$25, the value of the tools and appliances, is earned to plaintiff. The language "to plaintiff" evidently means something more than that the earnings are to be merely the gross receipts of the business, but that the amount earned is to be personal to him, that is, a profit after paying all other charges. In the contract proper, however, the defendants had agreed "to pay him [plaintiff] such part of said \$475 less such amount as is earned therefrom." It might be proper, also, at this point, to mention the fact that this instrument recites that MacFarlane had sold the property described to plaintiff, and that the latter had advanced and paid to the former the sum of \$500; but the evidence on the part of plaintiff shows, and it is not denied by the defendants, that, while the terms of the contract of sale had been previously agreed upon, yet the sale was not consummated, and the money was not paid over to MacFarlane until the instrument in question had been signed and delivered, so that the contract in suit was made in contemplation of the contract of sale.

In construing the word "earnings," as used in the statute of Wisconsin, exempting 60 days' earnings of a debtor for his personal services from execution and attachment, when necessary for the support of his family, Mr. Chief Justice Dixon, in Brown

v. Hebard, 20 Wis. 344, 91 Am. Dec. 408, says: "It is not easy, perhaps, to determine the precise application of this word as used in the statute. I think a correct definition to be the gains of the debtor derived from his services or labor without the aid of any capital. If the debtor has no capital, and no credit contributing to increase his profits, except the credit arising from the labor or services in which he is presently engaged, and out of the proceeds of which his obligations on account of such labor or service are to be discharged, then I think his net receipts or gains from such labor or services may fairly be accounted 'earnings.' If, for example, the man whose business it is to dig a well, sink a mine, erect a house, run a raft of lumber or a ferry-boat, or to perform any of the numerous kind of work in which the assistance of others is necessary, employs others, as he must do, to assist him, and who are to be paid as he himself is paid, out of the proceeds of the work, it seems to me that what remains after the others are paid must be regarded as his 'earnings.'" *Campfield v. Lang* (C. C.) 25 Fed. 128.

The instrument in suit, it will be observed, is not signed by plaintiff, but by the defendants only, and hence the language thereof is the language of the defendants, and this fact is of some importance in construing the instrument. "Where the true import and meaning of a written instrument is doubtful, and the intention of the parties cannot be determined from its language, the right doctrine is that it should be construed most strongly against the person using the doubtful language, and in favor of him who has been misled and advanced his money upon it." *Barney v. Newcomb*, 9 Cush. (Mass.) 46; *McFadden v. Friendly*, 9 Or. 222. Upon the face of the instrument, then, it seems to us, the parties intended net profits when using the word "earnings." But if there was any doubt remaining upon that point to be resolved by a resort to parol testimony, the conclusion is irresistible from the consideration of defendant MacFarlane's evidence alone that such was the intentment of the parties. He says: "I guarantied that if he went in there he would make \$500 in that seven months, provided he done it in a businesslike manner." And it appears from all of the evidence that it was understood by the parties when making their contract the plaintiff was to have an assurance of a return of his money from the net proceeds of the business, and we so interpret their contract.

It remains to be considered whether plaintiff has conducted the management of the business "in a faithful, business, and workmanlike manner," as provided in the contract so as to entitle him to recover. Just what this phrase means is somewhat uncertain. Defendants contend that plaintiff

should have attended to the rafting of the logs himself, and that it was reasonably possible for a person skilled in that work to have rafted all the logs delivered there in the seven months without the aid of others, and they have offered testimony that tends to support that claim. But the contract does not require him to do that. He has agreed, or rather defendants have required of him, as a condition to the guaranty, that he shall "conduct the management" of the boom, which does not necessarily mean that he shall do the work himself. He has complied with that condition when he has shown that he gave to the management of the boom his personal attention and by rendering such reasonable personal services thereabouts as he was able and qualified to give. Plaintiff was not an experienced raftsman, and for about two years preceding the date of the contract had been a clerk or agent for the Ilwaco Railway & Navigation Company, at Ilwaco. MacFarlane had been acquainted with plaintiff during all that time, and prior to the making of the contract plaintiff made no representations to him that he was a raftsman. Under these circumstances, then, MacFarlane had no right to assume that plaintiff was skilled in rafting logs; and, in fact, he did not act on that assumption, for he says he did not know whether plaintiff was skilled in that work or not.

The testimony shows quite clearly that plaintiff assiduously attended to the care of the boom, giving it his undivided personal attention, and performing such work as he was able to do, and, in fact, during the last three months he performed all of the work himself. During the first four months of the period, when he needed assistance, he employed the same men MacFarlane had employed to assist him when he turned over the management of the boom to plaintiff on December 19, 1904, and he paid them the same wages. So that we think the business was managed by plaintiff in a faithful and reasonably businesslike manner. It is not claimed by defendants that the work was not done in a workmanlike manner, or that any loss was occasioned by any neglect or deficiency in that respect. It appears from the evidence that at the time of the transfer the railroad company was under a contract to deliver 2,000,000 feet of logs at the boom each month until August 1, 1905, and that was the reason the contract of guaranty was made to terminate at that time. But, soon after the making of the contract, the railroad company failed from some unexplained reason to make delivery of more than about 500,000 feet, on an average, per month. This was the cause of plaintiff failing to make the anticipated profits. The evidence shows that the total receipts were \$534.55, while the total expense was \$747.55.

that is, the actual operating expense exceeded the entire income by \$247.14.

It follows that the decree of the circuit court should be affirmed.

COLUMBIA LAND CO. v. VAN DUSEN INV. CO.

(Supreme Court of Oregon. Aug. 6, 1907.)

1. ESTOPPEL—SILENCE—CLAIM TO PROPERTY.

Plaintiff's silence as to its claim that the line dividing the water frontage between it and defendant should deviate from a due north course, or whether or not it used or had a map made showing recognition of a due north line of division, does not preclude plaintiff from proving the true line, in the absence of conduct amounting to estoppel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 285.]

2. NAVIGABLE WATERS—ADJOINING OWNERS—DIVISION OF FRONTAGE.

A proper division of water frontage along a navigable stream in all cases is that each shore owner should have a proportionate share of the deep-water frontage; and it being impracticable to make a division according to the rule applicable to property situated in a cove, or to take the current of the stream as the basis from which to determine the division line and the stream being three or four miles wide and the tide rising nine or more feet, the line of deep-water frontage should be the basis of apportionment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, § 197.]

Appeal from Circuit Court, Clatsop County; T. A. McBride, Judge.

Suit by the Columbia Land Company against the Van Dusen Investment Company. From a decree for plaintiff, defendant appeals. Modified and remanded.

This is a suit to establish the line dividing the water frontage between two shore owners. There was a decree for plaintiff, and defendant appeals. The upland bordering on the south shore of the Columbia river, owned by both plaintiff and defendant, is part of the Henry Marlin donation land claim. The plaintiff and defendant own in common the tide lands and water frontage (except that they have sold and conveyed portions thereof) in front of the shore line, beginning at a point in the meander line of the river where it is intersected by the division line between the town of First addition to Van Dusen's Astoria and the town of Alderbrook; thence along said meander line to its intersection with the section line between sections 2 and 3, township 8 N., range 9 W., W. M.; thence northeasterly along said meander line to a point therein 736.2 feet distant on a straight line from said intersection. Plaintiff owns the tide land and water frontage in front of the shore line from that point easterly, and the line in dispute is the line which will divide the water front from this point of shore division. Plaintiff and defendant have heretofore jointly conveyed to Hume and others from such common holding all of such water frontage lying west of the following line, viz.: Beginning at a point 345.1 feet north

40° 45' east from a point on the section line between sections 2 and 3, 50 feet north of the corner common to sections 2, 3, 10, and 11, and running thence north 10° 12' west to the pier head line. Defendant claims that the dividing line should extend due north from the shore point of division; plaintiff claiming that it should be a line from the shore point of division at right angles to the pier head line.

C. G. Fulton, for appellant. J. F. Hamilton, for respondent.

EAKIN, J. (after stating the facts). Attention is called to what appears to be an error made by the party who drew the findings and decree for the trial court. We find no data from which the lower court determined the angles of the shore line of plaintiff and defendant, and it is incorrectly expressed, viz., plaintiff's shore line base as 58° north of east undoubtedly was intended as north 58° east, the perpendicular to which is north 32° west; and the same as to the defendant's shore line base, found as 48° north of east, the perpendicular to which is north 42° west, and the court's conclusion therefrom that the division line between plaintiff and defendant is 53° west of north undoubtedly is a mistake, and was intended as north 37° west, which bisects the angle between the said two perpendiculars. By this correction the finding of the court is intelligible. Otherwise the court gives to the plaintiff an angle of 26° 12' greater than it asks.

It is not necessary to pass upon the question whether or not the defendant acquired, by adverse possession, title to any of the water front west of the east line of the property conveyed to Hume, as none of it is in dispute here, and can have no bearing upon plaintiff's right east of such line. Plaintiff's silence as to its claim, that the division line between plaintiff and defendant should deviate from a due north course, or whether or not it used or had a map made, showing recognition of a due north line of division, does not preclude plaintiff now from proving the true line, as there has been no conduct amounting to estoppel. Defendant's claim that the various city plats of Astoria recognize the division of the water front upon north and south lines is without force. Each shore owner, in platting his land into lots and blocks, has platted the same approximately perpendicular with the shore, and in all but one case this results in extending such division lines due north into the water front. Although the general course of the shore line is south of west, yet it is not regular, and, as to any one plat, the exterior lines thereof are practically perpendicular to the shore, and no conflicts between them have resulted. The general shore line of Alderbrook is east and west. As to Adair's plat, several blocks at the exterior lines are perpendicular to the shore line. The same is true of McClure's plat, and Shiveley's Astoria is laid out paral-

lel with the shore, though not north and south, and the water front is divided at the same angle, while the shore line of the Henry Marlin claim extends more abruptly to the northeast.

A proper division in all cases is that each shore owner shall have a proportionate share of the deep-water frontage, and the rules adopted by the courts in relation thereto are with that end in view. 4 Am. & Eng. Enc. L. 828; *Deerfield v. Pliny Arms*, 17 Pick. (Mass.) 41, 28 Am. Dec. 276; *Blodgett & Davis Lbr. Co. v. Peters*, 87 Mich. 498, 49 N. W. 917, 24 Am. St. Rep. 175; *Williams v. Lane*, 87 Wis. 152, 58 N. W. 77. The difference in such rules, as announced by different courts, is evidently due to the varying conditions in each case more than to the diversity of opinion as to equitable methods. The rule applicable to property situated in a cove, as adopted in *Rust v. Boston Mill Corp.*, 6 Pick. (Mass.) 158, followed in several states, and relied upon by defendant here, is fair and equitable in cases where it can be applied, but will not apply here for the reason that this shore cannot properly be considered a cove. The headlands are probably four miles apart, and, being projections at the extremes of a long and irregular shore line, make such a basis of division impracticable. *Thornton v. Grant*, 10 R. I. 477, 14 Am. Rep. 701. Neither is it practicable to take the current of the stream as the basis from which to determine the division line. The township, along the front of which Astoria is situated, is a peninsula, extending into the river, having sheltered bodies of water on either side called bays. In front of the peninsula the river is very wide, probably three or four miles, the tide rising nine or more feet, and therefore we consider that the line of deep water frontage should be the basis of apportionment, being the basis adopted for division of water frontage in lakes and tide water. This will not conflict with *Montgomery v. Shofner*, 40 Or. 244, 66 Pac. 923, as the situation is entirely different; but, taking the line of deep water as the basis of division instead of the thread of the stream, the result will be the same. In *Aborn v. Smith*, 12 R. I. 370, 372, it is said: "The problem here is to define water fronts in regard to a harbor line, not to divide flats or alluvion. The establishment of a harbor line, we have held, amounts to an implied permission to the riparian proprietors within it to fill out to it. The question is: How fill out to it? We answer, fill straight out to it. The owners of the upland are impliedly permitted to carry the upland forward to the harbor line so that each owner will occupy the part which is abreast his own land. There may be exceptional cases where the shore or the harbor line is so peculiar that permission to fill straight out cannot be applied. Perhaps it cannot be implied at the elbow which we have mentioned in the shore, where the harbor line diverges from a direct course. If

there are several estates there, it cannot. The mode of filling in that case must be varied. But the variation ought to be limited by the necessity for it. * * * It follows that the dividing line between the water fronts here, in case the parties have not established one for themselves, is a line drawn from the shore end of the dividing line of the upland to the harbor line so as to intersect it at right angles. This rule is analogous to the rule laid down in *Gray v. Deluce*, 5 Cush. (Mass.) 9." See, also, *Williams v. Lane*, 87 Wis. 152, 58 N. W. 77.

In the present case the government of the United States has established a pier head line at deep water adjacent to this property, and we believe a proper and equitable division of such deep water frontage will be to draw a line from such pier head line at right angles thereto to meet the division line between plaintiff and defendant at the shore. This is the rule adopted in 12 R. I. 370, above quoted. The government pier head line established in 1890 appears to have an angle in front of plaintiff's property at its intersection with the section line between sections 2 and 3 extended, and might thus work an inequality of division, as suggested in *Aborn v. Smith*, supra; and in such a case a general course of the pier head line should be taken. 4 Am. & Eng. Enc. L. 828. However, the government in 1903 established a new pier head line in front of these properties, which appears to be straight, and therefore should control; and the decree will be modified to the extent that said division line shall be extended from the point of division at the shore in a course at right angles to the government pier head line established in 1903 to the intersection of the west line of the property conveyed by plaintiff and defendant jointly to Hume, and thence north 10° 12' west on said west line of the Hume property to the said pier head line. As the record does not disclose the course of the pier head line established in 1903, we are unable to fix the course of division line between plaintiff and defendant therefrom.

The cause will therefore be remanded to the lower court to ascertain the course of the government pier head line established in 1903 to establish the division line therefrom between plaintiff and defendant, as above indicated, and to enter decree thereon. Neither party shall recover costs on this appeal.

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OLIVER et al. v. CITY OF NEWBERG et al.
(Supreme Court of Oregon. Aug. 20, 1907.)

1. MUNICIPAL CORPORATIONS—STREETS—FORMER COUNTY ROADS.

When the city of Newberg proceeded to act under its charter (Laws 1893, p. 316), providing the city might open, control, etc., all highways within the corporate limits, and excepting the territory out of the county's jurisdiction, it accepted the relinquishment and grant of all county roads within its territory,

and ipso facto they became streets, and hence subject to the burden of streets.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1420.]

2. SAME.

Whether a county road becomes a street when included within a city's corporate limits depends upon the intention of the Legislature, as gathered from the city charter, general laws, and the whole course of legislation on the subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1420.]

3. DEDICATION—STREETS—SALE OF LOTS WITH REFERENCE TO PLAT.

A sale of lots with reference to a plat showing a street is sufficient to complete a dedication of the street, subjecting it to any new servitude incident to it as a street.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, § 35.]

4. MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—ASSESSMENT—APPORTIONMENT.

Newberg City Charter (Laws 1893, p. 305) § 82, provides each lot or part of block abutting a street, extending to the center line of the block, shall be liable for the full cost of a street improvement upon the one-half of the street abutting upon it. Section 64 (page 301) provides the council shall assess upon each lot, etc., liable therefor, its proportionate share of the cost of an improvement. Section 65 provides the total cost shall be assessed proportionately to the adjacent lots. Section 66 requires the council to determine the proportionate share of the cost assessable to each tract, and to assess the proportionate shares, and makes the determination and assessment conclusive. Section 110 (page 312) provides that, in assessing the cost of a street improvement, the council shall assess one-half of the cost upon the property on each side of the street to the center line of the abutting blocks, excepting that the cost for building or repairing sidewalks shall be charged to the property immediately abutting thereon. *Held*, that section 82 merely declares what proportion of a block shall be liable for the improvement of an abutting street, that the measure is not to each lot for the expense of the improvement of the half street abutting such lot, and that it is proper to apportion the total expense of the improvement pro rata according to frontage on the street.

Appeal from Circuit Court, Yamhill County; William Galloway, Judge.

Suit by A. P. Oliver and others against the city of Newberg and others to enjoin the collection of street improvement assessment. From a judgment dismissing the suit, plaintiffs appeal. *Affirmed*.

This is a suit brought by plaintiffs against the city of Newberg and others to enjoin the collection of an assessment of the expense of a street improvement upon abutting property. The street improved is known as "First Street," and was originally a county road, laid out by Yamhill county prior to the platting of any part of the city of Newberg and prior to its incorporation. The town was originally incorporated in 1889, and afterward, in 1893, a new act of incorporation was passed, repealing the old one. In the re-enactment of 1893 the charter excepts out of the jurisdiction of the county court of Yamhill county all the territory within the city for road purposes or taxation therefor, and grants to the city the full control of all

county roads within its jurisdiction. In the year 1905 the said city, by virtue of the terms of its charter with reference to the improvement of streets, proceeded to grade, gravel, and erect a curb on either side of said First street for a distance of nine blocks, and after the completion of said improvements ascertained the expense of grading and graveling to be \$4,440, and of the curb 45 cents per lineal foot. The city then proceeded to assess the said expense, less the street intersections, to the abutting property along the said street pro rata according to the frontage. On trial of the suit, the findings were in favor of defendants, and the suit dismissed; and the plaintiffs appeal.

Martin L. Pipes and J. S. McCain, for appellants. Richard W. Montague and Clarence Butt, for respondents.

EAKIN, J. (after stating the facts). The plaintiffs seek to avoid liability for said assessment upon the ground that the said alleged First street is a county road, and abutting property is not subject to the expense of the improvements thereof under the city charter, and that, if liable, the city should have assessed to each lot only the expense of the improvement of the half street abutting thereon. The issues as to the manner in which improvements were made and the character of the material used thereon are waived by the plaintiffs. Questions for consideration therefor are: Is the so-called First street a street within the meaning of the charter authorizing such improvements? And, if so, was the manner of the assessment of the expense of the improvement against the adjacent property within the authorization of the charter?

By the charter of 1893 the city of Newberg was created, the boundaries of which included the street in question; and by section 139 it is provided that: "The city of Newberg, as created by this act, shall have full power to lay out, open, work, change, and control all the highways and roads within the corporate limits thereof, and the inhabitants of said city within said limits, and all property therein shall be exempt from the payment of road taxes of any and every kind to the county of Yamhill. * * * For the purpose mentioned in this section, the territory within the limits of the city of Newberg is excepted out of the jurisdiction of the county court of Yamhill county, Oregon, and full control of all roads and highways, or parts thereof, within the corporate limits of said city is hereby vested in the city of Newberg." Laws 1893, p. 316. When the city proceeded to act under the charter of its creation, it thereby accepted the relinquishment and grant of all county roads within its territory, and ipso facto they became streets. In *Hipple v. East Portland*, 13 Or. 97, 8 Pac. 907, cited by plaintiffs' counsel as holding contrary to this view, it is found that the language of the charter is very different from the one

before us. The East Portland charter amendment of 1872 (Laws 1872, p. 181) only excepts the territory out of the jurisdiction of the county court and authorizes the city to collect road taxes for repairs of streets. It also appears that the act of 1872 was an amendment or addition to the East Portland charter relating to county roads, and not mentioned in the original charter. Mr. Justice Lord, in holding that the act did not make it a street, says: "The case is different where, by the act, the limits of the city are extended, and new territory is acquired and subjected to the laws and jurisdiction of the municipality." Also, in the Eugene charter, section 98 (Laws 1889, p. 296) gives authority to the city when it is deemed expedient to establish streets upon county roads within its limits; and when so located they shall become streets. In *Huddleston v. Eugene*, 34 Or. 343, 55 Pac. 868, 43 L. R. A. 444, it is held that no new condemnation was required and that the ordinance for its improvement was an acceptance of the grant; and in the opinion in that case, Mr. Justice Moore cites with approval *McGrew v. Stewart*, 51 Kan. 185, 32 Pac. 896, in which it is held that, where a city extends its boundary over new territory, the highway therein was impressed with the character of a street, and subject to exclusive control by the city and to the liabilities and servitudes of all other streets within the city. To the same effect is *Elliott, Roads and Streets* (1st Ed.) p. 313; *Id.* (2d Ed.) § 450.

Whether a county road becomes a street, when included within the corporate limits of a city, depends upon the intention of the Legislature, as gathered from the city charter, general laws, and the whole course of legislation on the subject. 2 *Dillon's Mun. Corp.* § 676 et seq.; *State ex rel. v. Com'rs Putnam Co.*, 23 Fla. 632, 3 South. 164. Where the Legislature has expressly conferred upon the corporation control of the county roads within its boundaries, and excepted the territory within it from county control for road purposes, there is no question but that such highways become streets, and subject to all the burdens of streets. This is definitely stated in 27 *Am. & Eng. Enc. Law* (2d Ed.) 104, and recognized in *Elliott, Roads and Streets* (2d Ed.) § 116. In *Railroad Company v. Defiance*, 52 Ohio St. 262, 299, 40 N. E. 89, 97, the court say: "While counsel for the plaintiff concede that the parts of the county roads so brought within the defendant's corporate limits became highways of that municipality, they contend it acquired control of them, in the language of the petition, 'for police purposes only,' by which we understand counsel to mean that the defendant was without authority to improve them at all, or, if improved, the expenses should be paid by tax collected from the property of the whole county. This position is, we think, untenable. The highways so brought within the corporate limits of the defendant were removed from the control which the county

commissioners theretofore had over them, and became subject to the control, supervision, and care of the municipal authorities, like other streets and highways of the corporation. By express statutory provision the council is given 'the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds and bridges within the corporation,' and is charged with the duty of causing 'the same to be kept open and in repair, and free from nuisance.' Section 2640, Rev. St. The duty thus devolved upon the council is attended with the power to do whatever may be necessary in the proper and lawful performance of the duty, including the power to improve such ways, or parts thereof, in any lawful manner, when and as the public convenience may demand. Grading a street, and changing its grade, when necessary for its convenient use by the public, are lawful modes of improving the street, and keeping the same open and in repair." To the same effect are *City of Louisville v. Brewer's Adm'r*, 72 S. W. 9, 24 Ky. Law Rep. 1671; *Almand v. Atlanta Con. St. Ry. Co.*, 108 Ga. 417, 34 S. E. 6; *Cascade County v. City of Great Falls*, 19 Mont. 537, 46 Pac. 437; *State v. Jones*, 18 Tex. 874; *Town of Ottawa v. Walker*, 21 Ill. 605, 71 Am. Dec. 121. By the terms of the charter above quoted, county roads within the corporate limits of the city of Newberg, existing at the time of the act of incorporation, thereby became streets.

2. The plats of the town of Newberg and additions thereto include the ground traversed by the county road now claimed as First street, which is marked thereon as "First Street"; and although prior thereto there was an easement over the same in the public for a roadway, yet the fee remained in the original owner or his grantee. In most of these plats the dedicators use the language, "We hereby dedicate all our interests in the streets and alleys as shown by said plat, field notes, and survey," or equivalent language; and even where such words of dedication are omitted, and the street is shown by the plat, the sale of lots by the proprietor with reference to such plat is sufficient to complete such dedication (*Spencer v. Peterson*, 41 Or. 257, 68 Pac. 519, 1108; *Christian v. Eugene [Or.]* 89 Pac. 419); and, such being the case, the dedication subjects the street to any new servitude incident to it as a street. This is also recognized in the case of *Helpe v. East Portland*, 13 Or. 97, 8 Pac. 912, where Mr. Justice Lord says: "The next defense is estoppel by dedication, in this: that the plaintiff had sold lots abutting upon the disputed tracts according to a recorded plat, recognizing the same as a street. As stated, this certainly would be a good defense." But in that case the disputed tract was expressly reserved from the dedication. Some of these additions were laid out and the plats executed prior to the incor-

poration of the town in 1889; but by the act of incorporation they became subject to the control of the municipality and to the liabilities and servitudes incident to the streets (*McGrew v. Stewart*, 51 Kan. 185, 32 Pac. 896), and upon either ground First street is a street subject to all the burdens incident to streets within the municipality.

3. The validity of the method adopted by the city in apportioning the expense of the improvement is questioned by plaintiffs. The expense of the curb and graveling was uniform as to every lot, and the only fluctuation in expense is in the grading, which cost \$713.50 for the whole distance of 2,402 feet—less than 15 cents per front foot. If the expense of grading the half street in front of some lots was only one-fourth as much as that of grading in front of others, as testified by one witness, the cost for grading the lots incurring the least expense would be $7\frac{1}{4}$ cents per front foot, and according to plaintiffs' theory the excess of their burden would not exceed \$3.50 upon a 50-foot lot. Section 82 (page 305) of the charter of 1893 is relied upon by plaintiffs as supporting their claim that each lot is liable for the improvement of only the half of the street in front of it or abutting upon it. The only purpose of this section is evidently to declare what proportion of a block shall be liable for the improvement of a street in front of it, viz.: In extending the liability to the middle of the block, and considering the charter as a whole, this section can only be construed to mean that all the portion of the block extending back to the center line thereof shall be liable for the full amount assessable to the half street in front of it. We arrive at this conclusion for the reason that section 64 (page 301) provides that the council shall "assess upon each lot or part thereof liable therefor its proportionate share of the cost" of the improvement. Section 65 also provides that the total cost of the improvement shall be assessed proportionately to the adjacent lots; and section 66 provides that the council "shall then proceed to ascertain and determine the proportionate share of such cost assessable to each tract of land, and to assess by resolution each lot or parcel of ground with its proportionate share of such cost, which determination and assessment shall be final and conclusive." Section 110 (page 312) still further strengthens this view, as it provides: "In assessing the cost of any street improvement * * * upon the abutting property holders, the council shall assess one-half of such cost upon the property on each side of such street * * * to a line in such adjacent or abutting blocks parallel with such street or alley so improved, and one-half the entire distance across such block therefrom: provided, that all assessment for the cost of building or repairing any sidewalk or pavement shall be upon the property immediately adjacent to or abutting

thereon, and for the full price of constructing or repairing such sidewalk or pavement." The exception contained in that section clearly shows that the Legislature meant that the expense of the whole improvement is to be apportioned to the adjacent property, except sidewalks and pavement, which are to be built by the owner in front of his own property, and the provision that one-half of the improvement shall be assessed to each side of the street shows that the measure is not to each lot the expense of the improvement of the half street abutting such lot. The charter, taken as a whole, clearly contemplates that the expense of the improvement, such as this, shall be apportioned to the abutting property on each side of the street back to the center line of the block proportionately, and even with that limitation it leaves considerable discretion to the council as to what shall constitute such proportionate apportionment; and we find that there was no error in apportioning the total expense of the improvement pro rata according to the frontage on the street.

The decree of the lower court is affirmed.

(50 Or. 99)

STATE v. REMINGTON.*

(Supreme Court of Oregon. Aug. 20, 1907.)

1. CRIMINAL LAW—EVIDENCE—ADMISSIBILITY—MAPS.

On a trial for assault with intent to kill, a map of the locus in quo, shown to have been made by a competent surveyor, who was also a disinterested person, was competent, though made at the direction of the district attorney to illustrate his theory of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1024.]

2. SAME—TRIAL—RECEPTION OF EVIDENCE—ORDER OF PROOF.

Under the express provisions of B. & O. Comp. § 842, the order of proof is within the discretion of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1609.]

3. SAME—OPINION EVIDENCE—MATTER WITHIN KNOWLEDGE OF JURY.

A witness, first shown to be competent, may state, on a criminal trial, his opinion as to whether a 30-30 rifle would make a hole the size of the hole in a picket from a fence shown him, notwithstanding it was admitted that the shooting was done with a 30-30 rifle, and though the picket and the bullet which struck complaining witness, but which was mashed and battered, were received in evidence; such testimony not being subject to the objection that the question was one which the jury was as competent as witness to determine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1052.]

4. HOMICIDE—ASSAULT WITH INTENT TO KILL—EVIDENCE—ADMISSIBILITY—EXTENT OF INJURY.

On a trial for assault with intent to kill, evidence of a physician, who treated complaining witness, as to the extent and effect of the injury inflicted, was admissible as bearing on the issue of defendant's intent to kill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 379.]

* Rehearing denied October 22, 1907.

5. SAME—INSTRUCTIONS.

On a trial for assault with intent to kill, it appeared that ill feeling had existed between complaining witness and defendant, and that defendant knew that complaining witness had threatened to take his life and went armed for that purpose; that defendant, having occasion to call on one who lived beyond complaining witness' farm, selected a route which took him across complaining witness' farm, but which route persons living in that vicinity had used without objection, and that defendant carried with him a 30-30 rifle. Held to warrant a charge that one cannot claim self-defense if he intentionally put himself where he knew he would have to invoke its aid, that if defendant could have avoided any conflict without increasing the danger to himself it was his duty to do so, and that if defendant sought the conflict, and showed fight and used a deadly weapon, or did an act in such a way as if about to engage in an affray, he could not invoke the law of self-defense until he had first retreated as far as he could with safety to himself.

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

E. L. Remington was convicted of assault with intent to kill, and he appeals. Affirmed.

Grant Corby and W. H. Holmes, for appellant. John H. McNary, Dist. Atty., for the State.

MOORE, J. The defendant, E. L. Remington, was convicted of the crime of assault with intent to kill, alleged to have been committed in Marion county, November 22, 1906, by shooting and wounding one W. W. Slaughter, and appeals from the judgment which followed.

His counsel contend that an error was committed in admitting in evidence, over their objection and exception, a map of the locus in quo where the shooting occurred. B. B. Herrick, county surveyor of the county mentioned, testified that, pursuant to the district attorney's direction, he measured a part of Slaughter's land and made a plat thereof, which he identified, and upon which appear black lines indicating certain objects. Thus, in a small square on the map is written the phrase "Pig shed," and on the west side of the shed are two parallel lines, marked "Log 3 feet high." At the southwest corner of the shed is a small circle having a cross therein, and designated by the words "Point where shells were found." A garden is represented as being east of the pig shed, in which is another circle similarly marked, and indicated by the sentence "Point where plow lies." Two lines extend north and south, 29 and 124 feet, respectively, east of the pig shed, which are specified, in the order named, "Board fence 4 feet high" and "Picket fence 5 feet high." At a point in the palings last mentioned, in a direct line between the circles specified, is a cross, marked "Bullet hole in fence 3½ feet above ground." A trail is represented as extending southeasterly across Slaughter's land, the nearest line of which is about 122 feet south of the pig shed. A county road, extending north and south, is indicated on the map as being east of such premises, and across the highway are certain

lines, marked "Pomeroy's house." All the objects thus specified, and others not mentioned, are represented by black lines. There are also on the plat certain red lines, in the broken parts of which appear numbers, indicating in feet the distance, respectively, from one object to another. Omitting these numbers, the red marks are as follows: One direct and two curved lines connect the circles hereinbefore mentioned. A line extends from the circle designating the point where the plow lies to Slaughter's dwelling, and from thence to Pomeroy's house. A line is drawn southeasterly from the pig shed to the trail, and another line also extends southwesterly from the point where the plow lies to a point in the picket fence. The objections interposed to the introduction of the map in evidence were based on the ground that no testimony had been introduced tending to show that the shooting had been done at any given point, and also for the reason that the red lines were made on the plat, at the district attorney's direction, to illustrate his theory of the case.

The state attempted to establish the fact, by the discovery of the three empty shells of the same caliber as the defendant's rifle, which parts of cartridges were found near the southwest corner of the pig shed, that Remington fired his gun from ambush behind the log indicated on the plat. The county surveyor was not present when the metallic cases were discovered, and the information which enabled him to note on the plat the words "Point where shells were found" was not derived from his personal observation of a material fact, but obtained from the declarations of others. In *Adams v. State*, 28 Fla. 511, 10 South. 106, the plaintiff in error was charged with the crime of murder in the first degree, and at his trial a map was offered in evidence, on which were delineated the route of a certain person and also the positions severally occupied by others. A verdict of guilty as alleged having been returned, judgment was rendered thereon, in reversing which the court say: "The Spanish did not take the map and trace the route in explanation of his testimony; neither did Sandy Sheffield mark on the map where he was, and where he saw Will Adams passing along; but it appears that Mr. Brown put these indications on the map. It also seems that the map was introduced in evidence after Spanish and Sheffield had testified. We think a map or diagram of the country in its physical condition at the time can be put in evidence, and any witness, in giving testimony as to localities, can indicate on the map the relative position of things or persons. But for a person who knew nothing of these matters, except what he heard from others, to designate the movements of persons on the map, would be testimony of a secondary character, and improper to be admitted." In the case at bar A. E. Pender testified that the morning after the shooting he

found in the grass and ferns at a point about six or eight inches west of the log indicated on the map, and at the southwest corner of the shed, two "30-30" shells, and two days thereafter he discovered another shell of the same size about three feet southwest of where he found the others; and, his attention having been called to the map, he identified thereon the places and objects thus indicated. Referring to a bullet hole in a picket of the fence he further stated that the perforation in the paling was in a direct line between the places where the two shells were found and where the plow was left in the furrow. This witness stated on cross-examination that, from the place where he found the two shells, a person using a gun right-handed would have been behind the shed. The order of proof is regulated by the sound discretion of the court (B. & C. Comp. § 842); and, though the map was received in evidence before Pender was called as a witness, his identification of the "point where the shells were found" rendered the map competent evidence, as illustrating his description of the premises. 4 Elliott, Ev. § 3044; Rowland v. McCown, 20 Or. 538, 26 Pac. 853; People v. Cassidy, 133 N. Y. 612, 30 N. E. 1003.

Considering the respective theories of the district attorney and defendant's counsel, it is deemed proper to state the relation which existed between the prosecuting witness and Remington at the time the shooting occurred. Slaughter's wife had been divorced from him on the ground of cruel and inhuman treatment, in which suit he made no appearance. He blamed Remington, however, for his marital troubles, and had repeatedly threatened to take his life, to accomplish which he usually carried a revolver, occasionally exhibiting it, and declaring that he went thus armed to execute his purpose, which menaces had been communicated to Remington. Slaughter possessed the reputation, in the vicinity in which he lived, of being quarrelsome and desperate. The defendant's testimony is to the effect that he was engaged at Woodburn in selling firearms and other goods; that he left his place of business, November 22, 1906, in the afternoon, intending to call upon one George Killin, who lived in an easterly direction and beyond Slaughter's farm; that, thinking he might find some game on the way, he took with him, as was his custom, a gun, and, as he was passing on the shortest route along a trail, generally used by the public, across Slaughter's land, he observed some one moving, and, looking carefully, he recognized Slaughter approaching him in a threatening manner, armed with a shotgun; that the witness first accidentally discharged his gun upwards, but thereafter, hastily firing two other shots, Slaughter was hit; that the defendant immediately started back to Woodburn to surrender himself to a peace officer; that as he approached the town he saw sev-

eral women, and thinking they had heard of the difficulty he had encountered, and possibly might be alarmed to see him armed, he hid his gun under a fence. On cross-examination, he was asked where he was at the time of the shooting, and replied, "I don't know exactly where I was." He further said, however, that he did not think he was on the trail indicated on the map, but that there were several other regularly traveled paths leading across Slaughter's land, on one of which he was traveling. William Esch, a deputy sheriff, stated on oath that Remington, having given bail, was temporarily released and went with the witness to the outskirts of Woodburn, where they found under a fence a "30-30" Savage rifle, which the defendant admitted he had hidden at that place. This gun and the shells discovered by Pender were received in evidence. Slaughter testified that as he was plowing in his garden he heard the report of a gun behind him, and, looking back, a shot soon thereafter penetrated his left shoulder, whereupon he ran toward his house, when another shot was fired, and some missile pierced his left eye, destroying the sight thereof; that when he entered the house he seized a loaded double-barreled shotgun with which to defend himself, and started for Pomeroy's house; and that he did not see the person who did the shooting. Pender, whose testimony has hereinbefore been adverted to, further stated on oath that he heard shots fired November 22, 1906, in the afternoon, and saw Slaughter, as he reached the county road, carrying a shotgun and calling for help; that the witness took the gun and found it loaded with paper cartridges, the cap on one of which had apparently been struck or indented by the firing pin. James Monto, who is Slaughter's nephew, testified on rebuttal that he visited this uncle October 6, 1906, and attempted to use the latter's shotgun, but did not discharge it, and, looking at the shells, he found the cap had snapped.

The foregoing is thought to be a fair synopsis of the material testimony, relating to the cause of the shooting, and, based thereon, the question to be determined is whether or not the court erred in permitting the district attorney, over objection and exception, to illustrate his theory of the case by introducing in evidence a map of the locus in quo, having thereon red ink lines extending from the point representing the southwest corner of the pig shed to the point indicating the place where the plow was lying when the plat was made. In *People v. Phelan*, 123 Cal. 551, 56 Pac. 424, the defendant was convicted of the crime of murder in the first degree on circumstantial evidence, in part tending to support the theory of the prosecution that, lying in wait behind a stump, he watched the approach of his victim, whom he killed, and thereafter claimed that he acted in self-

defense. In affirming the judgment in that case, Mr. Chief Justice Beatty, referring to a plat of the locus in quo which was admitted in evidence, makes the following observation: "It is contended that the superior court erred in overruling objections of defendant to the admission in evidence of maps and photographs of the scene of the homicide, and especially of the evidence given in that connection as to the position of the hollow stump, as to the relative elevations of the stump and junction of the trail, as to the fact that there was an unobstructed view from the one point to the other, etc. The court did not err in admitting this evidence, the manifest purpose of which was to sustain the theory of lying in wait. The facts surrounding the killing were certainly material, and the topography of the spot where the killing occurred was clearly relevant. It was not for the court, but for the jury, to determine what theories could be justly founded on such facts." In the case at bar the discovery of the shells, of the same caliber as that of the defendant's rifle, and the penetration by a bullet of a picket in a direct line between the points where the shells were found at the southwest corner of the pig shed and where the plow was left in the furrow in the garden, as claimed by Slaughter, when he was shot, are circumstances tending to establish the theory of the prosecution, in illustrating which the map, with the red lines thereon, was admissible in evidence, not to prove a substantive fact, but to illustrate the testimony applicable to the physical conditions. The map was made by a competent and evidently disinterested person after a careful survey of the premises, and, though the plat contained certain written words, descriptive of existing objects, no objection was urged by defendant's counsel against the admission of the map in evidence on account of such memoranda. In *People v. Johnson*, 140 N. Y. 350, 354, 35 N. E. 604, 606, the court, in commenting upon the admission of such evidence, remark: "There was no error in permitting the drawings representing the premises to be put in evidence. They were not photographs, but sketches made by an artist showing the locality of the blood stains in the basement and on the doors above. He swore to their accuracy from his own personal knowledge and observation. The learned trial judge was extremely careful about them. He required explicit proof of their accuracy, and, when descriptive words were marked upon them, stood ready to strike off any to which reasonable objection should be made. They served only to explain localities, and their accuracy was satisfactorily shown."

Dr. Nell O'Leary, a practicing physician, testified that he visited Slaughter professionally soon after he was shot, and found a large penetrating wound in the left shoulder that between the patient's third and fourth

vertebra he observed a protuberance, in which he made an incision and removed a ball that had become "mushroomed," which bullet was identified by him and received in evidence. The witness further stated on oath that, immediately after treating the wound, he visited Slaughter's premises and found, in the vicinity where the shooting occurred, a picket that had been pierced by a bullet; that the entrance of the bullet had made a small hole, but its exit had produced a larger perforation; that he removed the paling, which, having been produced at the trial, he identified, whereupon he was asked, "Did you ever handle firearms?" and he answered, "Yes, sir." "Q. Have you ever owned a 30-30 rifle? A. No, sir; I have never owned one. I have handled one. Q. Do you know how large a cartridge it has? A. Yes, sir. Q. Do you know how large the slug is? A. Yes, sir. Q. Do you know how large a hole the slug would make? A. I do. Q. State whether or not, in your opinion, a 30-30 rifle would make a hole the size of this one in this picket?" The defendant's counsel objected to the question, on the ground that, as the bullet had been received in evidence, the orifice in the paling afforded the better proof of the fact sought to be elicited. The objection was overruled, and an exception allowed, whereupon the witness replied, "That is about the size hole it would make." It is argued by defendant's counsel that, although their client, as a witness in his own behalf, testified that he did the shooting with a 30-30 rifle, as the bullet and the picket referred to by the witness had been received in evidence, the jurors were as competent as O'Leary to determine whether or not the hole in the paling had been made by a bullet of the caliber specified, and, this being so, an error was committed in permitting the witness to answer the question. It will be remembered that the objection interposed at the trial is based on the requirement which the law imposes upon a party to furnish primary or best evidence, while the contention of defendant's counsel in this court seems to rest on the assumption that the question propounded involved an inquiry concerning a matter which was within the observation of persons in the ordinary walks of life, and therefore it did not require an answer from an expert witness. It could probably be said that the legal principle now insisted upon was not considered by the trial court, and for that reason its action in determining the matter was not subject to review. Treating the question, however, as properly reserved, we think average persons, who, it must be assumed, composed the panel of the jury, could not say with any degree of certainty what a "30-30" rifle was, or determine what would be the size of a hole which a bullet discharged from a gun of that caliber would make in a paling. Believing that correct answers to these inquiries could

not be given by all men of common education and experience, and that the jury were incapable of forming a correct conclusion on the subject from a comparison of the enlarged "mushroomed" bullet with the hole in the picket, the testimony so objected to was admissible. *National Bank v. Fire Association*, 33 Or. 172, 50 Pac. 568, 53 Pac. 8; *Farmers' Bank v. Woodell*, 38 Or. 294, 61 Pac. 837, 65 Pac. 520; *Aldrich v. Columbia Ry. Co.*, 39 Or. 263, 64 Pac. 455; *Ruckman v. Imbler Lbr. Co.*, 42 Or. 231, 70 Pac. 811.

Dr. J. P. Goray testified that he was a practicing physician, and made a specialty of diseases of the eye, ear, nose, and throat, and that on December 9, 1906, he had treated Slaughter; and he was thereupon asked, "Did you examine his wounds at that time?" An objection to the inquiry on the ground that it was incompetent, immaterial, and irrelevant, having been overruled, he replied: "I examined his eye, and saw his back dressed." After detailing the then condition of the patient, the witness further testified that on January 4, 1907, he removed Slaughter's injured eye to preserve the sight of his remaining organ of vision. It is contended by defendant's counsel that the testimony so objected to did not relate to any of the issues involved in the trial, but tended to arouse sympathy for Slaughter in the minds of the jurors, and to divert their attention from the merits of the case, to the prejudice of their client; and hence an error was committed as alleged. In the commission of the crime charged in the information herein, the intent with which the shooting was done is necessarily a controlling element. It is not the intention to use a deadly weapon, but the determination to kill, of which the use of the weapon is evidence, that constitutes an assault with intent to kill. *Palmore v. State*, 29 Ark. 248. Testimony, therefore, tending to show the magnitude of an assault, from which a felonious intent is deducible, may be admitted for that purpose. *People v. Sutherland*, 104 Mich. 468, 62 N. W. 566. It is competent, as a part of the *res gestæ*, for a person who has been beaten by another to detail the extent and effect of the injury inflicted. *People v. Zounek*, 20 N. Y. Supp. 765, 66 Hun, 626. So, too, a physician who has treated a person wounded by the felonious use of a dangerous weapon may testify as to the nature of such injury. *State v. Haynie*, 118 N. C. 1265, 24 S. E. 536. We believe the testimony of Dr. Goray was admissible, in the consideration of which the jury might determine whether or not the defendant, in using the weapon, intended to take Slaughter's life.

The court charged the jury in part as follows: "I further instruct you, in relation to the law of self-defense, that one cannot claim its benefits if he has intentionally put himself where he knows or believes he will have to invoke its aid. The circumstances

justifying an assault under the law of self-defense must be such as to render it unavoidable. If you believe from the evidence beyond a reasonable doubt that the defendant could have avoided any conflict between himself and Slaughter, without increasing the danger to himself, it was his duty to avoid such conflict, and so render a resort to the law of self-defense unnecessary. If the defendant sought the conflict with Slaughter, and Slaughter showed fight, and used the deadly weapon or did an act in such a way as if he was about to engage in an affray, if under those circumstances the defendant sought the conflict, he could not invoke the law of self-defense until he had himself first retreated so far as he could with safety to himself." An exception having been taken by defendant's counsel to this part of the charge, it is insisted that an error was committed in giving it. The instruction thus challenged is similar in import to a part of a charge given in the case of *State v. McCann*, 43 Or. 155, 161, 72 Pac. 137, 139, in speaking of which it is there said: "The language employed by the court in the instruction complained of must be read in the light of the surrounding facts. It is possible that, under some circumstances, the charge might be subject to objection; for in a free country it is not expected that one person shall flee from another, and it may be that the demands of business might require one intentionally to go where he knows or has reason to believe he may be in imminent danger, and possibly compelled to resort to force as a matter of self-defense."

In order thoroughly to understand the meaning of the instruction hereinbefore quoted, other parts of the charge relating to the same subject, which immediately preceded the language complained of, will be set out to wit: "Although Slaughter may have been a violent man, or a dangerous man, and although he may have made threats against the life of the defendant, yet he does not forfeit his right to personal safety unless he does some overt act indicating a present purpose to do injury or great bodily harm, or to kill the defendant. Mere threats alone, without some overt act indicating an intent to carry the threats into execution, would not authorize the killing or doing great bodily harm by the defendant, and would not justify the defendant in shooting Slaughter as a means of self-defense. The right of self-defense being founded upon necessity, the party who would invoke it must avoid the attack, if he can do so without danger or peril to himself. Hence it is that no threat to kill or inflict great bodily injury, without an overt act indicating a design to carry the purpose into immediate effect, will justify the taking of human life; and it is the duty of one that is threatened so to act that he will not precipitate the attack, and thus himself bring on the necessity for taking life

which he could safely avoid. On the other hand, if the defendant was where he had a right to be, and was assaulted by Slaughter with a deadly weapon, and without provocation and with the apparent purpose of killing the defendant, or doing him great bodily harm, or if the acts of Slaughter were such as to lead a reasonably prudent man in the defendant's situation to believe, and the defendant did honestly believe, that he was in imminent danger of death or great bodily harm, the defendant would not be obliged to retreat, but could stand his ground and meet the attack in such a way and with such force as, under all the circumstances, he at the moment honestly believed, and had a reasonable ground to believe, was necessary to save his own life, or protect himself from great bodily harm. Again, the defendant would have no right to seek a quarrel with Slaughter, although Slaughter had made threats and was a dangerous man." Immediately following the instruction first above repeated, the court further said to the jury: "It is for you to determine now whether, on the one hand, the defendant was where he had a right to be, and was attacked by Slaughter or assaulted by him, or whether the acts of Slaughter were such as to raise in the defendant's mind, as a reasonably prudent man in his situation, a reasonable belief that there was in store for him either death or great bodily harm, and that that danger was imminent; but you are to consider, on the other hand, whether he sought a conflict with Slaughter, and apply to it the rules which I have given you."

Considering this part of the charge in connection with the instruction excepted to, the defendant, prior to the shooting, knew that Slaughter had threatened to take his life, and by reason of such manifest hatred Remington must have known that the privilege of passing over the trail that crossed his enemy's land would be denied him, though persons living in that vicinity had used the way without objection. Necessarily possessing this information, the defendant voluntarily selected a route which, when traveled, took him, armed with a dangerous weapon, upon the premises of his adversary, who, he must have had reason to believe, would dispute his further progress in that direction. Slaughter had been living at Woodburn, and it is claimed that his return to the farm was not known by Remington, when the latter undertook to pass over the trail. His want of knowledge in this particular was a question which the jury were called upon to determine, and they undoubtedly considered the matter. In view of all the attendant facts and circumstances, we believe the court was warranted in giving the instruction complained of.

Other alleged errors are assigned; but, deeming them unimportant, the judgment is affirmed.

WESTMAN v. WIND RIVER LUMBER CO.

(Supreme Court of Oregon. Aug. 27, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—DANGEROUS MACHINERY—DUTY TO GUARD.

It is the duty of a master to cover or fence dangerous machinery so as to lessen the risk of injury to employes, if it can be done by the exercise of due care and with reasonable expense, without interfering with the conduct of the business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 228-231.]

2. SAME—ASSUMED RISK.

While a master is primarily bound to guard dangerous machinery in the exercise of ordinary care, the servant may dispense with the performance of such duty if he consents to work at a place which will expose him to danger, knowing and fully comprehending the risk incurred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 584-592.]

3. SAME—EVIDENCE.

Where plaintiff, an oiler in defendant's mill, claimed to have been injured by the slipping of a plank in a platform constructed for his use, while it was defendant's theory that plaintiff was not performing his duties at the time he was injured, but was handling a loose conveyor belt, which had been removed from its pulley, and that it became entangled in the shaft while plaintiff was holding it, thereby causing the injury, plaintiff could prove in rebuttal that such conveyor belt was frayed at the edges, in order warrant an inference that the belt was likely to get caught and wound around the shaft without human aid.

4. SAME—YOUTHFUL EMPLOYÉ—DUTY TO WARN.

Where plaintiff, a lad between 15 and 16 years old, had been employed as an oiler in defendant's sawmill shortly before his injury and was without experience in such work, defendant was bound to warn him of the danger incident to his employment and the risks attending it, unless such danger was open and apparent to one of plaintiff's age, experience, and capacity, in the exercise of ordinary care and prudence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 314.]

5. SAME—ASSUMED RISK—QUESTION FOR JURY.

In an action for injuries to an inexperienced servant in a sawmill while performing the duties of an oiler, whether the dangers of his employment were so open and obvious that he assumed the risk thereof was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1068-1088.]

Appeal from Circuit Court, Multnomah County; Alfred F. Sears, Jr., Judge.

Action by David Westman, by Jonas Westman, his guardian ad litem, against the Wind River Lumber Company. From a judgment for plaintiff, defendant appeals. **Affirmed.**

This is a personal injury action. Plaintiff, while engaged as oiler in defendant's sawmill, was caught in the machinery and severely injured. At the time of the accident he was between 15 and 16 years of age. About a year prior to that time he had worked for defendant for a few months piling slabs and wheeling saw dust, but had nothing to do with the machinery in the mill. He applied for re-employment two or three weeks before

the accident, and wanted \$2 a day, but the foreman told him that defendant was not paying "kids" more than \$1.75 a day, and if he was satisfied with such wages he could go to work as oller, and the engineer would show him where the oil can was. He had never worked as oller in a mill before, and was given no instructions as to his duties or warned of the dangers incident thereto. He oiled the first afternoon and a short time the next morning, when he was ordered to pile slabs, and continued at that work until about a week before the accident, when he was again put to oiling. In the basement of the mill, and 4 or 5 feet from the ground, is a line shaft 2.16 inches in diameter, upon which were several pulleys, from which belts extended to the machinery on the floor above. One of these pulleys was 40 inches in diameter, and 19½ inches from it was a 4-inch belt running from the main shaft to a pulley near the floor above to operate a conveyor for the refuse from the lath saw. A few inches further along, and 3 or 4 feet above the shaft, was a conveyor box, and beyond that, and 38½ inches from the main pulley, was another pulley on the shaft. A short distance above the main shaft was a tightener frame, with a pulley 20 inches in diameter, used for tightening the belt leading from the main pulley to a bolter saw above. The distance from this tightener frame to the conveyor referred to was about 19 inches. A platform upon which the workman stood when oiling the machinery, and especially the tightener pulley, was 28½ inches in front of the main shaft and about 3 feet from the ground. As originally constructed this platform was made of two planks, each 2 inches in diameter, 12 inches wide, and 12 feet long, supported by brackets extending from nearby posts; but the evidence tended to show that at the time of the accident there was but one plank in use and it was unfastened. The oil cup on the tightener pulley was 12 or 14 inches in front of, and about 5 feet 6 inches above, the platform, and almost, if not quite, directly over the main pulley. On the morning of the accident the foreman told plaintiff that the tightener pulley shaft was a new one, and for him to watch and screw down the oil cup whenever it got hot. Plaintiff testified that, to reach the oil cup, he had to stand on his tiptoes on the board referred to, support himself by holding with one hand to the tightener frame, which was moving back and forward over a space of 5 or 6 inches, thrust his head and shoulders between the tightener frame and the conveyor, and then reach around an 8-inch projecting timber with the other hand to the oil cup. About 10 o'clock that morning, while the mill was in operation, he had occasion to tighten the oil cup; but for some reason it worked hard, and, while he was standing on the platform, as above stated, exerting himself to screw it down, the platform slipped, precipitating him

forward into the belts and pulleys, severely injuring him. He brings this action, by his guardian ad litem, to recover damages for the injury so received, alleging that defendant was negligent in not furnishing him a safe place in which to work, in not protecting, guarding, or fencing the machinery about which he was to work, in not instructing him how to perform his duties with safety, and in not warning him of the dangers incident to his employment. Defendant denied the negligence charged, and as a defense pleaded assumption of risk and contributory negligence. Plaintiff had verdict and judgment, and defendant appeals.

W. D. Fenton, for appellant. J. M. Long, for respondent.

BEAN, C. J. (after stating the facts). The first assignment of error is based on the admission of testimony tending to show that defendant could have guarded or protected the machinery, about which plaintiff was working at the time of the accident, at slight expense and without interfering with the reasonable and efficient operation of its business, thereby lessening the danger to him by coming in contact with such machinery. The contention of defendant is that, unless required by law, it is not the duty of a master to cover, fence, or guard dangerous machinery or dangerous premises, where its servants are required to work, but that its full duty is discharged if it warns the servant of the attending danger, or the risk is so open and obvious that the servant must take notice thereof. Several cases, among which are *Rock v. Indian Orchard Mills*, 142 Mass. 522, 8 N. E. 401, and *Gilbert v. Guild*, 144 Mass. 601, 12 N. E. 368, are cited in support of this contention; but, if they are authority for the broad doctrine that it is not the duty of the master in any case to fence or guard dangerous machinery, we must decline to follow them. It is a part of the implied contract between master and servant that the master will furnish the servant with a reasonably safe place in which to perform his work and reasonably safe tools, appliances, and machinery to work with, and a failure in this regard is negligence. If by due care and reasonable expense dangerous machinery can be covered or fenced, without interference with the conduct of the business, so as to lessen the risk to employes, it is the duty of the master to do so. *Thomp. on Neg.* § 4017 et seq., where the question is fully discussed and authorities cited. While such is the primary duty of the master, a servant may, however, dispense with its performance. If he agrees and consents to work at a place which will expose him to danger, knowing and fully comprehending such danger and the risk he incurs thereby, he cannot complain, if he is injured, that the place might have been made safer by the fencing or guarding of the machinery. But this is on the theory that he

knowingly and voluntarily assumed the increased risk, and not because it was not the duty of the master to protect the machinery in the first instance. If, as said by Mr. Justice Lord, in *Roth v. N. P. L. Co.*, 18 Or. 211, 22 Pac. 844, "the service required to be performed is dangerous, or rendered so by reason of the master's failure to provide a place where the servant may do his work with safety, but which, by the exercise of due care and reasonable expense on the part of the master, might have been made safe, his omission would be a breach of duty, and render him liable for any injury arising therefrom, unless the servant has knowledge of, and comprehends the nature or extent of, the risks to which he is exposed at the place provided, and thereby dispenses with the performance of this duty on the part of the master, or unless the master, when the servant is ignorant or inexperienced, points out, or gives him full notice of, the risks attending such service at the place to be performed, and thereby enables him to appreciate such risks, and to avoid them." There was no error in admitting the testimony complained of.

It is also claimed that the court erred in admitting the testimony of Jonas Westerman, in rebuttal, that the conveyor belt, which ran from the main shaft to a pulley near the ceiling, was old and frayed at the edges. This belt was found, after the accident, wound around the main shaft where the plaintiff was injured. It seems to have been the theory of defendant that plaintiff was not in the performance of his duties at the time of his injury, but was in some way handling or playing with the conveyor belt, which a short time before had been removed from the pulley by the foreman of the mill and was not then in use, and that it had become entangled in the main shaft while he was holding it, thereby causing his injury. It was to combat this theory that plaintiff was permitted to show that the belt was of

such a character that it was likely to get caught and wound around the shaft without human aid.

Defendant requested the court to charge the jury that it was not bound to warn plaintiff of the danger of coming in contact with the belts or machinery, about which he was required to work. The complaint alleged, and the evidence tended to show, that plaintiff was not only a minor, between 15 and 16 years of age, but inexperienced in the work at which he was employed. It was defendant's duty, therefore, to point out or give him notice of the danger incident to his employment and the risks attending the same (4 *Thomp. on Neg.* § 4091; 20 *Am. & Eng. Ency. Law*, 97), unless they were so open and apparent that one of his age, experience, and capacity, in the exercise of ordinary care and prudence, should know and appreciate them to the same extent as an adult; and that was a question for the jury (*Avery & Son v. Meek* [Ky.] 45 S. W. 355).

And, finally, it is contended that the court erred in overruling defendant's motion for a nonsuit and in refusing to direct a verdict on the theory that the dangers attending plaintiff's employment were open and obvious, and he was bound as a matter of law to know and appreciate them. But, as we have said, plaintiff was not only a minor, but an inexperienced workman, and therefore it was a question for the jury whether the dangers were open and obvious to a person of his age and experience. *Bowers v. Star Logging Co.*, 41 Or. 301, 68 Pac. 516; *Dubiver v. City Ry. Co.*, 44 Or. 227, 74 Pac. 915, 75 Pac. 693; *McDonald v. O'Reilly*, 45 Or. 589, 78 Pac. 753; *Mundhenke v. Oregon City Mfg. Co.*, 47 Or. 127, 81 Pac. 977, 1 L. R. A. (N. S.) 278; *Foley v. California Horseshoe Co.*, 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87; *Jenson v. Will & Finch Co.* (Cal. Sup.) 89 Pac. 113.

Finding no error in the record, judgment is affirmed.

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VALENTE et al. v. SIERRA RY. CO. OF CALIFORNIA. (Sac. 1,474.)

(Supreme Court of California. July 22, 1907.)

1. CARRIERS—DEATH OF PASSENGER—COLLISION—NEGLIGENCE—INSTRUCTIONS.

In an action for death of a passenger on a railroad train by a collision, an instruction that the burden of showing that the collision occurred by no fault of defendant, and from some inevitable casualty or unavoidable accident or cause beyond the power of human care or foresight to prevent, was on the defendant, merely required the carrier to comply with Civ. Code, § 2100, providing that carriers shall use the utmost care and diligence for the safe carriage of passengers, and was not objectionable as requiring too high a degree of care.

2. SAME—BURDEN OF PROOF.

In an action against a carrier for death of a passenger in a collision, the court charged that the burden was on the carrier to show that the collision occurred without its fault, and from inevitable casualty or unavoidable accident, etc., and that it must establish by a preponderance of the evidence that the collision resulted from such unavoidable accident, etc. *Held* erroneous, as relieving plaintiffs from the burden of establishing their allegation of negligence in the first instance, the court having nowhere instructed that the burden was on plaintiffs to establish the truth of their allegation of negligence by a preponderance of the evidence.

3. EVIDENCE—JUDICIAL NOTICE—EXPECTANCY TABLES.

Courts take judicial notice of the standard mortality tables.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 17.]

4. SAME — AUTHENTICITY — PROOF — DISCRETION.

The admission of mortality tables without preliminary proof of authenticity and reliability is within the discretion of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 17, 362.]

5. DEATH—EXPECTANCY OF BENEFICIARIES—EVIDENCE.

In an action for death, it was not error for the court to admit evidence of the life expectancy of the beneficiaries as shown by a mortality table; the jury being instructed that no recovery could be had in any event for a period longer than the probable term of decedent's life.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 84.]

6. CARRIERS—DEATH OF PASSENGER—CARE REQUIRED—INSTRUCTIONS.

In an action for the death of a passenger, an instruction that railroad companies engaged in transporting passengers for hire are bound to use the best precautions in practical use to secure the safety of passengers was objectionable; such carriers being only required to use the best precautions in "known" practical use.

Department 1. Appeal from Superior Court, Tuolumne County; L. W. Fulkerth, Judge.

Action by Frank Valente and others against the Sierra Railway Company of California. From a judgment in favor of plaintiffs, and from an order denying defendant's motion for a new trial, it appeals. *Reversed.*

J. C. Campbell, S. D. Woods, and F. W. Street, for appellant. Nicol & Orr, F. P. Otis, and J. F. Rooney, for respondents.

ANGELLOTTI, J. On June 25, 1904, a collision occurred on the railroad of defendant corporation, between a passenger train and a work train, in which Marie Valente, a passenger on the passenger train, was killed. This is an action by her surviving husband and children for the damages resulting to them from her death, due, it is claimed, to the negligence of defendant. The trial was by jury, and a verdict for \$12,000 damages was given. The defendant appeals from the judgment entered thereon, and from an order denying its motion for a new trial.

The complaint alleged the happening of the collision and the death of Mrs. Valente resulting therefrom. These allegations were admitted by defendant in its answer. The complaint further alleged "that said collision was caused by and resulted from the carelessness and negligence of said defendant, and its servants and agents, in the management and operation of its said train, and the death of said Marie Valente was caused by and resulted from the said carelessness and negligence of said defendant, and its servants and agents, in the management and operation of its said train." These allegations were denied by the answer, which further alleged as follows: "On the contrary, said defendant alleges that said collision and the death of said Marie Valente therefrom was and were caused by and resulted from inevitable accident, without any fault or negligence on the part of the said defendant, or of its servants or agents, in any way whatsoever." Upon the trial evidence was introduced by the defendant to meet the prima facie case of negligence made by the showing of the accident. The collision occurred on a very heavy grade, the work train, consisting of an engine, and oil car about half filled with oil, and several flat cars, going down this grade and running into the rear of the passenger train. There was evidence tending to show that the work train was properly equipped, and in first-class order, and that the train hands carefully managed the same, and that the accident was due to the fact that the oil car had sprung a leak, allowing oil therefrom to drip upon the rails, with the result that the train could not be stopped. It is not intimated by plaintiff that the evidence would not have supported a conclusion by the jury that the defendant was free from negligence. Under these circumstances the trial court, after instructing the jury that, by reason of the admission as to the collision and the death of Mrs. Valente therefrom, a presumption arose that the accident resulted from defendant's negligence, and that, in order to rebut such presumption, defendant must show that the collision resulted from some inevitable cas-

ualty or unavoidable accident, or from some cause which human care and foresight could not have prevented, instructed the jury as follows: "The burden of showing that the collision occurred by no fault of the defendant and from some inevitable casualty or unavoidable accident or cause beyond the power of human care or foresight to prevent is on the defendant. *In order to absolve itself from liability from any loss which may appear from the evidence to have been occasioned by such collision, it must establish by a preponderance of the evidence that such collision was caused by or resulted from some inevitable casualty or unavoidable accident or cause beyond human care or foresight to prevent.*" The court nowhere instructed or intimated to the jury that, upon the whole case, the burden was upon the plaintiffs to establish the truth of their allegation of negligence by a preponderance of evidence.

Complaint is made that these instructions charged defendant with a degree of care entirely unwarranted. This matter was very fully considered by this court in the recent case of *Kline v. Santa Barbara, etc., Ry. Co.*, 90 Pac. 125, and decided against the contention of defendant. It was shown in the opinion that, as to the particular matter under discussion, it was thoroughly established by our decisions that the language of such instructions was "the equivalent and no more than the equivalent of the rule" enacted in section 2100 of the Civil Code, requiring a carrier of passengers to use the "utmost care and diligence for their safe carriage," and was a correct statement of the rule of law applicable in such cases. The criticism that the words "beyond the power of human care or foresight to prevent" and "cause beyond human care or foresight to prevent" might be construed as meaning that, although the carrier had used the utmost care and diligence, he would still be liable if, after the accident, it appeared that it could have been avoided by a precaution which a very cautious person, not knowing that the accident was about to occur, would not have taken, was also made in that case. The court there, recognizing the true rule to be that the question as to whether the carrier has exercised the proper care and diligence is to be determined in view of the facts and circumstances which existed prior to the accident, declared, in reply to this objection: "It cannot be error, therefore, for a trial court, in submitting a case of this kind to the jury, to state the rule in its approved form, and, if counsel have reason to fear that the jury may understand the rule so expressed as requiring more than the utmost caution of very cautious persons, in view of the circumstances known or imputed to the knowledge of the carrier before the accident, they have the right to propose an instruction embodying the proper qualifications."

We can, however, find no valid answer to

another objection made by defendant to the portion of these instructions that we have italicized. By it the jury was clearly instructed that the defendant must show by a preponderance of evidence that it was not negligent, or, in other words, that it used the utmost care and diligence, in order to avoid a recovery of the damages resulting to plaintiffs from the death of Mrs. Valente. This also was the plain effect of all the instructions taken together. Such is not the law.

In any action for damages resulting from negligence, it is essential to the statement of a cause of action that negligence on the part of the defendant be alleged, and, if the allegation be denied, it must be proved by the plaintiff by a preponderance of the evidence. The affirmative of such an issue is primarily upon the plaintiff. This is elementary law, and, of course, it is not disputed by learned counsel for plaintiffs. Their contention in support of such instruction rests upon the well-settled doctrine, stated in *Shearman & Redfield on Negligence*, § 59, as follows: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." In accord with this doctrine, it is the rule in this state that, when such an accident is shown by the plaintiff, or admitted by the pleadings, for there can be no difference in effect between the establishment of the fact by evidence on the trial and the admission of that fact by the pleadings, a *prima facie* case of negligence on the part of the defendant is made, which is sufficient to call upon the defendant to show the exercise of the requisite care, and thus offset the presumption of negligence arising from the happening of the accident. This presumption, however, is simply evidence in the case, having no greater or different effect than the evidence of witnesses showing negligence would have, and in no degree changes the rule as to the burden of proof, in the strict sense of that phrase, *viz.*, the burden of producing a preponderance of evidence. That burden does not shift from side to side in the trial of a case, but constantly remains with the party having the affirmative of the issue, who, in an action for damages for negligence, is the plaintiff. Instructions declaring that, when such an accident is shown, the "burden of showing" want of negligence is on the defendant, do not mean, according to the decisions of this state, that the defendant is compelled to show want of negligence by a preponderance of evidence. The term "burden of showing" or "burden of proof," used in that connection, signifies simply the burden of meeting the *prima facie* case made by

the plaintiff. This is the only theory upon which such instructions can be held to be free from error, unless we are to hold that the well-settled rule as to the burden of proof being on the party who has the affirmative of the issue has no application in the one case of an action for damages for negligence, where the damage results from an accident to a thing under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care. It is eminently proper to hold that such a showing affords presumptive evidence of negligence, but it would be illogical and contrary to our well-established practice to hold that any kind of an evidentiary showing made by the party holding the affirmative of an issue in support of his claim, however strong such showing may be, throws upon the other party the burden of doing anything more than producing evidence enough to offset the effect of the plaintiff's showing. When a defendant has made such a showing as to the exercise of the care required of him by the law as to leave the evidence upon the issue of negligence in such condition that the jury cannot conclude that the negligence has been satisfactorily shown, he has met the requirements of the law, and the verdict must be against the plaintiff. The rule in this regard is no different in the case of a carrier of passengers from the rule applicable to defendants of whom a lesser degree of care is required. The only difference between these classes of defendants is as to the amount of care required; the carrier of passengers being guilty of negligence as to a passenger if he fails to use the "utmost care and diligence."

The rule, as stated by us, is fully recognized and established by our decisions. The case of *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871, was an action upon a contract, but, in view of an instruction to the jury to the effect that the defendant was required to have a preponderance of testimony upon a certain issue, owing to a presumption of evidence following a showing made by the plaintiff, which instruction was held erroneous, it is directly in point. It is pointed out in the opinion that the term "burden of proof" is used in different senses, sometimes being used to signify the burden of making or meeting a prima facie case, and sometimes the burden of producing a preponderance of evidence, and it was shown that, where it is used in the former sense, it means no more than that it is incumbent on the party against whom the prima facie case has been made to make such a showing that upon the whole case there is not a preponderance of evidence in favor of plaintiff's allegation of negligence. In *Kahn v. Triest-Rosenberg Cap Co.*, 139 Cal. 340, 73 Pac. 164, a case where the accident, which was admitted, made a prima

facie case of negligence, it was held that instructions to the effect that the burden to prove lack of care and to prove negligence is on the plaintiff throughout the case, and that plaintiff must show the same by a preponderance of evidence, were correct statements of the law, and not in conflict with the other instruction as to the effect of the admission as to the happening of the accident. It was said that the contention of the defendant was founded upon a failure to perceive the effect of the presumption as evidence. The court further said: "This presumption is itself evidence in the case, and it does not change the rule as to the burden of proof. It is merely the evidence by which the plaintiffs undertook to establish the fact which they were bound to prove. It still remained the law that, upon the whole evidence, the plaintiffs must have the preponderance in order to succeed." In *Cody v. Market St. Ry. Co.*, 148 Cal. 90, 82 Pac. 666, a passenger carrier case, it was held that an instruction to the effect that the presumption of negligence arising from proof of the accident and consequent injury threw upon the carrier the burden of showing want of negligence did not require the carrier to show want of negligence by a preponderance of evidence, but only to make such showing "as will leave the jury, with all the evidence before it, unsatisfied as to whether there was negligence on defendant's part." It was also there declared that, in such a case, it was necessary for the plaintiff to prove negligence by a preponderance of evidence. In *Patterson v. S. F. & S. M., etc., Co.*, 147 Cal. 178, 81 Pac. 531, also a passenger carrier case, the questions here involved were exhaustively discussed. It was held that instructions to the effect that, on the issue of negligence the plaintiff has the affirmative of the issue and must prove such negligence by a preponderance of evidence, and that any presumption arising from the accident need not be overcome by a preponderance of evidence, and that, if the railroad company introduce "sufficient evidence simply to balance such presumption without overcoming it by a preponderance of evidence, the presumption is overcome," were correct. See, also, *Kay v. Metropolitan, etc., Co.*, 163 N. Y. 447, 57 N. E. 751.

The cases cited by learned counsel for plaintiffs contain nothing opposed to the views we have stated, with the single exception of the case of *Bush v. Barnett*, 96 Cal. 202, 31 Pac. 2, a department case. Here the court upheld an instruction that the proof of plaintiff that she had been injured "would cast upon the defendant the burden of proving that the injury was occasioned by inevitable casualty, or by some other cause which human care and foresight could not prevent." This instruction, as we have seen, was correct, and did not throw upon defendant the necessity of proving want of negligence by a

preponderance of evidence. The court in discussing it, however, said that the defense that the injury resulted from some unavoidable accident, or from some cause beyond the power of human care or foresight to prevent, was an affirmative one, which the rule as to the burden of proof requires him to establish by a preponderance of evidence, as in any other affirmative defense. This statement was erroneous, and in conflict with every decision of this court on the subject. Other cases cited are those where the defense was clearly and strictly an affirmative defense, and it was held simply that the burden is on the defendant to prove new matter alleged as an affirmative defense, which, of course, is the law. Here there was not and could not be any affirmative defense on the issue of negligence. Negligence on the part of defendant was alleged, as it had to be in order that a cause of action be stated. If plaintiff had alleged simply the collision and consequent death of Mrs. Valente, without any allegation of negligence, there would be no claim that the complaint was sufficient. Defendant simply denied the allegation of negligence. What it said in addition as to inevitable accident, etc., was merely supplemental to the denial and superfluous, and in no degree impaired the effect of the denial. It was not the statement of an affirmative defense. We cannot say as a matter of law that this instruction was not prejudicial to defendant. It follows that the judgment and order must be reversed on account thereof.

Several other points are made for a reversal, but they require very little notice for the purposes of a new trial.

The question as to the admission of a table of life expectancy without preliminary proof as to its authenticity and reliability appears to be decided against defendant's contention by the case of *Keast v. Santa Ysabel, etc., Co.*, 136 Cal. 256, 259, 68 Pac. 771, where it is held that the court may admit any table satisfactory to it, requiring or not requiring preliminary proof, depending upon whether of its own knowledge it is satisfied, or whether it desires evidence to satisfy itself, of the authenticity of the table. This ruling is, of course, founded upon the theory that the courts take judicial notice of the standard tables. 20 Am. & Eng. Ency. of Law (2d Ed.) p. 886. We can see no injurious effect in

the admission of evidence as to the life expectancy of the beneficiaries as shown by such a table, provided the jury is clearly instructed that it cannot, in any event, award damages to any one for any period extending beyond the probable term of the life of the deceased. As damages cannot be awarded any particular beneficiary for any period extending beyond such beneficiary's life, it is proper that such beneficiary should be allowed to show that his expectancy of life is as great as that of the deceased, just as the defendant, on the other hand, would be allowed to show that the life expectancy of the beneficiary is less than that of the deceased. See *Redfield v. Oakland, etc., Co.*, 110 Cal. 277, 287, 42 Pac. 822.

The instruction that "Railroad companies engaged in the transportation of passengers for reward are bound to use the best precautions, in practical use, to secure the safety of their passengers," is perhaps too broad a statement as an abstract proposition. The rule as stated in *Treadwell v. Whittier*, 80 Cal. 593, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175, cited by plaintiffs, is that such companies are bound to use the best precautions in known practical use. This does not mean that such use must, in fact, have been known to a particular defendant, but simply that it must have been such that it would have been known to any company exercising the utmost care and diligence in keeping abreast with modern improvement in the matter of such precautions. We can conceive of cases where a precaution may have been in practical use to such a limited extent that it would not have become known as an improvement to those exercising the utmost care and diligence in this behalf, and in such cases the instruction would be erroneous. Under the evidence given upon the trial, this was not such a case, and the instruction was therefore not prejudicially erroneous. We have considered it necessary to point out the error therein solely for the purpose of a new trial, in view of the possibility that on such a new trial the matter may be material.

We find no other matter requiring discussion.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.

DAVIS v. DAVIS. (Sac. 1464.)

(Supreme Court of California. July 23, 1907.)

DIVORCE—ADULTERY—EVIDENCE.

Evidence in an action for divorce *held* sufficient to sustain a finding of adultery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 411-411.]

Department 2. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Carrie Davis against Sam Davis. Judgment for plaintiff. Defendant appeals. Affirmed.

L. L. Chamberlain, for appellant. A. K. Robinson, for respondent.

McFARLAND, J. This is an action for a divorce brought by the wife against the husband upon the ground of the latter's adultery with a woman named Myrtle Hall. Defendant in his answer denies the adultery; but the court found as a fact that it was committed as alleged in the complaint, and rendered an interlocutory judgment declaring plaintiff entitled to a divorce. From the judgment, and from an order denying a motion for a new trial, defendant appeals.

The main contention made by the appellant, and the only one calling for special notice, is that the evidence was insufficient to support the finding of the court of the fact of adultery; but this contention is not maintainable. There was sufficient evidence to support the finding. For instance, it was proven without any conflict of evidence that at and about the time of the alleged adultery Myrtle Hall was a public prostitute; that she and defendant were socially very friendly and intimate; that part of the time appellant was confined in the county jail charged with a certain crime and during that time Myrtle Hall visited him frequently at the jail, and took him meals and delicacies; that afterwards he was released from custody on bail, and then he and said woman were together frequently on the street, and frequently took their meals together at a certain restaurant. Furthermore, Myrtle Hall lived in a "little house opposite the house known as 'The Palace,' upon a certain street in the city of Auburn; and there was testimony that he visited her in the said house at least twice. In the face of the foregoing facts and testimony there is no ground for holding here that there was not substantial evidence to warrant the trial court in finding the fact of adultery. We cannot say that the finding was not in accordance with the weight of probabilities. It is true that appellant and the woman Hall testified that appellant did not go into the latter's house, although they admit that he went to the house and conversed with her at the door; but this only made a conflict of evidence which left with the court the power and duty to de-

termine where the truth was. Counsel for appellant says that the woman Hall was a witness for appellant in the matter of the criminal prosecution that was hanging over him and that this accounted for the apparent intimate relations between her and appellant; but it is to be presumed that the court considered this circumstance and gave it whatever weight it was entitled to. No doubt, the court, in weighing the probabilities, attached much importance to the fact that she was a woman of unchaste character and conduct.

There are two or three exceptions to rulings made by the court on the admissibility of evidence; but, in the first place, we see no error in any of these rulings, and, in the second place, they do not involve matters of importance enough to justify a reversal, even if erroneous.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

ERICKSON v. HOCHBRUNE.

(Supreme Court of Washington. Aug. 27, 1907.)

1. APPEAL — FINDINGS — REVIEW — CONFLICTING EVIDENCE.

A finding by the court on conflicting evidence will not be set aside on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

2. WORK AND LABOR—ACCEPTANCE OF SERVICES.

Plaintiff, who was doing a large amount of grading, needed dirt, which he removed from defendant's lot in grading the same, without any contract with defendant. It had been plaintiff's custom to obtain written contracts for grading, and he attempted to obtain one from defendant, but failed to secure it. Defendant notified plaintiff on several occasions, and twice in the presence of witnesses after the grading was nearly completed, to cease trespassing on his lot, but plaintiff continued and completed the work. *Held*, that defendant was not estopped to deny that the grading was done with his acquiescence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Work and Labor, § 3.]

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by C. J. Erickson against Ferdinand Hochbrune. From a judgment for defendant, plaintiff appeals. Affirmed.

Shauk & Smith, for appellant. Kerr & McCord, for respondent.

PER CURIAM. Action by C. J. Erickson, plaintiff, against Ferdinand Hochbrune, to foreclose a lien on lot 7, block 44, A. A. Denny's addition to the city of Seattle. The plaintiff alleges that, under an oral contract, he performed work and labor of the value of \$1,745.26 in grading the lot by removing dirt therefrom, that no payment had been

made therefor, and that he had, by filing notice, perfected a lien on the lot. The defendant, after admitting his ownership of the lot, denied all other allegations of the complaint. The trial court found that the plaintiff, without authority, and against defendant's consent, entered upon the lot and removed dirt therefrom; that the defendant frequently warned him to keep off; that the defendant never entered into any contract for the removal of any dirt; and that plaintiff was a trespasser. From a judgment in favor of the defendant, the plaintiff has appealed.

The only question on this appeal is whether the findings are sustained by the evidence. Although some conflict exists, we are unable to conclude from all the evidence that the findings are not sustained. As the preponderance of the evidence seems to be with the defendant, we cannot disturb the findings made by the trial judge, who saw the witnesses and was in a position to determine their credibility.

The appellant contends that even though it be conceded that the respondent did notify him to keep away from the lot, and cease work thereon, such notice was not given until after three-fourths of the grading had been done, that respondent had theretofore knowingly permitted him to almost complete the work, and that he should now be estopped from denying an implied contract for the work or his obligation to pay. Were appellant's statement in this regard clearly sustained by the preponderance of the evidence, his contention would not be without merit. While it is true that the respondent on two occasions in the presence of witnesses notified appellant to keep away from the lot and cease work, after a large percentage of the grading had been done, the testimony of the respondent shows that he himself at other and previous times had given like notices to appellant. There is evidence which, although rather indefinite, tends to show that appellant, who was doing large amounts of grading on the streets, and other property abutting respondent's lot, needed the dirt being removed, which he was selling to third parties. It also appears that, while it was his custom to obtain written contracts for grading done by him, he had failed to secure any

written contract from respondent, although he had attempted to do so. Taking all surrounding circumstances into consideration, and having due regard to the weight of the evidence, we are unable to find any estoppel against the defendant, or that the trial court erred in the findings made.

The judgment is affirmed.

(73 Kan. 435)

J. B. EHRSAM & SONS MFG. CO. v. JACKMAN.

(Supreme Court of Kansas. Jan. Term, 1906.)

Petition for rehearing denied.

For former opinion, see 85 Pac. 559.

BURCH, J. In a petition for a rehearing, it is suggested that the first paragraph of the syllabus is broad enough to indicate an approval of the third conclusion of law made by the trial court. The syllabus is, of course, based upon the situation of the parties disclosed by the record, and so considered can scarcely be misinterpreted; but, to relieve the apprehension of counsel, it may be said the court did not feel that it was called upon to determine the correctness of the conclusion referred to.

The parties have not acted under the contract. The contract provides for a test run of the mill, to be made with wheat of a specified quality. The plaintiff has not insisted that the defendant furnish wheat of contract quality for a test. The defendant has not arranged for a test with wheat of that quality. No test of the character prescribed by the contract has been made. The defendant has not waived a test according to the contract. Therefore the defendant's obligation has not been matured, as the contract requires.

The fourth conclusion of law made by the trial court is correct as applied to the test run which the contract contemplates.

Manifestly the court must here take leave of the controversy. Further discussion of the grading of wheat in the vicinity of the mill in 1903 would be bootless; and the petition for a rehearing is denied. All the Justices concurring.

SCOTT v. WHITE et al.

(Supreme Court of Oregon. Aug. 20, 1907.)

1. TRUSTS—RESULTING TRUSTS—EVIDENCE.

In a suit to enforce an alleged resulting trust in certain land, evidence held insufficient to sustain a finding that plaintiff and defendant W. purchased the land jointly, under an agreement that the actual cost of the land was \$7,000 and that plaintiff should be entitled to a certain portion of the entire tract on that basis, but to require a finding that defendants, acting as real estate brokers, sold so much of the land as plaintiff desired in a single tract on a basis of \$7,000 for the entire tract, and themselves took the balance of the tract in detached portions under their option to purchase the entire tract for \$5,000.

2. JOINT ADVENTURES—ACCOUNTING.

Plaintiff and defendant, W., who was a member of a firm of real estate brokers having an option to purchase a tract of land for \$5,000, contracted to buy the land on a basis of \$7,000, under an agreement providing that if plaintiff and defendant W., within 60 days after the payment of the earnest money, paid the balance of \$6,850, the owner's agent agreed to convey the land, etc. Held, that such agreement bound W. and plaintiff to pay the owner \$7,000 for the land, and hence the fact that W. thereafter avoided fulfilling his part of the obligation by exercising an option held by his firm did not create a liability on W.'s part to account to plaintiff for the amount saved.

Appeal from Circuit Court, Jackson County; H. K. Hanna, Judge.

Suit by William Scott against John F. White and another. From a decree in favor of plaintiff, defendants appeal. Reversed.

This is a suit to impress upon certain lands held by defendants a resulting trust, arising out of an alleged joint purchase by plaintiff and defendants of a larger tract, of which the land in question was a part. It is alleged, in substance, that about March 15, 1903, defendants proposed to plaintiff that they jointly purchase of A. L. Dickinson 2,105.82 acres of land in Jackson county and that defendants entered into such an agreement with plaintiff; that defendants concluded the negotiations for the purchase of the land, and falsely and fraudulently represented to plaintiff that the purchase price thereof was \$7,000, whereas they paid but \$5,000, of which amount plaintiff furnished \$4,542 and defendants \$458; that, after the purchase was made, plaintiff and defendants partitioned the land between themselves, the former receiving 1,365.82 and the latter 740 acres; that plaintiff, relying upon the representations of defendants that the purchase price of the premises was \$7,000, conveyed to defendants 740 acres of land as their share, and defendant White conveyed to plaintiff 1,365.82 acres as his share, defendants representing to plaintiff that such division was in proportion to the respective amounts which each had contributed to the purchase thereof; but it is alleged that defendants contributed only \$458. The prayer is that defendants account to plaintiff for

547 of the 740 acres conveyed by him to White; that plaintiff be decreed the owner in fee of that amount of the land, and that defendant White be decreed plaintiff's trustee thereof; and that plaintiff have judgment against defendants for his share of the proceeds of any of the land sold by them since the making of the partition. The defendants by general denial traversed the complaint, except as thereafter alleged. The further averments are, in substance, that defendants were and are partners engaged in a real estate business at Medford, Jackson county; that at and for a long time prior to March 15, 1903, they had an option for the purchase of the property described in the complaint at the price of \$5,000; that on that date it was agreed between plaintiff and defendants that plaintiff should purchase, under defendants' option, as much of all of the property as he might thereafter desire and be able to pay for, upon a basis per acreage of \$7,000 for the entire tract; that defendants would purchase the rest of the property at their own price, and pay all commissions and expenses necessary for the carrying out of the deal; that prior to the agreement plaintiff had examined the property, and at the time was willing to purchase as much of the tract as he might be able to pay for upon a basis of \$7,000 for the entire tract, and that defendants agreed that they would cause to be conveyed to plaintiff by the owner as much of the land, at the rate herein specified, as he would pay for, and that the defendants would take the balance under the terms of their option; that, in accordance with the terms of the contract, defendant caused the owner to convey all of the land to plaintiff and defendant White; that White assisted plaintiff to procure the amount of money necessary to pay for his portion of the land; and that, after the conveyance of the property to them jointly, they partitioned it in the proportion stated in the complaint. By his reply plaintiff denies each affirmative allegation in the answer, "except such thereof as are not in controversy of plaintiff's complaint herein, and except the allegation thereof that defendant White assisted plaintiff in obtaining money," etc. The cause having been tried before the court, findings were made in favor of plaintiff, on which a decree was entered, decreeing plaintiff to be the owner in fee of 547 of the 740 acres deeded by him to defendant White, and that the latter hold the same in trust for plaintiff. Judgment was also awarded plaintiff against the defendants for \$1,182.72 as his share of the proceeds from the sale of 200 acres of the disputed land made by White before the commencement of this suit. From this decree and judgment, defendants appeal.

A. E. Reames, for appellants. R. L. Mattingly, for respondent.

SLATER, C. (after stating the facts). It does not appear by any express averment of the complaint what were the terms of the agreement, if any, between plaintiff and defendants, under which plaintiff claims they jointly bought the property. Whether they were to contribute equally towards the purchase price, and share in the same proportion the advantages of the purchase, or whether one should contribute more than the other, and a different division of the fruits of the transaction be made, is not alleged; but there is the bare allegation that they agreed to jointly purchase a tract of land. But from his subsequent averments it seems to have been assumed by the pleader that the plaintiff was to have an equal advantage with defendants, and that there was to be a division in proportion to the amounts contributed by each toward the purchase price of the land. Hence it is alleged, in effect, that defendants, in making the partition, broke their agreement and by fraud and deceit have obtained an unfair advantage over plaintiff and deprived him of his proportionate share of the land. Assuming that such was the issue framed by the pleadings, we are of the opinion that the plaintiff has not sustained that issue by that preponderance of clear and satisfactory proof as a court of equity always requires to establish fraud upon another. Plaintiff not only has the burden of proof of the issue, but the charge must be proved by clear and satisfactory evidence. In such a case the degree of proof required is, perhaps, enhanced by the reason of the latitude allowed in admitting evidence to prove fraud. *Freeman v. Topkis*, 1 Marv. (Del.) 174. 40 Atl. 948. "A party, therefore, relying upon the establishment of a cause of action or a right to a remedy against another, based upon the alleged commission of a fraud by such person, must show affirmatively facts and circumstances necessarily tending to establish a probability of guilt in order to maintain his claim. When evidence is capable of an interpretation which makes it equally as consistent with the innocence of the accused party as with that of his guilt, the meaning must be ascribed to it which accords with his innocence rather than that which imputes to him a criminal intent." *Morris v. Talcott*, 96 N. Y. 100.

Plaintiff has endeavored to bring himself within the case of *Kroll v. Coach*, 45 Or. 459, 78 Pac. 397, 80 Pac. 900, where it was held that a person having exclusive information relative to a proposed purchase, offering others an opportunity to take an interest and share the anticipated advantages on equal terms with him, is bound to act with entire truthfulness and good faith toward them in the matter, and if he derives a personal gain by deceiving them he is accountable as a trustee *ex maleficio*, on the legal theory that such person thereby assumes a relation of

trust and confidence towards the intending purchasers. Opposed to this theory is the contention that the parties were dealing with each other at arm's length and as strangers to any fiduciary relation. In that case neither of the parties were in the business of real estate agents, but they were seeking to jointly buy from another for their own advantage. The facts of this case are that early in the year 1903 plaintiff came to the town of Medford, seeking a new home, and wishing to invest in timber lands. He there became acquainted with defendants, who were partners in a real estate business, and to whom he disclosed his intentions. They had shown him different pieces of property which they had for sale as agents for others; but, none of these suiting plaintiff, they suggested to him the Donegan tract, which they had for sale, comprising 2,105.82 acres, and consisting of four separate tracts situate in the same vicinity. This land belonged to one Dickinson, a nonresident of Oregon, who had come into the ownership of it by foreclosure of a mortgage, and thereafter had employed Geo. W. Hazen, of Portland, as his agent to sell the land, as well as A. E. Reams, an attorney, of Medford, who had foreclosed the mortgage, and, since bidding it in for plaintiff, had had immediate charge of the land, had been renting it, collecting rents, paying taxes thereon, and endeavoring to find a purchaser in conjunction with Hazen. In February, 1903, they had offered the place through defendants as agents for \$6,000; but, failing to get a sale at that price, Reams gave to defendants the privilege of buying or selling the tract as an entirety at the price of \$5,000. Plaintiff testifies that at the inception of his dealing with defendants they told him they could sell him this tract at \$4 per acre and make a good commission, that defendant White took him to view the land with the object of making a sale, and that after having looked it over White asked him what he thought of it, to which he replied: "It looks cheap at \$4 per acre, and if I had the money I believe I would buy it." And then White said: "That is our fix. If we had the money, we would buy it ourselves." Up to this point plaintiff confesses that he was dealing with defendants at arm's length, that he knew they were real estate agents, and were acting as agents for others, and that they were expecting a profit or commission out of this land by procuring a purchaser for the whole of it; and hence at that time no relationship of trust or confidence could have existed between them. But at this point plaintiff claims that defendants voluntarily abandoned the position they occupied of dealing with him at arm's length, and, surrendering all claims for commission or profits, they took him into their confidence. It is manifest that to establish such a case the evidence should be clear and convincing.

Plaintiff further testified: That White

then proposed to him: "What is the matter with our buying it together?" To which plaintiff replied: "My money is pretty well tied up back East. I don't know as I can." That White then said: "If you want to go in with us, we will let you in on the ground floor. We won't charge you any commission." That plaintiff then asked, "What will be the purchase price, then?" to which White replied, "\$7,000 for the entire tract," and to which plaintiff said, "If I can have 60 days to get my money, I will go in with you." Plaintiff further testified: That White procured 60 days' time by paying to C. L. Reams, brother of A. E. Reams, as a forfeit, the sum of \$150, of which plaintiff furnished one-half and defendants one-half. That White obtained from C. L. Reams, as Dickinson's agent, a receipt in the following form: "\$150.00. Jacksonville, Oregon, Mar. 19, 1903. Received from John F. White and William Scott the sum of one hundred and fifty dollars, which sum of money is accepted under the following conditions: If the said White and Scott shall, within a period of sixty days from this date, time being the essence thereof, pay or cause to be paid to me the full sum of \$6,850, I agree to make, execute, and deliver to them a good and sufficient deed for the 2,105-acre tracts of land, in Jackson county, Oregon, known as the 'Donegan Tracts,' and now owned by me. I agree that in case I am unable, within 60 days or at the time the said \$6,850 is tendered to me, to have the title clear and free from incumbrances, that I will refund the said sum of \$150 to the said White and Scott; but in case default should be made in the tendering of the sum of \$6,850 within the said 60 days from this date, time being the essence thereof, then the said \$150 shall belong to me and be my property, and shall be considered as liquidated damages to me. It is understood by the said White and Scott that the premises are under lease to S. F. Godfrey." That plaintiff then, through White's assistance, made arrangements to borrow from a local bank the amount of money he might need. Before the expiration of the 60 days plaintiff and defendants agreed to divide the land between them, the former to take 1,365.82 acres in one body, and the latter to take 740 acres, which was in three separate and detached parcels. When the time came to pay for the land, plaintiff handed White his check for \$4,467, which, together with the \$75 initial payment, made \$4,542 for his share of the land, at the rate of \$7,000 for the entire tract; but defendants in fact paid to Hazen at Portland no more than \$5,000 for the entire tract. In preparation for the final conclusion of the sale C. L. Reams, through Hazen, had obtained from Dickinson a deed, which he executed on May 13, 1903, conveying the entire tract to N. E. Ross, a stenographer in Hazen's office, for the express consideration of \$5,000, which deed was placed in escrow

and, on that amount being deposited for Dickinson, N. E. Ross conveyed the land to defendant White and plaintiff, for the express consideration of \$7,000, when in fact nothing was paid to N. E. Ross. After receiving the title White and Scott exchanged deeds, dividing the property between them as had been previously agreed upon; but the latter contends that the division was made by him, under the belief on his part, induced by statements of defendants upon which he says he relied, that they were paying \$7,000 for the entire tract. Opposed to this is the contention of defendants that they neither agreed with plaintiff "to take him in on the ground floor and charge him no commission," as testified to by plaintiff, nor represented to him that they were to pay \$7,000 for the land, but that, they having an option to buy the land for \$5,000 in the entire tract and learning from plaintiff that he would not be able to buy and pay for all of it at the price first named by them, they proposed to him to let him have as much of the land as he might wish and could pay for at the rate of \$7,000 for the entire tract, and that they would take and pay for the remainder at their own terms, under their option; that plaintiff at first did not know how much of the land he might be able to pay for, and hence the amount that he did finally take was not ascertained by them at the time the agreement was made, but was ascertained later; that when the division was made plaintiff, having his choice, took what he wanted and all he wanted, leaving to them the most undesirable part of the land in three separate and detached pieces. Defendants admit that they concealed from plaintiff the fact that they paid no more than \$5,000 for the entire tract, for they say they were not bound to make any disclosure to him on that matter, because they were not acting as his agents, but were in fact selling to him under their option.

It thus appears that the testimony of the parties to the suit is directly in conflict. Plaintiff relies for corroboration upon a series of letters which passed between Hazen and C. L. Reams relative to this transaction, which discloses no more than an attempt on their part to conceal the actual amount to be paid by defendants for the land; but it is not shown that what they did or said was done at the instance or request of defendants, and hence their statements are not binding upon defendants. They are not parties to this cause, nor privy to the contract with plaintiff on which this suit is based, and therefore their statements cannot be considered. The primary issue to be determined here is: What was the contract between plaintiff and defendants, on which their subsequent transactions were based? Did defendants agree to take plaintiff in "on the ground floor," as he says, and give him an equal chance or share in the profits of the purchase from Dickinson? Or did they sell him as much

of the land as he could pay for at the rate of \$7,000 for the entire tract? When this issue is settled, the entire case is determined. We find the plaintiff's testimony, with slight, if any, corroboration, standing in support of his contention, as opposed to the testimony of both defendants; and while both Trowbridge and White on the witness stand deny plaintiff's statements as to the terms of the contract, and also affirmatively state their understanding of the same, the latter fails to deny the defendants' statements, although he was called as a witness in rebuttal. Trowbridge testified that he first made the arrangements with plaintiff for the sale to him of as much of the land as he might thereafter ascertain he could pay for at the rate of \$7,000 for the entire tract, and that White concluded the transaction. White confirms this testimony; but plaintiff, while he details his conversation with White, fails to deny Trowbridge's testimony as to the contract made with him. It also appears to our satisfaction from the evidence that in making the division of the land the parties did not act in conformity with plaintiff's theory of the contract by sharing equally in the advantages of the purchase, but rather in conformity with defendants' theory. Plaintiff had his choice of selection, taking the larger and better part of the land, which lies in one compact body and bordering upon the river, distinct advantages for the surrender of which defendants would receive no equivalent if plaintiff's theory was to prevail, while there was left to defendants as their portion three detached tracts of upland of inferior quality, none of which bordered on the river. We must therefore conclude, under the law as hereinbefore announced, that he has failed to make out a preponderance of the testimony in his favor by clear and satisfactory proof. Moreover, it would appear that defendants were either acting as agents for Dickinson or as purchasers from him, and in either event, from the terms of the receipt taken by White from Dickinson's agent, they in fact made themselves liable to him for \$7,000 for the entire tract; and if they in some manner have avoided the fulfillment of that liability it would not create any cause of complaint in favor of plaintiff against the defendants.

The decree should be reversed, and one entered here dismissing the complaint.

(50 Or. 142)

STATE v. WALTON.

(Supreme Court of Oregon. Aug. 27, 1907.)

1. CRIMINAL LAW—APPEAL—RECORD—PLEA.

It being essential to a conviction of a felony that defendant be arraigned and plead or refuse to plead, the fact of his pleading or refusing to plead must affirmatively appear in the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2753.]

2. SAME—RECORDS—AMENDMENT.

While the records of the court, as kept by the clerk, may be amended to conform to the

facts, it must be presumed that no record of the proceedings could be made other than as disclosed by the records as shown by the transcript on appeal. *State v. Gilbert* (Or., unreported) quoted with approval.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2901-2910.]

3. SAME—PROCEDURE.

The public has an interest in the trial of all persons accused of a crime, from which it follows that in proceedings involving the deprivation of the life or liberty of a person that which the law makes essential cannot be dispensed with or affected by either the express or implied consent of the accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 614, 615.]

4. SAME—NECESSITY OF ARRAIGNMENT AND PLEA.

Under B. & C. Comp. § 1328, providing that the arraignment must be made by the court or by the clerk or district attorney under its direction, and consists in reading the indictment to defendant, and delivering him a copy, and asking him whether he pleads guilty or not guilty, and section 1364, providing that, if the demurrer to the indictment be disallowed, the court must permit defendant, at his election, to plead, which he must do forthwith, or at such time as the court may allow; but, if he do not plead, the judgment must be given against him, it is essential to a conviction of a felony that defendant be arraigned and that he plead or refuse to plead.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 612.]

Appeal from Circuit Court, Multnomah County; John B. Cleland, Judge.

Charles W. Walton was convicted under an indictment charging assault and robbery, and appeals. Reversed, and new trial ordered.

Henry St. Rayner, for appellant. G. C. Moser, Deputy Dist. Atty., for the State.

KING, C. On September 1, 1904, an information was filed by the district attorney against defendant, Chas. W. Walton, charging him with assault and robbery of one Emmanuel Johnson. It appears from the record that on the following day the information was read to defendant and a copy thereof handed to him, after which, on his request, he was given two days in which to plead. On the day fixed to plead a demurrer was filed, which, on October 5th following, was overruled, succeeded three weeks later by defendant's trial and conviction. After verdict, written objections to the sentence were filed, on the ground that defendant had not been fully arraigned, not having at any time answered, nor been given an opportunity to answer, as to whether he was guilty or not guilty, which were overruled, and defendant sentenced to 20 years' imprisonment.

It is immaterial whether the motion filed was intended as a motion in arrest of judgment, or an objection to further proceedings, as its contents are sufficient to call the court's attention to the alleged irregularity in the trial, and to constitute an objection to the imposition of the sentence pronounced. We are then confronted with the question as to whether the entry of a plea on behalf of the defendant is essential to the trial of one ac-

cused of felony. Defendant made no objection to the irregularity complained of until after verdict, nor does it affirmatively appear that an entry of a plea would have affected the result, or that defendant was in any manner prejudiced by the oversight. The record not only fails to disclose that any plea was entered, but it appears from affidavits in the record that he was not asked whether he desired to enter a plea of guilty or not guilty, and that at no time during the trial did defendant refuse to plead. It is urged by counsel for the state, and held by the learned court below, that such plea is not essential where no objections are made thereto during the trial, and that the alleged error is of no avail to defendant unless it appears from the record that he lost some rights by reason of a plea not having been entered. B. & C. Comp. § 1328, indicates what shall constitute an arraignment, and is as follows: "The arraignment must be made by the court, or by the clerk or the district attorney under its direction, and consists in reading the indictment to the defendant, and delivering to him a copy thereof and the indorsements thereon, including the list of witnesses indorsed on it or appended thereto, and asking him whether he pleads guilty or not guilty to the indictment." It appears from the record that all the requirements of this provision were complied with, except the record does not disclose that defendant was asked "whether he pleads guilty or not guilty to the indictment." If essential to a conviction of a felony that such plea must be entered before proceeding to trial, the same rule would necessarily apply with reference to the requirements of the record of the proceedings in this respect, as under the statute making the presence of the defendant necessary during the proceedings. The rule is settled in this state that this fact must affirmatively appear in the record of the trial. *State v. Cartwright*, 10 Or. 193; *State v. Gilbert*, decided May 14, 1883 (unreported). In the latter case two indictments were filed against the defendant, accusing him of murder. With the exception of the names of the persons alleged to have been murdered, there was no difference in the indictments. The defendant was tried under both indictments at the same term, convicted, and sentenced to death; but in the journal entry of the judgment the clerk neglected to state any crime for which the conviction was had, nor was there any record of the trial indicating upon which of the indictments the defendant was tried, while both appeared in the transcript of the judgment roll. In passing upon the record, Mr. Chief Justice Watson says: "It has been suggested that this court should presume that the proceedings in the court below were regular, and that the duplicity in the record has occurred through the inadvertence or mistake of the clerk in making up the judgment roll, of which the record before us is simply a transcript. But this judgment

roll, although prepared by the clerk, is the record of the court. To it alone can we look to ascertain what the action of the court below was, and upon it determine whether any error was committed. The duty of the clerk in such matters is ministerial undoubtedly, and subject to the supervision and control of the court. But his record is the highest record of the judicial action of the court. It imports verity, and, until impeached by the court itself, is conclusive of the matters to which it relates. *Schirmer v. People*, 33 Ill. 278." The court accordingly held that no conditions could be presumed to exist other than as appear in such record; that the record might be amended to conform to the facts (where no adverse rights have intervened), but, since this had not been done, it would be presumed that no record of such proceedings could be made other than as there disclosed. It follows under the decisions referred to that it is unnecessary for us to determine whether the affidavits in the record can be considered, since the record fails to disclose that Walton was given an opportunity to answer as to whether he was guilty or not guilty, or refuse to do so. His rights will, therefore, be determined under the record before us without reference to the affidavits, and it will accordingly be presumed that no plea was either made or refused.

The Criminal Code of this state provides: "If the demurrer be disallowed, the court must permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the court may allow; but if he do not plead, the judgment must be given against him." B. & C. Comp. § 1364. A demurrer was filed by the defendant, and, after it was overruled, had he refused to plead, this provision of the statute would require judgment to have been given against him. Our statute (section 1375) further provides that "an issue of fact arises (1) upon a plea of not guilty, or (2) upon a plea of former conviction, or acquittal of the same crime"; (Id. § 1376) that "an issue of law arises upon a demurrer to the indictment"; and (Id. § 1377) that "an issue of law must be tried by the court, and an issue of fact by a jury, of the county in which the action is triable."

It is maintained by counsel for the state, and suggested in the decision of the circuit court, that, as a person charged with a crime is permitted at his election to plead forthwith or at such further time as may be allowed by the court, if he does not so plead, judgment must be entered against him, and that, if the defendant desires to enter a plea, it becomes his imperative duty to make it manifest; citing *People v. King*, 28 Cal. 265, as sustaining that view. In that case the defendant, when called upon to plead, acting on the advice of his attorney, refused to do so, whereupon the court ordered a plea of not guilty to be entered, and impaneled a jury before which he was tried, resulting in conviction. The statute of that state, like

ours, provides that, in case a defendant refused to plead, judgment should be entered against him. Relying on the theory that the trial was irregular because sentenced on the verdict of a jury in place of sentence by the court without such verdict, the defendant appealed. On this question the court held that the defendant was in no way injured, as he had not only had every guarantee given him by the statute, but, more than that, he had been tried by a jury, and, while it was the duty of the court to have entered judgment without a jury in the manner specified in the statute, having had a jury trial, defendant, not being injured by reason thereof, was in no position to complain. In holding that case to be in point here the learned court below evidently overlooked the fact that the defendant in the case cited refused to plead after being given an opportunity to do so. That the trial court and counsel for the state have misapplied the authority last considered manifestly appears from later decisions on the point in that state, among which is *People v. Corbett*, 28 Cal. 328. The defendant there was tried and convicted of grand larceny. After being informed of the indictment, he asked, and was given, four days in which to plead, but did not plead on the day set for that purpose. Two weeks later he was brought into court, and through his counsel moved for a separate trial; the indictment being against him and two others. The motion was granted, a jury impaneled, witnesses sworn on behalf of defendant, and the case argued to the jury, which, after receiving their charge, returned a verdict of guilty. The court there states that there was manifestly no arraignment, that the indictment was not read to the defendant, nor a copy tendered to him, nor defendant asked whether he would plead guilty or not guilty to the indictment, and holds: "If the defendant had at any time anterior to the trial pleaded not guilty, the defects in the arraignment, or rather the omission to arraign, might have been cured, on the ground of waiver. But neither the motion of defendant for a separate trial, nor the introduction of witnesses by him, nor the fact that the case was argued on his behalf to the jury—nor did all of them combined—cure the want of a plea. There was not only no arraignment, but over and beyond that there was no issue for the jury to try. Not only did the defendant not plead; but, inasmuch as the statute opportunity for pleading was never extended to him, he was never under any obligation to plead. A verdict in a criminal case, where there has been neither arraignment nor plea, is a nullity, and no valid judgment can be rendered thereon. *Douglass v. State*, 3 Wis. 820; 1 Whar. § 530. And so is a verdict rendered upon a plea put in by the attorney of a party indicted for a felonious assault with intent to rob. *McQuillen v. State*, 8 S. & M. 587." Section 296 of the California Code (St. 1851, p. 244, c. 29) quoted

in *People v. King*, 28 Cal. 265, which is identical with B. & C. Comp. § 1364, quoted above, is mentioned in *People v. Corbett*, supra, concerning which the court say: "The act does not extend to the case of a verdict where there is a plea but no indictment, nor does it reach the case of a verdict where there is an indictment but no plea. Where either of the two are wanting, it is as fatal as though both were wanting. The presence of both is essential to an issue, and, where there is no issue, an oath administered to the jury would impose no obligation, nor would false swearing on the part of witnesses amount to perjury. That a trial so conducted 'would tend to prejudice the defendant in respect to a substantial right' * * * is too plain for argument."

It is also maintained that defendant could not have been injured by not entering a plea as to his guilt or innocence. The same could in some instances be said of a person tried for a felony and convicted without a jury, or where, being represented by counsel, he is tried and convicted in the usual manner, but without being present in person. In *State v. Cartwright*, 10 Or. 193, it is held, and is the universal rule, that the presence of the defendant, when tried for a felony, cannot be waived, and is essential to a valid conviction. As stated in *Hopt v. Utah*, 110 U. S. 574, 579, 4 Sup. Ct. 202, 204, 28 L. Ed. 262: "The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods." The law does not even permit the attorney of a person charged with a felony to enter a plea for him, but requires the defendant to do so in person. Even on the day set for that purpose it is not customary, nor is it expected, that the defendant shall arise and make such plea known until directed by either the court or district attorney. He would have no means of knowing when the particular time of the day or hour fixed had arrived until his attention should be called to it in the usual manner. The prisoner, as a rule, would be the last to risk incurring the court's displeasure by rising unsolicited at an improper moment to announce he was ready to plead. It is not, therefore, to be expected that the defendant should make his desire in that respect manifest until called upon to do so. The attorney might think a plea of guilty inadvisable, and yet the defendant himself, for reasons unknown to his counsel, may desire to enter such plea. His rights in this respect are such that his attorney can neither exercise nor waive for him. The case at bar furnishes a good illustration of an instance where the public has an interest in the proper trial of the person charged with

a crime. Here we have a defendant, who, when on trial, was but 17 years of age, and sentenced to 20 years' imprisonment in this case and 5 years' additional in another case, here pending. He was tried under constitutions guaranteeing that no man shall be convicted or deprived of his liberty without due process of law, and that "laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice." Const. art. 1, § 15. Yet it is contended that he should remain imprisoned for a quarter of a century without having been convicted in the manner prescribed by our statute. If innocent, the public may need, and is entitled to, his services as a citizen, even though he should desire to waive all his legal rights and seek imprisonment. If guilty, not only the defendant, but the public, as stated, is entitled to any reduction of sentence or other benefits that may have been possible by the defendant showing a desire to be reformed, and throwing himself on the mercy of the court with the chance, however small it may have been, of being permitted to serve a shorter term as a convict and a longer period of his life as a reformed member of society. In the first act proposed in this country for proportioning crimes and punishments, prior to which (1778) even many small offenses were capital, it was stated that "the reformation of offenders was an object worthy of the attention of the law, and that extermination instead of reforming the accused weakened the state by cutting off so many who, if reformed, might be restored sound members to society, who, even under a course of correction, might be rendered useful in various labors for the public. * * * 1 Jefferson's Works (Ed. of 1903) p. 218.

In *Enck v. Wash. Territory*, 1 Wash. T. 138, an Indian was tried and convicted of murder after the entry by his counsel of a plea of "not guilty." On appeal his failure to plead in person was assigned as error; and, in passing on this point, the court make the following observation: "Articles 5 and 6, amendments to the Constitution of the United States, among other rights secured to the accused, declare 'the accused shall enjoy the right to be informed of the nature and cause of the accusation' against him; and, however the law may be in inferior crimes, in capital cases, when the prisoner is put upon his trial, this right cannot be waived by the counsel nor denied by the court. Nor is it an answer to this to say that a waiver of arraignment by counsel and entering a plea of not guilty by counsel secure to the prisoner all the benefits of an arraignment in person or a plea of not guilty entered by prisoner in person, and that thereafter prisoner should not be permitted to except to what was not to his disadvantage on the trial. The prisoner, if guilty, might consider it to his interest to plead guilty and put himself upon the mercy of the jury or court. But, whether so or not,

before any man 'shall be held to answer for a capital or otherwise infamous crime,' it is absolutely indispensable that the nature of the accusation as contained in the indictment should be made known to him, that he may enjoy the privilege of assenting or dissenting, by plea of guilty or not guilty, to the charge alleged." *State v. Straub*, 16 Wash. 111, 47 Pac. 227, is cited as holding to the contrary rule, but that case is not in point, and the statements there on the question here involved are mere dicta, for the reason that the defendant in that instance did, in fact, enter a plea, and the same was shown by a nunc pro tunc entry of an order curing the defect. Numerous cases are cited in the opinion of the learned court below and by the state as sustaining respondent's contention, but, after a careful examination thereof, we find that, owing to the facts surrounding the various cases upon which the decisions there hinge, few are applicable to the case before us. Of the cases cited the following appear to sustain the position that the entry of a plea is not essential under all circumstances, even when the charge is for a felony: *Moore v. State*, 51 Ark. 130, 10 S. W. 22; *State v. Cassady*, 12 Kan. 550; *People v. Bradner*, 107 N. Y. 1, 13 N. E. 87; *Tarver v. State*, 95 Ga. 222, 21 S. E. 381; *State v. Winstrand*, 37 Iowa, 110. The case of *State v. Jerry*, 3 La. Ann. 576, decided in 1848, is probably the first on record, and *State v. Cassady*, supra (1874) impliedly overruled by subsequent decisions of that court, the second to hold to this view. The decision in *State v. Jerry*, however, is not in harmony with the subsequent decisions of that state. The case of *State v. Chenier*, 32 La. Ann. 103, makes no reference to the *State-Jerry Case*, but, notwithstanding the plea was entered after the beginning and before the close of the trial, the judgment of the trial court was reversed; the appellate court stating: "We cannot sanction such a departure from ancient landmarks in criminal procedure. The prisoner must be arraigned, and must plead to the indictment before the case is set down for trial or tried. It may be that in this particular case no prejudice was wrought to the accused. Still we think it unsafe to sanction such irregularities in capital cases." See, also, *State v. Hunter*, 43 La. Ann. 157, 8 South. 624; *State v. Brackin*, 113 La. 879, 37 South. 863. It will be observed that the courts holding to the rule invoked by the plaintiff do so on the assumption that the entry of a plea is a matter of form and not of substance, while those holding to the doctrine here recognized declare the plea essential to an issue, without which there can be nothing to try. The authorities supporting the position urged by the state, with but one exception (*Martin v. Territory*, 14 Okl. 593, 78 Pac. 88), were filed prior to the decision in *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097, in which, although the omission of the plea was there raised for the first time, the court fully sus-

tain the rule here insisted upon by defendant. The statute under which the defendant in that case was tried is, on all material points, similar to the Criminal Code of this state, including, also, provisions to the same purpose as B. & C. Comp. §§ 1404, 1484, to the effect that any technical errors and imperfections or departure from the form or mode prescribed by the Code shall be disregarded unless it actually prejudiced or tends to the prejudice of the defendant. Mr. Justice Harlan, speaking for the court, so clearly states the law on the subject, and gives such cogent reasons for the doctrine announced, that we quote extensively therefrom as follows: "The views we have expressed would seem to be the necessary result of section 1032 of the Revised Statutes [U. S. Comp. St. 1901, p. 722], which provides: 'When any person indicted for an offense against the United States, whether capital or otherwise, upon his arraignment stands mute or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury.' This statute is based on Act April 30, 1790, c. 9, § 30, 1 Stat. 119, Act March 3, 1825, c. 65, § 14, 4 Stat. 118, and Act March 3, 1835, c. 40, § 4, 4 Stat. 777. It proceeds upon the established principle that before a criminal trial can be legally commenced there must be an issue to try, and that a plea by or for the accused is essential to the formation of the issue. And the section above quoted requires the entry of the plea before the trial commences. Where the crime charged is infamous in its nature, are we at liberty to guess that a plea was made by or for the accused, and then guess again as to what was the nature of that plea? Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities upon this subject, safety lies in adhering to established modes of procedure devised for the security of life and liberty. Nor ought the courts, in their abhorrence of crime, nor because of their anxiety to enforce the law against criminals, countenance the careless manner in which the records of cases involving the life or liberty of an accused are often prepared. Before a court of last resort affirms a judgment of conviction of, at least, an infamous crime, it should appear affirmatively from the record that every step necessary to the validity of the sentence has been taken. That cannot be predicated of the record now before us. We may have a belief that the accused, in the present case, did, in fact, plead not guilty of the charges against him in the indictment. But this be-

lief is not founded upon any clear, distinct, affirmative statement of record, but upon inference merely. That will not suffice. We are of opinion that the rule requiring the record of a trial for an infamous crime to show affirmatively that it was demanded of the accused to plead to the indictment, or that he did so plead, is not a matter of form only, but of substance in the administration of the criminal law. Consequently such a defect in the record of a criminal trial is not cured by section 1025 of the Revised Statutes [U. S. Comp. St. 1901, p. 720], but involves the substantial rights of the accused. It is true that the Constitution does not, in terms, declare that a person accused of crime cannot be tried until it be demanded of him that he plead, or unless he pleads, to the indictment. But it does forbid the deprivation of liberty without due process of law; and due process of law requires that the accused plead, or be ordered to plead, or, in a proper case, that a plea of not guilty be filed for him, before his trial can rightfully proceed, and the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law, and essential to a valid trial, was taken in the trial court. Otherwise the judgment will be erroneous. The suggestion that the trial court would not have stated, in its order, that the jury was sworn to try and tried 'the issue joined,' unless the defendant pleaded, or was ordered to plead, to the indictment, cannot be made the basis of judicial action without endangering the just and orderly administration of the criminal law. The present defendant may be guilty, and may deserve the full punishment imposed upon him by the sentence of the trial court. But it were better that he should escape altogether than that the court should sustain a judgment of conviction of an infamous crime where the record does not clearly show that there was a valid trial." A dissenting opinion appears by Mr. Justice Peckham, who not only holds it should be presumed a plea was entered without that fact affirmatively appearing in the record, but, like all the courts sustaining that view, appears to entirely overlook the fact that the statute expressly makes a plea essential to an issue, and that without such a plea it would necessarily result in the conviction of the person charged with a crime without an issue having been tried, and also fails to take into consideration the further important feature that the public is interested in seeing that a person is not deprived of either life or liberty without a trial in the manner prescribed by law.

The authorities sustaining the principles enunciated in *Crain v. United States*, supra, and here recognized, are numerous, among which are 4 Bl. Comm. pp. 322, 323, 341; 1 Bish. New Cr. Proc. §§ 733, 801; Wharton Am. Crim. Law, § 530; *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097;

Hopt v. United States, 110 U. S. 579, 4 Sup. Ct. 202, 28 L. Ed. 282; *Shelp v. United States*, 26 C. C. A. 570, 81 Fed. 694; *Childs v. State*, 97 Ala. 49, 12 South. 441; *Terr. v. Blevins*, 4 Ariz. 68, 77 Pac. 616; *People v. Corbett*, 28 Cal. 328; *People v. Monaghan*, 102 Cal. 229, 36 Pac. 511; *Ray v. People*, 6 Colo. 231; *Hoskins v. People*, 84 Ill. 87, 25 Am. Rep. 433; *Parkinson v. People*, 135 Ill. 401, 25 N. E. 764, 10 L. R. A. 91; *Dansby v. United States*, 2 Ind. T. 456, 51 S. W. 1083; *Hicks v. State*, 111 Ind. 402, 12 N. E. 522; *State v. Baker*, 57 Kan. 541, 46 Pac. 947; *State v. Chenier*, 32 La. Ann. 103; *State v. Hunter and Frank*, 43 La. Ann. 157, 8 South. 624; *State v. Brackin*, 113 La. 879, 37 South. 863; *Commonwealth v. Hardy*, 2 Mass. 303; *Sartorius v. State*, 24 Miss. 602; *Hill v. People*, 16 Mich. 351; *Grigg v. People*, 31 Mich. 471; *State v. Vanhook*, 88 Mo. 105; *State v. Saunders*, 53 Mo. 234; *Beck v. United States*, 145 Fed. 625, 76 C. C. A. 417; *Barker v. State*, 54 Neb. 53, 74 N. W. 427; *Browning v. State*, 54 Neb. 203, 74 N. W. 631; *Hill v. State*, 1 Yerg. (Tenn.) 76, 24 Am. Dec. 441; *Jefferson v. State*, 24 Tex. App. 535, 7 S. W. 244; *Douglass v. State*, 3 Wis. 820; *People v. Heller et al.*, 2 Utah, 133; *Davis v. State*, 38 Wis. 487; *Ellick v. Terr.*, 1 Wash. T. 136.

It is true that the statute making a plea essential to an issue is merely declaratory of the common law, but the fact that it does so merely supplements the reason for holding to the well established landmarks in this particular, for it is evident from the embodiment of this provision in our Code that this requirement is deemed by the lawmaking bodies of the country a wise one, and, if wrong, the power to effect the change is, and should remain, a legislative, and not a judicial, function. The statute, by its terms, has expressly declared the entry of a plea to be essential to an issue, and its language in this respect being clear and free from doubt, we must recognize its provisions so long as in force.

The judgment of the court below should be reversed, and a new trial ordered.

STATE v. WALTON.

(Supreme Court of Oregon. Aug. 27, 1907.)

1. CRIMINAL LAW—APPEAL—PRESUMPTION—PLEAS.

Though, under B. & C. Comp. § 1379, a defendant is not entitled to move for a continuance till the case is at issue on a question of fact, and such an issue can be formed only by a plea of not guilty, or by refusal to plead, it will not be presumed from the fact that defendant asked for a continuance that he had either pleaded or refused to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2753.]

2. SAME—ARRAIGNMENT—WAIVER.

It being essential to a conviction of a felony that defendant be arraigned, he cannot waive an arraignment by asking for a continuance

and thereafter submitting to a trial without protest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 614.]

Appeal from Circuit Court, Multnomah County; John B. Cleland, Judge.

Charles W. Walton was convicted of an assault with a dangerous weapon, and appeals. Reversed, and new trial ordered.

Henry St. Rayner, for appellant. G. C. Moser, Deputy Dist. Atty., for the State.

KING, C. An information was filed September 12, 1904, against defendant under B. & C. Comp. § 1771, charging him with an assault with a dangerous weapon by shooting one O. Nelson, for which defendant was tried, convicted, and sentenced to imprisonment in the penitentiary for a term of five years. The defendant here is the same person charged with the crime of assault and robbery of one Emmanuel Johnson, in which case an opinion is filed at this time. Both cases were tried at the same term of the circuit court, resulting in conviction in each case and in appeals to this court.

The two cases were submitted together, similar errors being relied upon in each, consisting of the alleged erroneous order of the court below in overruling objections made to imposing sentence, which were there interposed on the ground that defendant was tried and convicted without being called upon to enter a plea as to his guilt or innocence. The only difference between the two proceedings, as disclosed by the record thereof, is that in this case the defendant, through his counsel in open court, by written motion, asked for a postponement of the trial, while in the action charging him with assault and robbery no continuance was requested. In both actions it is maintained that defendant was not injured by his failure to enter a plea; but in the case before us it is specially insisted by the state that since under B. & C. Comp. § 1379, defendant was not entitled to move for a continuance until the case was at issue on a question of fact, and as such issue could have been formed only by a plea of not guilty, or by refusal to plead (B. & C. Comp. § 1375), it will be presumed that defendant either pleaded or refused to do so, and that, if such presumption cannot follow, it must then be held that defendant, by asking a postponement of the trial, and thereafter submitting to the proceedings without calling attention or in any manner objecting to the irregularity until after verdict, waived his rights to be called upon to enter a plea. All questions suggested here, except as to the effect of the motion for postponement, are considered and determined in our opinion filed at this time in *State v. Walton*, above adverted to.

That it cannot be presumed a plea was entered by reason of any proceedings noted in the record, from which an inference to that effect may be drawn, is clearly settled adversely to the position maintained by plaintiff

in the following: *State v. Gilbert* (Or.) decided May 14, 1883 (unreported); *People v. Corbett*, 28 Cal. 328; *Hopt v. People of Utah*, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 202; *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097. The rule that it cannot be held that a defendant was legally convicted, and thus be deprived of his liberty, by a mere inference from the record, and that every step essential to a trial according to law must affirmatively and clearly appear, is fully recognized and included in the doctrine announced in *State v. Walton*, *supra*; and as to whether defendant, by asking for a continuance and thereafter by submitting to trial without protest, waived the right to be called upon to plead to the facts charged against him, we think the same rule should apply as there announced. As stated in *Hopt v. People of Utah*, *supra*: "That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure when on trial and in custody to object to unauthorized methods."

Even had defendant intended to waive his rights in this respect, it must be remembered that this is a matter in which the public has an interest, and which cannot be left entirely to the wishes of the person on trial. Otherwise, a defendant might enter into a binding contract with the state through the district attorney to go to the penitentiary for a certain number of years in satisfaction of an offense. But it is too well settled to need citation of authorities that the public has such an interest in procuring a trial of the citizens of a state according to law as to preclude such proceedings. In *Hill v. People*, 16 Mich.

351, it was held that "it would approximate such a position to hold that he might be bound by a contract providing for a trial before a court or jury unknown to the Constitution or the laws, the result of which trial might be to place him in the same prison." In that case it was contended that the defendant by failure to challenge a juror who was not a citizen of the United States had waived his right to object to the proceedings after verdict; but it was there held that such waiver should not be recognized, and in discussing the question the Supreme Court of Michigan observe: "Let it once be settled that a defendant may thus waive this constitutional right, and no one can foresee the extent of the evils which might follow; but the whole judicial history of the past must admonish us that very serious evils should be apprehended, and that every step taken in that direction would tend to increase the danger. One act of neglect might be recognized as a waiver in one case, and another in another, until the constitutional safeguards might be substantially frittered away. The only safe course is to meet the danger in limine, and prevent the first step in the wrong direction. It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection. It is in such cases emphatically that consent should not be allowed to give jurisdiction." The same reasoning there adopted is applicable to the points involved here.

For the reasons given in *State v. Walton*, *supra*, as well as those here added, the judgment of the court below should be reversed, and a new trial ordered.

151 Cal. 675

PEOPLE v. BRADBURY. (Cr. 1,377.)

(Supreme Court of California. Aug. 14, 1907.)

1. INDICTMENT AND INFORMATION—CONVICTION OF LESSER OFFENSE—RAPE—ASSAULT.

Pen. Code, § 240, defines assault to be an unlawful attempt, coupled with a present ability to commit a violent injury on the person of another. *Held* that, where defendant, charged with assault with intent to commit rape, was shown to be sexually impotent, he might be convicted of assault on evidence that his acts were such as to create a well-founded fear on the part of prosecutrix that he intended to rape her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 538.]

2. CRIMINAL LAW—INSTRUCTIONS—REQUESTED CHARGE.

In a criminal prosecution, a request to charge that, if the jury believed from the acts of witnesses for the prosecution, etc., that they, or any number of them, had pursued a common object of wrongfully prosecuting defendant for any wrongful purpose, and that such prosecution was instituted, not with the belief that the defendant was guilty of any crime, but in order that they might profit from making such charge, the jury should find defendant not guilty, was properly refused, as authorizing an acquittal if the jury believed that "some" of the witnesses were actuated by improper motives, though sufficient evidence was given by other witnesses to sustain a conviction.

3. SAME—MISCONDUCT OF ATTORNEY.

Where, after the district attorney had asked an improper question, by which he sought to get certain inadmissible facts before the jury, the court, on defendant's objection, severely reprimanded him and instructed the jury not to consider such matter, and the district attorney submitted to the court's ruling and refrained from pursuing the subject, there was no reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1693.]

In Bank. Appeal from Superior Court, Marin County; Thos. J. Lennon, Judge.

William B. Bradbury was convicted of assault, and he appeals. Affirmed.

James W. Keyes, for appellant. U. S. Webb, Atty. Gen., and Thos. P. Boyd, Dist. Atty., for the People.

McFARLAND, J. This case was in the District Court of Appeal, First District, and an opinion was there delivered. We approve and adopt all of the following part of that opinion:

"The defendant is charged in the information herein with an assault with intent to commit rape. Upon the trial thereon the jury found him guilty of an assault, and he was sentenced to pay a fine of \$150. From this judgment he has appealed:

"(1) That upon the charge set forth in the information a conviction of an assault could be had is not disputed. See *People v. Green*, 1 Cal. App. 432, 82 Pac. 544. It is urged, however, that, as the jury found the defendant was not guilty of an attempt to commit rape, he could not be convicted of an assault, unless there was evidence of some violent injury to the prosecuting witness, and that the record fails to show that such evidence was given. An assault is defined (Pen. Code,

§ 240) to be 'an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another.' The 'violent injury' here mentioned is not synonymous with 'bodily harm,' but includes any wrongful act committed by means of physical force against the person of another, even although only the feelings of such person are injured by the act. The term 'violence' as used here is synonymous with 'physical force,' and in relation to assaults the two terms are used interchangeably. *State v. Wells*, 31 Conn. 212; *State v. Daly*, 18 Or. 241, 18 Pac. 357; Am. & Eng. Enc. of Law, 'Violence.' Mr. Bishop says (2 Crim. Law, §§ 32-34): 'The kind of physical force is immaterial; * * * it may consist in the taking of indecent liberties with a woman, or laying hold of and kissing her against her will.' There was testimony before the jury to the effect that the defendant was sexually impotent, and the court instructed them that if such was the fact he would not be guilty of the offense charged in the information; but although, in view of this fact, the jury were authorized to find that there was an absence of any ability on his part to commit rape on the prosecuting witness, they were not precluded from finding that his acts were such as to create a well-founded fear upon her part that such was his intent, and if so he was guilty of an assault. If the information had charged him with merely an assault upon her, the evidence set forth in the record would be sufficient to sustain his conviction thereon.

"(2) The court did not err in refusing to give the following instruction asked on behalf of the defendant: 'If the jury believe, from the acts of the parties appearing as witnesses for the prosecution, and from all the facts and circumstances in the case, that they, or any number of them, have pursued a common object of wrongfully prosecuting the defendant with the purpose of obtaining money from him, or for any other wrongful purpose, and that such prosecution was instituted, not with the belief that the defendant was guilty of any crime, but with the purpose of wrongfully charging him with such crime, that they might profit from making such charge, the jury should find the defendant not guilty.' A fatal objection to this instruction is that it authorizes the jury to acquit the defendant, if they believe that some of the witnesses for the prosecution were actuated by illegal motives, notwithstanding ample evidence for his conviction might have been given by other witnesses."

The only other contention made by appellant for a reversal is founded upon the alleged misconduct of the district attorney. This alleged misconduct appears in the record as follows: One Quigley had testified as a witness for the prosecution, and defendant, when presenting his evidence, had called and examined as a witness one L. B. Hills, who testified to certain statements made to him

by Quigley which the latter had denied making. Thereupon on cross-examination the following occurred: "L. B. Hills: I have known Mr. Quigley about five or six months. He told me that a hired man had knocked Mr. Bradbury down. Mr. Boyd: Did he tell you why he knocked him down? A. No, sir. Q. Did he say he knocked him down for insulting his wife? Mr. Klerulff: It seems to me that that is irrelevant, incompetent, and immaterial, and an improper statement. Mr. Boyd: I have the right to the conversation that occurred. Mr. Hosmer: He said he did not, and I submit that that is misconduct on the part of the district attorney, and we assign it misconduct. The Court: I think it is gross misconduct. Mr. Boyd: I submit to your honor's ruling. The Court: After the witness has stated that he did not give his reason for it, you have no right to ask him the question and attempt to get before the jury something in that way that you could not do directly. It becomes my duty, gentlemen, in view of the conduct of the district attorney, to admonish you that you will pay no attention to anything suggested by that question or by that answer. It is absolutely not in this case. It is beyond your province, and the question should not have been asked, and you must disregard it entirely." No further attempt was made by the district attorney to repeat the question, or to ask any other similar questions. He immediately obeyed the ruling of the court. Conceding that it was wrong for the district attorney to ask the question, there is no precedent and no warrant for reversing the judgment merely for the asking of the one improper question, under the circumstances disclosed by the record. The cases where a judgment has been reversed by this court for the improper asking of questions have been in some important respects similar in character to the case of the People v. Wells, 100 Cal. 459, 34 Pac. 1078, where the district attorney persisted in asking a number of improper questions, and, although the court sustained objections to these questions, it did not comply with appellant's request that the district attorney be instructed not to ask any more such questions. In that case the court did not hold that the asking of the first improper question would have warranted a reversal, but says that it "would not be, perhaps, of itself sufficient ground for reversing the judgment." In the case at bar only one improper question was asked. The district attorney was severely reprimanded by the court for asking it, and he made no attempt to repeat the question or to ask a similar one, and the jury were expressly instructed to pay no attention to anything suggested by the question. Under these circumstances we do not think that the question could have been seriously prejudicial to the appellant, or that it affords just ground for a reversal. It comes within the ordinary rule that the sustaining of the objection to an improper

question is a sufficient disposition of the matter. It is only where a district attorney shows a clear and persistent attempt to influence a jury by wrongfully producing suspicious and hurtful suggestions through improper questions that his conduct in the premises becomes such misconduct as will warrant a reversal.

The judgment and order denying appellant's motion for a new trial are affirmed.

We concur: BEATTY, C. J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; ANGELLOTTI, J.

SHAW, J. (concurring). I concur in the opinion of Justice McFARLAND. I wish to add, however, that, even in cases where a district attorney does persistently attempt to influence a jury by improper questions calculated to produce suspicious and hurtful suggestions, it is the duty of the counsel for the defendant to make timely objection to the court, and the duty of the court thereupon to instruct the jury that such suggestions must be disregarded and that such suspicions must be rejected, and that when such instructions are given it will not be presumed that the jury were influenced by the improper conduct objected to, unless the record shows extraordinary circumstances tending to show that such influence existed notwithstanding the caution of the court. I think that the language of the opinions in some of the previous decisions of this court goes too far in support of the theory that there is some sort of a presumption that the misconduct of a district attorney will prevail with the jury and influence them in the face of the positive instructions of the court that they must not consider the suggestions thus improperly made. The presumption should always be that a jury has obeyed the instructions of the court, and, unless the contrary is shown by the record, that presumption should prevail in the appellate courts.

151 Cal. 536

GARVEY v. LA SHELLS et al. (Sac. 1,465.) (Supreme Court of California. July 22, 1907.)

1. VENDOR AND PURCHASER—CONTRACT—POSSESSION—RIGHTS OF PURCHASER.

An assignee of the purchaser of certain mining claims in possession under a contract of sale, obligating the vendor to give a warranty deed of the property conveying a perfect title thereto, could not retain both the land and the price until a title should be offered, on the vendor's failure and inability to convey a perfect title but was required either to pay the price according to the contract and receive such title as the vendor is able to give, or rescind the contract, restore possession, and recover the amount paid, if any, with the value of improvements after deducting rental value of the premises.

2. SAME—PURCHASE OF OUTSTANDING TITLE.

A contract for the sale of certain mining claims obligated the vendor to deliver a warranty deed conveying a perfect title to the entire claims. Two months prior to the date fixed

for the payment of the price the purchaser's assignee in possession discovered an alleged outstanding title to an interest previously owned by the vendor's co-tenant which such purchaser's assignee purchased. *Held*, that the purchase of such outstanding title inured to the benefit of the vendor, and such assignee was not entitled thereunder to possession as a tenant in common without paying the contract price, but was only entitled to claim reimbursement from the vendor for the amount paid for such outstanding title, with interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 391.]

3. TRIAL—ISSUES—FAILURE TO FIND.

Where the findings are sufficient as to all material issues, a judgment will not be reversed or new trial granted for failure to make findings on certain immaterial issues.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 940.]

4. SAME—CROSS-COMPLAINT—WAIVER OF OBJECTIONS.

Where the issues raised on the cross-complaint and answer and by the complaint and answer were tried together by consent, one of the defendants could not object that the issues raised on the cross-complaint and answer should have been tried before the issues raised by the complaint and answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1252.]

Department 1. Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by J. J. Garvey against W. S. La Shells and others. From a judgment in favor of plaintiff, and from an order denying defendant Klamath River Gold Mining Company a new trial, it appeals. Affirmed.

W. F. Aram and Coburn & Collier (Lewis A. Heilbron, of counsel), for appellant. R. S. Taylor and James F. Lodge, for respondent.

ANGELLOTTI, J. On September 25, 1903, plaintiff and Lucien Guilbert and P. J. Garvey, claiming to own the same, were in the exclusive possession of certain mining ground known as the "Garvey Bar Placer Mining Claim," which consisted of the ground embraced in two locations, one being designated the "Garvey Boys Mine" and the other the "Last Chance." They had been in such possession for five years, mining and operating the ground. On that day they entered into a written agreement with defendant La Shells whereby they agreed to sell to him said "Garvey Bar Placer Mining Claim," with all machinery thereon, for \$12,000, payable on July 12, 1904. The vendors agreed that within 10 days from September 25, 1903, they would execute "a good and sufficient deed to said property, free and clear of all incumbrances and subject only to the title of the Central Pacific Railway Company in and to such portion of said mining claim as was situated in said section fifteen, and subject only to the paramount title of the government of the United States, in and to" the remainder of said claim, and place the same in the Siskiyou County Bank at Yreka, to be by the bank delivered to the vendee on

the payment of the \$12,000 to the bank for the use of the vendors, provided such payment is made at any time prior to the close of banking hours on July 12, 1904. The vendee also agreed to pay \$140 interest on the purchase price on November 12, 1903, and \$105 interest on January 12, 1904. It was mutually agreed that if the vendee failed to pay such interest, or failed to pay the \$12,000 by July 12, 1904, "this agreement is to be void and of no effect, and the deed which the parties of the first part have agreed to deposit in the Siskiyou County Bank is to be returned to them by said bank." Immediately upon the execution of this agreement, possession of the property was delivered by the vendors to La Shells, who accepted the same under the agreement. La Shells continued in exclusive possession, mining the property until April 25, 1904, when he transferred his interest in the agreement and the property described therein to the defendant corporation, the Klamath River Gold Mining Company. Ever since such transfer such corporation has been in exclusive possession, mining, working, and operating such claim. Within the time fixed by the agreement the three vendors deposited in escrow with the Siskiyou County Bank, for delivery to La Shells upon compliance by him with the provisions of the agreement as to payment, their grant, bargain, and sale deed purporting to convey the property to him. Neither La Shells nor the corporation ever paid, or, prior to answer in this action, offered to pay, any portion of the consideration agreed to be paid, and none of the interest has been paid, and on July 13, 1904, the vendors, because of such failure to pay the \$12,000 or any part thereof, withdrew the deed deposited in escrow, and demanded of La Shells and the corporation the possession of said property. This demand not having been complied with, and payment having been refused, and plaintiff having succeeded to the interest of his co-vendors, this action was instituted for the recovery of the possession of the property, the amended complaint showing the facts before stated, and the court, upon sufficient evidence, finding the facts to be as so stated.

Defendant corporation, by its answer, alleged that it acquired La Shells' interest under the agreement on April 25, 1904, and that it has ever since been in the exclusive possession. It further alleged that one Michael Garvey was one of the original locators of both claims and continued to own an undivided interest therein to the day of his death, August 17, 1897, and that his estate continued to own such interest until April 30, 1904, on which day said defendant purchased such undivided interest from the estate. Basing its claim on such purchase, it claims to be the owner of such undivided interest and entitled to possession of the claims. Further alleging that the vendors had falsely represented themselves to be the exclusive owners of the property, subject only to the claims of the

railroad company and the United States government, that the agreement was entered into by La Shells because of such representations, and that the estate of Michael Garvey was the owner of an undivided interest, which the vendors had neglected to obtain and had never been able to convey, it declared that it was ready and willing to pay the plaintiff the several sums of money specified in the contract "whenever the said plaintiff can convey to it a clear title to said property subject only to the aforesaid interests of the said Central Pacific Railway Company and to the paramount title of the United States."

By its cross-complaint filed with the answer, it alleged the ownership of the estate of Michael Garvey as to such undivided interest, its purchase thereof from the estate on April 30, 1904, and its consequent ownership and right to possession under said purchase. Further alleging the agreement between the vendors and La Shells, and the assignment thereof by La Shells to it on April 25, 1904, it alleged that by such agreement the vendors agreed not only to convey their own interest, but also the interest of the estate of Michael Garvey, that the \$12,000 specified therein was the agreed consideration for the whole of said claims, and that the vendors have wholly neglected to acquire the said Michael Garvey interest and convey the same under the agreement. It further alleged that since acquiring the La Shells' interest in the agreement, it had placed improvements of the value of \$10,000 on the property. On these facts, it demanded judgment decreeing that it is the owner of the Michael Garvey interest, and fixing the proportion of the whole purchase price which ought to be paid to the vendors for the remaining interests, and adjudging that, upon the payment of such proportion within a reasonable time, a deed be executed to them for such remaining interest. By his answer to the cross-complaint, plaintiff, alleging that the only agreement of sale between the parties was the one alleged in the complaint, and admitting that Michael Garvey was originally a member of the mining co-partnership owning said claims, alleged that his interest had reverted to his associates by reason of his failure and that of his representatives to pay his proportional portion of money expended in doing the assessment work upon the property. It further alleged that neither La Shells nor appellant had offered to carry out the contract.

The court, after finding facts in accord with the allegations of the complaint, as we have stated them, found that due notice of forfeiture of the Michael Garvey interest to his co-owners for failure to pay his proportion of the amount of assessment work had been given on February 23, 1904, but, as will appear hereafter, we deem this finding immaterial. It also found that on April 30, 1904, the defendant corporation acquired at probate sale for the sum of \$300 all the interest

of the estate of Michael Garvey in said claims, and that neither La Shells nor appellant had ever made any tender of any character other than the offer in its answer already stated, both of which findings are sustained by the evidence.

Concluding that the most that appellant could claim for the failure in part, if any, of plaintiff's title, would be the amount paid by it for the Michael Garvey interest, \$300, with interest thereon from April 30, 1904, that defendant cannot in this action hold possession of the property under the agreement, and at the same time assert the adverse title of the Michael Garvey estate, and that plaintiff is therefore entitled to recover possession of the property, the court gave a judgment for such possession.

This is an appeal by the defendant corporation from such judgment, and from an order denying its motion for a new trial.

So far as the defense made by the answer is concerned, the case is simply that of a vendee who has received possession of the property from the vendor under a contract of sale, attempting to retain possession as against the vendor without fulfilling his covenants as to payment on two grounds: (1) That the title of the vendor is not good in that there is an outstanding undivided interest in the property, which title such vendee, more than two months before the date fixed by the agreement for the payment of the purchase price, had itself purchased; and (2) that by reason of such purchase the vendee became the absolute owner of such undivided interest, and is as tenant in common entitled to remain in possession. There is no merit in these claims.

As to the first ground, the position of appellant is that it may indefinitely keep possession of the property so received from the vendor, while refusing to make payment of the purchase price; in other words, may keep both the property and the purchase money. It has offered to pay nothing for the property, and confines itself now to offering to pay anything only when plaintiff can convey a clear title, which, under its claim, plaintiff can never do, as the vendee has acquired the outstanding title, and thus made a conveyance impossible. We are now referring solely to the matter set up in the answer. A purchaser cannot retain possession of property delivered to him under a contract of sale without complying with the terms of the contract as to payment, for the reason that the title of his vendor is not satisfactory. If a perfect title was to be conveyed, and the vendor is unable to give such a title, the vendee has appropriate remedies, but he cannot keep both the property and the purchase money. The rule applicable, as stated in the syllabus to *Worley v. Nethercott*, 91 Cal. 512, 27 Pac. 767, 25 Am. St. Rep. 209, which has since been declared to be a correct summary of the decision (*Halle v. Smith*, 128 Cal. 415, 60 Pac. 1032), is as follows: "A purchaser

of land in possession thereof under a contract of sale, by the terms of which the vendor is to give a warranty deed of the property, conveying a good and perfect title thereto, cannot, upon the vendor's failure and inability to convey a good and perfect title, retain both the land and the purchase money until a perfect title shall be offered him, but he must pay the purchase price according to the contract, and receive such title as the vendor is able to give, if he chooses to retain the possession of the land, or he may rescind the contract, restore the possession to the vendor, and recover the purchase money paid, together with the value of his improvements, after deducting therefrom the fair rental value of the premises; and, if he fails and refuses to adopt either course, he is liable to an action of ejectment by the vendor." See, also, *Bruschi v. Quail M. & M. Co.*, 147 Cal. 120, 81 Pac. 404; *Halle v. Smith*, 128 Cal. 415, 60 Pac. 1032; *Hannan v. McNickle*, 82 Cal. 122, 23 Pac. 271; *Gates v. McLean*, 70 Cal. 42, 11 Pac. 489; *Haynes v. White*, 55 Cal. 38; *McLeod v. Barnum*, 131 Cal. 605, 608, 63 Pac. 924. The claim of the appellant, in this regard, is devoid of every equitable feature, in view of the fact that the damage from the alleged outstanding title had been definitely ascertained and such claim of title had been acquired more than two months before the date fixed for the payment of the purchase money, and the least the appellant could have done, in order to show a disposition to do equity, was to tender the amount due on the contract, less the amount paid in acquiring such alleged outstanding title, with interest thereon. See *Gates v. McLean*, 70 Cal. 51, 11 Pac. 489. Much is said by appellant as to the placing of valuable improvements by it on said land, but both answer and cross-complaint show that all this was done with full knowledge of the facts as to the alleged outstanding title, and after appellant had purchased the same.

As to the second claim of appellant, viz., that it is the owner of an undivided interest of the property, by reason of the purchase of the alleged outstanding title, appellant, having entered into possession under the vendors' title and in subordination to it, is here estopped from denying such title in defense to plaintiff's action for possession. See *Coates v. Cleaves*, 92 Cal. 427, 430, 28 Pac. 580; *Hicks v. Lovell*, 64 Cal. 14, 20, 27 Pac. 942, 49 Am. St. Rep. 679; *Holden v. Andrews*, 38 Cal. 119. See, also, 29 Am. & Eng. Ency. of Law (2d Ed.) pp. 706, 707. There is no circumstance in this case excluding the same from the operation of the general rule on this subject.

Appellant was not entitled to any relief under its cross-complaint. The rule declared in *Marshall v. Caldwell*, 41 Cal. 611, as to the right of the vendee in possession, who discovers that his vendor owns only a portion of the land agreed to be conveyed, and is,

therefore, unable to perform his contract as to the remainder, to proceed to have the contract specifically enforced to the extent of the vendor's interest in the property, and to have abatement out of the purchase money for the deficiency, without restoring or offering to restore possession of the property, is undoubtedly the law, but it does not assist appellant. The only defect in the vendor's title alleged is the outstanding title of the Michael Garvey estate to an undivided interest in the property. This defect was removed by the appellant itself by the purchase by it, while in possession under the contract, and more than two months before the date for the payment of the purchase price, of the alleged outstanding title, for the sum of \$300. The generally accepted rule is to the effect that, if the purchaser in possession perfects the title of the vendor pending the executory contract by buying in an outstanding claim, the perfected title inures to the benefit of the vendor for all the purposes of the agreement, and the utmost that the vendee can ask is to be reimbursed for his outlay in obtaining such title, with interest thereon. See 1 *Warville on Vendors*, § 186; 29 Am. & Eng. Ency. of Law (2d Ed.) p. 618; *Stephens v. Black*, 77 Pa. 138; *Fuson v. Lambdin*, 66 S. W. 1004, 23 Ky. Law Rep. 2245; *Austin v. McKinney*, 5 Lea (Tenn.) 488; *Wilkinson v. Green*, 34 Mich. 221; *Frink v. Thomas*, 25 Pac. 717, 20 Or. 265, 12 L. R. A. 239. This rule is in full accord with the well-recognized doctrine that no one who goes into possession of land under another will be heard to dispute the title of that other during the continuance of the relation. Acquiring such outstanding claim during such continuance, in the language of the Supreme Court of Pennsylvania in *Stephens v. Black*, supra, "he becomes the trustee of his vendor." Under this rule, assuming the outstanding title to have been good, the title of the vendors was, for all the purposes of the agreement, perfected on April 30, 1904, and the deed then in escrow, ready to be delivered on payment of the purchase price, and which so remained until after appellant's default, offered a perfect title. Assuming that appellant would have been entitled to a conveyance of the whole property upon tendering, within the time fixed by the contract, the amounts specified therein, less the amount paid for the outstanding title, with legal interest thereon, it appears that no tender or offer of any kind has ever been made, and there is nothing in the case excusing such lack of tender. Under these circumstances, appellant was not entitled to specific performance as to the whole property, and certainly was not entitled, as it sought by its cross-complaint, to specific performance of a portion only upon payment of a proportionate amount of the purchase price, upon the theory that it was the owner of the remaining portion agreed to

be conveyed, by reason of its purchase of an adverse title thereto, while it was in possession under the contract of sale. Appellant did not seek in this action any allowance on account of the money expended in acquiring the alleged outstanding title, and no question is here involved as to the right of appellant to relief on account thereof. Under these circumstances, and in view of what we have heretofore said, it is not necessary to determine whether the finding regarding the forfeiture of the interest of Michael Garvey to the other owners is sustained by the evidence. It is immaterial here whether the alleged outstanding title of Michael Garvey was good or bad.

Complaint is made that the court failed to make findings as to certain issues, but, in our judgment, the findings are sufficient as to all material issues, and a judgment will not be reversed or a new trial granted for failure to find as to immaterial matters.

It is further urged that the court should have tried the issues arising on the cross-complaint and the answer thereto before trying the issues made by the complaint and answer. As to this, it is sufficient to say that, so far as the record shows, all the issues were tried together by consent of the parties.

There is no other point requiring notice.

The judgment and order are affirmed.

We concur: SHAW, J.; SLOSS, J.

151 Cal. 600

SCHOSTAG v. CATOR et al. (S. F. 4,852.)
(Supreme Court of California. Aug. 8, 1907.)

1. ELECTIONS—PRIMARIES—QUALIFICATIONS OF ELECTORS.

Pol. Code, § 1366a, provides that in all places where the primary election law is in force each elector, at the time of registering or time of transferring registration, shall declare his party affiliation, and, if he refuses to do so, he shall not vote at the ensuing primary, and section 1361a empowers the several political parties to prescribe additional tests if they desire so to do for those who offer to vote for delegates to their respective conventions. *Held*, that such sections were not in conflict nor objectionable, as violating Const. art. 2, § 2½, empowering the Legislature to provide for and regulate primary elections as constituting a partial exercise and a partial delegation of such power.

2. SAME.

Pol. Code, § 1366a, requiring each elector in precincts where the primary election law is in force to declare at the time of registering or transferring registration his party affiliation as a condition to his right to participate in the primary, is not void as a violation of Const. art. 2, § 1, in that it in effect provides an additional qualification to those prescribed therein for electors.

3. SAME—REASONABLENESS.

Pol. Code, § 1366a, requiring electors at registration desiring to vote at primaries, where the primary election law is in force, to declare their party affiliation in order to be entitled to vote at the primary, is not void for unreasonableness, in that an elector changing his party affiliation after his registration and before the

primary election would be precluded from voting with his new party.

4. SAME.

It was no objection to the validity of the act that one political party entitled to participate in the primary election had determined not to hold a convention or nominate candidates, so that the members of that party would be deprived of the right to vote at the ensuing primary.

5. CONSTITUTIONAL LAW—UNIFORMITY—VESTED RIGHTS.

Pol. Code, § 1366a, requires each elector at the time of registering to declare his party affiliation in order to entitle him to vote at the succeeding primary election, but declares that the section shall not apply to electors who registered before the act took effect, and permits them to vote at the succeeding primary, though their registration affidavits contained no declaration of affiliation. *Held*, that such excepted electors had a vested right to vote, and that the section was therefore not unconstitutional because of such exception for nonuniformity.

In Bank. Petition for a writ of mandate by Edward Gustave Schostag against Thomas V. Cator and others as constituting a board of election commissioners of the city and county of San Francisco. Writ denied.

Samuel M. Shortridge, for petitioner.
Thomas V. Cator, for respondents.

BEATTY, C. J. This is a petition for a writ of mandate to compel the defendants to issue instructions to the officers appointed to conduct the approaching primary election in the precinct where petitioner is registered to permit him to vote the ballot of any political party lawfully participating therein, notwithstanding his refusal to comply with the requirements of a new section of the Political Code, known as "section 1366a," which provides, among other things, that in all places where the primary election law is in force each elector at the time of registering, or of transferring registration, shall declare the name of the political party with which he intends to affiliate at the ensuing primary election or elections, that such name shall then be stated in his affidavit of registration, and that he shall not be allowed to vote on behalf of any other party, or for delegates to the convention of any other party, by virtue of that registration, unless before the close of registration he announces and has recorded a change of his party allegiance. If he refuses at the time of registering to give the name of his party, that fact is to be stated in the record, and in such case he is not permitted to vote at all at the ensuing primary, unless before the close of registration he declares his party allegiance by affidavit stating the name of the party with which he is affiliated.

The petitioner contends that this section is unconstitutional, and the defendants are in doubt as to its validity, not only for the reasons urged by the petitioner, but for the additional reason that on the same day (March 19, 1907) that the act adding section 1366a to the Political Code was approved another act was approved adding a new section

to be known as section 1361a, which, it is suggested by counsel for defendant, brings both enactments in conflict with section 2½ of article 2 of the Constitution, or, if either enactment can be held to be prior to the other, at least invalidates that act. The point of this objection is that section 2½ of article 2, which empowers the Legislature to provide for, and regulate, primary elections, while it authorizes the Legislature to prescribe tests of the right of electors to vote at primary elections by direct enactment, or to delegate to the governing bodies of the respective parties the power to prescribe such tests, does not permit the Legislature to partly exercise and partly delegate such power, but, on the contrary, by clear implication forbids any division of this function. We think this objection is overrefined. The Legislature, by section 1366a (St. 1907, p. 677, c. 352), has prescribed a test or condition to be complied with by all electors of every party who desire to participate in the primary elections, and by section 1361a (St. 1907, p. 641, c. 340) has empowered the several political parties to prescribe additional tests, if they desire to do so, for those who offer to vote for delegates to their respective conventions. There is no conflict between the two acts, and nothing in the Constitution which forbids even by implication provisions so reasonable and so just. The Legislature having the right to reserve the exercise of the power of prescribing tests to itself exclusively, or to delegate the power to the several parties, is invested with plenary control of the whole subject, and, if it deems some general test, applicable to all parties, necessary as a matter of wise state policy, it does not, by prescribing such a test, preclude the delegation of a right to prescribe more specific tests for the electors claiming to be members of a particular party. The state has a general interest in guarding the purity of primary elections, especially since party conventions have become an essential feature of our system of choosing public officers, and every party has a special interest, in reserving to its own members the control of its own affairs. It would be a deplorable construction of the Constitution which would forbid the enactment of general laws in furtherance of the general interest of the state, except upon condition of denying to the governing bodies of the respective parties the right to exclude from participation in their primaries electors who, according to their own standards of party fealty, are not entitled to act with them. This is a right which parties have always exercised heretofore without question, and is essential to their preservation. *Britton v. Board of Com'rs*, 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115. Our conclusion is that, since sections 1361a and 1366a are entirely harmonious in themselves, neither is unconstitutional by reason of the enactment of the other.

The question which remains to be considered is whether section 1366a is unconstitutional for any of the reasons assigned by the petitioner. It is claimed in the first place, that, under the guise of providing a test upon which an elector may participate in a primary election, it, in fact, imposes an additional qualification to those prescribed for electors by section 1 of article 2 of the Constitution. We do not think so. What we call "the primary election" is really a number of primary elections equal to the number of parties participating, but conducted at the same time and at the same polling places by one set of public officers, acting in behalf of all the parties desiring to elect delegates to their respective conventions. Therefore, when an elector desires to register in a manner which will entitle him to vote at the primary election, he must be understood as desiring to act with some party, and not with any other party. The registrar is for this purpose the agent of the several parties, and is making up a list of voters for each one of them. It is therefore just as reasonable to require the elector to range himself with some particular party for the purpose of the primary election, as it is to require registration of all electors who desire to vote at the general election. By one registration is secured the right to vote at an election open to all registered electors, by the other is secured the right to vote at an election open to those only who belong to a particular party. In either case registration is merely a condition, and an entirely reasonable condition, prerequisite to the casting of a vote by a qualified elector.

These views, if correct, dispose of several other objections urged by petitioner, and relieve us of the necessity of taking them up seriatim. We shall, however, notice some of the arguments that have been most strongly urged upon our attention. It is contended that the test prescribed by section 1366a is unreasonable, because with the close of registration the elector loses his right to change his party allegiance in consequence of a change in his political convictions, and is precluded from taking part in the election of delegates to the convention of the party with which on the day of the election his more matured opinions would impel him to cast in his lot. This inconvenience certainly does result from the provisions of the act, but the Legislature, which must be presumed to have foreseen it, probably regarded such sudden conversions during the short interval between the close of registration and the date of the primary election as likely to be of such rare occurrence as not to justify the omission of a provision evidently designed to prevent unscrupulous and mercenary electors from holding themselves free down to the day of election to vote with any party, upon any corrupt motive, for the purpose of influencing the nomination of its candidates for public office, while without any interest in their

success, and perhaps with an interest in their defeat. If it shall sometimes happen that a conscientious voter is converted from one political faith to another between the close of registration and the primary election, he may console himself for the loss of his vote by the reflection that his loss is trifling in comparison to his share of the advantage to the state of which he is a citizen, flowing from a measure which tends to prevent a grave abuse, especially in those centers of population where the primary election law is made obligatory.

Another inconvenience suggested by the fact that in the city and county of San Francisco one political party entitled to participate in the primary election has determined not to hold a convention or nominate candidates is that the members of that party in this instance, and the members of all parties in similar cases hereafter, will be deprived of the right to vote at the ensuing primary. This inconvenience does not seem to afford valid ground of complaint, since it amounts only to this: That the members of a party which holds no primary election are merely prevented from interfering in the management of a party to which they do not profess to belong.

As to the meaning of section 2½ of article 2 of the Constitution, we agree that it must be construed in the light of the evil to be remedied, and the course of legislation and judicial decision prior to its adoption. The evils to be remedied were the corrupt practices by which, in the absence of proper public control, primary elections were made to defeat the will of the bona fide members of political parties, and the course of legislation has been to enact one primary election law after another, which have as often been found unconstitutional by reason of various restrictions upon the legislative power contained in our fundamental law. The object of the people in adopting the amendment contained in section 2½ of article 2 was to remove these restrictions, and to give the Legislature a practically free hand in dealing with the evils which their previous legislation had vainly attempted to cure. In view of these considerations, we do not feel justified in narrowing by construction the power conferred upon the Legislature by that section to prescribe tests of the right to vote at primary elections.

The last and most serious objection to the validity of the law is that it is not uniform in its operation, that it creates classes and imposes more onerous conditions upon one class than another. The point of this objection is that the act contains a saving clause in favor of all electors who were registered before its enactment, permitting them to vote at this primary election notwithstanding their affidavits of registration contain no declaration of affiliation with any particular party. We do not regard this feature of the law as

fatal to its validity. As a permanent law of the state it creates no classes, and will be entirely uniform in its operations upon all electors. It is no ground for holding such a law unconstitutional that it saves the rights of some electors, who by complying with the law as it existed at the date of their registration secured the privilege of voting at all primary elections to be held during the time such registration holds good. We are not aware of any case in which a saving clause protecting vested rights has ever been held to invalidate a law general and uniform in other respects, and we think it not unreasonable to treat the rights secured by registration as meriting the same consideration in this connection as rights more strictly entitled to be ranked as vested rights.

Writ denied.

We concur: SHAW, J.; HENSHAW, J.; SLOSS, J.; LORIGAN, J.

151 Cal. 616

SAVINGS & LOAN SOCIETY v. BURKE,
Tax Collector. (L. A. 1,643.)

(Supreme Court of California. Aug. 9, 1907.
Rehearing Denied Sept. 5, 1907.)

TAXATION—IMPERFECT ASSESSMENT—EQUITABLE RELIEF.

Even if the provisions of Pol. Code, §§ 3628, 3650, as to assessing land by sections, applies to the assessment of a mortgage interest in lands, and such an interest was not so assessed, execution of a tax deed of such an interest will not be enjoined on this account, the owner of such interest not having tendered the amount of tax justly due from him, or at any time offered to pay to the tax collector the tax on such interest in any section, the amount of which is deductible from the deductions made on account thereof in the assessment of the mortgagor's interest.

In Bank. Appeal from Superior Court, Santa Barbara County; James W. Taggart, Judge.

Action by the Savings & Loan Society against Edmund M. Burke, tax collector of the county of Santa Barbara. Judgment for defendant. Plaintiff appeals. Affirmed.

Canfield & Starbuck, for appellant. U. S. Webb, Atty. Gen., Geo. A. Sturtevant, Deputy Atty. Gen., and E. W. Squires, Dist. Atty., for respondent.

SLOSS, J. This is an action brought to restrain the execution of a tax deed to the state, following a sale for nonpayment of taxes. A demurrer to the second amended complaint was sustained, and, plaintiff declining to amend, judgment went for the defendant. The plaintiff appeals.

The complaint in question sets forth these facts: The plaintiff in 1897 was, and ever since has been, the owner and holder of a mortgage interest in certain lands in Santa Barbara county. The mortgaged lands, consisting of some 8,800 acres, were included in territory which had prior to 1897 been di-

vided into townships and sections pursuant to the laws of the United States. The owner of the fee was J. W. Calkins, and the land was assessed to him for the year 1897 by sections, as required by sections 3628 and 3650 of the Political Code. The mortgage interest of the plaintiff was, however, assessed in a lump sum, without apportionment or division among the subdivisions or sections composing the mortgaged property. The amount of the tax was likewise computed in the assessment book in a lump sum, and appears therein as amounting to \$1,316.86. No part of the tax having been paid, the property was sold to the state (Pol. Code, § 3771), and the plaintiff, claiming that the failure to assess his mortgage interest by sections is fatal to the validity of the assessment and tax, seeks to enjoin the execution of a deed. For the purposes of this decision, we assume, but do not decide, that the provisions of the Political Code as to assessing land by sections are applicable to mortgage interests.

It is the law of this state, as declared in two decisions rendered since this appeal was taken, that the execution of a tax deed based on an imperfect assessment will not be restrained at the suit of one who does not offer to do equity by paying such tax as is, in morals and justice, chargeable against him. *Couts v. Cornell*, 147 Cal. 560, 82 Pac. 194, 109 Am. St. Rep. 168; *Grant v. Cornell*, 147 Cal. 565, 82 Pac. 193, 109 Am. St. Rep. 173. The appellant does not dispute the correctness of this rule, but seeks to distinguish the case at bar from those cited. It is said that in *Couts v. Cornell* the defect in the assessment was that the property was not sufficiently described for purposes of identification, and that such defect in the description did not affect the moral obligation of the landowner to pay the tax. Here, however, it is claimed that the failure to assess the mortgage interest in parcels, according to the governmental subdivisions of the land, directly affected the obligation to pay a tax at all; that it is the privilege of the taxpayer, where the land is required to be assessed in sections, to pay (or redeem) as to some sections, allowing the taxes on the remaining sections to become delinquent; and that if the state does not, by separately assessing and taxing the sections, put the owner of the property in a position to exercise his right to make such partial payment, he is under no moral obligation to pay any part of the tax. Whatever apparent force this argument might have is destroyed by an inspection of the complaint and an examination of the provisions of the Political Code regarding assessment for taxation. The complaint contains a copy of a portion of the assessment roll. This includes the assessment to Calkins, the owner of the fee, showing a valuation of the property by legal subdivisions, and a deduction, on account of the mortgage, from the valuation of each parcel. On the same page follows the assessment of

the mortgage interest to plaintiff. The sum of the deductions from the assessment to Calkins equals the amount at which the appellant's mortgage interest is assessed. This assessment to the owner of the fee was in accordance with the requirements of the Code. Under our system of taxation, the mortgage is treated as an interest in the land, and assessed at its full cash value. Pol. Code, § 3628. The land is entered in the assessment book by sections, with its cash value, and, where it is subject to a mortgage security, the assessor must enter "in the proper column, the value of such security, and deduct the same." Pol. Code, § 3650. The value of the mortgage security which is to be so deducted is the same as the "full cash value" at which the mortgage security is to be assessed. Since such deduction was made as to each section of the mortgaged land, the plaintiff could have readily ascertained, from the data necessarily appearing on the face of the assessment book, the amount of the tax justly chargeable against its interest in any one of the sections covered by its mortgage.

It is suggested that a payment as to a part of the mortgage interest which had been assessed as a whole would not have been accepted by the tax collector. If plaintiff in fact desired to free any specific sections of the land from the lien of the tax, there was nothing to prevent its offering to pay the tax properly chargeable to those sections. Such offer, even if refused, would have put it in a position to ask and receive the aid of a court of equity. If it never had the intention or desire to pay the tax as to any part of the land less than the whole, the failure to assess by subdivisions did not affect its obligation to pay the entire tax.

In either view, the appellant's failure to make any payment or tender leaves its case as devoid of equity as that of the plaintiff in *Couts v. Cornell*.

The judgment is affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; McFARLAND, J.; HENSHAW, J.

151 Cal. 539

JONES v. SUPERIOR COURT OF KERN COUNTY et al. (L. A. 2,071.)

(Supreme Court of California. Aug. 6, 1907.)

JUSTICES OF THE PEACE—APPEAL—BOND—SUFFICIENCY.

Code Civ. Proc. § 978, provides that an appeal from a justice court is ineffectual, unless an undertaking is filed in the sum of \$100 for the payment of costs "on appeal," or if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment including costs, when the judgment is for the payment of money. *Held*, that where a plaintiff before a justice's court, desiring to appeal, filed a bond reciting such appeal, claiming a stay of proceedings and providing a sufficient penalty for the payment of the judgment appealed from "and all costs," if the appeal was withdrawn or dis-

missed, etc., and all costs that might be recovered against it in the action in the superior court, the bond sufficiently provided for the payment of costs "on appeal," and was therefore sufficient.

In Bank. Petition for writ of prohibition by E. E. Jones against the superior court of Kern county and others, to the District Court of Appeal of the Second Appellate District. Case transferred to Supreme Court. Writ denied.

William W. Keye, for petitioner. George E. Whitaker and H. M. Barstow, for respondents.

McFARLAND, J. This is an application originally filed in the District Court of Appeal, Second Appellate District, for a writ of prohibition to restrain and prohibit the superior court of Kern county from proceeding with the trial of a cause pending therein, entitled Kern Valley Bank v. E. E. Jones. All of the justices of the said district court were not able to concur in a judgment, and the case was transferred to this court. The said Kern Valley Bank brought an action in the justice's court against the petitioner herein, E. E. Jones, to recover of the latter a money judgment, and Jones answered and demanded judgment against the bank; and after trial judgment was rendered in favor of the defendant Jones for \$190.76, and from this judgment the bank appealed to the superior court. Jones moved to dismiss the appeal upon the sole ground that no undertaking for the payment of costs had been given. The superior court denied the motion to dismiss, whereupon Jones commenced this present proceeding to prohibit the superior court from trying the case.

The law governing the matter of undertakings on appeal from a justice's court to a superior court is found in section 978, Code Civ. Proc., and that part of it which is material is as follows: "An appeal from a justice's or police court is not effectual for any purpose, unless an undertaking be filed with two or more sureties in the sum of one hundred dollars for the payment of the costs on appeal; or, if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money," etc. In the instrument filed by the respondent as an undertaking on appeal the judgment in the justice's court is fully recited. It is then stated that "the said plaintiff, Kern Valley Bank, is dissatisfied with said judgment and is desirous of appealing therefrom to the superior court of Kern county, state of California, and, pending such appeal, claims a stay of proceedings, and is desirous of staying the execution of the said judgment so rendered as aforesaid." Then the instrument states that, "in consideration of the premises, of such appeal, and of such stay of proceedings and execution, all as aforesaid," the two sureties bind themselves

jointly and severally and undertake in the sum of \$500, "and promise on the part of said appellant that the said appellant will pay the amount of the said judgment so appealed from and all costs, if the appeal is withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against it in the action in the said superior court." We think that this instrument is a sufficiently clear undertaking to pay the costs on appeal. It provides that, if the appeal be withdrawn or dismissed, the sureties will pay the judgment appealed from "and all costs" or the amount of any judgment and "all costs which may be recovered against appellant in the action in the superior court." It is somewhat difficult to imagine what "costs" are alluded to in the undertaking, unless costs on appeal be intended, for the costs incurred at the trial in the justice's court had become inserted in and were a part of the judgment, and were therefore included in the promise to pay the "judgment." However, it is quite clear that "all costs" include costs on appeal; and if in the case at bar the appeal should be withdrawn or dismissed, or a judgment should be rendered against appellant in the superior court, the sureties on the said undertaking are in either event liable for any costs that accrued on the appeal. There is no valid objection to the form of the undertaking. If it provide for the costs on appeal, it matters not that it also provides in the same instrument for a stay of proceedings. If after the words "all costs" there had been inserted the words "on appeal," no one would have objected to the form or sufficiency of the instrument as an undertaking on appeal; but if, as we hold, "all costs" as used in the instrument includes costs on appeal, then the undertaking is as effectual as if the words "on appeal" had been used. It is quite evident from the face of the instrument that it was intended to be an undertaking on appeal as well as for a stay, and the penal sum is more than twice the amount of the judgment, and the \$100 in addition.

We do not think that the above view is in conflict with any former decisions of this court cited by petitioner. The case mainly relied on is *McConky v. Superior Court*, 56 Cal. 83. But in that case the appellant contended that an undertaking for costs on appeal need not be given at all where there was an undertaking for a stay of proceedings, because in section 978, after the provision for the \$100 undertaking, the word "or" is used; and the only point decided in the *McConky* Case is that the word "or" as there used must be considered to mean "and," so that, even where there is an undertaking for a stay, there must also be an undertaking for costs on appeal. But in the *McConky* Case the undertaking there given does not appear in the record, and it was assumed that it did not contain any covenant which was the equivalent of a promise to pay the costs on

appeal; and the case is therefore not authorized on the point here under discussion.

The views above expressed make it unnecessary to consider other points made by respondent.

The application for the writ is denied, and the proceeding is dismissed.

We concur: BEATTY, C. J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.

151 Cal. 638

PEOPLE v. HOWER. (Cr. 1,388.)

(Supreme Court of California. Aug. 12, 1907.
Rehearing Denied Sept. 5, 1907.)

1. HOMICIDE — APPEAL — INSTRUCTIONS — PREJUDICE.

Where the only conflict in instructions with reference to the issue of drunkenness in a prosecution for assault with a deadly weapon was that caused by the giving of an erroneous instruction at defendant's request, which stated the rule more favorably to him than he was entitled to, he was not injured by the conflicting instructions, which properly stated the law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 715.]

2. HOMICIDE—ASSAULT WITH INTENT TO MURDER — DEFENSES — DRUNKENNESS — INSTRUCTIONS.

In a prosecution for assault with intent to murder, an instruction given at defendant's request, which merely informed the jury that if defendant, while under the influence of liquor, was unable to tell what he was doing and to distinguish between right and wrong, and was under the influence of liquor at the time of the alleged assault, they must acquit, was in conflict with Pen. Code, § 22, providing that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition, but that, when the actual existence of a particular motive or intent is a necessary element of a particular species or degree of crime, the jury may consider intoxication in determining such fact.

3. SAME—DEGREES OF OFFENSE—INTENT.

Defendant was informed against for assault with a deadly weapon with intent to commit murder, and was convicted of assault with intent to murder. The court correctly charged as to the various kinds or grades of offense included in the information, and instructed that evidence of drunkenness could only be considered for the purpose of determining the degree of the crime. *Held*, that the instruction should be construed to authorize the jury to consider the fact of intoxication in determining which of the various kinds or grades of offense included in the information the defendant was guilty of, and not as instructing that they should consider such evidence in determining the degree of the offense of assault with intent to commit murder with which defendant was charged which is not divided into degrees.

4. CRIMINAL LAW—EXAMINATION OF WITNESSES—PREJUDICE.

Accused was not prejudiced by the court's refusal to permit him to cross-examine certain witnesses examined for the state in order to obtain evidence on the issue of drunkenness as to which they had not been examined in chief, where accused subsequently examined the witnesses on such issue either as his own or when recalled by the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3143.]

Cal.Rep 89-91 P.—53

5. SAME—TRIAL—JURY—MISCONDUCT.

Where, in a prosecution for assault with a deadly weapon with intent to murder, there was nothing in support of defendant's allegation of misconduct of the jury in examining the coat and shirt worn by prosecutor at the time of the assault after submission of the case but the bare "information and belief" statement of defendant's attorney and the affidavits of the state on motion for a new trial supported a conclusion that the articles had been fully inspected by the jury at the time they were received in evidence, defendant was not shown to have been prejudiced by the fact that the garments were left in the courtroom, which was used by the jury after submission of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3170, 3178.]

6. SAME — APPEAL — INSTRUCTIONS — WITNESSES—CREDIBILITY.

An instruction that a witness who testifies falsely as to one fact is to be distrusted in other parts of his testimony merely stated a commonplace matter, which the jury would be apt to know without instruction, and was not ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3154.]

In Bank. Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

J. W. Hower was convicted of assault with intent to murder, and he appeals. Affirmed.

John A. Wall, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for respondent.

ANGELLOTTI, J. The defendant was found guilty of the offense of assault with intent to commit murder, upon an information charging him with the offense of an assault with a deadly weapon with intent to commit murder, and was adjudged to suffer imprisonment in the state prison therefor. He appealed from the judgment and from an order denying his motion for a new trial, and the cause was ordered transferred to this court for hearing and decision, after decision in the District Court of Appeal for the Third district.

1. Error is alleged in the matter of certain instructions given upon the subject of drunkenness. There was some evidence tending to show that the defendant was to some extent under the influence of intoxicating liquor at the time of the commission of the offense. The defendant testified that during the last four years "the drink habit had held him absolutely, that when under the influence of liquor he did not know right from wrong, that when the craving and desire for liquor came over him he could not resist it, and that on the day in question he commenced drinking, and remembered nothing about any trouble with the prosecuting witness." Upon defendant's request, the court gave to the jury the following instruction: "If you believe that in consequence of long intemperance that defendant has arrived at that stage whenever he is under the influence of liquor that he is unable to tell what he is doing, that he is unable to distinguish right from wrong, and that at the time defendant com-

mitted the alleged assault upon Frank Judeas he was under the influence of liquor, then I charge you that it is your duty to acquit." At the same time, the court on its own motion, instructed the jury as follows: (1) "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition, but, whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act. (2) It is a well-settled rule that drunkenness is no excuse for the commission of a crime. Insanity produced by intoxication does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated; and drunkenness forms no defense whatever to the fact of guilt, for, when a crime is committed by a party while in a fit of intoxication the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence can only be considered by the jury for the purpose of determining the degree of crime, and for that purpose it must be received with great caution."

It is not claimed by appellant that these instructions so given by the court on its own motion did not correctly state the law as to voluntary intoxication. The first was in the words of section 22 of the Penal Code, and the second has been held not to be erroneous in a long line of cases commencing with *People v. Lewis*, 36 Cal. 531. The claim of learned counsel for defendant is that these instructions are in conflict with the instruction given at his request, hereinbefore set forth, which, it is further claimed, was a proper instruction under the circumstances of this case. That there is such a conflict is apparent. It does not, however, follow that defendant can complain thereof. The instruction given at defendant's request was clearly erroneous. By it the jury were informed simply that if the defendant, while under the influence of liquor, was unable to tell what he was doing and unable to distinguish between right and wrong, and if he was under the influence of liquor at the time of the alleged assault, they must acquit. It disregards entirely the question as to whether the intoxication was voluntary, requiring an acquittal under the circumstances specified, whether the intoxication was voluntary or not. It was therefore in plain conflict with the provisions of section 22, Pen. Code, set forth in the first of the instructions given on this subject by the court on its own motion, and with the decisions of this court, and, so far as we have discovered, with the decisions of courts generally upon this sub-

ject. In *People v. Blake*, 65 Cal. 275, 4 Pac. 1, relied on by defendant in support of the instruction, the court, after declaring that it has been so frequently and so generally held both in England and in the highest courts of this and other states that drunkenness voluntarily brought on is no excuse for crime, that it may be considered as settled law, said, quoting approvingly from *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484: "It will moreover occur to every mind that such a principle is absolutely necessary to the protection of life. * * * But there is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which every one owes to his fellow men, and to society, to say nothing of more solemn obligations, to preserve, so far as lies in his power, the inestimable gift of reason. If it is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable, but if, by a voluntary act, he temporarily casts off the restraints of reasons and conscience, no wrong is done him if he is considered answerable for any injury which, in that state, he may do to others or to society." In *People v. Travers*, 88 Cal. 233, 239, 26 Pac. 88, 91, it was said by the court in bank, speaking through Mr. Justice McFarland: "As to the instructions asked by appellant on the subject of delirium tremens, etc., it is sufficient to say that settled insanity produced by a long-continued intoxication affects responsibility in the same way as insanity produced by any other cause. But it must be 'settled insanity,' and not merely a temporary mental condition produced by recent use of intoxicating liquor." The law upon this subject was so clearly and concisely stated by this court, speaking through Mr. Justice Henshaw, in *People v. Fellows*, 122 Cal. 233, 239, 54 Pac. 830, 832, that we quote therefrom at length: "No act committed by a person while in a state of voluntary intoxication is less criminal for this reason, saving that, when the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any specific species or degree of crime, the circumstance of voluntary intoxication may be considered by the jury in determining the fact whether or not that particular purpose, motive, or intent was present. Pen. Code, § 22. *But a sane person who voluntarily becomes intoxicated is not relieved from responsibility because of any mental derangement, mada a potu, or insanity produced by and consequent upon his own voluntary act.* Such is the import of the instruction in *People v. Lewis*, supra, and it is that form of insanity, if insanity it may be called (for we do not think the word happily chosen), to which the instruction has reference. *A sane man, therefore, who voluntarily drinks and becomes intoxicated, is not excused because the result is to cloud his judgment, unbalance his rea-*

son, impair his perceptions, derange his normal faculties, and lead him to the commission of an act which in his sober senses he would have avoided. Upon the other hand, if one, by reason of long-continued indulgence in intoxicants, has reached that stage of chronic alcoholism where the brain is permanently diseased, where the victim is rendered incapable of distinguishing right from wrong, and where permanent general insanity has resulted, then, and in such case, he is no more legally responsible for his acts than would be the man congenitally insane, or insane from violent injury to the brain." The italics are ours. See, also, note to Knight v. State (Neb.) 76 Am. St. Rep. 91. It may possibly be that, in view of the evidence of the defendant, he would have been warranted in requesting an instruction embodying the doctrine to the effect that, where permanent general insanity resulting from long-continued indulgence in intoxicating liquors, it has the same effect as to the responsibility of a person, as permanent insanity resulting from any other cause, although the foundation in the evidence for such an instruction is very slight. But no such instruction was requested, the instruction in fact requested and given being simply a statement absolutely at variance with section 22, Pen. Code, and the well-settled doctrine stated in the decisions above cited. The evidence was such as to warrant a conclusion on the part of the jury that the defendant, when sane and responsible, voluntarily made himself intoxicated, and therefore it must be held, under the decisions, that the instructions given by the court on its own motion were correct. The only conflict in the instructions given was that caused by the giving of the erroneous instruction at the request of the defendant, which stated the rule more favorably to him than it should have done. Under such circumstances the defendant has no good ground of complaint. People v. Suesser, 142 Cal. 354, 364, 75 Pac. 1093; Williams v. S. P. Co., 110 Cal. 457, 462, 42 Pac. 974; Dennison v. Chapman, 105 Cal. 447, 458, 39 Pac. 61. People v. Blake, supra, relied on by defendant in support of the instruction, is not opposed to the views we have stated. The question there was as to the admissibility of evidence in a case where an intent to defraud was a necessary element of the offense charged, and evidence tending to show that the defendant was unable or incapable of forming such intent was held admissible. This ruling was in full accord with section 22, Pen. Code.

The learned Court of Appeal held that the second instruction given by the court on its own motion was prejudicially erroneous in stating that "evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime," the offense charged—assault with intent to commit murder—not being divided into degrees.

But embraced in the charge made by the information were the lesser offenses of assault with a deadly weapon and simple assault, to constitute either of which the specific intent, which was an essential element of the higher charge, was not necessary. The court correctly instructed the jury as to the various kinds or grades of offense included in the information. We are of the opinion that, under these circumstances, the last-quoted portion of the instruction given could only be understood by the jury as authorizing them to take the fact of intoxication into consideration in determining as to which of the various kinds or grades of offense included in the information the defendant was guilty. So construed, the instruction was certainly not prejudicial. People v. Phelan, 93 Cal. 111, 28 Pac. 855, in which such an instruction was held erroneous, is not in point. The offense there charged was burglary, which is divided into two degrees, the only distinguishing feature between such degrees being as to the time when the crime is committed, burglary in the nighttime being of the first degree, and burglary in the daytime being of the second degree. The specific intent essential to that offense is the intent at the time of the entry to commit larceny or some other felony. The defendant introduced evidence to show that he was intoxicated at the time of entry for the purpose of showing the absence of an intent to commit any felony, in which event he was entitled to an acquittal. Under these circumstances the court instructed the jury that such evidence could only be considered for the purpose of determining "the degree of the crime." Manifestly, this could be read only as referring to the degrees into which the offense was divided by law, and as to which the court had doubtless instructed the jury. So read it was undoubtedly erroneous. See People v. Vincent, 95 Cal. 425, 429, 30 Pac. 581.

2. Four eyewitnesses of the assault were called by the people and examined as to the affair, but on their direct examination they were asked no question and gave no testimony as to defendant's condition so far as sobriety was concerned. On cross-examination each was asked as to defendant's condition for sobriety on that day, and an objection that the same was not proper cross-examination was sustained, the court stating that it would accord the privilege to defendant of recalling the witnesses as his own. One of these witnesses was called by defendant, and testified upon the subject favorably to him. The other three were called in rebuttal by the people, and testified on this subject, and the defendant was then given full opportunity to cross-examine them thereon. This right he then exercised. In view of these facts, it is unnecessary to consider whether the court erred in the rulings complained of. If it be assumed that it did err, manifestly the error was without prejudice.

3. It is claimed that the jury received evi-

dence out of court other than that resulting from a view of the premises. This claim is based upon an affidavit made by counsel for defendant showing that the coat and shirt worn by the prosecuting witness at the time of the assault, which, it is said, were in a "most horrible, revolting, and disgusting" condition, by reason of the rents and cuts therein made by defendant's knife and the "dried, matted, and putrid blood thereon" which had come from the wounds made by defendant, were, after being received in evidence and examined and inspected by the jury, left on the floor of the courtroom during the deliberations of the jury, the courtroom, in accord with the custom in said court, being used as the jury room. There is nothing but the bare "information and belief" statement of defendant's attorney to show that any examination of the coat or shirt was made by any juror after the submission of the case, and this, of course, was ineffectual for any purpose. *People v. Feld*, 32 Cal. Dec. 16, 86 Pac. 1100. The mere fact that they were on the floor in the courtroom and in sight of the jury, does not compel the conclusion that they were so examined. Moreover, the affidavits on motion for a new trial were such as to support a conclusion that these articles had been fully inspected and examined by the jury at the time they were received in evidence, and we are unable to see how, under the circumstances of this case, the defendant could be held to have been prejudiced, even had it appeared that the jurors or some of them had again inspected the garments.

4. The instruction as to distrust of a witness who testifies falsely as to one fact in giving his testimony, and the right of the jury to reject the whole of the testimony of a witness who is found by them to have deliberately testified falsely in one part of his testimony, noted by the learned Court of Appeal in its opinion, was not such as to call for a reversal. See *People v. Dobbins*, 138 Cal. 604, 72 Pac. 339. It is also to be noted that this instruction, which is word for word the instruction considered in the case last cited, belongs to that class of instructions which contain only mere commonplace matters that the jurors would be apt to know about and act upon in the absence of instructions. It is well settled that the giving of instructions of that class will not be held to be a proper ground for reversal. *People v. Tibbs*, 143 Cal. 100, 103, 76 Pac. 904; *People v. Wardrip*, 141 Cal. 229, 74 Pac. 744; *People v. Farrington*, 140 Cal. 656, 74 Pac. 288; *People v. Wong Bin*, 139 Cal. 65, 72 Pac. 505.

This disposes of all the points made for a reversal.

The judgment and order are affirmed.

We concur: BEATTY, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

McFARLAND, J. (concurring). I concur in the judgment of affirmance, because I think that the error committed by the trial court, which is hereinafter noticed, probably had no prejudicial effect upon the minds of the jury. But, in my opinion, the District Appellate Court was right in holding that the trial court committed an error in instructing the jury that "evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime." This is in direct conflict with section 22 of the Penal Code, and takes away from that section its most important feature. The section is as follows: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." This language is not confined to a "degree" of a crime, but embraces any "species," or kind of crime, whether divided into degrees or not. It applies to every crime of which the existence of a particular intent or purpose is a necessary element. It is true that this court, in two or three cases, used the expression that drunkenness could be considered only in determining the degree of a crime, but it was used only in murder cases where the degrees of the crime depended on a particular intent or purpose; and, as it was said in *People v. Vincent*, 95 Cal. 425, 30 Pac. 581, "the degrees of murder are based upon the 'intent'—the deliberation or premeditation—with which the act is done; and therefore it is not improper, in trials for unlawful homicide, to instruct the jury that they can consider intoxication only for the purpose of determining the degree of the crime, because that is telling them in substance that they may consider it in determining 'the purpose, motive, and intent' with which the act was committed." But the court did not intend to declare the invariable rule that drunkenness can be considered only to determine the degree of crime clearly appears in the case of *People v. Phelan*, 93 Cal. 111, 28 Pac. 855. In that case the defendant was charged with burglary, which crime consists in entering a building with intent to commit larceny or some felony. The defendant introduced evidence showing that he was greatly intoxicated at the time of the alleged commission of the crime and did not, and could not, have had any intent to commit a felony in the building, but the court instructed the jury—as the jury were instructed in the case at bar—that "evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of the crime." Of

course, this instruction in the Phelan Case was absurd, because the degrees of burglary are founded on the time of the commission of the crime, whether in the daytime or nighttime, and have no reference to the intent of the party charged; but the case was reversed for the giving of the instruction because it took away from the jury the right to consider the drunkenness of the defendant in determining the intent or purpose with which he entered the building. The principle would have been the same if burglary had not been divided into degrees at all. The court say: "As given, the instruction withdrew from the consideration of the jury evidence which the Code says a jury may consider in determining the intent with which an act is committed. * * * The instruction that the jury could not consider that evidence for any other purpose than that of determining the degree of the crime is clearly erroneous, and for that error the judgment appealed from must be reversed." And in *People v. Vincent*, supra, the court, commenting upon the Phelan Case said: "Burglary consists in entering a house * * * 'with intent to commit grand or petit larceny, or any felony'; and it is apparent to the dullest apprehension that a drunken man might unlawfully enter a house without any intent whatever to commit larceny or felony. And it is equally apparent that a jury, in determining with what intent he entered, might well consider the fact that he was intoxicated; but the 'degree' of the crime would have nothing to do with it. The court, in delivering the decision in *People v. Phelan*, 93 Cal. 111, 28 Pac. 855, did not consider it necessary to state that they were not dealing with a murder trial." We think therefore that in the case at bar the court clearly erred in using the language which we have considered; and any instruction in that abstract form should never be given. Whenever an essential element of a crime is the particular intent or purpose with which the act is done, drunkenness may be considered by a jury in determining whether such intent or purpose actuated the defendant; and this is so whether or not there are any degrees of the crime with which the defendant is charged.

151 Cal. 619

PEOPLE v. SMITH. (Cr. 1378.)

(Supreme Court of California. Aug. 9, 1907.)

1. CRIMINAL LAW—INSTRUCTIONS.

Defendant cannot complain of the refusal of his requested instructions, the court having given others embodying the same principles.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

2. SAME—MATTERS EXPLANATORY OF EVIDENCE—DECLARATIONS.

As explaining what defendant meant when, on having deceased pointed out to him by his brother, defendant asked deceased, "Can you repeat them words again?" evidence of the language previously used by deceased towards de-

fendant's brother about their mother, though uttered in the absence of defendant, is admissible.

3. SAME—MOTION TO STRIKE OUT EVIDENCE—NECESSITY.

There being nothing on the face of a question to indicate that an answer to it might not be relevant, material, and competent, it was necessary after its admission over the objection to the question that it was irrelevant, immaterial, and incompetent to move to strike out the answer that error may be predicated on the overruling of the objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2674.]

4. SAME—DECLARATIONS OF CO-CONSPIRATOR.

Though there was proof of conspiracy of defendant and his brother to kill deceased, yet the statement of the brother made after he had fled and was looking on at a distance, and between the first and second shots fired by defendant, "I knew he was going to get it," is inadmissible; it not being made while the declarant was aiding in furthering the object of the conspiracy, and not being a declaration in any manner in aid or furtherance of the conspiracy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 996.]

5. HOMICIDE—SELF-DEFENSE—EVIDENCE.

The defense in a homicide case being self-defense, defendant on the issue of whether he acted on a reasonable apprehension may show not only that he was much smaller than deceased, but that he had for a long time had a disease and as a result was weak and enfeebled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 419.]

6. SAME—HARMLESS ERROR.

The refusal to allow a physician to testify in a homicide case, in which the defense was self-defense, that defendant was afflicted with a certain disease, and as a result was weak and sick, at the time of the homicide, is not harmless, though defendant testified that he had been afflicted with the disease for a long time, and there was no evidence to the contrary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 714.]

In Bank. Appeal from Superior Court, City and County of San Francisco; F. H. Dunne, Judge.

Henry Smith was convicted of manslaughter and appeals. Reversed, and remanded for new trial.

Frank J. Murphy, for appellant. U. S. Webb, Atty. Gen., C. N. Post, Asst. Atty. Gen., and J. Charles Jones, Dist. Atty., for respondent.

LORIGAN, J. The appellant was charged with murder in the killing of one Joseph McCann in the city of San Francisco, and on trial was convicted of manslaughter. He appeals from the judgment and order denying his motion for a new trial.

It was insisted by the defendant upon the trial that the killing of McCann was committed by him in necessary self-defense. Several grounds are urged for a reversal, and in order that these may be properly considered it is necessary to refer to some of the evidence in the case. That evidence tended to show that on the afternoon of the day of the homicide (January 11, 1905) the deceased

was in Meyerborg's saloon at the southwest corner of Taylor and Eddy streets, in the city of San Francisco, drinking, when Fred Smith, a brother of the defendant, entered. It does not appear that these two were acquainted, but as soon as Fred Smith entered McCann stepped up to him and addressed him as a "little son-of-a-bitch" and characterized his mother and sister as whores. Fred Smith, with tears in his eyes, told McCann that he (Smith) was only a little fellow and unable to defend himself, but that he had a brother who would make him "eat those words" or "repeat those words," if he would wait until he could get him. McCann said he would wait, and Fred Smith left the saloon. Some fifteen minutes later Henry Smith, the defendant, the brother of Fred Smith, walked into the saloon, took a glass of beer, and then went out. He immediately returned with Fred Smith, who had remained on the outside when defendant first entered the saloon, and as they came in the latter pointed to McCann as the person who had used the language about their mother and sister, saying, "That is the man." The defendant addressing McCann said, "Did you call my mother a whore?" Fred Smith then immediately said, "Can you repeat them words over again?" followed by the defendant also saying, "Can you repeat them again?" Before anything further could occur, save probably a response by McCann that he could, the defendant was grasped by a bystander, who, assisted by the barkeeper, put him out of the saloon. At the time the defendant entered the saloon he was armed, and there was some evidence that as he spoke to McCann when he last entered he made a motion to draw a pistol. After being put out of the saloon defendant and his brother went to another saloon on the northwest corner of Taylor and Eddy streets, where they remained about 10 minutes, came out, and started across Eddy street in the direction of their home on Taylor street. As they crossed Eddy street McCann, who was either standing in front of Meyerborg's saloon, or had just then come out of the Eddy street entrance to it, saw them approaching and started towards the defendant, called him a "little son-of-a-bitch," and said, "You got a gun," and tried to grasp him. The defendant ran out on Taylor street, followed by McCann, who overtook him and grasped him and they fell on the street, the deceased on top of the defendant. As to what occurred when McCann reached the defendant, and just when the shots which occasioned his death were fired, is in dispute under the evidence. There was evidence however, on the part of the defendant that when McCann overtook the defendant he struck him on the side of the face, then caught hold of him, threw him down on the street, got on top of him, grasped him by the throat, saying, "You little son-of-a-bitch, I will kill you with your own gun," struck him again and was bumping

his head against the cobblestones, when defendant pulled his pistol from his hip pocket and fired twice, both shots taking effect in the body of McCann and causing his death the day following. While McCann was pursuing the defendant, Fred Smith, his brother, ran into a store in the vicinity and was looking out of the show window on Taylor street, when the proprietor thereof addressed him, inquiring what was the matter. The only response made by Fred Smith was, "I knew he was going to get it." This statement of Fred Smith's was proven to have been made between the firing of the first and second shots at McCann by the defendant, and was admitted over the objection of the defense. It further appeared from the evidence that McCann was a marblecutter, 45 years of age, and weighed about 240 pounds. The defendant was 21 years of age, had been employed as a solicitor in the clothing business, and, according to his own testimony, weighed some time prior to the homicide, about 105 pounds, and for 3½ years had suffered from catarrh of the stomach and had been under the care of a physician, Dr. Newton, for 2½ years prior to the date of the conflict. This is a sufficient statement of the evidence to illustrate the points made upon this appeal.

Complaint is first made of the refusal of the court to give certain instructions which were requested by the appellant. As the record, however, shows that the instructions given by the court of its own motion embraced the same principles of law contained in the instructions asked by the defendant, he has no valid ground of complaint that the instructions tendered by him embodying the same principles were refused.

It is also insisted that the court erred in allowing certain witnesses for the prosecution to state the language used by the deceased towards Fred Smith in the saloon in which he called the mother of the defendant a whore. The claim of appellant is that, as he was not present at the time the language was used, evidence relative to its use was inadmissible against him. Before any proof of the use of this language by deceased was made it was shown that defendant on his second entry into the saloon, and after his brother had pointed out the deceased as the man who used the language, said, "Did you call my mother a whore?" and, "Can you repeat them [words] again?" Under these circumstances evidence of the language used by McCann towards Fred Smith about the mother of defendant, even though uttered in the absence of defendant, was admissible as explaining what defendant meant and to what he had reference when inquiring of McCann whether he had used the language, and asking him whether he could repeat it. Particularly is this true in view of the fact that Fred Smith, the brother of defendant, at this same time, inquired of McCann whether he could "repeat them words over again," followed immediately by the same inquiry made

by the defendant. The jury were entitled to know what was meant by the inquiry of defendant as to whether deceased could repeat "them words again," and to know what words of deceased defendant referred to in order to clearly understand the inquiry addressed by defendant to McCann, and as throwing light upon the purpose and motive of defendant in making it.

It is next urged that the court erred in overruling the objection of appellant to the admission in evidence of the declaration made by Fred Smith while the shooting was taking place, namely, "I knew he was going to get it." It is insisted by the respondent that the defendant cannot avail himself upon this appeal of the alleged error in the admission of this evidence, because, although he objected to the question asked, he did not, after it was answered, move to strike out the response. This point is undoubtedly good. There was nothing on the face of the question to indicate that an answer to it might not be relevant, material, and competent evidence, and hence it was not improper to overrule the objection urged against the inquiry upon the only ground urged, namely, that it was irrelevant, immaterial, and incompetent. The question only appeared to be vulnerable to all these objections when the answer to it was given, and as that was the first and only time it appeared to be so, it was the duty of the defendant to move to strike the answer out, and having failed to do so, no error can be predicated on the overruling of the objection. *People v. Williams*, 127 Cal. 216, 59 Pac. 581; *People v. Lawrence*, 143 Cal. 148, 156, 76 Pac. 893, 68 L. R. A. 193. If this were the only point made for a reversal of the judgment, we would, for that reason, have to hold that it was not well taken; but, as the cause must go back for a new trial, we feel impelled to dispose of the question as to the admissibility of this evidence upon its merits, and now proceed to do so.

The theory of the prosecution on the trial of the case was that after McCann had used the language to Fred Smith when he first came in the saloon concerning his mother and sister the latter sought the defendant and a conspiracy was entered into between them to kill McCann, and in defense of this ruling of the trial court it is insisted by respondent that there was evidence in the case tending to show such conspiracy; that it was still existent, and its object had not been finally accomplished when the declaration was made, as the second shot had not then been fired by defendant; that, as Fred Smith was a conspirator with defendant when this declaration was made by him and was made pending the conspiracy and in furtherance of its design, it was admissible evidence against his co-conspirator, the defendant. We cannot agree with the position of respondent,

and are of the opinion this evidence is inadmissible.

We do not discuss the claim made by appellant that there was no evidence in the case supporting the theory of a conspiracy. It was insisted, on the trial, that there was, and evidence was introduced, which, it is asserted now, supported that claim. Whether there was, or was not, a conspiracy entered into between these brothers having for its object the killing of McCann is a question of fact to be determined by a jury from the evidence under appropriate instructions from the court, and as the question immediately under consideration does not involve any inquiry as to whether there was, or was not, sufficient proof of the conspiracy, that question is left, where it properly belongs upon a new trial, namely, to the jury. For the purposes of present consideration, if it should be conceded there was sufficient proof of a conspiracy, still we do not think that this declaration of Fred Smith was admissible. The rule allowing statements or declarations of one conspirator to be given in evidence as against his co-conspirator requires, not only that the conspiracy be pending and its object not consummated when the statements or declarations are made, but also that such statements, in order to be admissible, must be in aid and furtherance of the common purpose or design of the conspiracy.

The rule is stated in *Cyc.*, vol. 8, p. 680: "Acts or declarations of a conspirator cannot be admitted as against a co-conspirator, unless such acts were performed or declarations made in aid or execution of the conspiracy." And, as to the admission of such statements or declarations, it is said in *People v. Irwin*, 77 Cal. 494, 504, 20 Pac. 56, 59: "No declarations except those made 'during the pendency of the conspiracy and in furtherance of its objects,' can be used against a co-conspirator. Declarations showing past acts, or expressing merely the opinion or desire of the conspirator making them, are not binding upon any one except himself, or those in whose presence they are made"—citing cases. Now, examining the declaration of Fred Smith admitted in evidence in the light of the principle declared in these authorities, it is readily observable that such declaration was in no manner in aid or execution of the asserted conspiracy, or in any way in furtherance of its objects. A declaration, statement, or act of a conspirator, to be admissible as in "furtherance" of the conspiracy, must, as the word "furtherance" *ex vi termini* imports, be an act, statement, or declaration which in some measure, or to some extent, aids or assists towards the consummation of the object of the conspiracy. How can it be claimed that the declaration in question was of this character? When this declaration was made by Fred Smith, the conflict between his brother and McCann was practically on, and he had fled from the scene

to a place of safety. Certainly, it cannot be pretended that at the time he answered the inquiry of the storekeeper he was doing anything in aid of the killing of McCann, or which tended to effect that object. His declaration that he knew that the deceased was "going to get it" was simply a statement of his belief or opinion on the subject. It was not made at a time when Fred Smith was aiding in furthering the object of the asserted conspiracy, nor was it a declaration in any manner in aid or furtherance of the alleged conspiracy, and as any declaration made by him could only be admissible if it were, such declaration was inadmissible when it was not. The only authority cited by respondent in support of the ruling is the case of *People v. Murphy*, 45 Cal. 137, but in that case the exclamation of Mrs. Murphy, the wife of the defendant who was on trial, accompanied acts done by her in furtherance of an apparent conspiracy entered into between her husband and herself to kill the deceased, and occurred in the presence and hearing of her husband at the time of the homicide and was admissible for that reason under the rule.

The last ground for a reversal is predicated upon the refusal of the trial court to permit the appellant to show what his physical condition was on the day of the homicide. In his statement to the jury before presenting the evidence on behalf of defendant, his attorney stated that, among other matters which would be proven by the defense, it would be shown that some time prior to, and at the time of, the homicide, defendant was under the care and treatment of Dr. Newton, a physician of the city and county of San Francisco; that he was afflicted with catarrh of the stomach, and on the day of the homicide was weak and sick as a result of this disease. Dr. Newton was called as a witness by the defendant to prove these facts, but the court refused to permit him to testify on the subject. The rejection of this evidence by the court was error. The rule is uniform that, when the defense is self-defense, it is always competent to show the relative physical strength of the deceased and the defendant. The defense in this case was self-defense. It was claimed by the defendant that the deceased was a larger and more powerful man than himself; that he had pursued him, struck him, and thrown him down upon the street; that he had him clutched by the throat, had declared his intention of killing him, and was beating his head on the cobblestones; and that to prevent the deceased from inflicting great bodily injury upon him, or carrying his threat of death into execution, and under a reasonable apprehension that he would do so, he fired the shots which killed him.

In considering that defense, the defendant was entitled to have go before the jury all evidence which tended to support it. It is always a material issue to such a defense

whether defendant acted under a reasonable apprehension of the infliction upon him by deceased of great bodily injury, or death, at the time he killed him. And, as bearing upon that question, evidence of a great disparity of the relative physical condition of the deceased and the defendant is always an important and material fact to be considered by the jury. Common experience teaches that, when an attack is made without deadly weapons by one who is physically weak and feeble, upon another of vigorous physical condition and of superior strength, there is no room for asserting that any reasonable apprehension of injury from such an assault could exist, which would warrant killing the assailant. When, however, the assailant is a larger and more powerful man than the assailed, and the latter is unable to resist his attack, either on account of inferior natural physical vigor, or muscular debility occasioned through disease, it is equally general experience that such inability to resist on such account would naturally operate upon the mind of the assailed to create an apprehension of danger, which, if reasonably entertained, might justify him in killing his assailant. Whether he had grounds for a reasonable apprehension would be for the jury, and any evidence is competent which has a tendency to prove that fact. Certainly, evidence tending to show that a defendant was weak and enfeebled from disease would have a bearing upon that issue. It is only natural that one unable to successfully resist a dangerous assault made upon him because suffering from disease which has impaired his strength would more readily believe he was in imminent danger than if he were healthy and vigorous. Of course, the belief of the defendant that he was in such danger would not be conclusive. It would be for the jury to determine whether as a reasonable man he was justified in so believing. But, in determining that question, a defendant is entitled to have a jury take into consideration all the elements in the case which might be expected to operate on his mind, and, as a debilitated physical condition preventing him from successfully resisting his assailant might reasonably be expected so to do, defendant is entitled to have evidence of that fact, if it be a fact, go before the jury to be considered by them, with the other circumstances in the case, in ascertaining whether the plea of self-defense is sustained. The physical condition of the defendant is always important under such a plea in determining what a reasonable man in the position of the defendant would have done under the same conditions.

This principle of law is so well established that the citation of authorities is unnecessary. In fact, we do not understand the rule to be questioned by the respondent. Its position relative to this rejected evidence is that the defendant was not prejudiced by the ruling because he testified himself on the sub-

ject of the disease from which he was suffering. It is true he did testify that he had been afflicted with the disease for almost three years and a half, and had been under the care of Dr. Newton for two years and a half prior to the homicide. He did not, however, testify as to the effect of such disease upon his physical condition; to what extent, if any, it affected him or impaired his strength or vigor—matters upon which it is to be assumed the physician would have intelligently and thoroughly enlightened the jury had he been permitted to do so. Nor would it be a sufficient answer to the claim of error in rejecting the evidence of the physician to say that no prejudice resulted to the defendant because the defendant himself testified on the subject, and no evidence to the contrary was offered by the prosecution. It was of the highest importance to the defendant that the fact of his debilitated physical condition at the time of the homicide should be presented to the jury in support of his claim that he acted in self-defense. He was not only entitled to testify himself on the subject, but to introduce evidence to corroborate his testimony. He was entitled to present the matter to the jury fully and under the most favorable circumstances. And in that regard it seems hardly necessary to suggest that the jury would be more inclined to favorably consider evidence as to the physical condition of the defendant coming from a reputable physician—a disinterested witness—qualified to speak accurately on the subject, than they might when coming from the defendant, whose testimony in that respect they might consider colored in vital self-interest, if for this same reason they did not reject it as untrue.

There is nothing further presented on this appeal for consideration. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; ANGELL-OTI, J.; SHAW, J.; HENSHAW, J.; McFARLAND, J.; SLOSS, J.

151 Cal. 592

PEOPLE v. GRILL. (Cr. 1382.)

(Supreme Court of California. Aug. 6, 1907.)

1. HOMICIDE—CORPUS DELICTI—EVIDENCE.

In a prosecution for homicide, evidence held sufficient to establish that deceased was killed by a shot from defendant's gun, fired with criminal intent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 471.]

2. SAME — MITIGATION—JUSTIFICATION—EXCUSE—BURDEN OF PROOF.

Pen. Code, § 1105, provides that on a trial for murder, the commission of the homicide by defendant being proved, the burden of proving circumstances of mitigation, or justification, is on him, unless the proof of the prosecution shows that the crime only amounted to manslaughter, or that defendant was justifiable or excusable. *Held*, that such section was not lim-

ited to cases where defendant claimed the killing was justified as in self-defense, but extended to a case where defendant claimed the killing was accidental.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Homicide, § 276.]

3. CRIMINAL LAW — TRIAL — INSTRUCTIONS — WEIGHT OF EVIDENCE.

An instruction that, on a trial for murder, "the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation," etc., was on him, was not objectionable, as an intimation that the fact that defendant intentionally fired the shot that killed deceased had been proved; the jury being otherwise charged that they were the exclusive judges of the facts, and must decide only on evidence satisfying them of the existence of every essential fact beyond a reasonable doubt, that the corpus delicti must be proved by the state by competent evidence, and if the jury had a reasonable doubt as to whether or not deceased was killed by the accidental discharge of defendant's gun they must acquit him.

4. SAME—CREDIBILITY OF WITNESSES.

An instruction that a witness willfully false in a material part of his testimony is to be distrusted in others, as provided by Code Civ. Proc. § 2061, was not ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1893.]

5. SAME—FORMER CONVICTION—PUNISHMENT—EFFECT.

Where accused after having been convicted of murder in the first degree and sentenced to life imprisonment was granted a new trial, on his application, at which he was again convicted of the same offense, his former conviction and sentence was no bar to a sentence of death on the second conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 378, 394.]

6. SAME—EVIDENCE—PHOTOGRAPH.

Where, in a prosecution for homicide, defendant claimed that he accidentally shot deceased, and that after the shot was fired he placed the gun on the floor of the front room of deceased's cabin in front of the bed, and there was nothing in the case which made the exact position of the gun at all important, a photograph of the front room of the cabin taken six days after the homicide was not objectionable because there was some uncertainty in the evidence as to whether the gun was in exactly the same position when the photograph was taken as when first found after the shooting, there being evidence that the articles shown in the photograph, including the gun, were respectively in the same position as when the body of deceased was found the morning of the homicide.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 893.]

7. SAME — EVIDENCE AT FORMER HEARING — ABSENCE OF WITNESS.

In a prosecution for homicide, evidence held to sustain a finding that a witness was out of the state at the time of the trial and could not be produced, so as to authorize the introduction of her testimony taken at the preliminary examination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1236.]

8. SAME—ORDER OF PROOF.

That the court permitted the testimony of a witness at the preliminary examination of accused to be admitted and read to the jury before all of the evidence to show the witness' absence from the state at the time of the trial had been produced was not an abuse of discretion, where the subsequent proof fully established such fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1611.]

In Bank. Appeal from Superior Court, Sonoma County; A. G. Burnett, Judge.

A. J. Grill was convicted of murder, and he appeals. Affirmed.

See 86 Pac. 613.

Ross Campbell, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

SHAW, J. The defendant was charged with the murder of one W. S. Pearse. He was convicted of murder of the first degree. His motion for a new trial was denied, and he was sentenced to death. He appeals from the judgment and order.

1. Certain statements made by the defendant, wherein he admitted that Pearse received his death wound from a shotgun which defendant at the time held in his hands, he claiming that the discharge was accidental, were introduced in evidence. It is urged that there was no sufficient proof of the corpus delicti aside from these admissions. This claim is evidently based on the assumption that the deposition of Mae Pearse, daughter of the deceased, was improperly admitted in evidence, and upon a consideration only of the other evidence of the prosecution. We have concluded, as will hereafter be shown, that her deposition was properly admitted, and with that evidence the proof of the corpus delicti is ample, without aid from the defendant's admissions.

At the time of the homicide Pearse, with his daughter, who was 14 or 15 years old, was living in a small cabin consisting of two rooms, one in front of the other, with a door communicating between them. Grill had arrived at the Pearse cabin the day before on a visit and had remained overnight, sleeping in a bed in the rear room. On the day of the homicide, which was Sunday, Pearse and Grill went hunting together, returning to the cabin about seven in the evening. Pearse then, according to the evidence for the prosecution, accused Grill of stealing some money which he said he had left in the house, and there was a quarrel between them which continued from time to time until about 9 o'clock, Pearse in the meantime having taken off his clothes preparatory to going to bed. Some noise was made by a dog on the outside of the house, whereupon both went out of the house, Grill carrying a shotgun. The noise subsided, both re-entered the house, and Pearse apparently laid down upon the bed in which he usually slept. This bed stood in the left-hand corner of the front room, with the head toward the door leading to the rear room. The quarrel continued after they re-entered the house and presently a shot was heard. Grill came out of the house, saying to the daughter that he had killed a skunk. Thereupon he and the daughter, who had remained outside, left the premises in a buggy and drove to the residence of Mrs. Stoffal, where the daughter remained. Grill had been

working for Mr. Jacobs, a neighbor of the deceased, and he arrived at Jacobs' residence about midnight and stayed there the remainder of the night, sleeping in a room by himself. The following morning he went to his work without mentioning Pearse's death, or saying anything about any trouble at Pearse's residence. The next morning Pearse was discovered by the neighbors lying upon his bed dead from a gunshot wound in the back part of the head. He was lying on his back, but partly on his left side, facing towards the front of the house, with the back of his head toward the rear room, his head resting on a pillow. A double-barreled shotgun, with one barrel recently discharged, lay upon the floor in front of the bed. The position and character of the wound indicated that the shot had come from the rear, and a witness who saw the body as it was found testified that "the shot came right from the rear, right square from the rear. It couldn't come from any other direction." Five or six slits cut in the pillow a few inches from the head of the deceased, and apparently made by shots from the gun, pointed in the direction leading from the partition door to the wound. There were no powder marks on the pillow. The nature of the wound, its location in the back part of the head, the position of the body, the slits in the pillow, the absence of powder marks, and the conduct and statement of the defendant after the shooting, furnished sufficient evidence of the fact that the deceased was killed by a shot from the defendant's gun fired with criminal intent.

2. The court, in its instructions, read to the jury section 1105 of the Penal Code, which is as follows: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." It is claimed that this was error. The position of the defendant is that this instruction is not applicable, except where the defendant admits the intention to kill and claims that it was in self-defense, and that it was harmful because of the phrase, "the commission of the homicide by the defendant being proved," which, it is said, constituted an intimation or statement by the court that the fact that the defendant intentionally fired the shot had been proven. It is not the law that this instruction is applicable only where the justification offered is that the killing was in self-defense. It applies in any case where the defendant offers evidence in mitigation of the offense, that is, to reduce the degree of the crime; or in justification, as that it was in self-defense or in the lawful execution of a death sentence; or in excuse, as that it occurred by accident and not design. The defense in this case was that it occurred by accident, and this, if

proved, would have been an excuse for the homicide. The instruction was therefore applicable to the case. The phrase objected to was not inserted in the instruction as a statement by the court that the commission of the homicide by the defendant had been proved. It was meant as an expression of a condition or event, upon which the succeeding part of the instruction would become applicable, and that is its true rhetorical meaning when considered in connection with the text. Its signification is the same as if the sentence began thus, "When, upon a trial for a murder, the commission of the homicide by the defendant has been proved," etc. Thus understood, it does not constitute a statement of the fact by the court. In *People v. Tapia*, 131 Cal. 647, 63 Pac. 1001, this instruction was given with some additions declaring the extent of the burden of proof cast upon the defendant. It was criticised in that case upon the ground that the jury might have understood the above-quoted phrase as a declaration that the fact referred to had been proved. The defendant in that case did not attempt to mitigate, justify, or excuse the homicide, but denied that he had committed the act. Consequently, it was said, "the instruction should not have been given, for it was entirely inapplicable." The evidence that Tapia did commit the homicide was said to be very weak and unsatisfactory. It was in view of this condition of the evidence and of the inapplicability of the instruction to the case that the court considered that the jury might have misconstrued the expression as a statement by the court with regard to the sufficiency of the evidence. In the present case the instruction could not have been so understood by the jury. Other instructions repeated frequently the proposition that the jury were the exclusive judges of the facts. They were told that they must not decide upon a preponderance of the evidence, but that the prosecution must show the defendant's guilt, and every fact essential to a conviction, beyond a reasonable doubt, and must prove the corpus delicti by competent evidence beyond reasonable doubt before they could consider the admissions of the defendant; that if they had a doubt whether or not Pearse was killed by the accidental discharge of the defendant's gun they must acquit the defendant; that the burden of proof was upon the prosecution, and if upon the proofs there was a reasonable doubt of his guilt remaining the defendant must be acquitted. In view of these instructions it would be impossible for any jury of ordinary intelligence to have supposed that the instruction complained of was intended to state to them that the fact that the defendant had committed the homicide had been proven. See *People v. Hawes*, 98 Cal. 653, 33 Pac. 791.

3. Another instruction stated that "a witness willfully false in a material part of his testimony is to be distrusted in others." That this is a principle of the law of evi-

dence, and one of the rules by which the court or jury must be guided in the consideration of the weight of evidence, cannot be disputed, for it is made so by statute. Code Civ. Proc. § 2061. It has been repeatedly held by this court that the giving of such an instruction is not cause for reversal, and we adhere to the precedents thus made. *People v. Dobbins*, 138 Cal. 694, 72 Pac. 339; *People v. Tibbs*, 143 Cal. 108, 76 Pac. 904; *People v. Wardrip*, 141 Cal. 229, 74 Pac. 744; *People v. Farrington*, 140 Cal. 656, 74 Pac. 288; *People v. Wong Bin*, 139 Cal. 65, 72 Pac. 505; *People v. Wilder*, 134 Cal. 184, 66 Pac. 228; *People v. Kelly*, 146 Cal. 123, 79 Pac. 846.

4. Upon a former trial for the same charge the defendant was convicted of murder of the first degree with the penalty of imprisonment for life. A new trial was granted upon his own motion. It is now claimed that, where there is a charge of murder of the first degree and a conviction of murder of the first degree with the penalty of imprisonment for life, such judgment is a virtual acquittal of the character of murder sufficiently atrocious to justify the death penalty and is a bar to the infliction of the death penalty upon a retrial of the same charge. There is no foundation for such claim. It has been held that a conviction of murder of the second degree, upon the trial of a charge of murder of the first degree, is no bar to a subsequent conviction of the higher degree, upon a retrial of the same case granted upon defendant's motion. *People v. Keefer*, 65 Cal. 235, 3 Pac. 818; *People v. Carty*, 77 Cal. 216, 19 Pac. 490; *People v. Gordon*, 99 Cal. 232, 33 Pac. 901. Upon this exact point we need express no opinion. The discretion given to the jury to mitigate the punishment upon a conviction of murder in the first degree and inflict imprisonment for life only does not divide that degree of murder into two degrees, but merely reduces the punishment. The mere substitution of imprisonment for life for the death penalty is not a determination that any element of murder of the first degree is lacking. On the contrary, such a verdict cannot be given until all the facts necessary to constitute that degree of murder are established. The former conviction was not an acquittal of the first degree of murder, nor of any degree thereof. The instruction asked by the defendant to the effect that it was a bar against the infliction of the death penalty was properly refused.

5. A photograph of the front room of the Pearse cabin, taken six days after the homicide, was admitted in evidence after proof that the articles shown therein, including a shotgun lying on the floor, were, respectively, in the same position as when the body of Pearse was found the morning after the homicide. It is claimed that there was some uncertainty in the evidence introduced as a foundation for the introduction of this photograph as to whether the gun was in exact-

ly the same position when the photograph was taken as it was when first found after the shooting, and hence it is contended that the admission of the photograph was error. The theory of the defense was that after the discharge of the gun in defendant's hands he placed it on the floor of the front room in front of the bed, and the defendant so testified. There was nothing in the case which made its exact position at all important. A witness who saw it when first found testified that the photograph showed it in practically the same place. It was admitted as a diagram or illustration. The ruling was proper and is sustained by the following decisions: *People v. Crandall*, 125 Cal. 132, 57 Pac. 785; *People v. Phelan*, 123 Cal. 564, 56 Pac. 424; *People v. Figueroa*, 134 Cal. 161, 66 Pac. 202; *People v. Mahatch*, 148 Cal. 200, 82 Pac. 779.

6. The deposition of Mae Pearse, the daughter of the deceased, taken at the preliminary examination of the defendant, was admitted at the trial, over his objection that there was no sufficient proof that she could not with due diligence be found within the state. A witness testified that he knew that Mae Pearse was, at the time of the trial, in the home of the Boys' and Girls' Aid Society in Portland, Or. Another witness, who was a relative of hers, testified that he knew her; that to the best of his knowledge she was in Portland, Or.; that it was 9 or 10 months since he had heard from her; and that at that time she was in the Boys' and Girls' Aid Society in Portland, and that the chief of police of Portland informed him of that fact. The sheriff's return on a subpoena showed that she was not found in Sonoma county. This evidence was somewhat weakened on cross-examination by showing that the relative's testimony as to her presence in Portland, Or., was based, in part at least, upon information received from the chief of police, and that the witness who testified positively that she was in Oregon had not known her while she was in California. Other circumstances were given, however, and the evidence as a whole was sufficient to sustain the decision of the court that she was absent from the state at the time of the trial and could not be produced as a witness. *People v. Lewandowski*, 143 Cal. 576, 77 Pac. 467; *People v. Reilly*, 106 Cal. 650, 40 Pac. 13. At the time the deposition was read the whole of the evidence to show her absence had not been produced. This, however, was merely a matter of the order of proof which is always within the discretion of the court, within reasonable limits. The subsequent proof upon the subject cured any error that might have been committed in admitting the deposition before the foundation was fully laid.

No other objections to the regularity of the proceedings are made by the counsel for the defendant, and upon an independent examination of the record we perceive no error committed by the court against the defendant.

The trial seems to have been in all respects fair and regular.

The judgment and order are affirmed.

We concur: BEATTY, C. J.; ANGELL-OTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MCFARLAND, J.

151 Cal. 606

HALL v. JAMESON. (L. A. 1,905.)

(Supreme Court of California. Aug. 9, 1907.
Rehearing Denied Sept. 5, 1907.)

1. BILLS AND NOTES—SIGNING AS TRUSTEE—PERSONAL LIABILITY.

W. deeded land to J., as trustee, with power to mortgage it. J. gave a mortgage beginning "I, J., as I am trustee" under a deed from W., by virtue of the power in said deed, in consideration of \$2,800, convey said land, with the condition that if he pay to the said grantees said sum the deed, and a note signed by him, whereby he promised to pay said sum, should be void, and with the covenant that he would observe the terms of said condition. J. gave a note whereby he promised to pay the \$2,800, signed "J., trustee." *Held*, that as the deed of W. gave no power to J. to make a personal promise on behalf of the beneficiaries or trustor, and as Civ. Code, § 2267, providing that a trustee is a general agent for the trust property, that his authority is such as is conferred on him by the declaration of trust and by this chapter, and none other, and that his acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal, gives no such power, and as the note or mortgage contained no stipulation relieving him from personal liability or requiring the lender to look to the mortgaged property alone as security, he was personally liable on the note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 260-267.]

2. LIMITATION OF ACTIONS—ACCRUAL OF CAUSE OF ACTION—SALE UNDER POWER IN MORTGAGE—ACTION FOR BALANCE.

A note and mortgage provided that the sum borrowed should be paid in three years, with interest to be paid semiannually. The mortgage provided that on default in performance of any condition the mortgagee might sell the mortgaged premises at auction, on three weeks published notice, and out of the proceeds retain all sums secured by the mortgage. *Held*, that such sale and application of the proceeds had no effect to render due the balance of the debt, so that the statute began to run against an action therefor only from the end of three years after the giving of the note.

In Bank. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by F. G. Hall against William H. Jameson. Judgment for plaintiff. Defendant appeals. Affirmed.

E. W. Freeman, for appellant. John G. North, for respondent.

SHAW, J. This is a suit upon a promissory note in the following words: "\$2800. Boston, June 8th, 1897. For value received, I promise to pay to Nathaniel U. Walker, trustee under the will of Francis Jackson, for the benefit of Harriet M. Palmer, or order, two thousand eight hundred dollars, in three years from this date with interest, to be paid semiannually, at the rate of five

per centum per annum, until this note is paid in full. William H. Jameson, Trustee." This note was assigned to plaintiff before suit. Judgment was given for the plaintiff, and the defendant's motion for a new trial was denied. The defendant appeals from the judgment and order.

1. It is first contended that the note is not binding upon the defendant personally, but only upon him in his capacity as trustee, and that, therefore, the personal judgment against him is erroneous. Prior to the execution of the note, one William L. Joy had executed a deed conveying to the defendant, as trustee for certain stated purposes, a tract of land in Massachusetts. The deed empowered the defendant, as trustee, "to mortgage said property, or any part thereof, from time to time for such sums, to such persons or corporations (and) upon such terms as he may deem expedient," and gave directions as to the disposition of the money thus to be obtained. In pursuance of this power the defendant borrowed of Walker, the payee of the note, the sum of \$2800, for which he executed the above note, and at the same time, to secure its payment, he executed to Walker a mortgage upon the Joy land. This mortgage, being part of the same transaction, must be read in connection with the note, and the whole construed as one contract in order to arrive at the true meaning of each. The mortgage was in the common-law form, purporting to convey the land to Walker as security for the debt. It began thus: "Know all men by these presents, that I, William H. Jameson, as I am trustee under a certain deed from William L. Joy, * * * by virtue of the power in said deed contained and every other power me hereto enabling, in consideration of two thousand eight hundred dollars, * * * do hereby give, grant, bargain, sell and convey unto the said Nathaniel U. Walker," etc., the land particularly described. The condition was in part as follows: "Provided, nevertheless, that, if I, my heirs, executors, administrators, or assigns, shall pay unto the grantee or assigns, the sum of two thousand eight hundred dollars in three years from the date hereof, with interest thereon," etc., * * * "then this deed, as also a note of even date herewith, signed by me, whereby for value received, I promise to pay the grantee or order the said principal sum and interest at the times aforesaid, shall be void." There followed a covenant in these words: "And I hereby, for myself and my heirs and assigns, covenant with the holder or holders hereof to perform and observe each and all of the terms of the foregoing condition." In explanation of the meaning of the contract as affecting the personal liability of Jameson, evidence was introduced to show that he obtained no personal benefit from the transaction, and that he was acting throughout solely in the interest of the trustor and the beneficiaries. There was also testimony of a contemporaneous understanding that Jameson was not

to be held personally liable, but as this was contradicted by other testimony and the finding is in favor of the plaintiff, we must disregard that testimony, even if we considered it competent.

This contract by its terms purports to make the defendant personally liable thereon, and neither the context nor the circumstances proven are sufficient to change its effect in that particular. It has been held that where a promissory note reading "we promise to pay," etc., is signed by the president of a company subscribing his own name with the addition of the words "Prest. Pac. Peat Coal Co." and by the secretary of the company with the addition of the words "Sec. pro tem.," it is the note of the company and not the personal obligation of the president and secretary. *Farmers' & M. Bank v. Colby*, 64 Cal. 352, 28 Pac. 118. On the other hand, a note reading "we promise to pay," etc., and signed "D. Hassett, President," was held to be the personal liability of D. Hassett. *Hobson v. Hassett*, 76 Cal. 203, 18 Pac. 320, 9 Am. St. Rep. 193. The court in the latter case said: "There is nothing on the face of the note to show that there was any principal back of the defendant. He signed his own name, and wholly failed to indicate, if he had a principal, who or what the principal was. The word 'president,' which he added to his name must be regarded as a mere descriptio personæ." These cases perhaps sufficiently illustrate the rule applicable to contracts thus signed where the maker claims exemption from personal liability on the ground that he is an agent. If the facts in this case brought it within the rule applied in *Farmers' & M. Bank v. Colby*, supra, the defendant would be exonerated. But it is not a similar case. In the *Colby* Case there was no question but that the president and secretary had power to bind the company by contract, and to that extent at least it is different from the case at bar. In the *Hassett* Case the decision went upon the ground that the contract of Hassett did not purport to bind any one but himself, and that, although he did not so intend and was in fact acting for his principal, the contract could not be varied by parol evidence. This case is governed by the latter rule. The contract made by Jameson consists of two distinct and separate parts—the mortgage on the land, and the promise and covenant to pay the money, which the latter purported to bind the trustee personally. The trust deed of Joy to Jameson gave the latter power only to mortgage the trust property. It gave no power whatever to make any promise or covenants to pay any money on behalf of Joy or on behalf of the beneficiaries. With respect to the mortgage, Jameson was acting solely as trustee, and could not act otherwise, for he had no personal interest in, or power over, the land. With respect to the note and covenant, he was acting solely in his own behalf, for he had no

authority thus to contract except for himself. Where an agent makes a contract really on behalf of his principal, but which purports to be his promise and to bind himself alone, and he has not in fact any authority to make that particular contract for his principal, the general rule is that the agent will be personally bound by the contract, notwithstanding his lack of personal interest in the consideration. He will be conclusively presumed to have intended to bind himself. This rule is particularly applicable where a trustee, in dealing with trust property, makes some personal promise to pay money in furtherance of the trust, which he has no authority to make as trustee. In regard to such contracts he is a principal and must be presumed to have intended to act for himself alone. The rule is thus stated by the Supreme Court of the United States in *Taylor v. Mayo*, 110 U. S. 330, 4 Sup. Ct. 147, 28 L. Ed. 163: "When a trustee contracts as such, unless he is bound, no one is bound, for he has no principal. The trust estate cannot promise. The contract is therefore the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by contracts he makes as trustee, even when designating himself as such. The mere use by the promisor of the name of trustee or any other name or office or employment will not discharge him. * * * If a trustee, contracting for the benefit of a trust, wants to protect himself from individual liability on the contract, he must stipulate that he is not to be personally responsible, and that the other party is to look solely to the trust estate." There is nothing in the note or mortgage of Jameson that can be construed as a stipulation relieving him from personal liability or requiring the lender to look to the mortgaged property alone as security. The reference, in that part of the instrument operating as a conveyance, to the fact that Jameson was conveying as trustee, was properly inserted therein for the purpose of designating the source of the power by which he was assuming to hypothecate the trust property. It only indicates the character in which he acted and the power which he possessed in relation to the part of the contract which constituted the mortgage, and it does not purport to qualify the direct covenant to pay contained in that instrument, nor the express promise contained in the note. The power to "mortgage" the property did not include power to make a personal promise on behalf of the beneficiaries, or the trustor, that they, or either of them, should pay the money. It carried power only to pledge, convey, or hypothecate the property as security for money. Civil Code, § 2920. The defendant's promise to pay the money was not necessary to the execution of the power, and it must be considered as his own personal obligation whereby he became surety for the payment of the money.

There is nothing in section 2267 of the Civil Code contrary to this conclusion. It is as follows: "A trustee is a general agent for the trust property. His authority is such as is conferred upon him by the declaration of trust and by this chapter, and none other. His acts within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal." This refers to the trust property alone. His acts respecting that property, if authorized by the terms of the trust, bind the property. He is to that extent an agent for the property and for the interested parties. Consequently, the mortgage of the trust estate in this case was valid; but nothing in this section, nor in the deed of trust, gave him an authority to bind the trustor or beneficiaries personally.

We are therefore of the opinion that the personal judgment against Jameson is supported by the evidence.

2. It is further claimed that the action is barred by the statute of limitations. The note and mortgage were executed in the state of Massachusetts, and therefore under subdivision 1, § 339, Code of Civil Procedure, the action would be barred two years after the cause of action accrued. The action was begun on January 3, 1902. By the terms of the note it did not become due until June 8, 1900, which was less than two years before the action was begun. The mortgage provided that the sum borrowed should be paid in three years from its date, "with interest thereon, at the rate of 5 per centum per annum, payable semiannually." It also contained the following provision: "But upon the default in the performance of any part of the foregoing conditions, the holder or holders hereof may sell the granted premises * * * at public auction; such sale to be on or near the granted premises, or at the real estate exchange and auction board in the city of Boston, without notice or demand, except giving notice of the time and place of sale once in each of three successive weeks in any one newspaper published in said Newton, and may convey the same by proper deed or deeds to the purchaser. * * * And out of the proceeds of such sale or sales the holder or holders hereof shall be entitled to retain all sums then secured by this deed (whether then or thereafter payable), including all costs," etc. Default was made in the payment of the interest due on December 8, 1898, and again on June 8, 1899. Thereupon on June 14, 1899, under the power aforesaid the mortgagee sold the premises for the sum of \$2,000. This left a balance of \$1,221.68 remaining unpaid on the principal and interest on the note.

The argument is that, under the terms of the power of sale above set forth, it was necessary for the mortgagee to declare the principal and interest on the note and mortgage immediately due and payable, as a condition precedent to, or concurrent with,

the exercise of the power of sale; that this election transformed the debt into a matured obligation, on which an action might have been maintained on June 14, 1899; that the statute of limitations began to run at that date; and, hence, that the action was barred two years thereafter. In support of this claim the defendant cites *Brickell v. Batchelder*, 62 Cal. 624, *Maddox v. Wyman*, 92 Cal. 674, 28 Pac. 838, and *Phelps v. Mayers*, 128 Cal. 549, 58 Pac. 1048. In none of these cases was there any question concerning the effect which the exercise of such a power of sale as the one here involved would have in accelerating the time of maturity of any balance on the debt remaining unpaid after the proceeds of the sale were applied thereon. The question in each case was concerning the right to foreclose for the entire debt, where the mortgage authorized a foreclosure suit upon a default in some minor condition, before the maturity of the entire debt. The cases are therefore not strictly in point, even if the instruments were alike. But they are not identical. There is a difference in the terms which is important and material. The case of *Brickell v. Batchelder* is as strongly in favor of the defendant as any of the cases cited, and a comparison of the mortgage there construed with that here involved will serve to distinguish them all. In that case the mortgage provided as follows: "But in case default shall be made in the payment of the said principal sum or the interest thereon, or any part thereof, * * * then said party of the second part, his heirs, executors, administrators, or assigns, are hereby empowered to proceed to sell the premises above described, with all the appurtenances, *in the manner prescribed by law*. And out of the money proceeding from such sale, the party of the second part shall retain the above amount of thirty-six thousand dollars," with interest and costs and 2 per cent. for attorney's fees, which the instrument declared should become a debt to the mortgagee "upon filing the complaint in foreclosure." (The italics are ours). The other cases are substantially the same in this respect. The provision in the mortgage here involved was that the mortgagee "may sell the granted premises at public auction," said sale to be "on the granted premises" or at the Boston real estate exchange, and "without notice or demand except" a three weeks' notice in a newspaper. The reason for holding that the mortgage in *Brickell v. Batchelder*, supra, required a declaration making the entire debt immediately due, was that the provision authorizing the sale of the premises "in the manner prescribed by law" could not be construed otherwise than as requiring a sale upon execution issued upon a decree of foreclosure in an action for that purpose. This was said to be obvious from the fact that there was no other manner "prescribed by law" that could be applicable to such a case. And, as this made a foreclosure suit neces-

sary to the exercise of the supposed power, it necessarily, in the opinion of the court, implied that the mortgagee was given power to declare the entire debt fully matured, notwithstanding that, by the terms of the mortgage, the principal was not yet payable. It was assumed, although not stated, that an action of foreclosure could not be maintained, unless the entire debt was declared due. In the present case the terms of the mortgage imposed no such necessary implication and presented no such difficulty. The sale was not to be made by the sheriff as upon an execution sale, but at public auction on the premises, and by the mortgagee upon a notice specially prescribed in the power. No suit for foreclosure was required. The mortgagee could execute the power without judicial authority. It provided that the mortgagee should retain out of the proceeds of sale a sum sufficient to pay the note and interest. This implied that, when the sale was made, a part of the principal and interest on the debt equal to the proceeds which might be applicable thereto should thereupon be payable. But to say that a sum is payable is not the same as to say that it is due. A note made payable "on or before" a fixed date is payable at any time after it is executed; but it does not become due until the date fixed. In the mortgage under consideration there is not a word to the effect that the debt shall become due upon the sale, nor to the effect that the mortgagee, as a condition to the exercise of the power, must declare that it is due. The express language of the instrument is that it shall not become due until three years after its date. To interpolate a provision that it shall all become due upon a sale under the power, or that by such sale a greater part of the principal shall be immediately payable than the proceeds of the sale will pay would be to put in the contract that to which the parties did not agree, and that which would contradict the express terms to which they did agree. By the contract, the payor of the note was to have the full term of the note within which to pay any deficiency remaining thereon, after the application of the proceeds of the sale. The mortgagee was given no power to deprive the payor of this advantage by any declaration he could make at the time of the sale. The effect of the sale and of the application of the proceeds was a mere payment upon the debt, a payment authorized to be made before its maturity and of no more force in accelerating the maturity of the debt than any other payments authorized to be made upon a debt before it becomes actually due. It disposed of the mortgaged property in execution of the mortgage, and practically extinguished that part of the contract, leaving remaining the covenant to perform and the promise contained in the note which remained in force to the extent of the balance remaining unpaid. These were separate obligations and the suit is upon the note. No action could have been

maintained for the balance due thereon until the expiration of three years from its date. It follows that the action was not barred by the statute of limitations.

The judgment and order are affirmed.

We concur: McFARLAND, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

151 Cal. 113

MALONE v. SIERRA RY. CO. OF CALIFORNIA. (Sac. 1,470.)

(Supreme Court of California. May 2, 1907.
Rehearing Denied May 31, 1907.)

1. APPEAL — REVIEW — PREJUDICE — JURY — CHALLENGE FOR BIAS.

The Supreme Court will not review the refusal of the trial court to allow a challenge for bias, unless injury is shown, and where it does not appear that defendant was forced to exercise a peremptory challenge on a juror, or that he had exhausted his peremptory challenges, no injury is shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4126.]

2. DAMAGES — ASSESSMENT — PHYSICAL EXAMINATION OF PLAINTIFF.

Where, in an action for personal injuries, plaintiff consented to submit to an examination by any physicians appointed by the court, and offered, while on the witness stand, an inspection of his injured arm to defendant's medical experts, and it appeared that two of such experts had previously examined and inspected plaintiff's injuries, and the third was given an opportunity to inspect them, being appointed by the court for such purpose, it was not error to refuse defendant's application that a personal examination be made of the body of plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 531.]

3. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Where, in an action for personal injuries, the reasonableness of the expenses which plaintiff had incurred for medical treatment, etc., was not disputed, an instruction that plaintiff was entitled to recover such sum as would compensate him for the expense he had incurred for medical treatment during the time he was disabled, while erroneous as not limiting the expenses to the necessary and reasonable value of the medical services, was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4219.]

4. DAMAGES—PERSONAL INJURIES—NOMINAL DAMAGES.

Where, in an action against a carrier for injuries to a passenger through negligence, there was no evidence as to what wages plaintiff earned or as to his earning capacity, but the nature of plaintiff's employment and the occupations at which he had worked were in evidence, plaintiff was entitled to recover more than merely nominal damages.

5. SAME—MENTAL ANGUISH.

In an action for personal injuries, through negligence, mental suffering or anguish is an element of damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 253.]

6. SAME—INSTRUCTIONS.

Under Civ. Code, § 3233, providing that damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof, or certain to result in the future, instructions, in an action for personal injuries, authorizing the jury to estimate prospective

damages upon what they believed might be the plaintiff's future suffering, were erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 552.]

7. TRIAL — INSTRUCTIONS — ERROR CURED BY SUBSEQUENT INSTRUCTION.

The error in the instructions was not cured by a subsequent instruction that plaintiff was entitled to recover not only such damages as he might have suffered, but also such damages as by the evidence it was reasonably certain he would suffer in the future.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 715.]

Department 2. Appeal from Superior Court, Tuolumne County; L. W. Fulkerth, Judge.

Action by Edward D. Malone against the Sierra Railway Company of California. Judgment for plaintiff, and defendant appeals. Reversed.

S. D. Wood, J. C. Campbell, and F. W. Street, for appellant. F. D. Nicol, F. P. Otis, and Ashley & Neumiller, for respondent.

HENSHAW, J. Plaintiff was a passenger upon one of defendant's trains, and was injured by a collision between his train and another, also belonging to defendant. He brought his action to recover damages for injuries inflicted, and the jury returned a verdict in his favor. From the judgment which followed defendant moved for a new trial, which the court refused. Defendant appeals from the judgment and from the order refusing it a new trial.

1. It is urged that the court erred in not allowing the challenge for bias interposed by defendant to one of the panel; but it has long been the rule of this court that it will not review the action of the trial court in this regard, unless prejudice or injury is shown. *People v. McGungill*, 41 Cal. 429; *People v. Gatewood*, 20 Cal. 149; *People v. Gaunt*, 23 Cal. 157; *People v. Weil*, 40 Cal. 268. By the record before us it is not made to appear that defendant was forced to exercise a peremptory challenge upon the juror, or that defendant had exhausted his peremptory challenges. In no way, therefore, is it made to appear that it suffered any detriment by the ruling of the court.

2. It is contended that the court erred in refusing defendant's application that a personal examination be made of the body of the plaintiff. This court has recently had occasion to consider this matter in *Johnson v. Southern Pacific Company*, 89 Pac. 348. The facts in this case, however, disclose that plaintiff consented to submit to an examination by any physicians appointed by the court; that he had, while on the witness stand, offered an inspection of his injured arm to the defendant's experts, Drs. Anderson, Congdon, and Gould. Drs. Anderson and Congdon had previously examined and inspected the plaintiff's injuries, and Dr. Gould was given an opportunity to examine and inspect them, and was appointed by the

court to make such examination. We see no force, therefore, in defendant's objection.

3. In instructing the jury upon the measure of damages, the court declared as one of the elements of damage "such sum as will compensate him for the expense, if any, he has paid or incurred in the employment of a physician and the purchase of drugs during the time he was disabled by the injuries, not exceeding the amounts alleged in the complaint." It is objected to this instruction that the correct measure of damage in this regard is not the amount which he may have paid or become liable for, but the necessary and reasonable value of such services as may have been rendered him; such reasonable sum, in other words, as has been necessarily expended or incurred in treating the injury. Such unquestionably is the true rule; yet we do not believe that the jury could have been led into error prejudicial to the defendant by the instruction which was given. The reasonableness of the expenses which plaintiff had incurred was not disputed.

4. The court further charged the jury that the plaintiff could recover for the value of his time during the period that he was disabled by the injury. It is said that there was no evidence as to what wages the plaintiff earned, or as to his earning capacity, and that it was therefore error for the court so to charge. But the nature of plaintiff's employment, the occupations at which he had worked, were in evidence, and, even without any positive testimony as to the wages which he had previously earned, there was sufficient to have warranted the jury, in case they found a permanent impairment of earning capacity, to have awarded more than merely nominal damages. *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91, 66 Pac. 72.

5. The court instructed the jury that an element of damage was "the pain and anxiety that he has suffered or may suffer by reason of his injuries." And, again, it instructed them that in estimating damages "you may take into consideration * * * the physical and mental suffering he may have sustained or may undergo in the future by reason of the injuries." It is argued that mental suffering is not an element of damage. In support of this proposition is cited *Newman v. Smith*, 77 Cal. 22, 18 Pac. 791, which was an action in fraud concerning real property, and the plaintiff sought a recovery for the worry, annoyance, and anxiety which the fraud had caused him. This court held that these were not elements of damage in such a case. *Munroe v. Dredging Co.*, 84 Cal. 516, 24 Pac. 303, 18 Am. St. Rep. 248, was an effort in an action by the personal representatives of the deceased to recover damages for the grief and mental suffering of the deceased's next of kin, and it was held that in such a case this was not a permissible element of damage. In *Morgan v. S. P. Co.*, 95 Cal. 510, 30 Pac. 603, 17 L. R. A. 71, 29 Am. St. Rep. 143, an action by a mother to

recover damages for the death of her child, the same effort was made to recover for the sorrow and mental anguish of the parent, and it was held that in that case it was not an element of damage. But, upon the contrary, where the suffering or mental anguish is endured by the victim, it has been recognized as an element of damage since the case of *Malone v. Hawley*, 46 Cal. 409. See *Sloane v. So. Cal. Ry. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

6. In instruction 18, the court informed the jury that an element of damage was "such reasonable sum as the jury shall award him on account of the pain and anxiety that he has suffered or may suffer by reason of his injuries." In instruction 19, the jury was informed that "in estimating the damages to be awarded you may take into consideration * * * how far his injuries are permanent in their character and results, as well as the physical and mental suffering he may have sustained or may undergo in the future by reason of the injuries." These instructions were erroneous in permitting the jury to estimate prospective damages upon what they believed might be the plaintiff's future suffering. The rule as laid down in section 3283 of the Civil Code declares that: "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof or certain to result in the future." An instruction that the jury may award such prospective damages, if any, "as they believe plaintiff has sustained or will sustain," has been held erroneous. *Pa. Co. v. Files*, 65 Ohio St. 403, 62 N. E. 1047. An instruction that the plaintiff could recover for bodily pain and suffering, which "he may have to endure in the future," is condemned. *Raymond v. Keseberg*, 91 Wis. 191, 64 N. W. 861. An instruction that a recovery might be had for the pain and suffering which "plaintiff was likely to endure in the future" is also condemned. *Kucera v. Merrill Lum. Co.*, 91 Wis. 637, 65 N. W. 374. An instruction that, "in estimating the damages, you will allow plaintiff for any physical suffering and pain and mental anguish, if any, she has suffered and shown in evidence, or which she may in the future suffer, if any, in consequence of the alleged injury," is erroneous, as permitting the jury to enter the realm of speculation regarding such future suffering. *Hall v. Cedar Rapids, etc., Ry. Co.*, 87 N. W. 739, 115 Iowa, 18. To the same effect is *Chicago Ry. Co. v. De Clow*, 124 Fed. 142, 61 C. C. A. 34; *Chicago, etc., R. R. Co. v. McDowell*, 92 N. W. 121, 66 Neb. 170; *Ross v. Kansas City*, 48 Mo. App. 440; *Ohio, etc., Ry. Co. v. Cosby*, 107 Ind. 32, 7 N. E. 373. It is true that in a succeeding instruction the court declared that plaintiff was entitled to recover, not only such damages as he may have suffered, but also "such damages as by the evidence it is reasonably certain he will suffer in the future." Herein is a declaration of the true

rule, but none the less the instructions upon the matter are conflicting, and it cannot be said by which the jury was guided.

For which reason the judgment and order must be reversed, and the cause remanded.

We concur: MCFARLAND, J.; LORIGAN, J.

151 Cal. 649

PEOPLE ex rel. McCONNELL v. CITY OF WILMINGTON et al. (L. A. 2,000.)

(Supreme Court of California. Aug. 13, 1907. Rehearing Denied Sept. 12, 1907.)

MUNICIPAL CORPORATIONS—INCORPORATION—ORGANIZATION—CHARTER—REPEAL.

Act Feb. 20, 1872 (St. 1871-72, p. 108, c. 113), as amended by Act March 21, 1872 (St. 1871-72, p. 446, c. 337), incorporating the town of Wilmington, never having been followed by an organization of the town as a municipal corporation, the Legislature was not deprived, by Const. art. 11, § 6, providing that municipal corporations organized prior to the adoption of the Constitution of 1879 might continue their existence and save their form of government, etc., from repealing such incorporation act as amended and passing a new act for the incorporation of a city comprising the territory included within the boundaries of the contemplated town.

In Bank. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Quo warranto by the people, on relation of Lee A. McConnell, against the city of Wilmington and others. From a judgment sustaining a demurrer to the complaint, relator appeals. Affirmed.

U. S. Webb, Atty. Gen., and Hunsaker & Britt, for appellant. Bicknell, Gibson & Trask (Dunn & Crutcher, O. P. Widaman, and Edward E. Bacon, of counsel), for respondents.

HENSHAW, J. This is a proceeding in quo warranto in which a judgment is sought declaring and adjudging that the defendant, the "city of Wilmington," and the other defendants, claiming to be officers of such city, are usurping and exercising without authority of law the franchises and powers of a city of the sixth class, and enjoining them from asserting or attempting to exercise such franchises. A general demurrer to the complaint was sustained, and, plaintiff declining to amend, judgment was rendered for defendants. From this judgment plaintiff appeals.

It appears from the complaint that on the 6th day of November, 1905, certain persons presented to the board of supervisors of the county of Los Angeles a petition praying that a portion of said county, within the boundaries defined in the petition, be incorporated as a municipal corporation of the sixth class, with the name of the city of Wilmington, under an act of the Legislature entitled "An act to provide for the organization, incorporation, and government of municipal corporations," approved March 13, 1883. The petition com-

plied with the act as to the number of bona fide residents within the boundaries of the proposed city, and also with respect to the number and character of the signers thereof. The board of supervisors granted the prayer of the petitioners and called for an election to be held on December 22, 1905, at which election a majority voted "for incorporation" and the personal defendants were elected trustees of said proposed city, whereupon the board declared that the said city of Wilmington was duly organized and it is exercising corporate functions as such city.

The appellant does not object to the regularity of the proceedings leading to the alleged incorporation of said city, and does not attack the validity of the incorporation, except on this one ground, namely, that most of the territory embraced in the petition was inclosed in a previously organized municipal corporation called the town of Wilmington, and that the territory not embraced in such previously organized corporation does not contain 500 residents, which number of residents is required by the act. It is therefore contended by appellant that the proceedings under which respondents are claiming to be a city are void, because there cannot be at the same time within the said territory two distinct municipal corporations exercising conflicting powers, and because the municipal corporation act expressly applies only to territory "not incorporated as a municipal corporation." In support of this proposition the complaint avers that on February 20, 1872, (St. 1871-72, p. 108, c. 113), the Legislature passed an act incorporating the town of Wilmington, and that the entire territory embraced in the boundaries of the said town as thus incorporated is included within the boundary of the alleged "city of Wilmington," and also that on March 21, 1872 (St. 1871-72, p. 446, c. 337), the Legislature passed another act to amend the first act above mentioned.

Respondent's main answer to this proposition is that in 1887 the Legislature passed two acts—the one repealing the act to incorporate the town of Wilmington, and the other repealing the act amending the act incorporating the said town—and, as a fact, such repealing acts were passed and approved. But appellant contends that these repealing acts were unconstitutional and void, and therefore had no effect upon the continued existence of the said town of Wilmington. Its main reliance in this regard is placed on section 6, art. 11, of the Constitution. The second sentence of this section gives to municipal corporations organized before the adoption of the Constitution of 1879 the right of continuing their existence and of saving their form of government, and this right, it is contended, is wholly inconsistent with any asserted power of the Legislature to destroy them. In support of this contention, reference is made to *Desmond v. Dunn*, 55 Cal. 243; *Staude v. Election Comm.*, 61 Cal. 313;

Ex parte Armstrong, 84 Cal. 655, 24 Pac. 598; People v. Com. Council, 85 Cal. 369, 24 Pac. 727; Ex parte Helm, 143 Cal. 553, 77 Pac. 453. Without pausing to analyze these decisions, but conceding, for the purposes of this case, that they go as far as appellant contends in holding that the Legislature is denied the power to abrogate and annul special charters antedating the Constitution of 1879, respondents show a marked and important difference between those cases and the one at bar. Those decisions, one and all, were made with reference to organized and operating municipal corporations. In the case at bar it is made clearly to appear that the town of Wilmington, though incorporated, never became organized at all. The allegation of the complaint in this regard is as follows: "That the town of Wilmington is, and ever since the 20th day of February, 1872, has been, a municipal corporation, duly incorporated under and by virtue of that certain act of the Legislature of the state of California entitled 'An act to incorporate the town of Wilmington in the county of Los Angeles, in the state of California,' approved February 20, 1872, and of that other certain act of the Legislature of the state of California, amendatory thereof, entitled, 'An act to amend an act entitled 'An act to entitle the town of Wilmington, in the county of Los Angeles, in the state of California,' approved February 20, 1872, approved March 21, 1872.'" A reading of the incorporating act of the town of Wilmington shows that for the organization of the town an election was to be held in April to select town trustees, marshal, assessor, and other officers, and that the board of trustees elected were to assemble within 10 days after the notice of their election and organize. This act was approved upon February 20, 1872, and the allegation of the complaint is that ever since that day the town of Wilmington has been a municipal corporation. This allegation distinctly negatives the idea that any organization could have been effected, and amounts to nothing more than the legal conclusion of the pleader that the town became a municipal corporation because the Legislature passed a certain incorporating act. This pleading respondents insist is equivalent to an admission that the inhabitants of the territory affected by the incorporation act never exercised any corporate rights or incurred any corporate duties under the act. This, they assert, was the ground for the ruling of the trial judge in sustaining the demurrer to the complaint for insufficiency and in allowing plaintiff 10 days in which to amend to cover this defect. Plaintiff's failure to amend in this regard, they contend, is a pregnant admission that the town of Wilmington never in fact organized under the act. Respondents quote in their brief from the language of the learned trial judge as follows: "I have considered it necessary to discuss the constitutional question involved only

with reference to the fact that the town government of Wilmington was never organized under the incorporation act, and, in view of the fact that there may be some contention over the question as to whether there ever was such organization, the plaintiff will be allowed 10 days in which to amend, should plaintiff desire to allege the fact."

In view, therefore, of the uncontested fact that plaintiff's attention was called to this omission in its pleading, and that the demurrer was sustained to it upon this ground, with leave to plaintiff to amend, and in view of the further fact, as shown by the judgment, that plaintiff failed and refused to avail itself of this permission, the conclusion is irresistible that it was unable to do so. The real question, then, with which we are confronted, is whether the Legislature has the power to repeal an act of incorporation which has stood for years upon its statute books without organization under it. As to this we entertain no doubt that it can do so. The constitutional provisions which are relied upon deal exclusively with cities and towns which are organized municipalities. We know of no constitutional inhibition which prevents the Legislature from clearing away the dead underbrush of such laws as this. A mere incorporating act, never in any way acted upon, presents an entirely different case from one where the act of incorporation has been followed by organization. While in a certain sense territory becomes incorporated by the incorporating act, it is in a sense most limited. There is plain recognition of this distinction in the language of article 11, § 6, of our Constitution. Thus that section, while providing that cities and towns heretofore organized or incorporated may become organized under general laws, in the next sentence declares, not that cities and towns heretofore incorporated shall be subject to and controlled by general laws, but that cities and towns "heretofore or hereafter organized shall be so controlled." Thus the Constitution designedly protects only organized municipalities from legislative interference other than by general laws. The legislative power is plenary excepting as limited by the Constitution, and there is nothing in that instrument to prevent the lawmaking power from wiping off of its statute books an incorporating act under which no organization has ever been effected. Not only may the Legislature do this, but it may often be desirable that it should be done to the very end that a new municipality incorporated and organized under the existing general laws of the state may proceed with its corporate duties without the possibility of embarrassment. For this reason, the demurrer was properly sustained, and the judgment appealed from is affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; SLOSS, J.; ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.

151 Cal. 630

GREENAWALT et al. v. ROGERS. (L. A. 1,842.)

(Supreme Court of California. Aug. 12, 1907.
Rehearing Denied Sept. 10, 1907.)

1. CANCELLATION OF INSTRUMENTS—FRAUD—CONSENT.

Civ. Code, § 1689, provides that a contract may be rescinded if the consent of the party rescinding was given by mistake or obtained through duress, fraud, or undue influence, and section 1568 declares that consent is deemed to have been obtained through one of such causes only when it would not have been given had such cause not existed. *Held*, that a written instrument could not be rescinded for fraud when it appeared that consent would have been given and the contract entered into if the fact misrepresented had been truthfully stated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, § 2.]

2. COMPROMISE AND SETTLEMENT—FRAUD—VACATION.

Plaintiff having recovered judgment against defendant for \$2,563.09, defendant represented that he had lost all his money in Alaska, was without funds, and was engaged as a common laborer at not exceeding \$1.50 a day, and it was impossible to pay any portion of his debts, but offered a note, with his brother as surety, for \$100, in full satisfaction of the judgment. This was accepted, the note paid, and the judgment satisfied. Thereafter plaintiff sued to set aside the satisfaction for fraud, alleging that defendant was in fact rich at the time of settlement. The proof, however, disclosed that defendant's statements as to his impecunious condition were true, except that he did own a lot of the value of \$400, which was not disclosed, and that his debts were upwards of \$15,000. *Held*, that such misrepresentation was insufficient to justify the vacation of the settlement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, § 2.]

In Bank. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Henry Greenawalt and another against Ralph Rogers. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Reversed and remanded.

McNutt & Hannon, Will D. Gould, and Jas. H. Blanchard, for appellant. H. L. Dunningan, for respondents.

SLOSS, J. This is an action brought to obtain a decree canceling and setting aside a satisfaction of judgment claimed to have been entered in reliance upon fraudulent representations by the defendant. The trial court made a decree in favor of the plaintiffs, and the defendant appeals from the judgment and from an order denying his motion for a new trial.

The complaint alleges that in June, 1890, one A. H. Judson recovered a judgment against the defendant, Ralph Rogers, for \$1,793.95. In July, 1895, A. H. Judson transferred the judgment to the plaintiff Greenawalt for collection, under an agreement that Greenawalt should receive one-third of all sums collected, and A. H. Judson the remaining two-thirds. Shortly after the assignment Greenawalt brought an action upon the as-

signed judgment, and in said action recovered judgment against Rogers for \$2,563.09. In May, 1902, the defendant, Rogers, represented and stated to A. H. Judson that he had been absent in Alaska; that he had lost all the money that he had made during his stay in Alaska; that he was absolutely without funds, property, or expectations of any description; that he was engaged as a common laborer for his brother at wages not exceeding \$1.50 per day; that it was absolutely impossible at that time, and in all probability would in the future be absolutely impossible, for him to pay any portion of his debts or obligations; that he was largely indebted to other persons, and that his absolute necessities of life and the absolute necessities of his family consumed all that he could possibly earn at that time; that if the said Judson would cause satisfaction of the judgment, then outstanding in the name of the plaintiff Greenawalt, to be entered of record, and accept the sum of \$100 in full satisfaction of said judgment, he, the said Rogers, would execute and deliver to said Judson his promissory note for the sum of \$100 and procure his (Rogers') brother to execute the said note as surety for him. Rogers further represented that the said \$100 was the utmost that he would be able to pay upon said judgment, and that, unless Judson and Greenawalt accepted it, they would entirely lose their claim. These representations were communicated by A. H. Judson to Greenawalt, and said Greenawalt and Judson, fully believing said statements and relying upon them, and by reason of such belief and reliance, accepted the proposition and the said promissory note for \$100. The promissory note was paid about the 20th day of July, 1902, and on the 23d day of July, 1902, Greenawalt acknowledged upon the margin of the record full and entire satisfaction of the judgment. The plaintiffs allege that all of these statements of the said defendant were false, fraudulent, and made with the purpose and design to deceive Greenawalt and A. H. Judson, and to procure from them satisfaction and release of the said judgment; that, in fact, the said Rogers at the time of making said representations was absolutely solvent; that he had brought with him from Alaska personal property exceeding in value the sum of \$60,000, and had in his possession and was the owner of money and other personal property exceeding in value the sum of \$60,000, which facts he fraudulently concealed from Greenawalt and A. H. Judson. Plaintiffs allege, further, that at the time of the representations Rogers did not owe debts exceeding the sum of \$15,000, and that during all of said time he was worth money and other personal property in the sum of \$45,000 over and above all his just debts and obligations. The plaintiffs allege that they, and the said A. H. Judson, did not discover the said fraud practiced upon them until about the 15th day of May, 1904. On or about the 30th day of

June, 1904, it is averred the said A. H. Judson assigned to W. B. Judson all his interest in and to the cause of action herein set out. The prayer of the complaint is for the cancellation of the satisfaction of judgment, and that plaintiffs recover judgment against Rogers in the sum of \$2,563.09, together with interest thereon from the 11th day of September, 1896, less the sum of \$100. The complaint was filed July 5, 1904. By an amendment to the complaint filed April 17, 1905, the plaintiffs allege that at the time of making the statements above set forth, the defendant was the owner in fee simple and vested with the legal title to real property in the county of Los Angeles of the value of \$750, and that at said time he was the owner of other real property in said county standing in the name of other persons who held for his use and benefit, which said real property was of the value of \$6,000, all of which facts were by the said Rogers fraudulently concealed from the plaintiffs, who were absolutely ignorant of said facts, and did not discover them except as alleged in their complaint. The answer denied the making by defendant of the representations set forth in the complaint, and denied the ownership by defendant of the real or the personal property alleged in the complaint to have been owned by him. The answer also denies the assignment by A. H. Judson to the plaintiff W. B. Judson.

The findings are in favor of plaintiffs on the issues raised as to the making of the representations. But it is found by the court that at the time of making such representations the defendant did not own, or have in his possession, money or personal property of the value of \$60,000, or any part or portion thereof, other than a very small amount, which was necessary for his own support. The court further finds against the allegation of the complaint that at the time of the settlement Rogers was solvent, and against the allegation of the amendment that he was the owner of real property, standing in the name of others, of the value of \$6,000. It finds, however, that at the time of making the representations the defendant, Rogers, was the owner of lot 14, block 1, of Garvanza addition No. 1 of the city of Los Angeles, and that this property was of the value of \$400, and that Rogers did at the time of the settlement conceal from A. H. Judson and from Greenawalt the fact that he owned this property, and that he did so conceal this fact with the intent and purpose of thereby inducing Greenawalt and Judson to satisfy and compromise said judgment. There is a finding against the allegation that A. H. Judson had assigned his cause of action to the plaintiff W. B. Judson.

From these findings, the court draws the conclusion of law that the plaintiff H. Greenawalt is entitled to a judgment canceling and setting aside the satisfaction of judgment entered of record by him, and that he is

entitled to a judgment against the defendant Rogers for the amount claimed in the complaint. A decree was entered accordingly, canceling such satisfaction and giving the plaintiff Greenawalt judgment against Rogers for \$4,017.97, together with costs.

It is argued on behalf of the appellant that the complaint is defective in failing to allege that plaintiff promptly upon the discovery of the alleged fraud, and prior to the commencement of the action, offered to restore to the defendant the \$100 received from him. Civ. Code, § 1691; Kelley v. Owens, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797. The appellant makes the further points that A. H. Judson was a necessary party, that any rights which the respondent Greenawalt may have had are barred by laches, and that the evidence is insufficient to justify the finding that Rogers was the owner of the lot in Garvanza addition, valued at \$400. It will not be necessary to consider the soundness of any of these contentions, since we are satisfied that the findings, read in connection with the averments of the complaint, do not show such misrepresentation or concealment of a material fact as would justify the setting aside of the contract of compromise.

The complaint sets forth a clear case of aggravated fraud. The representation that defendant was without means, when in fact he was the owner of realty of the value of \$6,750, and personality of the value of \$45,000 over and above his debts, was a fraud which, if followed by proper action on the part of the defrauded parties, would furnish abundant cause for relieving them against a settlement whereby they accepted \$100 in satisfaction of an undisputed claim of several thousand dollars. But respondent fell far short of establishing the case which he had set out to prove. From the findings it appears that the defendant, instead of having \$45,000 of personal property applicable to the payment of his debts, had none, and, instead of owning real property worth \$6,750, owned but a lot of the value of \$400. While there is a gross disproportion between the amount paid in compromise and the resources of the defendant, as alleged in the complaint, this disproportion becomes less, if, in fact, it does not disappear, when the price of the settlement is compared with the actual amount of defendant's means, as found by the court. When it is considered, further, that the effect of the decree is to subject the defendant to a judgment indebtedness of over \$4,000, on account of a claim which he had settled several years before by a payment of \$100, the facts on which the decree is based should be scrutinized with care to determine whether they justify such a result.

As was said by this court in Colton v. Stanford, 82 Cal. 351, 398, 23 Pac. 16, 28, 16 Am. St. Rep. 137, quoting the language of Judge Temple, who had presided at the trial of that case in the lower court: "The power

to cancel a contract is a most extraordinary power. It is one which should be exercised with great caution—nay, I may say with great reluctance—unless in a clear case. A too free use of this power would render all business uncertain, and, as has been said, make the length of a chancellor's foot the measure of individual rights. The greatest liberty of making contracts is essential to the interests of the country. In general, the parties must look out for themselves." See, also, *Oppenheimer v. Clunie*, 142 Cal. 313, 75 Pac. 899.

Our Code provides that a contract may be rescinded if the consent of the party rescinding was given by mistake, or obtained through duress, menace, fraud or undue influence. Civ. Code, § 1689. Section 1567 provides that "An apparent consent is not real or free when obtained through: (1) Duress; (2) menace; (3) fraud; (4) undue influence; or (5) mistake." Section 1568: "Consent is deemed to have been obtained through one of the causes mentioned in the last section only when it would not have been given had such cause not existed." It is the law everywhere that a misrepresentation must, in order to afford a basis for complaint by the party to whom it was made, have been with reference to a material fact. 20 Cyc. p. 23. Section 1568 above quoted furnishes a rule for determining what misrepresentations or concealments are to be deemed material. As is said by the court in *Colton v. Stanford*, supra, at page 399 of 82 Cal., and page 28 of 23 Pac. [16 Am. St. Rep. 137]: "The sections of the Civil Code above quoted [sections 1565, 1566, 1567, 1568] are clear and unambiguous in language, and they seem to establish the rule beyond all controversy that the contract cannot be rescinded when it appears that consent would have been given and the contract entered into notwithstanding the duress, menace, fraud, undue influence, or mistake relied upon. A misrepresentation as the basis of rescission must be material; but it can be material only when it is of such a character that, if it had not been made, the contract would not have been entered into. The misrepresentation, it is true, need not be the sole cause of the contract, but it must be of such nature, weight, and force that the court can say 'without it the contract would not have been made.'" Pom. Eq. Jur. § 890; *Elliott v. S. P. Co.*, 145 Cal. 441, 448, 79 Pac. 420, 68 L. R. A. 393; *Spinks v. Clark*, 147 Cal. 439, 444, 82 Pac. 45. Was there such misrepresentation of a material fact in the case at bar? The defendant represented that he had been absent in Alaska; that he had lost all the money that he had made there; that he was absolutely without funds, property, or expectations of any description; that he was engaged as a common laborer for his brother at wages not exceeding \$1.50 per day; that he was largely indebted to other persons; and that the sum of \$100 was the

utmost that he would be able to pay. None of these statements is found by the court to have been untrue, except the statement that he was without funds or property of any description, and this was untrue only to the extent that he was the owner of a lot of the value of \$400. The complaint alleges that Rogers at no time owed debts exceeding the sum of \$15,000. This form of allegation amounted to an assertion, by implication at least, that the defendant was indebted to the extent of \$15,000. Taken together with the further averment that he owned personal property of the value of \$60,000, and was possessed of \$45,000 over and above his just debts and obligations, it shows that the complaint was framed upon the theory that Rogers, at the time of making the representations complained of, had debts amounting to \$15,000. The respondent himself treats such indebtedness as an established fact, for in his brief he says that "the answer did not deny that the defendant owed the sum of \$15,000." The judgment satisfied amounted at the time of the settlement to about \$3,500. This was less than one-fourth of the total indebtedness of Rogers. If, therefore, this lot, which is the only property found by the court to have been owned by him, had been applied to the payment of his debts pro rata, whether by voluntary agreement, or through the bankruptcy proceedings, which, as the complaint alleges, the defendant was contemplating, the share which plaintiff and A. H. Judson could have received would have been less than the \$100, which they did in fact receive. If Rogers' ownership of this lot had been made known by him, the plaintiff Greenawalt would have been confronted with this situation: He would have been informed that Rogers had debts amounting to \$15,000, about \$3,500 of which was owing on the judgment in question, that he had absolutely no property with the exception of a lot worth \$400, and that the sum of \$100 was the utmost that he would be able to pay upon the judgment in question. The essence of the representations upon which Greenawalt and A. H. Judson acted was the statement that \$100 was all Rogers was able to pay upon their judgment. It was their belief that this representation was true that induced them to accept this sum. It is not conceivable that their action would have been different if they had been advised of further facts which were in no degree inconsistent with this ultimate and important fact. Under these circumstances, the concealment by Rogers of his ownership of this \$400 lot cannot be regarded as material to the settlement.

The court does not in terms find that this concealment was with reference to a material fact, nor that without such concealment the consent of plaintiffs would not have been given. All that is found is that Greenawalt and A. H. Judson fully believed and relied upon each of the statements of the defend-

ant in regard to his financial condition and his inability to pay the judgment, and that by reason of such belief and reliance they accepted the proposition. Most of the statements, however, and all of them which, under the facts alleged and found, can be regarded as material, are found by the court to have been true. It must follow that the findings are not sufficient to support the judgment, since they do not show that the consent of the plaintiff and A. H. Judson was obtained by fraud.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: SHAW, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J., ANGELLOTTI, J.

181 Cal. 607

PEOPLE v. BUCK. (Cr. 1,370.)

(Supreme Court of California. Aug. 14, 1907.)

1. CRIMINAL LAW—APPEAL—ORDER DENYING CONTINUANCE.

Pen. Code, § 1237, provides that a defendant may appeal from a judgment of conviction, from an order denying a motion for a new trial, or from an order made after judgment, affecting his substantial rights, and section 1173, subd. 2, provides that exceptions may be taken by defendant to a decision of the court on a matter of law in refusing to postpone the trial on his motion. *Held*, that an order denying accused a postponement of trial was reviewable on appeal from the judgment, and was not itself appealable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2585.]

2. SAME—RECORD—BILL OF EXCEPTIONS.

In order that defendant may obtain a review of an order denying a continuance in a criminal case, the motion, evidence and ruling must be incorporated in the bill of exceptions, as required by Pen. Code, § 1174.

3. SAME—CONTINUANCE—DENIAL.

Defendant was informed against for murder on February 3d, and was arraigned on the 5th, when counsel was appointed for him, and his time to plead extended until the 7th. A demurrer to the information was filed on that day, which was overruled, when he pleaded "not guilty," and the cause was set for trial on March 12th. Defendant protested at that time, claiming that as his defense was insanity, there was not sufficient time to procure the necessary evidence as to his personal and family history, and applied for a postponement for absence of certain witnesses whom he expected to testify concerning his insanity, and also because of his inability to obtain the depositions of certain alienists. *Held* that, all the witnesses so desired, except a nonresident alienist, having appeared and testified at the trial, the denial of the postponement was not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3045, 3046.]

4. SAME—LOCAL PREJUDICE.

Where a jury was obtained to try accused for murder from the panel in attendance, on the day the trial began, the court did not err in refusing to postpone the trial because of inflamed local feeling against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3045.]

5. HOMICIDE—INSANITY—QUESTION FOR JURY.

In a prosecution for homicide, evidence held to require submission to the jury of the question of defendant's insanity.

6. CRIMINAL LAW—MODIFICATION OF INSTRUCTIONS—PREJUDICE.

In a prosecution for homicide, defendant requested an instruction that the testimony of nonexperts was recognized as proper in support of the defense of insanity, and that the jury was not bound by the statement or testimony of such witnesses nor were they justified in disregarding them, but that it was the jury's duty to give such testimony the weight to which it was entitled. *Held*, that the latter portion of the instruction was a mere commonplace, and that defendant was not prejudiced by the court's elimination thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3154.]

7. SAME.

The elimination of a clause from an instruction requested by accused that all opinion evidence should be received and carefully considered with great caution was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3154.]

8. SAME—INSTRUCTIONS—WEIGHT OF EVIDENCE.

An instruction that the abstract opinion of any witness, medical or of any other profession, is of no importance, but that it was a juror's duty to arrive at his conclusion on his own judgment, exercised in a reasonable way after carefully weighing all the evidence, and that no judicial tribunal would be justified in deciding for or against the legal responsibility of one charged with insanity on the opinion of witnesses, however numerous or respectable, was properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1732.]

9. HOMICIDE—DEFENSES—INSANITY—INSTRUCTIONS—FALSE ISSUE.

Where, in a prosecution for homicide, defendant relied on actual insanity as a defense, an instruction that irresistible impulse to do an act known by the perpetrator to be wrong does not relieve him from its legal consequences was not erroneous as presenting a false issue.

10. CRIMINAL LAW—ARRAIGNMENT FOR SENTENCE—TIME.

Where a verdict convicting accused of murder was returned on March 21st, and defendant was arraigned for sentence on the 24th, the court did not err in refusing to grant a postponement of the sentence, in the absence of a showing in support of defendant's application for further time to procure affidavits as to newly discovered evidence in support of that ground for new trial.

11. SAME—NEW TRIAL—MOTION—ARGUMENT—LIMITATION OF TIME.

Where accused had been convicted of murder, it was not error for the court to limit his counsel's time to argue a motion for new trial to an hour.

12. SAME—APPEAL—BRIEFS—MISCONDUCT OF COUNSEL.

On appeal from a conviction of murder, it was improper for counsel for accused to refer to the trial court's action, which was fully justified, as a "brutal abuse of discretion and an inhuman violation of his [defendant's] constitutional rights."

In Bank. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Morris Buck was convicted of murder, and he appeals. *Affirmed*.

A. D. Warner, for appellant. U. S. Webb, Atty. Gen., Henry T. Gage, and W. I. Foley, for the People.

BEATTY, C. J. The defendant, having been sentenced to death upon conviction of murder, appeals from the judgment and from an order denying his motion for a new trial. He has also given notice of an appeal from an order denying his motion for a postponement of the trial; but, since the ruling upon that motion is reviewable on appeal from the judgment, there is no necessity and no provision for a separate appeal. Pen. Code, §§ 1237, 1173, subd. 2. But to obtain a review of an order denying a continuance in a criminal cause it is necessary to incorporate the motion, evidence, and ruling in a bill of exceptions (Pen. Code, § 1174), and one of the questions here presented is whether it appears by this record that any such bill of exceptions was ever settled or allowed.

The information charging the defendant with the crime of murder was filed on February 3d. On the 5th he was arraigned and, being without counsel, a member of the Los Angeles bar, who represents him on this appeal, was appointed by the court to conduct his defense, and time to plead extended to the 7th. On that day he filed a demurrer to the indictment, which, being overruled, he entered his plea of not guilty. The cause was then set for trial on March 12th.

Assuming for the present that the affidavit subsequently filed in support of the motion for a postponement of the trial (a copy of which is printed in the transcript) can be treated as a part of the record, it appears that counsel for defendant protested very earnestly on February 7th against the fixing of so early a date as March 12th for the trial, upon the ground that his conference with defendant on the previous day had satisfied him that the defendant was insane at the date of the homicide, and that his trial on the 12th of March would not allow sufficient time to procure the necessary evidence as to his personal and family history, or to prepare his defense in other particulars. This objection was, however, overruled by the court, and on March 12th, when the cause was called for trial, defendant made his motion for a postponement, based upon the affidavit in question.

Many objections of a purely technical character are urged by counsel for the people to any consideration of this affidavit, and if we were disposed to rule with technical strictness in a matter of this kind we might be justified in holding that it is not a part of the record because not strictly and formally included in the bill of exceptions. But in view of the facts that the defendant was without counsel, that counsel appointed by the court was new to the state and unfamiliar with our practice in criminal cases, and

that matters which he was clearly entitled to have had included in the bill of exceptions were probably not so included through mere inadvertence, we are unwilling in a case of such serious import to rest our decision upon grounds so purely technical as that matters which ought to have been shown by the bill of exceptions appear only in the minutes of the court, and that exceptions to the orders denying the continuance and the new trial were not formally entered at the time the rulings were made. Disregarding, therefore, the objections referred to, assuming that exception was taken to the order denying a continuance of the trial, and treating the affidavit submitted in support of the motion as part of the record, we proceed to consider whether there was any error or abuse of discretion in refusing the continuance.

The simple facts of the case are that the defendant applied to a lady by whom he had formerly been employed as a coachman for a loan or gift of money with which to establish himself in business. She did not answer his letter immediately, and he went to her house in the city of Los Angeles armed with a knife, a derringer, and a revolver. Learning that she was not at home, he sat down on the front porch to await her return. When she came she entered the house by a side door, and was informed that the defendant was waiting to see her. She went out to see him, and he renewed his request for money. She excused herself upon the ground that there were so many demands upon her purse, and for some reason—probably because she was alarmed—went in the house and telephoned for her coachman. When she came out again, defendant asked her whom she had rung up, and she told him. Some other conversation ensued, and the defendant, among other things, told her he was desperate. In the end he shot her twice, causing her death within a few moments. He, then, in the presence of several persons who had been attracted to the scene, put his pistol to his own head and inquired, "Gentlemen, shall I do it?" He did not fire, but sat down with his pistol in his lap and waited till an attempt was made to arrest him, when he ran and took refuge in an ice cream parlor, where he was soon after taken in custody. Upon these facts it was very clearly a case of deliberate murder, unless the defendant was insane, and accordingly his sole defense was insanity.

The affidavit of defendant's counsel, which was filed on the 12th day of March, in support of his motion for a postponement of the trial, showed proper diligence upon his part in preparing his defense, and was intended to show that it would have been impossible to secure the attendance of material witnesses on the point of defendant's personal and family history, or the depositions of distinguished alienists, who, in answer to a hypothetical question based upon facts which

counsel expected to prove, had stated that the defendant—assuming those facts to be capable of proof—was certainly insane, and must have been insane at the date of the homicide.

One of these alienists was Dr. I. E. Cohn, of the Napa Asylum, and the other was Dr. W. A. Jones, of Minneapolis, Minn. The only witnesses on the point of personal and family history whose attendance had not been secured were William and Earl Buck, brother and nephew of the defendant, for whom subpoenas had been issued, but who had not been found. On the other hand, the affidavit showed that the defendant was prepared with a very considerable amount of evidence of persons who had known the defendant and his family and of public records which showed that about three years prior to the homicide the defendant had been adjudged insane upon the report of a commission appointed in a proceeding instituted under the laws of this state. Counter affidavits were filed on the part of the people, but they are not included in the record or printed in the transcript. Counsel for appellant seems to consider that the absence of these counter affidavits gives him serious grounds of complaint, but we cannot see how he is injured by their omission, since, in their absence, we can only assume that the material averments of his affidavit were uncontradicted, or, as is more probable, account for their absence upon the supposition that they were deemed superfluous in view of the disclosures at the trial.

But for these disclosures it might be a serious question whether the denial of a continuance was not an error. It turned out, however, that both William and Earl Buck attended the trial and testified in favor of the defendant, and Dr. Cohn, of the Napa Asylum—one of the two alienists who had stated in reply to the hypothetical question that in his opinion the defendant was insane—also attended in obedience to a subpoena issued at the instance of the defendant, and upon the usual order of the court for the attendance of witnesses residing out of the county. He was in court on the day the motion for continuance was made, and was present throughout the trial. In the intervals of the trial he visited and examined the defendant in jail, with the result that he was not called as a witness by the defendant, but testified in rebuttal that he was sane at the time of the trial and at the date of the homicide. It is probable that the ruling on the motion for a postponement of the trial was made with a knowledge that Dr. Cohn and William and Earl Buck were or would be present in time to give their testimony, in which case it was clearly right. But, however this may be, it was clearly not injurious in any view in which it could be claimed to have been erroneous. It is true the deposition of Dr. Jones, of Minnesota,

was not obtained, and probably could not have been obtained for the trial with any amount of diligence, but it cannot be held an abuse of discretion or a denial of right to refuse to postpone a criminal trial in the courts of California until the depositions of non-resident alienists based upon hypothetical questions can be obtained in support of the plea or defense of insanity.

Nor did the court err in refusing to postpone the trial because of an allegation in the affidavit that local feeling was inflamed against the prisoner, and that eminent special counsel had been retained to assist the prosecution. The absence of any widespread feeling against the prisoner is shown by the fact that a jury was filled from the panel in attendance on the day the trial began, and a continuance would not have deprived the people of the aid of the special counsel, or freed the defendant of their opposition.

On the trial much evidence was introduced tending to prove that defendant was insane. There was evidence that his father's father had been insane; that his father had died a few years before of some disease affecting the brain; that his mother's mother had been an inmate of an insane asylum of which his mother had been a matron; that defendant himself had at one time been adjudged insane, but discharged after a few days' detention; that after his discharge he had taken up a wandering life, tramping from place to place and working desultorily in various menial employments. Opposed to this was the testimony of a number of experts, who, as the result of personal examinations and the evidence in the case, were all of the opinion that the defendant was perfectly conscious of what he was doing at the time of the homicide and fully aware of the nature and of the criminality of his acts. Upon this evidence it was a case for the jury to determine, under the instructions of the court, whether the defendant was insane or not.

It is contended that the court erred, not only in the charge given to the jury, but in refusing and modifying instructions requested by the defendant. The twelfth instruction so requested was to the effect that the testimony of nonexperts was recognized as proper in support of the defense of insanity, stating the reason of the rule. The concluding clause of the instruction was as follows: "You are not to be bound by the statement or testimony of such witnesses, neither are you justified in disregarding them. It is your duty to give them such weight as they are entitled to." The court in giving this instruction omitted the language quoted. No reason occurs to us why so mere a commonplace should not have been allowed to stand, but there seems as little reason why it should have been requested. It must be presumed that a jury always understands that it is their duty to give to any evidence submitted

to it the weight to which it seems entitled, and the refusal of the judge to make that comment on any particular item or line of evidence cannot be supposed to prejudice the party offering it. The thirteenth instruction requested by defendant was to the effect that in weighing and considering expert testimony, it is the duty of the jury to exercise their own intelligent judgment, and to allow it such weight only as after careful scrutiny they may deem it deserving of. A final clause in this instruction was as follows: "And all opinion evidence should be received and carefully considered and scrutinized with great caution." In giving the instruction this clause was omitted. It would have been harmless if allowed, but its omission was equally harmless, since the part given covered the same proposition. The fourteenth instruction requested by defendant was refused outright. It was as follows: "The abstract opinion of any witness, medical or of any other profession, is not of any importance. It is a juror's duty to arrive at his conclusion upon his own judgment exercised in a reasonable way, after carefully weighing all of the evidence. No judicial tribunal would be justified in deciding for or against the legal responsibility of one charged with insanity upon the mere opinion of witnesses, however numerous or respectable." The refusal was proper upon the ground that there is no such rule of law. The case cited as authority sustaining the instruction (*In re Redfield*, 116 Cal. 655, 48 Pac. 794) is not in point.

It is contended that the defendant was prejudiced by that part of the charge of the court, where, in defining the character of insanity which the law regards as a valid defense in cases of homicide, and other crimes of violence, it is pointed out that "irresistible impulse" to do an act known by the perpetrator to be wrong does not relieve him of its legal consequences. It is said that no such defense was made or attempted—that he had relied alone upon "settled insanity"—and therefore that the injection of this "false issue" into the case was confusing, misleading, and prejudicial to the only defense which had been made either in the evidence or the argument. We do not think it an error for a court where the defense of insanity is interposed to a charge of murder to state the law of insanity fully and with all its special limitations and qualifications, and we cannot see how the defendant could have been prejudiced by what was said in regard to "irresistible impulse."

Misconduct of counsel for the prosecution is alleged, but the record does not sustain the allegation that the evidence was misstated by special counsel for the people, and, if it had been, that was a matter for correction at the time by an appeal to the court and to the recollection of the jurors. As to the perfervid language of the district attorney in characterizing the atrocity of the crime, that

was a matter of taste which we are not called upon to consider. When he went too far in the opinion of the trial judge, he was admonished and corrected by him.

The verdict of the jury was returned on the 21st of March, and the defendant arraigned for sentence on the 24th. Counsel says he requested further time to procure affidavits as to newly discovered evidence in support of that ground of his motion for a new trial, but it does not appear that he made any showing in support of this application, and we cannot see that the court abused its discretion in refusing to postpone the arraignment and in limiting counsel to one hour for the argument of the motion for a new trial.

We regret to be obliged to add that there are many passages in the brief of counsel for appellant reflecting upon the action of the trial judge, which appear to be without the slightest justification. To say that it was "a brutal abuse of discretion and an inhuman violation of his constitutional rights" to compel the defendant to go to trial in the face of the affidavit for continuance would have been grossly improper language to incorporate in a brief, even if the facts had justified the charge. The offense is aggravated in this case by the absence of any foundation for the charge. Other less flagrant instances of abuse of the privilege of counsel need not be specified. We may hope that there may be no recurrence of similar offenses.

The judgment and order of the superior court are affirmed.

We concur: HENSHAW, J.; ANGELLOTTI, J.; SHAW, J.; MCFARLAND, J.; LORIGAN, J.; SLOSS, J.

6 Cal. App. 88

JONES v. EVANS et al. (Civ. 328.)

(Court of Appeal, First District, California.

July 10, 1907. Rehearing Denied by

Supreme Court Sept. 5, 1907.)

1. BILLS AND NOTES—ACTION—PLEADING—CORPORATE EXISTENCE.

In an action on notes given by defendant to a company and indorsed to plaintiff, a perfect cause of action is shown without proof of the company's corporate capacity.

2. CORPORATIONS — NOTES — INDORSEMENT — AUTHORITY OF OFFICER.

In an action on notes indorsed to plaintiff by the payee corporation by its vice president, the authority of the vice president to make the indorsement was sufficiently shown where plaintiff indorsed the notes at the vice president's request, they were afterwards discounted, and the proceeds received by the corporation or paid out under specific directions in discharging its obligations, and where the corporation had delivered to plaintiff assets and securities under an agreement made on its behalf by the vice president to secure him from liability for indorsing, among others, the notes sued on.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1737.]

3. PLEDGES—RIGHTS OF PLEDGEE—COLLATERAL SECURITY FIRST—NECESSITY FOR APPLYING.

Before suing the maker, an indorser of notes was not bound to apply collateral securities delivered to him subject to the claims of a creditor by the payee as security for the indorsement of notes including those sued on; a bill in equity having been filed against plaintiff by the creditor claiming the assets, and it appearing that no part of the money on hand could be applied to any particular note or claim until after the settlement of the litigation, and then only in the event of plaintiff's success.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, § 140.]

4. SAME—AGREEMENT—CONSTITUTION.

Under the express terms of Civ. Code, §§ 2986, 2987, where a corporation, to secure plaintiff from liability on notes he indorsed and procured to be indorsed, transferred to him, and his indorsers, subject to the claims of another, the entire proceeds of certain territory in which it did business, the contract providing that, on failure to meet the notes, the assets would be collected, reduced to cash, and the proceeds applied to the payment of the notes, there was a pledge as collateral security for the notes indorsed and procured to be indorsed by plaintiff.

5. BILLS AND NOTES—ACTION BY INDORSER—DEFENSE—WANT OF CONSIDERATION.

In an action on notes by an indorser, it was no defense that the maker was paid no consideration for the notes, there being no showing plaintiff knew that fact, since, in the absence of evidence to the contrary, the presumption of law under the express terms of Civ. Code, § 3104, is that the notes were indorsed before maturity and for a valuable consideration, and the notes having been indorsed to plaintiff before maturity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 693.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action on notes by S. W. Jones against J. W. Evans and others. From a judgment for plaintiff and an order denying a new trial, defendant Evans appeals. Affirmed.

II. A. Powell, Geo. R. Williams, and W. A. Dow, for appellant. Sullivan & Sullivan and Theo. J. Roche, for respondent.

KERRIGAN, J. This is an action on two promissory notes, made by J. W. Evans, payable to the order of the Domestic Sewing Machine Company. That company, before maturity, indorsed these notes, and delivered them to plaintiff. Thereafter, and before maturity, both notes were indorsed by plaintiff and discounted at certain banks. Defendants failed to meet these notes when they fell due. They were duly protested, and the plaintiff was compelled to pay the amounts due thereon. Defendants failed to reimburse plaintiff for such payment, and this action was brought. A trial was had only against the defendant Evans. Process was not served on the other defendant. The cause was tried by the court, sitting without a jury, and judgment was entered in favor of plaintiff. This appeal is from the judgment entered against defendant Evans, and

from the order denying his motion for a new trial.

1. It is alleged in the complaint in the usual form that the Domestic Sewing Machine Company was a corporation. Appellant urges that there is no evidence that the company ever organized, or acted as a corporation. As we have seen, this is an action against the defendant Evans, the maker of the notes, and, so far as his liability on these notes is concerned, the corporate existence of the defendant Domestic Sewing Machine Company is absolutely immaterial. In other words, a perfect cause of action in favor of respondent as against the appellant Evans is set forth in the complaint without regard to the allegation concerning the corporate capacity of the defendant Domestic Sewing Machine Company. Crocker-Woolworth Nat. Bank v. Carle, 133 Cal. 409, 65 Pac. 951.

2. The indorsement on each note reads: "Domestic Sewing Machine Company by David Blake, Vice President." Appellant asserts that there is no showing that David Blake had authority to make these indorsements. The evidence discloses that both notes were indorsed by respondent at the request of David Blake; that after being so indorsed they were discounted, and all moneys received by reason of such discounting were transmitted to the Domestic Sewing Machine Company and received by it, or else paid out under specific directions in discharging some of its obligations. Again, as part of his own case, appellant read in evidence a portion of the deposition of respondent, wherein he testified that he had an agreement with the Domestic Sewing Machine Company, in which it agreed to pledge with him certain assets of the company to secure him from liability for indorsing, among others, the notes involved herein. This agreement was signed: "Domestic Sewing Machine Company by David Blake, Vice President." The evidence further shows that, pursuant to this agreement, the Domestic Sewing Machine Company did deliver to respondent some of its assets and securities. Whether it was a copartnership, corporation, or unincorporated association, it accepted and retained the benefits of the indorsement of its name upon the notes by David Blake, vice president, and upon the faith of these indorsements it procured the indorsement of the respondent. According to well-established principles of law, it could not accept the benefits derived from the indorsement of said notes by Blake, and at the same time repudiate his authority to make such indorsement.

3. Appellant contends that the respondent was bound to apply the collateral securities held by him to the payment of the notes before bringing suit thereon. It appears from the testimony that the respondent Jones indorsed and procured to be indorsed promissory notes for the Domestic Sewing Machine Company, to the extent of over \$200,000,

other than those described in the complaint. In order to secure the respondent Jones from liability upon these notes, an agreement was entered into between Jones and the Domestic Sewing Machine Company, by virtue of which, subject to the claims of one Sutherland, it assigned and transferred to the respondent and his indorsers the entire proceeds of a certain territory in which it did business. The contract also provided that, in the event of the failure to meet these notes, the assets were to be collected, sold and reduced to cash, and the proceeds applied toward the payment of the notes. It appears from the evidence that respondent had paid a number of other promissory notes, indorsed by him, for the company after the notes had been protested, and that he had collected about \$19,000 net under this agreement. The evidence also disclosed that a bill in equity had been filed by one Sutherland against the respondent, claiming said assets, and that no part of the balance of the moneys on hand could be applied to any particular note or claim until after the litigation now pending as to the ownership of the assets had been fully settled, and then only in the event that the respondent prevailed. This agreement constituted a pledge of the property described, as collateral security for the notes indorsed and which were procured to be indorsed by respondent. Civ. Code, §§ 2986, 2987; *Sonoma Valley Bank v. Hill*, 59 Cal. 109. In this last-mentioned case it is said: "It is well settled that, in the absence of a statute or stipulation to the contrary, the possession of the pledged property does not suspend the right of the pledgee to proceed personally against the pledgor for his debt, without selling the pledge, for the reason that the security is only collateral. It has been repeatedly so held" (citing a number of cases).

In *Ehrlick v. Ewald*, 66 Cal. 97, 4 Pac. 1062, the Supreme Court uses this language: "The court below found that defendant was indebted to plaintiff for money loaned. To secure the payment thereof, defendant had delivered to plaintiff certain personal property, which property is still held by plaintiff, who had taken no steps to subject the same to sale for the payment of the debt. The action has been brought to recover the amount due with interest. The defendant insists that according to section 726, Code Civ. Proc., the action cannot be maintained; that the plaintiff must first seek to foreclose his lien before he can have an independent action for money. This view was taken by the court below, in refusing judgment for plaintiff on the findings, and in rendering judgment for defendant." And, after quoting from various sections of the Code, the court proceeds: "We find nothing which will prevent a pledgee from having his action to recover the debt, without first exhausting the subject of his pledge. * * * The plaintiff was entitled to his judgment for the amount stated in the

findings, with interest." In *Commercial & S. Bank v. Hornberger*, 140 Cal. 16, 73 Pac. 625, the Supreme Court again stated: "The pledgee may recover the amount of his debt from the debtor by an independent suit without foreclosing the pledge." To the same effect is *Farmers' & Merchants' Bank v. Copsey*, 134 Cal. 287, 66 Pac. 324.

4. Appellant testified that he was paid no consideration for these notes, but there is no showing that respondent knew this. In the absence of evidence to the contrary, the presumption of law is that the notes were indorsed before maturity and for a valuable consideration. Section 3104, Civ. Code. Again, the uncontradicted evidence of respondent was that the notes had been indorsed to him before maturity. The action of the court in striking out this testimony of the appellant was correct, for it constituted no defense.

5. Appellant's motion for nonsuit was denied, and, in addition to this ruling, he complains about the admission of certain evidence. These matters, so far as they merit attention, have been fully discussed in what we have already said, and they need no further elaboration.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

6 Cal. App. 77

MUSHET v. FOX. (Civ. 373.)

(Court of Appeal, Second District, California, July 5, 1907. Rehearing Denied by Supreme Court Sept. 3, 1907.)

1. TRIAL—FINDINGS BY COURT—NECESSITY OF FINDING—PLEA OF WANT OF CONSIDERATION.

The plea of want of consideration in an action on a note is an affirmative defense, on which the defendant is entitled to a finding if there is any evidence in support thereof.

2. APPEAL—PREJUDICE—OMISSION OF FINDING.

The court's omission to make a finding on a plea of want of consideration in an action on a note was immaterial on appeal, where such failure would not affect the substantial rights of the appellant, under Code Civ. Proc. § 475, requiring the court on appeal to disregard any error not affecting substantial rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4234, 4239.]

3. SAME—NECESSITY OF OBJECTIONS AT TRIAL.

In the absence of particular objections, no error can be claimed on appeal to the admission of evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1141.]

4. EVIDENCE—WEIGHT AND SUFFICIENCY—EVIDENCE IMPROPERLY ADMITTED.

Defendant, having suffered attachment, solicited two other creditors to levy an attachment on his property for the purpose of counteracting the first, and, for this purpose, the creditors transferred their claims to R., assistant secretary of a board of trade, who brought suit, aided by attachment thereon. Defendant thereafter requested plaintiff, who was secretary of the board of trade and who had received an assignment of the claims from his assistant to have the attachments released, but he refused unless defendant executed a note and chattel

mortgage to secure them, which was done. *Held*, that evidence of R. that prior to the execution of such note plaintiff caused the original indebtedness owing by defendant to the creditors, "which had been transferred to the witness, to be transferred to plaintiff," in the absence of an objection on proper ground, was sufficient to establish an assignment of the claims to plaintiffs as the consideration for the note.

Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Action by W. C. Mushet against E. R. Fox. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

L. M. Fall, for appellant. Carroll Allen and W. T. Craig, for respondent.

ALLEN, P. J. Appeal by defendant from a judgment in favor of plaintiff. The action was upon a note secured by chattel mortgage executed by defendant to plaintiff. Copies of both note and mortgage were set out in the complaint. The sole issue tendered by the answer was a plea of want of consideration. The court, upon the trial, found all of the allegations of the complaint to be true, but made no finding as to the affirmative issue raised by the answer.

The record contains a bill of exceptions, settled and allowed by the trial court on October 13, 1906, being the day succeeding the trial, in which bill alone appears the specifications of error relied upon. Judgment, however, was not entered until October 24, 1906. A copy of the bill of exceptions was served upon plaintiff's counsel November 2, 1906, and on that day filed. The certificate of the judge is that the bill of exceptions had been "duly prepared and settled with due time and in the manner required by law." Assuming for the purposes of this decision, but without deciding, that a bill of exceptions specifying as error the insufficiency of the evidence to support a finding may be settled and allowed before such finding is actually made, and treating the bill of exceptions as a part of the record, we are satisfied that the judgment should be affirmed.

That the plea of want of consideration is an affirmative defense is determined in *Pastene v. Pardini*, 135 Cal. 433, 67 Pac. 681. If there is any evidence offered in support of such affirmative defense, the defendant is entitled to a finding thereon; yet, if it appears from the record that "the failure to make such finding would not affect the substantial rights of the appellant, the judgment ought not to be reversed. Code Civ. Proc. § 475." *Winslow v. Gohransen*, 88 Cal. 452, 26 Pac. 504. In support of the issue of want of consideration, the appellant's evidence shows that he was indebted to two certain corporations in an aggregate amount of \$642.10; that another creditor of appellant had levied an attachment upon his property, and he thereupon, for the purpose of counteracting this attachment, solicited the corporations to issue an attachment upon their

claims; that these corporations, in compliance with such request, procured the Wholesalers' Board of Trade, of which plaintiff was secretary, and one Rossiter, who was assistant secretary, to bring suit upon their claims, which suit was brought in the name of Rossiter and an attachment duly levied; that thereafter defendant, by giving bond, had the first attachment released, and requested plaintiff to release the second attachment, which he refused to do unless other security was given for the claim. Thereupon defendant executed the note and chattel mortgage to plaintiff for \$747.11, and the attachment was accordingly released. It does not appear what costs or expenses were incurred by plaintiff in the attachment proceedings, or that the amount of the note was in excess of the original claim and such costs. Appellant testifies that, after the attachment was levied and before the release, he gave a check to one of the corporations for the amount of its claim, but this check was not, upon presentation, paid on account of "want of funds"; that thereafter defendant deposited in the bank upon which said check was drawn funds more than sufficient to cover such check, but the same was not thereafter presented nor paid; that, when he gave the check, the corporation executed a receipt to defendant for the amount of its original bill, and after the dishonor of the check refused to surrender the same until the receipt was returned. Defendant's claim of want of consideration is based upon the proposition that no evidence was offered tending to show that the claims of the corporations had been actually assigned to Rossiter before suit, or by Rossiter to plaintiff before the execution of the note and mortgage. The only competent evidence in relation to such assignment is that of Rossiter, who, testifying in relation to the facts existing at the date of the note, says: "In the meanwhile plaintiff caused said original indebtedness owing by defendant to said packing houses and transferred to witness to be transferred to plaintiff." Defendant objected to this evidence, but upon what grounds does not appear. In the absence of any proper objections, no error can be claimed in the admission of such statements, and they show sufficiently the assignment and transference of the claims to plaintiff. The statements or acts of the assignors subsequently made or performed could have no effect against plaintiff as tending to overcome his proof of transfer. Aside from this, the situation of the defendant after giving the note and mortgage was not unlike that of one executing an undertaking for the release of an attachment, in which latter case, in an action upon such undertaking, the court will not inquire into the sufficiency of the complaint, or admit evidence as to matters therein necessary for determination in the original action out of which the attachment issued. *Bailey v. Aetna Indemnity Co.* (decided by this court June 18, 1907) 91 Pac.

416, and authorities therein cited. The attachment being actually released, such release was the agreed consideration for the note.

We find no error in the record, and the judgment is affirmed.

We concur: SHAW, J.; TAGGART, J.

4 Cal. App. 432

PEOPLE v. FITTS. (Cr. 72.)

(Court of Appeal, First District, California. Nov. 23, 1906.)

1. ROBBERY—ASSAULT WITH INTENT—INSTRUCTION AS TO SIMPLE ASSAULT.

On a prosecution for assault with intent to commit robbery, there being no evidence of assault except in connection with the attempt to commit robbery, no instruction as to simple assault need be given.

2. CRIMINAL LAW—HARMLESS ERROR—INSTRUCTION.

The giving of an instruction that, if any of the witnesses willfully swore falsely as to any material matter, it is the duty of the jury to distrust their entire testimony, if violative of the inhibition of the Constitution against charging with respect to matters of fact, is harmless; it being as to mere commonplace matters within the general knowledge of the jurors.

3. SAME—ARGUMENT OF COUNSEL—REFERENCE TO DEFENDANT'S NOT TESTIFYING.

Under Pen. Code, § 1323, declaring that neglect of a defendant to be a witness cannot in any manner prejudice him or be used against him on the trial, it is not ground for reversal that the prosecuting attorney merely told the jury that the person they were trying was not W. (indicted with defendant) who took the stand, but F., the defendant, who did not take the stand, as to which fact he was not permitted to comment and should say nothing; the court having then also told the jury that it was the legal right of defendant to remain silent, and that no presumption should be indulged in against him because of his failure to take the stand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1672.]

4. SAME—MATTERS NOT SUSTAINED BY EVIDENCE.

W., indicted, but not tried, with defendant, having testified that, when they arrived at a certain place, the evening after they were claimed to have committed the offense, they met a fellow named Gilluly, the mere statement of the prosecuting attorney that defendant on reaching such place the evening after the assault "met the Gilluly gang—the Gillulys are well known in Santa Rosa"—is harmless, though there was no evidence of their being so known.

Appeal from Superior Court, Marin County; T. J. Lennon, Judge.

Terence Fitts appeals from a conviction. Affirmed.

Ross Campbell, for appellant. U. S. Webb, Atty. Gen., for the People.

HARRISON, P. J. The defendant was indicted for an assault with intent to commit robbery, and upon the trial thereof was convicted and sentenced to a term in the state prison. From this judgment and an order denying his motion for a new trial he has appealed.

It was shown by the testimony of the

prosecuting witness that between the hours of 2 and 3 o'clock in the morning of December 6, 1905, he was addressed from the outside of his cabin on the Greenbrae drawbridge, and on opening the door a little way he was seized by the throat and dragged outside by a man named Woods, and that the defendant thereupon went through his pockets; that they went inside the cabin, and the defendant, after throwing its contents into confusion, came outside, and while holding the witness tight in his grasp demanded with a threatening gesture that he give up his sack of gold; that thereupon he was pulled around by Woods and struck upon the temples, by which he was rendered unconscious for about two hours. Woods, who was a witness for the defendant, testified that he and the defendant were together during the whole of the night of December 5th in a box car behind the freight house in San Rafael, and that neither of them was at any time that night at Greenbrae, or on the Greenbrae drawbridge.

1. One of the grounds urged in support of the appeal is the refusal by the court to instruct the jury, as requested by the defendant, that the charge in the indictment embraces two offenses; that is, an assault with intent to commit robbery, and an assault which is commonly termed a simple assault. The only evidence before the jury of the assault by the defendant was that of the prosecuting witness, and, if the jury believed his testimony, the defendant made no assault upon him except in connection with his attempt to commit robbery. The testimony of the witness Cleary, upon which the appellant claims the right to this instruction, did not purport to describe the occurrence, but was merely a statement of what the prosecuting witness had told him. If the testimony of Woods should be believed by the jury, there was no evidence of even a simple assault on the part of the defendant. Under the evidence before them the only verdict which the jury could render was either one of guilty as charged in the indictment or of acquittal. The court was therefore justified in refusing the instruction, upon the ground that there was no evidence before the jury to which it could refer. *People v. Chavez*, 103 Cal. 407, 37 Pac. 389; *People v. Lopez*, 135 Cal. 23, 66 Pac. 965; *People v. Swist*, 136 Cal. 520, 69 Pac. 223.

2. The court instructed the jury: "If any of the witnesses examined before you have willfully sworn falsely as to any material matter, it is your duty to distrust their entire testimony." It is contended by appellant that by this instruction the court violated the constitutional inhibition against charging the jury with respect to matters of fact. While it is held that in so far as the statute "requires" such an instruction to be given it is unconstitutional, it is at the same time said that the giving of such instruction will not be held to be reversible error, since

by it the jury are instructed as to mere commonplace matters within their general knowledge. *People v. Wardrip*, 141 Cal. 229, 74 Pac. 744.

3. The witness Woods was indicted jointly with the defendant, but the defendant was separately tried, and Woods was a witness in his behalf. In his closing argument to the jury the district attorney, while commenting upon the testimony, said to them: "You are trying the defendant Flitts and not Woods, and we have shown that he (Flitts) is the one that ran his hand in Feliz Sands' pocket, and I don't want you gentlemen of the jury to become confused as to which is the person on trial in this action and whose case you can alone consider. The codefendant Woods, the one who took the stand, is not the defendant on trial. The person on trial is the defendant Flitts—the one who did not take the stand. I am not permitted to comment on his failure to take the stand, nor shall I say anything about that." The attorney for the defendant objected to his reference to the fact that the defendant did not take the stand, and the court thereupon instructed the jury that it was the legal right of the defendant to remain silent, and that they were to indulge in no presumption against him because of his failure to take the stand in his own behalf.

It is contended by the defendant that the above remarks of the district attorney are in violation of section 1323 of the Penal Code, and constituted misconduct on his part for which the verdict should be set aside. Section 1323 declares that the neglect or refusal of a defendant to be a witness "cannot in any manner prejudice him or be used against him on the trial or proceeding." We are of the opinion that the above reference of the district attorney to the defendant was for the purpose of directing the attention of the jury to testimony which particularly affected him rather than Woods, and cannot properly be considered as indicating a purpose on his part to "use" against the defendant the fact of his not being a witness. The section does not declare that no reference to such fact shall be made, or that any reference, however innocent or inadvertent, shall be a ground for setting aside the verdict. It is only when the fact is "used against" the defendant that such result should follow. There is an expression in an opinion given by the court for the Third appellate district in *People v. Morris* (Cal. App.) 84 Pac. 463, to the effect that "it is error to allude in any way to the fact that the defendant had refrained from testifying," which may have been proper if limited in its application to the language of the counsel which was used in that case, wherein the fact was directly "used against" the defendant; but, if intended as the declaration of a rule or a construction of the provision in the section, it is an enlargement of the language of the statute which in our opinion is unauthorized.

Misconduct on the part of the district attorney is also assigned for another remark in his argument to the jury. Woods in his testimony stated that after they had reached Santa Rosa on the 6th of December they "met a fellow named Gulluly"; and, in addressing the jury in reference thereto, the district attorney said, "The defendant, on reaching Santa Rosa the evening after the assault, met the Gulluly gang—the Gullulys are well known in Santa Rosa." The proposition of the appellant that these remarks were prejudicial to him is submitted without any argument. No reference is made therein to the charge upon which the defendant was tried; and, while there was no evidence before the jury that the Gullulys are well known in Santa Rosa, it is evident that their verdict could not have been affected by this statement.

The judgment is affirmed.

We concur: HALL, J.; COOPER, J.

BERRY et al. v. EQUITABLE GOLD MINING CO. (No. 1,708.)

(Supreme Court of Nevada. Sept. 4, 1907.)

1. APPEAL — RECORD — FILING — ORIGINAL — COPY.

Two duplicate volumes entitled "statement on appeal" in the handwriting of the clerk of the district court were filed September 8, 1906. They were identical, except that one of them was indorsed "copy," and this instead of the original was the one that was settled by the district judge. *Held*, that the certification and settlement of the copy instead of the original was not a fatal defect, but that the copy could be considered as an original.

2. SAME—MOTION TO DISMISS—TIME.

A second motion to dismiss an appeal on grounds not previously urged, not made before the day of the hearing, nor until after respondent had filed his brief, was too late.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3149.]

3. JUDGMENT—ORDER FOR JUDGMENT—EXCEPTION—TIME OF TAKING.

Where no order was made directing the entry of judgment at the time a verdict was rendered, but defendant's counsel took an exception as soon as a *nunc pro tunc* order was made, and he became aware of the direction that judgment be entered, the exception was in time.

4. APPEAL — JUDGMENT ROLL — CONTENTS — SUMMONS.

The summons is not an essential requisite of a judgment roll to sustain an appeal, where the judgment was rendered after trial at which defendant appeared.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2284.]

5. JUDGMENT—ENTRY BY CLERK—AUTHORITY.

A decree for a perpetual injunction entered by the clerk was void on its face, where it was unsupported either by the verdict rendered or by an order of the judge directing its entry.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 506.]

6. TRIAL—GENERAL AND SPECIAL VERDICT.

Where there is a general and a special verdict, if either has force, the latter controls.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 857.]

7. WATERS AND WATER COURSES—APPROPRIATION OF WATER—BENEFICIAL USE.

Where plaintiffs claimed that S. had appropriated the water of a spring and had deeded the same to them and sought an injunction perpetually enjoining defendant from interfering therewith, plaintiffs' right to the water was limited to the amount beneficially appropriated, so that the jury having found that S. appropriated 20 gallons a day, plaintiffs were only entitled to that amount and could not restrain defendant's use of the excess.

Appeal from District Court, Storey County.

Suit by T. Berry and others against the Equitable Gold Mining Company. From a judgment in favor of complainants and from an order overruling defendant's motion to set it aside, it appeals. On motion to dismiss appeal. Denied. Judgment set aside. Case remanded.

O. E. Mack, for appellant. F. M. Hufaker, for respondents.

TALBOT, C. J. The plaintiffs brought this action by a complaint, alleging that the water of a spring had been appropriated by Jack Shepard and by him deeded to them, and demanded an injunction perpetually enjoining the defendant from interfering therewith. The case was tried by a jury, which brought in a verdict "in favor of the plaintiffs," and found special issues, and among these that Shepard had appropriated 20 gallons per day of the water. At the time of returning the general verdict the jury had omitted to find upon the special issues which had been submitted to them, and the court had them retire and find upon these special issues. The next day the clerk entered a judgment, reciting and premised upon the general verdict in favor of the plaintiffs for the water, and directing that the defendant be perpetually enjoined from interfering with it. In reference to this entry it is stated in the record that "the county clerk, of his own motion, without any order from the court, without any findings from the court, without any order of the court adopting said findings of the jury, entered judgment. Many months later the defendant moved to set aside this judgment. The court denied the motion, and directed the entry nunc pro tunc of an order for judgment in accordance with the verdict. The facts are more particularly stated in the decision on the proceedings in mandamus to require the settlement of the statement on appeal. *State v. District Judge* (Nev.) 88 Pac. 335.

The notice and undertaking on appeal state that this appeal is from the judgment and from the order of the district court overruling defendant's motion to set it aside. Respondents moved to dismiss the appeal upon the ground that no statement had been settled. There are two volumes, duplicates, entitled "Statement on Appeal," both indorsed as filed September 8, 1906, by, and shown to be in the handwriting of the clerk of the district court. These appear to be identically

the same excepting that one is indorsed "copy," and the motion to dismiss is upon the ground that this, instead of the original, is the one that has been settled by the district judge. On the hearing in this court we directed that the latter might be filed, or that the other copy could be indorsed by the district judge and filed. The volumes being the same, and both equally showing the proceedings in the trial court, the fact that the certification of settlement was attached to the one marked "copy" after this court had directed that the statement be settled we think is immaterial and should not deprive the appellants of the right of appeal or of presenting their case. As the one marked "copy" bears the filing and signature of the clerk and the certificate and signature of the judge, it may be considered as the original and the indorsement of the word "copy" as a misnomer.

Respondents made a second motion to dismiss the appeal upon other grounds, part of which had been determined in the mandamus proceedings, but this motion, under the court rule, comes too late, and the right to make the same is waived because it was not made before the day of the hearing nor until after respondents had filed their brief.

It is said that no question regarding the sufficiency of the order of the district judge directing that judgment be entered in accordance with the verdict can be considered, because no exception was taken to the order at the time it was made upon the rendition of the verdict. It is true that no exception was so taken, because the order was not then heard by counsel or the clerk; but, when the nunc pro tunc order was made, and as soon as counsel was aware of the direction that judgment be entered, exception was taken, and due specification of error and the proceedings of the court are contained in the record.

It is also claimed that any defect in the judgment cannot be considered for the reason that by omission of the summons there is no judgment roll before this court. Although the statute directs the clerk to include the summons as part of the judgment roll, it is not necessary that there should be one in all cases. The object and purpose of the summons is to bring defendants into court, and the practice act provides that they may appear without summons, and if they so appear no reason exists why they may not have their cases reviewed on appeal in the same manner as in others where there may be a summons in the case. In fact, the summons is imperative only in default cases in which no appeal lies. Here we have before us all the papers directed to be placed in the judgment roll excepting the summons, which is not essential, as the defendant was in court and the judgment itself is sufficient without reference to any other paper to indicate its invalidity. It shows that it was entered by the clerk

upon the verdict, and that it attempted to grant relief by perpetual injunction, which under the statute he was not authorized to give. It is not signed by the judge, and contains no reference to any order of the court. If the order entered nunc pro tunc be considered, it directs the entry of the judgment in accordance with the verdict, without specifying the general or special verdict.

For respondents it is argued that they had a constitutional right to a jury, and were entitled to the result of the verdict and to have a judgment entered upon it by the clerk. If this were true, and the case were not one in equity (*Duffy v. Moran*, 12 Nev. 97), still neither the verdict nor the order of the judge directs the entry of the decree for perpetual injunction which was made by the clerk. Consequently, and too clearly for argument, this judgment shows upon its face that it is void and cannot be sustained upon any legal principle, because it was entered by the clerk, a ministerial officer who could not act judicially in this regard and who was not directed to enter such decree by any order of the court, and was not, and could not have been, authorized to enter it by the verdict of the jury. On a motion for that purpose the court could have set aside this decree as having been inadvertently entered by the clerk and unauthorized, and the appeal is properly from his order in that regard and from the judgment as presented with the papers essential to be brought here in the judgment roll.

As the plaintiffs base their claim upon an appropriation alleged to have been made by Shepard, they are limited to the amount which was beneficially used by him. The jury found that this was 10 gallons for mining and 10 gallons for domestic purposes each day. Where there is a general and a special verdict, if either has any force, the latter controls. If the jury desired to give the plaintiffs all the water flowing from the spring or more than 20 gallons per day because they found that their grantor Shepard had used that quantity, nevertheless the law would limit the right to the amount beneficially appropriated. By directing judgment in accordance with the verdict, it may be assumed that the district court approved of the finding of the jury and found in favor of an appropriation by Shepard to the extent of at least 20 gallons per day. The defendant complains because the decree was not modified so as to allow the plaintiffs this quantity. The judgment being void because its nature was such that its entry was unauthorized by the clerk, the condition of the case is not so materially different than it would be if no decree had been entered. At least, with the consent of the parties, the findings may be considered a correct determination of the facts and as warranting the entry of a proper decree upon them by the district court, even if the judge who tried the case

has been succeeded in office. *Jerrett v. Mahan*, 20 Nev. 90, 17 Pac. 12.

Respondents' motions to dismiss the appeal are denied, the judgment is set aside, and, if within 20 days after filing of the remittitur the plaintiffs file their written consent that judgment be entered in favor of them for the use of 20 gallons per day of the water of the spring in controversy and for costs of suit and for a perpetual injunction restraining defendant and its agents and employes from interfering with the free use by the plaintiffs of that quantity of the water per day, a decree will be so entered by the district court, but otherwise a new trial will be had.

NORCROSS and SWEENEY, JJ., concur.

(73 Kan. 414)

BARNETT v. SCHAD.

(Supreme Court of Kansas. Jan. Term, 1906.)

Petition for rehearing. Denied.

For former opinion, see 85 Pac. 411.

SMITH, J. All the questions raised by the defendant in error in his petition for a rehearing were considered and determined adversely to him before the decision was handed down. It may be well, however, to state more clearly the ground upon which the first paragraph of the syllabus is based, as it seems to be misapprehended.

It is conceded that a district judge should make no order allowing an injunction until a suit for an injunction has been commenced in his court. A suit is commenced by filing a petition and causing a summons to be issued thereon (Code, § 57; Gen. St. 1901, § 4487), and, when an injunction is allowed at the commencement of the suit, the clerk should indorse upon the summons "injunction allowed" (Code, § 243; Gen. St. 1901, § 4690). Thus it appears the summons should issue before the making of the order, and the order should be made before the issuance of the summons. The difficulty is usually overcome by first filing the petition, then procuring the order, and then procuring the issuance of summons with the indorsement. This solution, however, is more apparent than real.

The contention that there was a defect of parties defendant in failing to join the judgment creditor with the sheriff was not overlooked, although not mentioned in the decision. The judgment creditor was a proper party, but was not a necessary party. He could make any defense he had through his agent, the sheriff, or, if he had desired, he could have asked, by motion, to be made a party, and such application, in the discretion of the court, could have been allowed. The sheriff, however, could have made any defense which he and the creditor, jointly or

severally, could have made. Hence the creditor was not a necessary party. *Taylor v. Hosick, Adm'r, etc.*, 13 Kan. 518, 526.

The petition for a rehearing is denied. All the Justices concurring.

(51 Or. 457)

SANBORN v. FITZPATRICK et al.

(Supreme Court of Oregon. Sept. 3, 1907.)

1. APPEAL—BOND—JUSTIFICATION OF SURETIES.

Where an appeal bond was conditioned that appellants and their sureties would pay all damages, costs, and disbursements that might be awarded against them on appeal, it was sufficient and not defective, as limiting the liability to \$500, because the sureties only qualified in that sum.

2. SAME—REPORT OF EVIDENCE—REPORTER'S CERTIFICATE.

Where the evidence was taken in shorthand by an official reporter, whose duty it was to report the entire proceedings, a certificate to the reporter's transcript that it was a full, true, and correct transcript of the shorthand notes taken at the trial and of the whole thereof should be construed as certifying that it included the entire proceedings had at the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2698, 2699.]

3. SAME—RECORD—IDENTIFICATION BY JUDGE.

B. & C. Comp. § 827, provides that in suits in equity which have gone to a decree the trial judge shall identify the testimony and exhibits within 10 days thereafter, and that, where the evidence is taken by a stenographer, he shall extend the same and certify to its correctness, and that all documentary evidence shall be preserved and incorporated in the report of the evidence by the referee. *Held*, that the evidence is only required to be identified by the judge when the case is tried before a referee, and, on a trial before the court, the transcript of the evidence is to be certified by the stenographer.

4. SAME—CERTIFICATION OF EXHIBITS.

B. & C. Comp. § 827, requires the testimony to be certified by the official stenographer where the case is tried before the judge and a stenographer, and B. & C. Comp. § 553, and Supreme Court Rule 1 (91 Pac. vii), declare that, when an appeal is from a decree, the clerk shall attach together the testimony, depositions, and other papers on file in his office containing the evidence offered at the trial, and deliver the same to appellant, taking his receipt therefor in duplicate, which depositions, exhibits, and other papers may be certified by the clerk. *Held* that, where the case is tried before the trial judge and an official stenographer, the exhibits may be properly certified by the clerk without a certificate from the trial judge or the reporter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2714.]

5. SAME—FORM OF RECORD.

B. & C. Comp. § 553 (Supreme Court Rule 1 [37 Pac. vi]), providing that, where an appeal is taken from a decree, the clerk shall attach together the testimony, depositions, and other papers on file in his office containing the evidence, etc., in so far as it requires the evidence and exhibits to be bound in a single volume, is directory only, so that it is not a fatal defect that the pleadings, exhibits, and evidence are bound in separate volumes held together by rubber bands.

6. SAME—FILING EXHIBITS.

It was no objection to the sufficiency of an appeal record that the exhibits which were properly identified by the stenographer as they

were introduced in evidence were not filed with the clerk of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2318.]

Appeal from Circuit Court, Clatsop County; Thomas A. McBride, Judge.

Action by George W. Sanborn against Nora Fitzpatrick and others. From a judgment in favor of plaintiff, defendants appeal. On motion to dismiss the appeal and to strike from the files the evidence taken in the trial court and exhibits. Denied.

This is a motion to dismiss the appeal, accompanied, in the same instrument, with a motion to strike from the files all of what purports to be the evidence taken in the court below, including the exhibits. The motion to strike is urged on the ground that (1) it does not appear that any of the exhibits were received in evidence, nor the documents purporting to be the exhibits are all the exhibits introduced in evidence at the trial; (2) that the exhibits are not attached to, nor form any part of the testimony; (3) that they are not properly identified; (4) that the exhibits were not filed in the office of the clerk of the county where the cause was tried; (5) that the volume purporting to contain a transcript of the shorthand reporter's notes of the proceedings is not properly certified, in that it does not appear from the certificate of the official reporter that the transcript certified to contains all the testimony, evidence, and proceedings had at the trial; and (6) that all the exhibits and documents are not attached to nor made a part thereof. The certificate to the testimony filed is as follows: "State of Oregon, County of Clatsop—ss.: I, Charles E. Runyon, official reporter of the Fifth Judicial District of the State of Oregon, do hereby certify, that the above and foregoing is a full, true and correct transcript of my short hand notes taken at the trial of the above-entitled cause, and of the whole thereof. Witness my hand this 29th day of January, 1907. Chas. E. Runyon." The exhibits are bound in a separate volume, and have affixed thereto the following certificate: "State of Oregon, County of Clatsop—ss.: I, J. C. Clinton, county clerk in and for said county and state, and clerk of the circuit court in and for said county, hereby certify that the hereto attached Exhibits marked 'Plaintiff's Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, and Defendants' Exhibits A, B, C, D, E, F, G, H, I, K, L, M, N, P,' are the original exhibits offered on the trial of the case of George W. Sanborn, Plaintiff, vs. Nora Fitzpatrick, E. M. Linden and Robert J. Linden, Defendants, in the above-entitled court. In testimony whereof I have hereunto set my hand seal of said circuit court this 31st day of May, A. D. 1907. J. C. Clinton, Clerk of Circuit Court. [Official Seal.]" The motion to dismiss alleges that the undertaking on appeal limits the liability therein to \$500. for which reason a dismissal of the appeal is demanded.

E. B. Watson, for appellants. G. C. Fulton, for respondent.

KING, C. (after stating the facts). The first point demanding attention is the sufficiency of the undertaking on appeal, to which it is urged by plaintiff that the liability thereon is limited to \$500. If limited, it is settled that the undertaking is insufficient. *State v. McKinmore*, 8 Or. 207. But an examination of the undertaking before us fails to disclose any language therein limiting the liability of either defendants or their sureties. Its provisions follow the wording of the statute, to the effect that appellants and their sureties will pay all damages, costs, and disbursements that may be awarded against them on appeal. True, the sureties only qualify in the sum of \$500, but this can in no way be construed as limiting their liability. *Wolfer v. Hurst* (decided August 6, 1907), 91 Pac. 368. The grounds stated in the motion to dismiss are therefore untenable.

It is next urged that the exhibits and transcript of the official reporter's notes should be stricken from the files, on account of the irregularities suggested in the motion. The certificate of the official reporter states that the transcript is a true and correct copy of his shorthand notes taken at the trial, and of the whole thereof. It will be presumed that where the court appoints an official reporter, and he enters upon the duties of his office, he reports the entire proceedings; and we think it clear from the language used in the certificate to the transcript of his notes that he intended thereby to state that it includes the entire proceedings had at the trial. Each exhibit is referred to in the evidence reported, designated by a letter as introduced, and the exhibits accompanying the transcript of the pleadings and evidence are marked in the order indicated in the testimony, with the reporter's name subscribed thereto, together with the certificate of the clerk attached, properly identifying each exhibit. Section 827, B. & C. Comp., provides that in suits in equity, where it has gone to a decree, the trial judge shall identify the testimony and exhibits within 10 days thereafter. This section also provides that, where the evidence is taken by a stenographer, he shall extend the same and certify to its being a correct transcript thereof, and that all documentary evidence shall be preserved and incorporated in the report of the evidence by the referee. It has been settled by the decisions of this court that the identification required of the trial judge applies only where the cause is tried before a referee, and not in presence of the court (*Tallmadge v. Hooper*, 37 Or. 503, 61 Pac. 349, 1127; *Hume v. Burns* [Or.] 83 Pac. 391); but, where the cause is tried before the trial judge, the stenographer, if one is appointed by the court, shall certify to the testimony. B. & C. Comp. § 553, as well as rule 1 of this court (91 Pac. vii),

provides, in effect, that, when the appeal is from a decree, the clerk shall attach together the testimony, depositions, and other papers on file in his office containing the evidence offered at the trial, and deliver the same to the appellant, taking his receipt therefor in duplicate, which depositions, exhibits, and other papers, under rule 1 of this court, may be certified to by the clerk. It follows that the certificate of the trial judge or reporter is not required to be affixed to the exhibits filed with the transcript, unless the cause is tried before a referee in the absence of the court, in which event the identification by the trial judge is necessary (*Tallmadge v. Hooper*, supra), while, if tried before the court, the stenographer's certificate is required to the transcript of his notes, and the exhibits must be identified by the clerk, as indicated.

It is also urged that the testimony and exhibits should be stricken from the files because not attached together in one volume. A strict construction of the language of the statute would indicate that this should be done. However, the manner of fastening them together is not stated. In the case before us the testimony is bound in book form and in a separate volume, the exhibits in another volume, the transcript of pleadings and other papers in another, and the three volumes held together by being inclosed in large rubber bands. In fact, this is the most convenient and practical manner in which it could have been done. That the law in this respect is directory, and not mandatory, is evident. It is well known that in many equity suits boxes, and even trunks, have been found necessary to bring here the voluminous, and almost endless number of exhibits, containing, in many instances, portions of machinery, firearms, etc., which would make the attaching of all together, in the manner indicated by a technical construction of the statute, an impossibility. The law does not intend either the impossible or impracticable, and, where the language of the statute would so indicate, it should be held directory, and not mandatory. In the majority of cases the plan indicated by the statute is more convenient; and, in fact, the practice adopted in some districts of copying all of the exhibits into the testimony where offered is safest, and, to say the least, most practicable and convenient for counsel as well as for the court, but such cannot always be done. It is clear, therefore, that some latitude must be allowed in such cases, and that the statute, on questions of this character, should not be strictly construed, where it does not appear that any one has been prejudiced by the acts complained of.

Again, it is insisted that the exhibits should be stricken from the record, because not filed with the clerk of the court below. We find no provision in the statute or rules requiring the exhibits to be thus filed. The official reporter, for the purposes of the par-

ticular case in which he is appointed by the court to act, is as much an officer of the court as the clerk, and his duties in reference to the documents and evidence introduced are similar in effect and of equal importance (*Tallmadge v. Hooper*, supra), and the stenographer in this case having marked each exhibit as filed, and having designated each by letters thereon with corresponding characters in the testimony, thereby making them easy of identification, this is sufficient.

The motion to dismiss and to strike should be denied.

(50 Or. 159)

HILDEBRAND v. UNITED ARTISANS.

(Supreme Court of Oregon. Sept. 3, 1907.)

1. INSURANCE—LIFE INSURANCE—SUICIDE—BURDEN OF PROOF.

The burden of proving the defense of suicide in an action on a mutual benefit certificate is on the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1653, 1999.]

2. SAME—PROOF OF DEATH—OFFICERS OF SOCIETY—AGENTS OF INSURER.

Where the by-laws of a mutual benefit society provided that on a member's death the officers of the local society to which he belonged should furnish full proof of death on printed blanks prepared for that purpose and give their opinion of the validity of the beneficiary's claim, such local officers must be considered the agents of the general society.

3. EVIDENCE—ADMISSIONS OF AGENT.

Where local officers of a mutual benefit society were required to furnish proofs of death on the decease of a member of such local society, the statements and admissions of such officers made against the interests of the general society are competent evidence against it in an action on the benefit certificate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 887-892.]

4. INSURANCE—MUTUAL BENEFIT SOCIETIES—PROOF OF DEATH—QUESTION FOR JURY.

In an action on a mutual benefit certificate, evidence held to require submission to the jury of the question whether proof of death was submitted by plaintiff or was furnished by the secretary of the local order in accordance with its by-laws.

5. WITNESSES — CROSS-EXAMINATION—IDENTIFICATION OF PAPERS.

Where, in an action on a benefit certificate, a witness on direct examination was asked to identify a letter received from defendant's supreme secretary, referring to certain proof papers, and was also questioned as to what proof papers the letter referred to, defendant was entitled as part of the witness' cross-examination to have the proof papers identified by the witness and to mark them for subsequent reference.

6. APPEAL—RULINGS ON EVIDENCE—PREJUDICE.

Where, in an action on a benefit certificate, all the proof papers relating to the controversy were subsequently admitted as part of the defense, including the report of a coroner's inquest finding that insured committed suicide, as defendant contended, defendant was not prejudiced by the court's refusal to permit defendant to introduce such proof papers, with the report of the inquest attached, as a part of the cross-examination of one of plaintiff's witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4200.]

7. INSURANCE—BENEFIT CERTIFICATE—ACTION—EVIDENCE.

Where the local secretary of a mutual benefit society, in accordance with its by-laws, sent proofs of insured's death to the supreme secretary, it was immaterial that she procured the services of an attorney, who was a member of the order, and who subsequently became the attorney for the beneficiary in an action on the certificate to assist her in submitting such proofs.

8. WITNESSES—COMPETENCY—KNOWLEDGE.

Where the local secretary of a mutual benefit society, in making out proofs of death of a member, procured the assistance of an attorney, who was also a member of the order, and who subsequently became the attorney of the beneficiary in an action on the benefit certificate, the secretary was competent to testify whether she procured such attorney's aid as a brother member of the order or as an attorney.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2175.]

9. TRIAL—OBJECTIONS TO EVIDENCE—EFFECT.

An objection to the relevancy, competency, and materiality of the subject-matter of a question waives any defects in its form.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 216.]

10. EVIDENCE — EXPERTS — HYPOTHETICAL QUESTION—RELEVANCY.

Where, in an action on a benefit certificate, it appeared that deceased had been shot through the temple, and defendant claimed he had committed suicide, a hypothetical question asked of physicians, calling for their opinion as to rigor mortis setting in at once in the case of a person dying almost immediately from the effects of a pistol ball entering the head through the right temple, was relevant and material.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 123-137, 424.]

11. EVIDENCE—COMPETENCY OF EXPERT.

A physician testifying as an expert must first be shown to be qualified either by actual experience in similar cases to the one put to him or by such careful and deliberate study as enables him to form a definite opinion of his own with reference to the matter under consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2345.]

12. TRIAL—OBJECTIONS TO EVIDENCE.

An objection to a question asked of an expert on the ground that he was not qualified to testify did not include an objection that the proper hypothesis had not been given.

Appeal from Circuit Court, Douglas County; L. T. Harris, Judge.

Action by Robert Hildebrand, by S. J. Culver, as guardian, against the United Artisans. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action by Robert Hildebrand by his guardian, S. L. Culver, against the United Artisans to recover \$1,900, with interest, upon a certificate issued to W. C. Hildebrand, the father of plaintiff, as a member of the order, by which it was agreed to pay the amount demanded in event of his death. Plaintiff's father was found dead in his room in Reno, Nev., November 18, 1903, with a pistol clasped in his right hand, a bullet having entered his right temple. No one was present nor knew of the incident until some hours after its occurrence. The cause of the death is unknown, and can only be surmised

from the surrounding circumstances. A coroner's inquest was had, the jury reporting to the effect that the deceased came to his death as a result of a gunshot wound inflicted by his own hand. No question was raised by the pleadings or proof as to his good standing in the order at the time of his death nor as to the identity of the beneficiary. Two questions were raised by the pleadings, namely: (1) Has the beneficiary submitted such proof of death as will entitle him to recover? (2) Did the deceased commit suicide? The rules of the order relative to proof of death of a member of the order appear in full in *Patterson v. United Artisans*, 43 Or. 334, 72 Pac. 1095. A trial of the issues mentioned was had before a jury, resulting in a verdict for plaintiff for the sum demanded. From the judgment thereon defendant appeals.

O. P. Ooshow, for appellant. J. T. Long and A. M. Crawford, for respondent.

KING, C. (after stating the facts as above). The first error assigned and relied upon is based upon the action of the court in sustaining an objection to defendant's offer to introduce in evidence, and have marked as its exhibit, the proof of death, as a part of the cross-examination of plaintiff's witness C. L. McKenna. This witness testified on direct examination that on April 12th, and at all times since, including the date of trial, he was and is the supreme secretary of defendant, and identified a letter to John T. Long, dated April 16, 1904, written by him as secretary of the Supreme Assembly of United Artisans. The letter was received in evidence, without objection, the material portion of which reads: "Your letter of April 14th is at hand, and in reply will say we have received the proof papers in the case of W. C. Hildebrand, Jr., deceased on January 5, 1904." On cross-examination the witness was questioned as to the proof papers there referred to, in the identification of which he answered that he had reference to the proof of death of Mr. Hildebrand, stating he thought it was sent by plaintiff. Witness was then handed a document and asked to state its nature, to which he replied that it was the proof mentioned in the letter, and the only proof received, which instrument was then offered in evidence. Objection was made and sustained to its introduction as incompetent and not proper cross-examination, as well as for the special reason that a part of the instrument offered purported to be the proceedings of the coroner's inquest, by which plaintiff was not bound. Defendant's counsel insist that, since the "proof papers" were mentioned in the letter, he was entitled not only to question the witness thereon, but to introduce them in evidence, notwithstanding the proof tendered included the proceedings had at the coroner's inquest. The record discloses that the witness was interrogated on cross-examination

as to the matters referred to in the letter, and that no objection was made until the "proof papers" were offered in evidence. The purpose of the cross-examination, as well as the attempted introduction of the "proof" in evidence, appears to have been intended for the purpose of sustaining the claim of suicide affirmatively pleaded by the defense. Where this defense is interposed to a policy of insurance, the presumption being that death resulted from natural causes, the onus is upon the defendant to sustain the allegations to that effect. *Cox v. Royal Tribe*, 42 Or. 365, 71 Pac. 73, 60 L. R. A. 620, 95 Am. St. Rep. 752. Where the by-laws of a mutual benefit society provide that upon the death of a member the officers of the local society to which he belonged, as in this case, should furnish full proof of death upon printed blanks prepared for that purpose, and give their opinion as to the validity of the beneficiary's claim, such local officers must be considered the agents of the general society, and their statements and admissions made against the interests of the general organization are competent evidence in an action on the benefit certificate. *Patterson v. United Artisans*, 43 Or. 333, 72 Pac. 1095; *Whigham v. Independent Foresters*, 44 Or. 543, 75 Pac. 1067. The proof in this instance was sent the defendant by Mrs. Edith Plank, as the local secretary of the order; at least she so testified, and her statements to that effect are not contradicted by any positive testimony, and if they had been contradicted it would have been a question for the jury. Evidence was given tending to show that when the proof was made J. T. Long, although assisting the local secretary, was not acting as attorney for the claimant, but as any other member of the order might have done in the way of assisting the secretary in the preparation of the proof she was required under the rules to furnish, notwithstanding he afterwards became one of plaintiff's counsel in this action, and signed his name as such. It is only upon the assumption that plaintiff, in place of the local secretary, by reason of Long's assistance, furnished the proof, that the proceedings of the coroner's inquest could be deemed admissible. There being some evidence showing that he was not acting as such attorney, and that the proof was furnished by Mrs. Plank, as secretary of the local order, it then became a question for the jury to determine whether the proof was furnished by plaintiff or by defendant's local agent. The proof offered on this point by defendant was evidently intended in support of its claim of suicide, as alleged, and only admissible for that purpose. The question asked McKenna by plaintiff's counsel was for the purpose of identifying the letter offered and received in evidence; but, since he was also questioned in his direct examination as to what proof papers the letter referred to, the defense was entitled, as a part of its cross-

examination, to have the proof papers identified by the witness and to mark them for subsequent reference, but it is very doubtful whether it was entitled, on cross-examination, to have them received in evidence. It was a part of its defense. Testimony of this class is sometimes admitted by the court in the exercise of its discretion, in which event its admission has been held not to be reversible error. *Wills v. Russell*, 100 U. S. 621, 25 L. Ed. 607. But it seems to be the well-recognized rule that, when a witness is called by one party, the opposing litigant only has a right to cross-examine upon the facts to which he testified in chief. In his direct examination McKenna did not pretend to identify nor to give the contents of the proof papers, but stated merely what the letter had reference to in that respect. If, on cross-examination, defendant can be permitted to go to the extent, not only of identifying the instrument, but of introducing it in evidence, he would thereby procure the advantage, under the pretense of cross-examination, of making him his witness in chief, and, at the same time, of depriving plaintiff of any cross-examination of the witness on points thereby elicited. It is manifest that such practice should not be encouraged. *Stafford v. Fargo*, 35 Ill. 481. Even though defendant's position on this point were tenable, any error that may have been committed in this respect was rendered harmless, as defendant's rights could not have been prejudiced thereby, in that all of the proof papers were subsequently admitted as a part of the defense, in the admission of which the court evidently assumed that it was a matter for the jury to determine whether the proof was furnished by the plaintiff or by defendant's local agent, and, if found as a fact to have been furnished by plaintiff, were entitled to consider the proof, with inquest attached, as an admission against plaintiff's interest, tending to support defendant's contention, and instructed the jury accordingly. We think, therefore, that defendant cannot avail itself of the alleged error of the court in refusing on cross-examination to admit the "proof papers" in evidence. *Olive v. Olive*, 95 N. C. 485; *City of Chicago v. Peck*, 196 Ill. 260, 63 N. E. 711; *Seymore v. Malcolm McD. L. Co.*, 58 Fed. 957, 7 C. O. A. 593; *Wills v. Russell*, 100 U. S. 621, 25 L. Ed. 607.

It is next urged that the court should have sustained the objection to the question asked Mrs. Plank, "Was he [Long] assisting you as attorney or just as a member of the order at your request?" as to the status of which it is urged that the witness was not competent to express an opinion. No objection was made to the question on the ground that it was calling for the opinion of the witness; but, regardless of that feature, we fail to see what bearing the answer could have in the light of Mrs. Plank's testimony, as it is shown that she, as secretary of the

order, sent the proof to the supreme secretary. It cannot be material, therefore, what assistance she may have procured, whether legal services or otherwise, as she was acting as defendant's agent, and the papers offered in evidence, constituting the proof referred to, were received by the supreme secretary from her as such agent. Again, the witness, while acting as such secretary, and having procured Long's assistance in filling out the blanks and in taking acknowledgments as a notary, was in position to know the capacity in which she procured his aid, whether as a brother member of the order or as an attorney, and fully competent to testify in reference thereto. Nor can there be any question as to her right to state the position in which Long assumed to act when he tendered and furnished his assistance. *Raub v. Otterback*, 89 Va. 645, 16 S. E. 933; *Bender v. McDowell*, 46 La. Ann. 393, 15 South. 21.

It is next insisted that the court erred in permitting the three physicians called as witnesses to give certain expert testimony relative to the effect of the gunshot wound in the temple of the deceased, a sample of the questions asked being: "Q. Now you may state, doctor, from your experience as a physician, and from observing people who were wounded in that way, what in your opinion would be the effect upon the muscles as to their relaxing, or becoming immediately stiffened—I think your medical term is rigor mortis, setting in—if a person dies almost immediately from the effects of a pistol ball entering the head through the right temple?" Objections were made to this class of questions as being incompetent, irrelevant, and immaterial, and for the reason that the physicians testifying had not been shown qualified to answer; but no objection was predicated upon the grounds that the proper foundation had not been laid, nor proper hypothesis given therefor. There can be no doubt as to the materiality, relevancy, and competency of the inquiries, as the answers sought and elicited thereby tend to rebut the proof of suicide offered by the defense. An objection to the relevancy, competency, and materiality of the subject-matter of the question waives any defects in its form. *Enc. Ev. vol. 9*, pp. 100-106.

It is a well-settled rule that before a witness can be permitted to give expert testimony it must not be on a subject of common experience. *State v. Anderson*, 10 Or. 448. The proper mode of examination is by a hypothetically stated case which should embody substantially all the facts relating to the subject; and a physician testifying as such expert must first be shown qualified to do so either by actual experience in cases similar to the one put to him or by such careful and deliberate study as enables him to form a definite opinion of his own in reference to the matter under consideration. Also, where he is called upon to testify from

his own knowledge, it must appear that he has trustworthy information and knowledge of facts involved and upon which his opinion is to be founded. Thompson on Trials, § 588; 8 Ency. Pl. & Pr. 745; State v. Anderson, 10 Or. 448; State v. Simonis, 39 Or. 111, 65 Pac. 595; Soquest v. State, 72 Wis. 659, 40 N. W. 391. Each of the physicians called as witnesses in this case not only testified that he is a licensed physician and practitioner of long standing, but to facts sufficient to indicate a reasonable amount of experience in, and observation of, the particular kind of gunshot wounds concerning which he was examined, from which it follows that the objection made as to the qualification of the witness to give testimony elicited is untenable. It is extremely doubtful, however, as to whether the questions in the form asked laid sufficient foundation or stated a proper hypothesis, but no objections appear on that account. The objections made go only to the relevancy, competency, and materiality of the testimony sought by the questions and to the qualification of the witnesses to testify on the points upon which they were interrogated. It is well settled that, where an objection upon one ground does not go to the other not stated, it is a waiver of all objections not specified. Enc. Ev. vol. 9, pp. 100-106. From which it follows that an objection having as its basis the assertion that the witness has not shown himself qualified to testify on a subject waives any objection to the sufficiency of the form of the question, or as to the proper hypothesis not being given. One goes to the knowledge of the witness, and the other to the form of the question asked. An objection to a hypothetical question on specified grounds raises no question as to its competency or sufficiency on other subjects, from which it follows that the converse must be true. Enc. Ev. vol. 9, pp. 105, 106; Stillman v. Northern Pac. F. & B. H. R. Co., 34 Minn. 420, 26 N. W. 399. "The rule is that, where an objection is made on an untenable ground, or on a ground that works no prejudice, and is overruled, such ruling furnishes no cause for reversing the judgment, because the admission of evidence against objection on some other ground would have constituted harmful error." McDermott v. Jackson, 97 Wis. 70, 72 N. W. 375. Among authorities sustaining the principles here recognized are: Enc. Pl. & Pr. vol. 8, pp. 223-237; Ladd & Bush v. Sears, 9 Or. 244; United Oil Co. v. Roseberry, 30 Colo. 177, 69 Pac. 588; White v. Smith, 54 Iowa, 233, 6 N. W. 284; In re New York El. R. Co., 12 N. Y. Supp. 857, 58 Hun, 610; Mount v. Brooklyn, 76 N. Y. Supp. 533, 72 App. Div. 440; Burlington Ins. Co. v. Miller, 60 Fed. 254, 8 C. C. A. 612; Missouri Pac. Ry. Co. v. Hall, 66 Fed. 868, 14 C. C. A. 153; Publishing Ass'n v. Fisher, 95 Mich. 274, 54 N. W. 759; McCooley v. Forty-Second St. R. Co., 79 Hun, 255, 29 N.

Y. Supp. 368; Frankel v. Wolf, 7 Misc. Rep. 190, 27 N. Y. Supp. 328; People v. Frank, 28 Cal. 508. In McCooley v. Forty-Second St. R. Co., supra, a physician was called to testify as an expert, whose testimony was objected to, and the overruling of the objection was assigned as error. The court in passing on this point say: "The next objection relates to a hypothetical question asked of a doctor, and which is sought to be sustained by the line of cases which hold that the question must contain the facts assumed, so that the jury can have before them the facts in the expert's mind upon which he bases his answer to the hypothetical question. These cases are not available to the appellant, because his objection was not put upon the ground that the question did not contain all the facts necessary to enable the expert to answer, but upon the ground of its incompetency." The court there held that such questions were objected to, not as to form, but as to being incompetent, and the objection thus made was not sufficient to call the attention of a trial judge to the grounds relied upon, for which reason there was no error. In State v. Martin, 47 Or. 282, 83 Pac. 849, a physician called as a witness testified that he was a graduate of a medical school and a licensed physician, and detailing the condition in which he found the injured person, concerning whom he was interrogated, whereupon he was asked his opinion as to the effect of the injury, etc., which was objected to on the ground that it was incompetent, but overruled, and the witness answered; it being maintained that, as no testimony had been given tending to show the qualification of the physician testifying, either by experience or study, an error was committed in permitting him to answer. It is there held that the objection to the question as being incompetent was not sufficient to raise the question as to the qualification of the witness. For the same reason we think an objection to a question asked an expert witness on the grounds that he is not qualified to testify would not include an objection on the ground that the proper hypothesis had not been given. In discussing the effect as to the objection relied on in State v. Martin, supra, Mr. Justice Moore says: "The object of every objection interposed at the trial of a cause, and of the exception to the court's ruling thereon, is to incorporate into the bill of exceptions the particular legal proposition submitted to and decided by the trial court, so that upon an appeal from its ruling an appellate tribunal may be able to review the identical question considered. As the objection which was made related to the alleged incompetency of the question, and not to the incompetency of the witness to express an opinion, the legal principle now insisted upon was evidently not considered by the trial court, and, this being so, no error was committed in permitting Dr. Thomas to answer

the question propounded after he had testified that he was a graduate of a medical school and a licensed physician, thus showing a prima facie qualification."

Other errors are assigned, but not argued, nor do they appear material. The record disclosing no material error, the judgment of the court below should be affirmed.

FARRELL v. PORT OF COLUMBIA et al.
(Supreme Court of Oregon. Sept. 3, 1907.)

1. STATUTES—GENERAL AND SPECIAL LAWS—MUNICIPAL CORPORATIONS—CREATION.

Const. art. 11, § 2, as amended June, 1906, providing that corporations may be formed under general laws, but shall not be created by special laws, and that the Legislature shall not amend, enact, or repeal any act of incorporation for any municipality, city, or town, etc., deprives the Legislature of power to create a corporation for municipal purposes by special act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 89.]

2. SAME.

Laws 1907, p. 182, incorporating the Port of Columbia as a municipal corporation, is a public law, but not a general one; it being applicable only to a particular locality.

3. SAME—PUBLIC LAWS—DEFINITION.

A public law is one not designated by the statute itself as private as provided by Const. art. 4, § 27, and of which court will take judicial notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 79.]

4. SAME—SPECIAL LAWS—MUNICIPAL CORPORATIONS.

Laws 1907, p. 182, incorporating the Port of Columbia as a municipal corporation, was in violation of Const. art. 11, § 2, as amended June, 1906, prohibiting the formation of corporations by special laws, and prohibiting the Legislature from enacting, amending, or repealing any charter or act of incorporation for a municipality, city, or town.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 89.]

Appeal from Circuit Court, Multnomah County: John B. Cleland, Judge.

Suit by Sylvester Farrell against the Port of Columbia and others. From a judgment in favor of defendants, plaintiff appeals. Reversed. Judgment for plaintiff.

J. M. Gearin, for appellant. Warren E. Thomas and S. B. Linthicum, for respondents. G. C. Fulton and F. J. Taylor, for Clatsop county.

BEAN, C. J. This suit involves the constitutionality of an act of the legislative assembly of 1907 to establish and incorporate the Port of Columbia. Laws 1907, p. 182. By this act the counties of Multnomah, Clatsop and Columbia are created a separate district, and the inhabitants thereof are constituted and declared to be a corporation by the name and style of the "Port of Columbia," and as such to have perpetual succession; to hold, receive, and dispose of real and personal property; to sue and be sued,

plead and be impleaded in all suits or proceedings brought by or against it. The declared object of the corporation so formed is to promote the maritime shipping and commercial interest of the Port of Columbia. For that purpose, it is given power and made its duty to own, operate, and maintain a towage service from the open sea, at the entrance of the Columbia river, to all points upon the river extending as far inland as Tongue Point, near Astoria; to purchase, own, lease, control and operate tugs and pilot boats; to appoint and license pilots; to fix and collect charge for pilotage; to acquire, own, and dispose of real and personal property; to make any contracts the making of which is not in this act expressly prohibited; and to do all other acts and things which may be requisite, necessary, or convenient in carrying out the powers conferred. For the purpose of acquiring tug and pilot boats, and providing the same with necessary appliances, the corporation is given power to issue, sell, and dispose of bonds not exceeding the aggregate sum of \$400,000, and power and authority to assess, levy, and collect each year a tax upon all property real or personal, within its boundaries, which is by law taxable for state and county purposes, not to exceed a rate therein specified, to retire such bonds at maturity and the payment of interest thereon. The power and authority given to the corporation is to be exercised by a board of commissioners, and their successors in office to be appointed as in this act provided.

This law was evidently modeled after that creating the Port of Portland (Sess. Laws 1891, p. 791), and, if the Constitution had not been amended since the enactment of the latter statute, it could possibly be sustained, if otherwise valid, on the ground that it is a corporation created for municipal purposes. At the time of the passage of the Port of Portland act, the Constitution (article 11, § 2) provided that corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes, and it was held that the Port of Portland was a corporation formed for municipal purposes within the meaning of this provision. *Cook v. Port of Portland*, 20 Or. 580, 27 Pac. 263, 13 L. R. A. 533. In June, 1906, the section referred to was amended to read: "Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state of Oregon." By this amendment the power to create corporations for municipal purposes by special act was not only eliminated, but the creation of a corporation by such an act is expressly prohibited, and it is no longer in the power of the

legislative authority to create a corporation public or private by a special law. It would seem, therefore, that the act incorporating the Port of Columbia is in violation of this section, as amended, and void. But counsel argue that it is a general and not a special law, and therefore not prohibited by the Constitution. It is not easy to define the distinction between a general law and one that is special, and, to use the language of the Court of Appeals of New York: "It has been found expedient to leave the matter, to a considerable extent, open, to be determined upon the special circumstances of each case." *Ferguson v. Ross et al.*, 126 N. Y. 459, 27 N. E. 954.

Statutes are often classified as public or general and private or special, a public statute being one of which the courts will take judicial notice, while a private statute must be pleaded. 1 Kent, *460; 1 Blackstone, *85. That this is a public law must be conceded, not only because it is one of which the courts will take judicial notice, but because the Constitution provided that every statute shall be a public law unless otherwise declared by the statute itself. Article 4, § 27. It does not follow, however, that because it is a public law it is a general one. "Public" and "general" as applied to statutes are sometimes synonymous, depending upon the context, but they are not so in all cases. Every general law is necessarily a public one, but every public law is not a general one. Thus an act incorporating a city is a public law, but it is not a general one, because it is applicable to a particular locality. Also an act authorizing a certain school district to issue bonds for the purpose of erecting a school-house, and purchasing a site therefor, is a special law, and in violation of a constitutional provision that "the Legislature shall pass no special act conferring corporate power." *Clegg v. School District*, 8 Neb. 179; *School District v. Insurance Co.*, 103 U. S. 707, 26 L. Ed. 601. And, again, laws amending a city charter in respect to making local improvements, or extending the limits of a particular city, are special acts, and held unconstitutional under a provision that "the Legislature shall pass no special act conferring corporate power." *Atchison v. Bartholow*, 4 Kan. 124; *City of Wyandotte v. Wood*, 5 Kan. 603; *State ex rel. Attorney General v. City of Cincinnati*, 20 Ohio St. 18. When used as opposite to "private," and having reference to the subject-matter of a statute, the term "general" is equivalent to "public." When, however, it is used in reference to the territory embraced within a law, and in opposition to "local," it means operating over the whole jurisdiction of the lawmaking power, instead of a particular locality. And, when it is used in contradistinction to "special," it signifies relating to the whole community or all of a class instead of to a particular locality or a part of a class. In this latter sense a law is general when it operates equally and uniformly upon all persons, places, or things

brought within the relation and circumstances for which it provided. But when it is applicable only to a particular branch or designated portion of such persons, places, or things, or is limited in the object to which it applies, it is special. *Lippman v. People*, 175 Ill. 101, 51 N. E. 872; *Wheeler v. Pennsylvania*, 77 Pa. 338; 26 Am. & Eng. Ency. of Law (2d. Ed.) 532; 1 Lewis, Sutherland, Stat. Con. § 195. It is in this sense that the terms "general" and "special" are used in the provision of the Constitution now under consideration. The object of the amendment was to deprive the lawmaking power of the right to create particular corporations, either public or private, and to require that all corporations be formed under a law, the provisions of which shall be applicable alike to all. A general law, within this section of the Constitution, is one by which all persons or localities complying with its provisions may be entitled to exercise the powers and enjoy the rights and privileges conferred. A special law, on the other hand, is one conferring upon certain individuals or citizens of a certain locality rights and powers or liabilities not granted to, or imposed upon, others similarly situated. The act creating the Port of Portland is clearly a special law as so defined, and cannot be upheld without doing violence to the expressed and plain language of the Constitution. The provision of article 4, § 23, prohibiting the passage of special and local laws on enumerated subjects, was under discussion in *Allen v. Hirsch*, 8 Or. 412, and *Maxwell v. Tillamook Co.*, 20 Or. 495, 26 Pac. 803. What is there said in reference to the distinction between general and special laws must be understood as applying to the construction of that provision of the Constitution and has only a general bearing upon the present case.

The cases of *Dunn v. State University*, 9 Or. 357, and *Liggett v. Ladd*, 23 Or. 26-45, 31 Pac. 81, are cited as authorities supporting defendants' position. It is argued that the regents of the University and of the Agricultural College are not corporations for municipal purposes, and since at the time of the passage of the laws providing for their appointment and defining their duties the Legislature was inhibited from creating corporations by special law, except for such purposes, the court necessarily must have concluded in ruling that they are incorporations, and that the act providing for their appointment was a general one. *Dunn v. University* (which was cited in *Liggett v. Ladd*, as authority for holding that the regents of the Agricultural College are a body capable of taking and holding title to real property) was a suit to avoid a deed made to the regents. The defense was that they were agents of and held the property in trust for the state, and therefore could not be sued. The court considered this position unsound. The effect which the provision of the Constitution inhibiting the creation of corporations by special act had on the question for decision is not referred to or

mentioned by the court. It is said in the opinion, however, that the University itself is not a corporation, but that the regents are an incorporated body, although not made so by the Legislature. But after discussing this question it is finally concluded that, whether an incorporation or not, they were agents of the state, holding the legal title to the property then in controversy, and for that reason possessed no immunity for being sued, and that was the only point in the case. Its determination in favor of the plaintiff was sufficient for the purpose of the decision, and what is said about the regents being an incorporation may, with propriety, be deemed dicta. But, however that may be, the decision is not an authority supporting the act now under consideration. The regents of the University, if an incorporation, in the sense that they may take and hold title to property, and sue and be sued, are not a corporation in the ordinary meaning of that term. They are merely administrative agents of the state, charged with the control and supervision of one of its educational institutions, with no power to levy or collect taxes, or impose burdens upon the people of the state or any particular locality thereof.

Having reached the conclusion that the act under consideration is unconstitutional and void, because it is an attempt to create a corporation by a special law, it is unnecessary to consider the question as to whether a corporation of the kind sought to be created is a municipality, within the meaning of that portion of article 11, § 2, as amended, which prohibits the Legislature from enacting, amending, or repealing the charter or the act of incorporation of a municipality, city, or town. The decree of the court below will be reversed and one entered here in favor of plaintiff.

MOORE, J., did not sit in this case.

IN RE CITY OF SEATTLE.

(Supreme Court of Washington. Sept. 5, 1907.)

1. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENTS.

In making assessments on abutting property for a street improvement, the value of the different pieces of property may be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1110.]

2. SAME.

Complaint may not be made of the manner in which commissioners arrive at the result in assessing abutting property for street improvements, where the property is not assessed for more than it is benefited, or for more than its proportionate share of the cost of the improvement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1094.]

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

In re petition of the city of Seattle with reference to establishing and laying out West-

ern avenue, in said city, in pursuance of Ordinance No. 11,704. From the judgment confirming the assessment roll, the Puget Sound Improvement Company and others appeal. Affirmed.

Peters & Powell and Harold Preston, for appellants. Scott Calhoun and Elmer E. Todd, for respondent.

PER CURIAM. The city of Seattle established a street between Virginia and Pike streets in that city, calling the same "Pike Place." The cost of the improvement was \$125,000. The statutory board of commissioners was appointed by the court to assess the costs of the improvement upon the property benefited. The commissioners charged to the city at large \$15,000, and apportioned the balance upon private property, making return thereof as required by the order appointing them. At the hearing had on this return a number of property owners appeared and objected to the assessment made against their respective properties, contending, among other things, (1) that it was not made in accordance with benefits, but in proportion to its market value; and (2) that the assessments as made against their respective properties greatly exceed the benefits conferred. The trial court heard evidence on the objections, found therefrom that they were not well founded, and confirmed the roll. The objectors named in the title appeal, and assign as error the ruling of the court on the objections above cited.

With reference to the first objection, Commissioner Watenman did testify that one of the elements taken into consideration in estimating benefits was the value of the particular lot under consideration, and he pointed out that the reason why certain lots were assessed in excess of certain others lying in the same vicinity was because they exceeded in value the others; the excess in the amount of the assessment being due to the excess of value of the one over the other, the percentage of benefit being the same in each case. The appellants argue that this is assessing according to market value, and not according to benefits, the manner contemplated by the statute. We do not think, however, that this is a just criticism of the action of the commissioners. As we understand the evidence, the assessment was not based entirely upon values that is, the commissioners did not merely make an estimate of the values of the different lots thought by them to be benefited by the improvement, and then apportion the charge among the lots on a percentage basis—but we understand that value was only one of the elements taken into consideration in estimating benefits, that they not only considered this, but considered all such other elements as appeared to them to enter into the question. There can be no valid objection to this method of proceeding, as certainly the value of a given tract is proper to

be taken into consideration with other elements in determining what proportion of an assessment such tract shall bear. But, if this were not so, the question would not be very material. The commissioners are chargeable with the result of their work, and not with the manner by which they arrive at that result. If the return itself does not show that the premises of the objector are assessed more than they are benefited, and more than their proportionate share of the cost of the improvement, the objector is not injured, and hence it is of no moment to him what process the commissioners employed in order to arrive at the result reached by them.

On the question of the excessiveness of the assessment against the property of the objectors, we find the evidence irreconcilably conflicting. But, after a painstaking examination of it, we are unable to say that the roll as returned is inequitable or unjust, or that the objectors' properties have been assessed more than they have been benefited, or more than their just proportion of the cost of the improvement.

The judgment confirming the assessment roll should be affirmed; and it is so ordered.

MEYERS v. SYNDICATE HEAT & POWER CO.

(Supreme Court of Washington. Sept. 5, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—RELATIONSHIP—SAFE PLACE.

In an action for injuries to servant, evidence *held* to warrant a finding that one R. was employed as defendant's servant to perform the work, with authority to hire plaintiff to assist therein, rendering defendant liable for plaintiff's injuries by failure to provide a safe place to work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 953.]

2. NEGLIGENCE—DANGEROUS PREMISES—LICENSEES—INJURIES.

Plaintiff, even if not defendant's servant, *held* a licensee on defendant's premises by defendant's invitation, and defendant was therefore responsible to plaintiff for failure to maintain the premises in a reasonably safe condition, so as not to expose him to hidden dangers of which he was not aware, and which were known to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 42, 44.]

3. TRIAL—SUFFICIENCY OF EVIDENCE—CHALLENGE—EFFECT.

A challenge to the sufficiency of the evidence must be denied if the evidence makes a case against the challenging party, whether such case falls strictly within the pleadings or not.

4. SAME—ISSUES AND PROOF—INSTRUCTIONS.

Plaintiff, in an action for injuries, alleged that he was defendant's servant, and that defendant was negligent in failing to provide a reasonably safe place to work. Proof disclosed that plaintiff was rightfully on the premises and was entitled to recover, though he was not defendant's servant, on the theory that defendant maintained an unguarded vat of hot water in a room on the premises, which was unknown to plaintiff, into which plaintiff fell. *Held*, that defendant having only challenged the sufficiency of the evidence, an instruction that the

jury could not find for plaintiff unless they found that he was an employé of defendant, given at defendant's request, did not become the law of the case, so as to preclude the jury from rendering a verdict on the other theory, defendant claiming that there was no evidence in the record to support the instruction.

5. MASTER AND SERVANT—ESTABLISHMENT OF RELATION—QUESTION FOR JURY.

In an action for injuries to plaintiff, who claimed to be working as defendant's servant, evidence as to whether plaintiff was defendant's servant or the servant of an independent contractor *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1135.]

6. DAMAGES—INJURIES—EXCESSIVENESS.

Plaintiff, while employed on defendant's premises, stepped into an unguarded vat of hot water, and was badly burned. He suffered severely for some time, but his injuries were not entirely permanent. *Held*, that a verdict allowing plaintiff \$2,700 damages was excessive, and should be reduced to \$1,700.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 357-371.]

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by J. H. Meyers against the Syndicate Heat & Power Company. From a judgment for plaintiff, defendant appeals. Affirmed on condition.

Fogg & Fogg, for appellant. Walter Christian and Chas. T. Peterson, for respondent.

FULLERTON, J. This is an action for personal injuries. In his complaint the respondent, who was plaintiff below, alleged, in substance, that he was employed by the appellant to work in and about a certain heat and power plant which the appellant was conducting in the basement of a building known as the "Washington Building," located in the city of Tacoma; that connected with the power plant was a toolroom maintained by the respondent, in which were kept the tools with which the respondent was to work; that beneath the floor of the toolroom, and opening therein, was a hot-water tank, filled with boiling water, which the appellant carelessly and negligently suffered to remain uncovered and unguarded; that the toolroom was insufficiently lighted, so that any one coming into or passing through the same was in grave danger of stepping into the water tank; that the respondent had never been warned of the existence of the tank; that in the course of his duties, while working under the direction of the appellant's foreman, it became necessary for him to go into the toolroom to get some tools; that, after passing into the room, the lights in the adjoining rooms went out, leaving the toolroom insufficiently lighted for him to see the water tank, and on his attempting to leave the room he stepped into the tank with his left foot, causing him great and permanent injuries, for which he demanded judgment. In its answer the appellant denied that the respondent was in its employ, or working under the direction of the foreman at the time he was injured,

and denied that it was necessary in the course of his duty or otherwise for the respondent to go into the room in which he was injured, and, while admitting that he did go into the room and step into the tank, denied that the tank was anywhere near the passageway of persons going into or through the room, and as an affirmative defense alleged contributory negligence on the part of the respondent. For reply the respondent denied the affirmative allegations of the appellant's answer. The case was tried to a jury, which returned a verdict in respondent's favor for \$2,700. At the close of the evidence, the appellant moved the court to take the case from the jury and enter a judgment for the appellant, and, on the motion being overruled, requested the court to instruct the jury to return a verdict in its favor, which motion was also denied. After the return of the verdict, it moved the court for a new trial, on the ground, among others, that the verdict was excessive and given under the influence of passion and prejudice. This motion the court likewise denied. The several rulings on these motions constitute the errors assigned on this appeal.

The motion to take the case from the jury, and the motion for a directed verdict, raise but one question, namely, the sufficiency of the evidence to justify a verdict in favor of the respondent; and, since the jury found in favor of the respondent, we must accept as true, where the evidence is contradictory, that part most favorable to his contention. The evidence tended to show the following facts: The appellant operates a heat, light, and power plant in the basement of the Washington Building, in the city of Tacoma. That a fixture connected with its plant was an exhaust pipe which ran from the boiler room to near the center of the building, thence upwards, through a light well, to the roof. To accommodate certain alterations that were being made in the building, it became necessary to change this pipe to another part of the light well. One Charles Richardson was selected to do the work. The appellant's secretary called him down to the plant, showed him what was necessary to be done, and directed him to procure the necessary assistance, and move the pipe to the required position, telling him that the change must be made on the coming Sunday, as that would be the first day the fires would be out and the pipe cool enough to be handled. Richardson was a master steam fitter, maintaining a workshop in the city of Tacoma, where he kept all the necessary materials and tools to successfully carry on his trade. He also kept regularly in his employ a number of men, some of whom were master steam fitters, and others apprentices and helpers. The conversation between the appellant's secretary and Richardson occurred near the middle of the week, probably on Wednesday. After ascertaining what was to be done, Richardson sent a steam fitter by the name

of Diamond, with a couple of helpers, to the plant, directing them to do certain preliminary work found necessary to be done before the pipe could be moved. Diamond and the helpers went to the plant on Thursday, and continued working there during the remainder of the week. While working there, the tools used by them were kept by permission of the appellant in a room off the engine room towards the front of the building, called by the witness the "toolroom." This room contained a work bench, and certain tools belonging to the appellant used in the business of steam fitting, and appears to have been used by the appellant as a workshop for doing repair work. The hot-water tank mentioned in the pleadings was in this room. It was a receptacle into which was drained the water condensing from the steam within the steam pipes. The respondent, who was also a master steam fitter, was at this time in the employ of Richardson, working on a building in another part of the city. On Saturday preceding the Sunday it was expected to move the pipe, Richardson told the respondent of the fact and requested that he go down there the next morning and do the work, telling him at the same time in answer to inquiries that he would find the necessary tools and helpers there when he arrived. The respondent reached the plant shortly before 8 o'clock on Sunday morning, and found Diamond there in the engine room. They at once proceeded to change their street clothes for their working clothes, and, when they had finished, the respondent inquired of Diamond concerning the tools. Diamond told him they were in the toolroom off the engine room, and they started for them; the respondent leading. They passed through the door into the room, and had just reached the work bench when the lights in the building went out. Diamond remarked that he had a candle, and proceeded to light it with a match. He failed in his effort, and, not having another match, the respondent said he would go and get matches. He turned and took a step or two towards the door, when he stepped into the hot-water tank and received the injuries for which he sues. The tank was uncovered and unguarded, and the respondent had not been told of its being in the room by the appellant, nor did he know of its existence.

The facts as here stated seem to us to warrant a recovery, no matter what view may be taken of the relation existing between the appellant and respondent. If the respondent was an employé of the appellant, then the appellant was liable on the principle that it failed to provide him a reasonably safe place in which to work. On the other hand, if he was an employé of Richardson and Richardson was an independent contractor, it is liable to him on the principle that he was on the appellant's premises by special invitation, and appellant owed him the duty to maintain the premises in a reasonably safe

condition for the uses the invitation authorized him to make of them, which duty it failed to perform. It is true the appellant extended no express invitation to the respondent to enter upon its premises, but it contracted with Richardson to so enter, and by its contract gave him express authority to employ the respondent. But, in the absence of such express authority, the rule is that the servant of an independent contractor engaged in work for the contractor on the premises of the proprietor is deemed to be thereon by invitation of the proprietor, and the proprietor owes him the same duty to provide for his safety that it owes to the contractor himself, namely, that he will maintain the premises in a reasonably safe condition for the uses the contractor or servant is entitled to make of them, and will not expose him to hidden dangers of which he is not aware, but which are known to the employer. *Thompson on Negligence*, §§ 680, 968, 979; *John Spry Lumber Co. v. Duggan*, 80 Ill. App. 394; *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. Ed. 235. So in this case, if the respondent's version of the occurrences is to be believed, the appellant owed the respondent the duty of either covering or guarding the tank into which he fell, or giving him timely warning of its existence, and, falling in this, it rendered itself liable for the injuries received by him.

The appellant argues, however, in this connection, that the complaint proceeds upon the theory that the respondent was in the employ of the appellant, and that, unless the respondent proved that fact, the appellant was entitled to have its motion for judgment or for a directed verdict granted. But the motions of the appellant were nothing more than challenges to the sufficiency of the evidence, and the rule is that the challenge must be denied if the evidence itself makes a case against the challenging party, whether the case made falls strictly within the pleadings or not. To hold otherwise would be to deny the plaintiff the benefit of the statutes relating to amendments. It may be that in this case, owing to its somewhat peculiar circumstance, the appellant would have been entitled to have the respondent elect on which of these divergent principles he intended to rely, and compelled him to amend his complaint if he elected to rely on the principle that he was on the premises as an invitee of the appellant; but, as no such request was made, the respondent cannot be held to be in default because he did not amend.

The appellant insists, also, that since the court at its request charged the jury to the effect that they could not find for the respondent unless they found that he was an employé of the appellant at the time of the accident, and since, as it contends further, there was no evidence before the jury that he was such an employé, such charge became the law of the case, and entitled it to a verdict and judgment in the trial court, and

consequently entitles it to a reversal in this court with instructions to enter a judgment in its favor. But while it is true this court has held that an instruction, even if erroneous or wrongfully given, is binding and conclusive upon the jury, and ground for reversal if the jury refuse to heed it (*Pepperall v. City Park Transit Co.*, 15 Wash. 176, 45 Pac. 743, 46 Pac. 407; *State v. McGilvery*, 20 Wash. 240, 55 Pac. 115; *Dyer v. Middle Kittitas Irr. Dist.*, 40 Wash. 238, 82 Pac. 301), we think this question is not presented in this record. The question was not raised, as we have shown, by the motion for nonsuit, since the court was bound to deny that motion if it found that the evidence justified a recovery on another theory than that outlined in the complaint, and it is not raised by this instruction, since the appellant not only did not except to it, but expressly requested that it be given, and consequently is now estopped from asserting that there was no evidence in the record on which to base it.

But, if we were to concede that the question was properly before us, we would hesitate to declare the verdict against the evidence. Whether a person employed to do a specific piece of work is a servant of his employer or an independent contractor is often a question difficult of solution, and frequently depends upon the answer given to the question: What is the proper conclusion to be drawn from the facts proven? Where the proper conclusion is doubtful, or where different minds may legitimately draw different conclusions from the facts proven, the question whether such person is a servant of the hirer or an independent contractor is for the jury, and the trial court is in duty bound to submit the question to them. It seems to us that this record presents such a state of facts. Without going into an analysis of the evidence, we think the jury may well have found that Richardson was a mere employé of the appellant, and authorized by it to employ the respondent on its behalf. This being true, there is no error in the court's charge, even under the appellant's conception of the state of the record.

On the question of the excessiveness of the verdict, we think the appellant has cause to complain. While the respondent was badly burned and suffered severely for a time therefrom, we think it not of such a permanent character as to warrant the amount awarded him. The judgment should not exceed \$1,700.

If, therefore, the respondent will remit from the judgment within 30 days after the remittitur reaches the trial court the sum of \$1,000, the judgment will stand affirmed as to the remainder (\$1,700) and costs taxed in that court. If, however, he fails to so remit within the 30 days, the judgment will be reversed and a new trial awarded. The appellant will recover costs in this court.

HADLEY, C. J., and CROW and RUDKIN, JJ., concur.

(47 Wash. 37)

MUIR v. BECK et al.

(Supreme Court of Washington. Sept. 5, 1907.)

SPECIFIC PERFORMANCE—PERFORMANCE OF CONDITIONS—SUFFICIENCY OF EVIDENCE.

Evidence in an action for specific performance of an agreement to convey lots to plaintiff, as consideration for his selling lots for defendants, held sufficient to sustain a finding that he had sold lots for defendants for the amount and within the time stipulated by their contract as a condition to his having the conveyance.

Appeal from Superior Court, King County; George C. Hatch, Judge.

Action by B. L. Muir against E. F. Beck and another. Judgment for plaintiff. Defendants appeal. Affirmed.

Gray & Stern and James A. Snoddy, for appellants. Vince. H. Faben, for respondent.

CROW, J. On or about March 6, 1905, the defendants E. F. Beck and Mary A. Beck, his wife, who had recently purchased block 72, Burke's Second addition to Seattle, for \$3,600, entered into a written contract with the plaintiff, B. L. Muir, which, in substance, provided that the property should be subdivided into lots, to be sold by the plaintiff, Muir, at not less than agreed minimum prices; that abstracts of title were to be furnished by the defendants Beck and wife at a cost of not more than \$5 per lot; that the expense of subdivision, surveying, platting, and clearing, not to exceed \$45, should also be paid by Beck and wife; that the plaintiff, Muir, was to receive a commission of 5 per cent. on all sales made by him; that, if within six months plaintiff had sold lots for cash and on time to the total value of \$5,500 over and above his commission, then all lots remaining unsold were to be conveyed to him by the defendants Beck and wife as additional compensation for his services. The plaintiff, claiming to have sold the required number of lots, commenced this action to compel the defendants to convey to him all lots not sold, and for an accounting for the proceeds of certain lots which he alleged the defendants had wrongfully sold after the expiration of the six months and after the plaintiff's completion of the contract. The trial court made findings, and entered a decree in favor of the plaintiff. The defendants have appealed.

Several assignments of error are made, but the appellant's principal contention is that sufficient lots were not sold within the six months to net them \$5,500 over and above respondent's commission. The trial court found that such sales had been made. After considering all the evidence and making careful computations based thereon, we conclude that this finding is correct. The substantial dispute between the parties was whether a certain sale of three lots made by the respondent, Muir, to one Choput, was for \$1,300 as contended by respondent, or only \$1,150, as

contended by appellant. The court correctly found it to have been for \$1,300. In fact, the appellant E. F. Beck admitted that he had executed a contract of sale, and afterwards a deed, to Choput expressing \$1,300 consideration. The cost of grading \$45, and the cost of abstracts \$96, being a total of \$141, should have been paid by appellants, but were, in fact, paid by respondent. Respondent is therefore entitled to a credit therefor against the \$5,500. This would leave \$5,351 as the net sum due appellants under the contract for sales made within the six months. Appellant's testimony caused the trial court to interrupt him on two or three occasions, and correctly suggest that his statements resolved the issues of fact in favor of respondent. Thereupon appellant would always urge some mistake or misunderstanding. He was granted time to make final computations, and, after doing so testified, without making any detailed statement, that he had received in money and time contracts, for all sales made by respondent, within the six months, the total sum of \$5,270; but he never admitted having received the extra \$150 on the Choput sale, which he did in fact receive. If this \$150, the \$45 for grading, and \$96 for abstracts be added to the \$5,270 admitted by him, there would be a total of \$5,561 to be charged against him on sales made by respondent within six months from the date of the contract, which more than constituted performance by respondent.

Other assignments of error are made, such as wrongful exclusion of evidence, incorrect amount of recovery, and improper form of judgment, all of which, after careful consideration, we conclude are without merit. Substantial justice has been done by the final decree entered, which is accordingly affirmed.

HADLEY, O. J., and MOUNT, FULLERTON, and RUDKIN, JJ., concur.

(47 Wash. 96)

STERN v. DANIEL.

(Supreme Court of Washington. Sept. 6, 1907.)

1. EVIDENCE—LETTERS.

In an action for attorney's services, letters written by defendant to plaintiff which showed that defendant was engaged in leasing buildings for immoral purposes were admissible, though they reflected on defendant's business character, to show that plaintiff rendered services to defendant in the way of advice and consultation in regard thereto, for which plaintiff was entitled to recover.

2. WITNESSES—PRIVILEGED COMMUNICATIONS.

Such letters, though privileged as between either plaintiff or defendant and third parties, were not so as between themselves.

Appeal from Superior Court, Spokane County; Miles Poindexter, Judge.

Action by Samuel R. Stern against R. T. Daniel. From a judgment for plaintiff, defendant appeals. Affirmed.

See 88 Pac. 1116.

A. E. Barnes and Geo. A. Latimer, for appellant. Horace Kimball and Samuel R. Stern, for respondent.

MOUNT, J. Respondent brought this action to recover from appellant for the value of services rendered as an attorney and counselor for appellant between July 1, 1903, and January 1, 1906, and also for disbursements alleged to have been made for appellant on account of certain cases then pending in court. The trial was to a jury, and resulted in a verdict in favor of respondent in the sum of \$1,000. The court denied a motion for a new trial, and entered a judgment on the verdict in favor of respondent in the sum of \$1,000. The defendant appeals.

The complaint alleged the value of the services to be the sum of \$2,305, and the amount of disbursements to be \$795.32, making a total of \$3,100.32. On this total the complaint alleged payments by the respondent amounting to \$1,422.25. The answer admitted the employment of the respondent by the appellant, but denied that the services performed by the respondent were of the value alleged in the complaint, and admitted the payment of \$1,422.25, which it is alleged fully paid respondent for his services and disbursements. The answer also alleged three affirmative defenses, substantially as follows: (1) That respondent needlessly expended the sum of \$490.92 in the defense of *Wright v. Daniel*, which the respondent should have known was a useless waste of money; (2) that in the case of *Wright v. Daniel*, owing to the unskillful manner in which respondent defended said case, it became necessary for appellant to employ other counsel at an expense of \$350, to assist respondent therein; (3) that, in the case known as the "Pattee Case," appellant was also required to employ other counsel at an expense of \$400, on account of the unskillfulness of respondent. Because there was no evidence to support these three affirmative defenses, they were each taken from the consideration of the jury. It is claimed by the appellant that the court erred in not granting a new trial, because (1) of insufficiency of the evidence to justify the verdict; (2) the jury was prejudiced against the appellant; (3) the fees were excessive upon their face, and because certain exhibits were erroneously allowed in evidence. A cursory reading of the plaintiff's testimony discloses that there is ample evidence to justify the verdict, if the jury believed it, which they evidently did, and we find nothing in the amount of the verdict to justify the contention that the jury were prejudiced against the appellant.

The complaint prayed for a balance of \$1,678. There was evidence to support the judgment for this amount. But the jury found for but \$1,000, which was, in our opinion, a conservative finding. There was evidence in the case which may have had a tendency of prejudice against the appellant. For example,

letters which were written to respondent by the appellant were introduced in evidence. These letters showed that appellant was engaged in leasing buildings for immoral purposes. But these letters were admissible to show that respondent had rendered services to the appellant in the way of advice and consultation in regard thereto, for which respondent was entitled to recover. The mere fact that these letters reflected upon the business or character of appellant was not sufficient reason for excluding them. If they were prejudicial on this account, that prejudice is not manifest in the verdict rendered. It is also claimed that these letters were privileged, and that the court erroneously admitted them. They would have been privileged, no doubt, as between either of the parties to this suit and third parties; but as between the attorney and client the rule of privilege will not be enforced where the client charges mismanagement of his cause by the attorney, as was the case here, and where it would be a manifest injustice to allow the client to take advantage of the rule of privilege to the prejudice of his attorney, or when it would be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights. 23 Am. & Eng. Enc. of Law (2d Ed.) p. 79; *Mitchell v. Bromberger*, 2 Nev. 345, 90 Am. Dec. 550. It was therefore not error to allow these letters in evidence.

It is also argued that the court erred in permitting certain hypothetical questions proposed to attorneys as witnesses upon the question of the amount of reasonable fees. The questions as finally permitted were, we think, in accordance with the plaintiff's evidence and supported by it, and therefore were not erroneous.

We find no reversible error in the record. The judgment must therefore be affirmed.

HADLEY, C. J., and CROW, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

GRANT et al. v. SPOKANE TRACTION CO.
(Supreme Court of Washington. Sept. 6, 1907.)

1. TRIAL — FINDINGS INCONSISTENT WITH GENERAL VERDICT.

A complaint in an action for personal injuries by a passenger against a street railway company alleged that while the car was motionless, and plaintiff was alighting therefrom, and about the time she placed one foot on the pavement, the other being on the step of the car, the car was negligently started. The jury in a special verdict found that, when the car started, plaintiff was standing with both feet on the steps of the car. *Held*, that the special verdict did not negative the general verdict that the car was started while plaintiff was alighting, which was the gist of the negligence charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 857.]

2. SAME—CONSTRUCTION OF SPECIAL VERDICT.
Where a special verdict is susceptible of two constructions, one of which will support the

general verdict and the other will not, that construction will be given to the special verdict which will support the general verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 872.]

3. WITNESSES—CROSS-EXAMINATION.

Where, in an action for personal injuries by a passenger against a street railway company, it appeared on the direct examination of plaintiff's husband that he was commonly called "doctor," and that, when the conductor asked him his name, he handed him a handbill, containing his name, picture, location of his office, and advertisement of his methods of treatment, cross-examination was properly permitted as to whether he was a licensed practitioner, whether he prescribed for his wife, and the handbill was properly admitted in evidence, the jury being entitled to know who the witness was and the character of his business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1106-1108.]

Appeal from Superior Court, Spokane County; Mitchell Gilliam, Judge.

Action by Nellie M. Grant and another against the Spokane Traction Company. From a judgment for plaintiff, both parties appeal. Affirmed.

Graves, Kizer & Graves, for appellant.
Danson & Williams, for respondents.

MOUNT, J. Action for personal injuries. The plaintiff Nellie M. Grant was injured while alighting from a street car operated by defendant. The cause was tried to a jury. A general verdict for \$1,700 was returned in plaintiffs' favor. Special interrogatories were submitted to the jury at defendant's request, and were answered by the jury as follows: "(1) Was the plaintiff Nellie M. Grant standing with both feet on the steps of the car when it started? Ans. Yes. (2) If so, did she attempt to get off, or did her husband, B. M. Grant, pull her off after the car had started, and while it was in motion? Ans. She attempted to get off, and was assisted by her husband. (3) Was the plaintiff Nellie M. Grant standing with one foot on the step and one foot on the pavement and in the act of getting off when the car started? Ans. No." Thereafter the defendant moved the court for a judgment notwithstanding the general verdict, and the plaintiffs moved for a new trial. Both motions were denied, and a judgment entered upon the general verdict. Both parties to this action have appealed.

The defendant contends that the special findings are inconsistent with the general verdict, and therefore control it, and plaintiffs contend that the court erred in permitting certain cross-examination of the plaintiff B. M. Grant while he was a witness in behalf of plaintiffs. The complainant alleged that "the defendant's said car was stopped by said defendant for the purpose of permitting plaintiff Nellie M. Grant and other passengers to alight from said car, and thereupon plaintiff Nellie M. Grant pro-

ceeded by invitation of said defendant to alight from said car while it was motionless, and while so in the act of alighting from said car, and at or about the time said plaintiff placed one foot upon the street, while the other foot was upon the step of said car, said defendant carelessly and negligently started said car, and dragged said plaintiff Nellie M. Grant for a short distance, finally throwing her violently to the ground," thereby injuring her. Plaintiffs' evidence substantially conformed to these allegations; but the jury found by the special findings above quoted that at the time the car started the plaintiff Mrs. Grant was standing with both feet on the steps of the car, and one foot was not on the steps and the other on the pavement. Defendant contends upon these special findings that the jury found against the case alleged in the complaint, but permitted recovery upon another state of facts. A number of cases are cited to the effect that a plaintiff cannot allege one state of facts and recover upon another, and this contention thus broadly stated is no doubt the rule (*Albin v. Seattle Electric Company*, 40 Wash. 51, 82 Pac. 145); but the negligence alleged here is that the car was motionless, and that the defendant carelessly started the car while plaintiff was in the act of alighting therefrom, "and at or about the time said plaintiff had placed one foot upon the street, while the other foot was upon the steps of said car." This last clause served to fix the time and position of the plaintiff when the car was started. It did not fix either exactly, but only at or about a certain time. The gist of the negligence was in starting the car while plaintiff was in the act of alighting. If plaintiff was in the act of alighting when the car started, and was injured thereby, without fault on her part, she was entitled to recover. We understand that defendant concedes this to be the rule. It might be extremely difficult for any one to know to a certainty whether both feet were on the steps, or one was without support, in space, between the step and the pavement, or one was on the step and the other on the pavement upon an occasion like the one in question, where the car was started while the passenger was in the act of alighting. The details which fix the exact moment or position of a person under such circumstances as existed in this case are usually arrived at by a process of reasoning rather than by memory, so that a person may easily be mistaken as to the exact position at a fixed time. No doubt in this case the starting of the car, the plaintiff standing with both feet upon the steps and with one foot on the step of the car, while the other was in space, and one foot upon the step while the other was upon the pavement, all occurred simultaneously, or so nearly simultaneously that the difference in time was imperceptible. As sug-

gested above, the statement of one of these positions by the pleader was for the purpose of fixing the time at which the car was started. If the car was started at either one of the times, the negligence was the same, because all of the acts necessarily took place almost simultaneously while the plaintiff was in the act of alighting. The careless starting of the car while plaintiff was in the act of alighting was the negligence both alleged and proved. We are of the opinion that the finding of the jury that the plaintiff was standing with both feet on the steps of the car when it started did not negative the general verdict to the effect that the car was started while plaintiff was in the act of alighting from the car, and therefore does not change the cause of action. There was no finding that the plaintiff was not in the act of alighting from the car when it was started. The most that can be claimed for the special findings is that they are susceptible of that construction. "Where a special verdict is susceptible of two constructions, one of which will support the general verdict and the other will not, that construction will be given the special verdict which will support the general verdict." *McCorkle v. Mallory*, 30 Wash. 632, 71 Pac. 186. We think the court did not err in refusing to render judgment for defendant notwithstanding the general verdict.

When the plaintiff B. M. Grant was a witness, it developed upon his direct examination that he was commonly called "doctor." He also testified that, when his wife was injured, the conductor of the car asked him his name, and, in reply thereto, the witness handed the conductor a small handbill, containing his name, picture, location of his office, and an advertisement of his methods of treatment. On cross-examination counsel for defendant was permitted to ask the witness if he was a licensed practitioner, and if he had prescribed for his wife; and counsel for defendant was also permitted to introduce the handbill above mentioned in evidence, and question the witness concerning the same. We see no impropriety in this cross-examination. The jury were entitled to know who the witness was and the character of his business. Plaintiff contends that the object of the examination was to prejudice the witness before the jury; but we find nothing either in the examination or in the substance of the evidence in the record to justify a reversal upon this ground alone. There was certainly no abuse of discretion on the part of the trial court in respect to the cross-examination of this witness.

The judgment is therefore affirmed, without costs to either party.

HADLEY, C. J., and CROW, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

(47 Wash. 146)

COX v. CAPITOL BOX CO.

(Supreme Court of Washington. Sept. 7, 1907.)

1. MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE.

Whether an employé injured while operating a rip saw was guilty of contributory negligence *held*, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1142.]

2. SAME — ASSUMPTION OF RISK — QUESTION FOR JURY.

Whether an employé injured while operating a rip saw, in consequence of his hand coming in contact therewith, on a co-employé jerking away the lumber attempted to be sawed, assumed the risk, *held*, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1063-1088.]

3. SAME — NEGLIGENCE OF MASTER — QUESTION FOR JURY.

In an action by an employé for injuries received, *held*, that the question of the negligence of the employer in placing the co-employé, who was 16 years of age and inexperienced, at work at the place, or in neglecting to properly instruct his co-employé how to do the work, or in failing to warn both the employé and the co-employé of the incidental danger, was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1044-1050.]

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by James D. Cox, a minor, by Mrs. Kate Alden, guardian ad litem, against the Capitol Box Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. S. Eskridge and Philip Tindall, for appellant. Govnor Teats, for respondent.

HADLEY, C. J. This is an action to recover damages for personal injuries. There was testimony to support the following facts: The defendant is a manufacturer of boxes, and among other things it makes grape boxes from veneer. In the process of making the grape boxes, it cuts two ventilators in each end of the veneer with a rip saw. The veneer is cut into strips from 16 to 18 inches in length, and of proper width for making into boxes. Several hundred of these strips are then tied into a bundle, and, with the strips standing on end, the bundle is from 16 to 18 inches high and of equal or greater length across the table. After they are tied up, the bundles are taken to a rip saw table for the purpose of cutting the ventilators. The guide of the rip saw table is placed at the proper distance from the saw, and, while the bundle stands upon the ends of the strips, it is pushed by the operator across the saw, which cuts the ventilators. All guards are removed from the saw, and it is left fully exposed; this being necessary in order to cut the slits for ventilating purposes. The saw is exposed above the table about an inch and a half or two inches, which is the depth of the slits cut in the veneer. Two persons are required to handle the bundles

during the operation of sawing the ventilators. One stands at the front of the saw, and pushes the bundle along over it. The other stands in the rear, receives the bundle as it comes over the saw, and then passes it back to the one in front, who runs it over the saw again to cut another row of ventilating slits. The saw revolves toward the one in front, who adjusts the bundle to the guide, and then pushes it over the saw, leaning forward as the bundle moves from him across the table. As he pushes, both hands are upon the bundle, and his face is downward until the top of the saw has cleared the bundle, when the other party, who is called an "off-bearer," takes it as aforesaid. At this juncture the operator's right hand is immediately over the saw. As the saw emerges from the edge of the bundle next to the operator, it begins to throw dust, and, to protect his eyes, he pulls his hat down over them, and this obstructs his view of the off-bearer. Considerable force is required to push the bundles over the saw, inasmuch as they range in weight from 30 to 60 pounds. Care is required of the off-bearer in taking the bundles away from the saw. If the bundle is jerked from the operator while he is in the position above described, his hand is liable to fall down upon the saw. The plaintiff had worked now and then around machinery for several years, but had never done the kind of work above described; he being but 18 years of age at the time of the accident. On the day of the accident a boy by the name of Griffin applied to the defendant for work. He was about 16 years of age and weighed about 100 pounds. He had never before worked in a mill. During the forenoon of that day Griffin worked taking away material from an ordinary ripsaw which the plaintiff was running. The work was simple, as he merely carried away the stuff as it was ripped. During that time he now and then put sticks on top of the saw which were thrown toward the plaintiff until plaintiff asked him to stop it; Griffin apparently not realizing the danger that might result from such amusement. During the afternoon of that day, the foreman of that department went to the plaintiff, and ordered him to operate the veneer ventilating saw heretofore described. The plaintiff objected, saying he had never done that work, and did not understand it. The foreman replied that they had a big order, and that the plaintiff must take up that work. At the same time he ordered the boy Griffin to act as off-bearer for the plaintiff; the duties being as heretofore described. The foreman said: "You want to be careful, and don't get your mits in here. If you do, you are liable to get them whacked off. I got a couple of fingers cut off ventilating this stuff." He also said to the plaintiff to be careful, and he ran one bundle through the saw. It was testified, however, that he did not show the boy Griffin how his

work should be done, or otherwise warn or instruct him. The boys proceeded with the work until about half past 4 o'clock in the afternoon, when the plaintiff was passing a bundle over the saw. It had almost reached the point where the plaintiff was to let go of it, his hat being pulled over his eyes to protect them from the dust, when Griffin quickly jerked the bundle away, and the plaintiff's hand fell upon the saw, whereby it was severely cut and torn, leaving permanent injuries. The plaintiff looked up, and Griffin still held the bundle. Plaintiff looked at his hand, and made some exclamation, when Griffin became frightened and ran away. There is really but little dispute about the foregoing facts, and, in any event, there is sufficient evidence to sustain all that is above stated. The cause was tried before a jury, and a verdict was returned for plaintiff in the sum of \$2,500. Judgment was entered for that sum, defendant's motion for new trial was denied, and it has appealed.

The errors assigned are that the court refused to take the case from the jury at the close of respondent's evidence and again at the close of all the evidence; also that appellant's motions for judgment notwithstanding the verdict and for new trial were denied. These assignments all involve the sufficiency of the evidence to establish the liability of appellant. Appellant by its answer not only denied negligence on its own part, but pleaded contributory negligence on respondent's part, and also alleged that the accident was due to the negligence of a fellow servant, and that respondent assumed the risk. The question of contributory negligence under such evidence as was submitted here was clearly for the jury, as has been repeatedly held by this court. Perhaps in an ordinary case the court might have concluded under this evidence that the proximate cause of the accident and injury was the negligence of the fellow servant, and that it was therefore a mere question of law for the court, and not one involving facts for the jury. The circumstances shown in evidence were, however, not usual. Here was a dangerous saw, revolving at great speed, in an exposed position. The exposure seems to have been necessary in order to accomplish the work as designed. Common experience would seem to suggest that about such a dangerous machine and situation only thoughtful persons of mature and deliberate judgment should be permitted to work. In any event, if young persons without maturity of mind and without experience are employed, it follows with equal force that they should be carefully shown how the work should be done, and fully warned against the dangers of failing to follow instructions. Here was a young man 18 years of age, who had been employed at other work in the factory. The foreman ordered him to forthwith take charge of this ventilating saw. He remon-

strated on the ground of lack of experience, but he was commanded to proceed at once with the work. A boy 16 years of age, who had never worked in a mill before that day, was ordered to take the position at the other side of the saw, and discharge the duties heretofore described. This boy was not instructed as to his duties, and was not warned of the danger that might result to his working companion under such circumstances as have been detailed. That he was not a boy of deliberate or mature mind is not only indicated by his youth, but also by other facts. In the forenoon of that day he, for amusement, threw sticks upon the rip saw to see them whirled away. These were thrown near the face of respondent, who narrowly escaped injury therefrom. Again, when respondent was injured, the young boy became alarmed and ran away. Such facts indicate extreme boyishness and lack of judgment or experience sufficient for the responsible position he was directed to fill. If it be said that appellant had not actual knowledge of these boyish traits, it may also be said that such traits may reasonably be expected in all boys of that age, unless by actual experience certain boys may have demonstrated more serious, thoughtful, and mature judgment. Perhaps a person older than respondent might have refused to work with such an inexperienced boy at such a place, but respondent was himself a mere boy. He had not done this work before and perhaps did not realize the danger of such a situation as arose. Moreover, he was required by his employer to act quickly and without time for deliberation. It should not, therefore, be said as a matter of law that he assumed the risk, and, under such circumstances, we think it was properly for the jury to determine whether appellant was negligent in placing so young and inexperienced a person at work at that place, whether it neglected to properly instruct him how to safely do the work, or to warn both him and the respondent of the incidental danger; and also whether the injuries of the respondent were primarily traceable to such negligence. The court submitted these questions to the jury, and the verdict established the negligence of appellant.

Neither party has cited in the briefs any authorities touching any question involved. The facts are such as lead us into the realm of fundamental principles which operate, or should operate, between men. Legal precedents are not necessary where the consciences of ordinary and reasonable minds universally accept certain principles as fundamentally right and just. Such minds intuitively believe that if an employer assumes to employ children or persons of extreme youth and inexperience about dangerous machinery, even if the act of employment in a given case is not itself negligence, it is at least negligence for the employer not to first inform himself

as to the experience and capability of the youth to cope with the particular situation, or to fail to properly and carefully instruct him about his work, or to warn him against impending danger to himself and others. In *Kirby v. Wheeler-Osgood Co.*, 42 Wash. 610, 85 Pac. 62, this court, however, discussed to some extent the rules for determining whether an employer has been negligent in the employment of children and young persons. Within what is there said, it was not for the court under the facts in this case to determine as a matter of law that appellant was not negligent. Under instructions the court properly submitted all questions of negligence to the jury, and, the jury having found that appellant was negligent in the premises, the verdict should be sustained for the foregoing reasons.

The judgment is affirmed.

CROW, MOUNT, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

SMITH v. CAPITOL BOX CO.

(Supreme Court of Washington. Sept. 7, 1907.)

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by Joseph Smith, a minor, by his guardian ad litem, Viola Smith, against the Capitol Box Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. S. Eskridge and Philip Tindall, for appellant. Govnor Teats, for respondent.

HADLEY, C. J. This is an action to recover damages for personal injuries. The facts are in essential particulars the same as those involved in cause No. 6,761, *Cox v. Capitol Box Co.* (decided by this court Sept. 7, 1907) 91 Pac. 555. The accident occurred in the same mill, and the plaintiff here was engaged in doing the same kind of work as was the plaintiff in the case cited. For a description of the plaintiff's situation as an operator of the rip saw cutting ventilating slits in the bundles of veneer for use in grape boxes, we refer to the statement of the facts in the opinion in the cause mentioned. In the case at bar the plaintiff, who was operating the ventilating saw, was at the time about 16 years of age, and his off-bearer, a boy by the name of Haviland, was somewhat older, but at the time of the accident he was not yet 17 years of age. Haviland quickly jerked the bundle of veneer away just as it was about to clear the saw, and the plaintiff's hand dropped from the bundle against which it was pressing and fell upon the saw, whereby it was severely cut and injured. The plaintiff had during his employment been most of the time engaged in other work, and up to the time he was hurt he had operated the ventilating saw perhaps as much as one whole day. He and Haviland had been work-

ing together at the saw but a short time when the accident happened. There was evidence that Haviland was of a negligent nature; that he was indolent, and that he worked in a lubberly, careless way, that he was generally reputed among the employes of the mill as being incompetent and lazy, and as taking no interest in his work. He had worked in the mill about a month, and the foreman daily passed and observed, or could have observed, his manner and method of working. The cause was submitted to a jury under issues and instructions similar to those in the case above cited, with the result that a verdict was returned for plaintiff in the sum of \$1,000. Judgment having been entered for said sum, the plaintiff has appealed.

We see no reason for distinguishing this case from that of *Cox v. Capitol Box Co.*, supra, unless it be in the way of finding additional elements of negligence which possibly make this a stronger case against appellant. There is no necessity for reviewing these in detail further than as they are suggested above. The parallel facts of the two cases we think are sufficient of themselves to lead to the same result, and for the reasons stated in the other opinion the judgment in this cause is affirmed.

CROW, MOUNT, FULLERTON, RUDKIN,
and DUNBAR, JJ., concur.

GAGE v. SPRINGSTON LUMBER CO.

(Supreme Court of Washington. Sept. 7, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—CARE REQUIRED.

In an action for injuries to a minor servant, an instruction that if both plaintiff and defendant were negligent, and plaintiff's negligence contributed proximately to the injury, plaintiff could not recover, was objectionable for failure to define the standard of ordinary care which would constitute negligence on plaintiff's part precluding a recovery.

2. SAME.

In an action for injuries to a minor servant, an instruction that if defendant gave plaintiff reasonable instructions as to the use of tools and machines, and plaintiff did not observe such instructions and so received an injury in consequence, defendant would not be liable therefor, was erroneous for failure to require the jury, in determining what constituted reasonable instructions to plaintiff to consider all the circumstances of the case, particularly the youth of plaintiff and the extent of his experience.

3. SAME—CONTRIBUTORY NEGLIGENCE.

An instruction that if plaintiff, a minor servant, did any act which contributed proximately to his injury, he could not recover—that is, if he did anything which contributed "in any way to the injury," defendant was not liable though negligent—was erroneous, as requiring of plaintiff more than the exercise of ordinary care.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Edgar Gage, a minor, by J. I. Seward as guardian ad litem, against the Springston Lumber Company. From a judg-

ment in favor of defendant, plaintiff appeals. Reversed and remanded.

Thos. H. Wilson, John C. Kleber, and Robertson, Miller & Rosenhaupt, for appellant. Danson & Williams and Peacock & Ludden, for respondent.

HADLEY, C. J. This is an action to recover damages for personal injuries. The defendant operated a sawmill at Springston, Idaho, and the plaintiff was at the time of the accident in the defendant's employ. The plaintiff was then a boy 15 years of age. He was when injured operating a drag or cut-off saw for cutting slabs into shorter lengths. As the slabs were cut from the logs by the main saw of the mill, they were carried by means of live rolls to a position in front of the cut-off saw. This saw was suspended in a swinging frame, and operated by means of an overhead shaft, with accompanying pulleys and belt. When the slab was in proper position, the operator of the saw pulled the saw frame toward him by a handle attached for that purpose. This dragged the saw toward the operator, and, by its circular motion, it cut its way through the slab; the course described by the saw being that of the arc of a circle. As the saw emerged from the slab, its moving teeth came above the table on which the slab rested, and revolved in front of the operator. While the plaintiff was thus operating the saw, it was drawn forward so as to strike his right arm, entirely severing a portion of the arm from his body. The complaint charged negligence on the part of defendant in a number of particulars relating to the construction and method of operating the saw, and also charged that defendant neglected to instruct the plaintiff as to the dangers and hazards of said place and the defects in the saw and appliances. It was also alleged that these were not obvious to the mind of the plaintiff, and that he neither knew nor appreciated the dangers. The defendant denied that it was negligent, and averred that the plaintiff's injuries were due to his own contributory negligence, and also that, with knowledge of the danger, he voluntarily assumed the risk thereof. The cause was tried before a jury, and a verdict was returned for the defendant. Plaintiff's motion for new trial was overruled, and judgment was entered dismissing the action. The plaintiff has appealed from the judgment.

The errors assigned all relate to instructions which were given to the jury and to the refusal to give others requested by appellant. The respondent argues that, even if errors were committed in giving the instructions, they became harmless in view of the verdict, for the reason that it was entitled to have the jury instructed to return a verdict in its favor. We do not think the evidence warranted such an instruction in respondent's favor. Under the testimony, all questions of negligence or contributory negli-

gence were for the jury, and each party was entitled to have those questions submitted to the jury by correct instructions, fully and clearly defining the law applicable to the facts as claimed by him. Somewhat extensive instructions were given, and to set forth all the criticised instructions in *hæc verba* with a discussion thereof would require more space than the importance of the subject warrants. The respondent urges that, when the instructions are read as a whole, the objections to segregated parts thereof are overcome. In some respects such would doubtless be true in some cases; but, under the particular facts of this case, we think that, even when the instructions are all considered as a whole, there are some parts that may have been confusing and misleading to the jury to the possible prejudice of appellant. Without undertaking to take up in detail all the subjects assigned as error, we will refer to certain ones only. The following instruction was given: "Or, if you should find that both the plaintiff and defendant were negligent, and the plaintiff's negligence contributed proximately to the happening of the injury, then the plaintiff cannot recover, and your verdict must be for the defendant." It will be seen that no reference is made in this instruction to the standard of reasonable and ordinary care as being all that was required of appellant. The instruction might easily have been understood by the jury to mean that, without regard to any question of care, if appellant's conduct in any way contributed to the injury, it became negligence and precluded his recovery. The rule is, however, that, to constitute contributory negligence, there must be want of ordinary care, having in view all the circumstances of the case and such lack of ordinary care must contribute to the injury as an efficient cause thereof. 7 Am. & Eng. Enc. of Law (2d Ed.) 375, 380. A part of the text upon the last cited page, supported in the footnote by the citation of many authorities, is as follows: "Nor will the fact that the person injured proximately contributed to his own injury by his conduct constitute contributory negligence, if he was not guilty of a want of ordinary care." The following appears in the instructions: "But if the defendant should give the plaintiff reasonable instructions as to the use of tools and machines, and the plaintiff should not observe such instructions, and should receive an injury in consequence, the defendant would not be liable therefor and the plaintiff could not recover." The above fails to call the attention of the jury to the fact that in determining what were reasonable instructions to appellant they should take into consideration all the circumstances, particularly the boyhood of appellant and the extent and character of his experience; that to make such instructions reasonable they must have been such as would have been understood by an ordinary boy of appellant's age

and experience, leading such an one to appreciate the dangers of the situation. It is true in another instruction reference is made to the age, experience, and capacity of appellant, and that respondent should have taken these into consideration when instructing appellant; but no standard is specified for such instructions, except that that degree of care should be exercised which an ordinarily prudent person would exercise under like circumstances. We think, in view of the boyhood of appellant and of his necessarily limited experience at the age of 15 years, that he was entitled to more specific statement of the duties resting upon the employer of children than the mere general statement applicable to the ordinary cases of adult persons. "Complaint is further made of a series of instructions, all to the effect that the conduct of the deceased, who was a girl of 13, was to be measured by what 'an ordinarily cautious, careful, and prudent person would have done under the same circumstances.' It is said that herein no allowance is made for the fact that the deceased was a minor child, and that the jury might well have been misled into believing that the care, caution, and prudence required of her were the care, caution, and prudence which the ordinary adult person would have exercised under the same circumstances. Of course, as was said in *Studer v. S. P. Co.*, 121 Cal. 400, 53 Pac. 942, 66 Am. St. Rep. 39: 'The same act which would be negligence in an adult may not be such if done by a child; but a child is required to exercise the same degree of care that would be expected from children of his age, or which children of his age ordinarily exercise. * * * Children, as well as adults, should use the prudence and discretion which persons of their years ordinarily have. The law imposes upon minors the duty of giving such attention to their surroundings and care to avoid dangers as may fairly and reasonably be expected from persons of their age and capacity.' In this regard, also, to avoid the possibility of misunderstandings, the instructions could profitably be made more explicit." *Quill v. Southern Pacific Co.*, 73 Pac. 991, 140 Cal. 268. With respect to the difference between the general rules applicable in cases of adults and children, see, also, *Kirby v. Wheeler-Osgood Company*, 42 Wash. 610, 85 Pac. 62.

The following instruction was given: "It is also the law that the plaintiff assumes all known dangers in and about his duties, and if there were defects or dangers in and about the machinery plaintiff was working at, and the plaintiff knew, or in the exercise of ordinary care should have known, of such defects and dangers, then he assumes all risk of danger from such defects, and if he is injured thereby the defendant would not be liable and the plaintiff cannot recover; and where the defects, if any, are known and apparent, the plaintiff assumes all danger there-

from, whether he has been instructed as to such defects or not." In the above instruction no reference is made to the boyhood of appellant, or to the rule as to ordinary care in such a case. The jury were left to infer that the same test for determining ordinary care applies in the case of instructing the child as in that of an adult. In this respect the instruction was defective. "In such cases, while a minor employé is held to have assumed the risks of the employment, yet it is only such risks as one of his age, discretion, and experience can be said to have comprehended that he will be charged with having assumed. And he may recover for injuries resulting from dangers that, by reason of youth, immaturity, and inexperience, he was unable to fully apprehend, and the perils of which had not been explained to him." 7 Am. & Eng. Enc. of Law, pp. 407, 408. The following instruction was given: "If the plaintiff himself did any act which contributed proximately to his injury, then he cannot recover, and the defendant would not be liable, even if the defendant was negligent in any one or more of the respects alleged in the complaint, and which caused the injury. In other words, where the plaintiff himself did anything which contributed in any way to the injury as I have heretofore stated, then he cannot recover even if the defendant was negligent." The above instruction squarely stated to the jury that, if the appellant did "anything" which "in any way" contributed to his injury, he could not recover, and that, too, without regard to how much or what degree of care he may have exercised under all the circumstances. The instruction was erroneous within the decision in *Atherton v. Tacoma Railway & Power Co.*, 30 Wash. 395, 71 Pac. 39, and cases there cited. The rule as stated in the instruction requires that appellant, in order to entitle him to recover, should have been absolutely free from any negligence whatever. By the opinion cited and other decisions of this court there mentioned, it is established in this state that all that the law requires in such cases is the exercise of ordinary care under the circumstances surrounding one, and that he may exercise such care although he may be slightly negligent in the broadest sense of the term.

Other assignments are made relating to the instructions given and requests refused; but we believe further discussion is not necessary, in view of what has been hereinbefore said. The judgment is therefore reversed, and the cause remanded, with instructions to grant a new trial.

CROW, MOUNT, and DUNBAR, JJ., concur.

We think the last instruction quoted erroneous, and for that reason concur in the result: FULLERTON and RUDKIN, JJ.

(47 Wash. 87)

LA BEE v. SULTAN LOGGING CO.

(Supreme Court of Washington. Sept. 5, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE—EVIDENCE.

In an action for injuries to servant, evidence held to show a prima facie case of defendant's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 954, 977.]

2. SAME—PLEADING—ALLEGATION OF NEGLIGENCE.

Where, in an action for injuries to a servant, the complaint charged negligence in furnishing plaintiff with a defective cable attached to a gin pole used in loading logs onto cars, the further allegation that defendant failed to provide plaintiff with a safe place to work was a deduction from the specific acts of negligence charged, and did not widen the scope of the inquiry, so as to authorize evidence of negligence not covered by the specific allegation.

Root, J., dissenting.

Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Action by W. C. La Bee against the Sultan Logging Company. From an order granting plaintiff a new trial, defendant appeals. Affirmed.

Graves, Palmer & Murphy and O. H. Winders, for appellant. Roney & Loveless and Hathaway & Alston, for respondent.

FULLERTON, J. This is an action for personal injuries. At the time he received the injury for which he sues, the respondent was in the employ of the appellant, working with a gang of men engaged in loading saw logs onto railroad cars. In loading the logs the men had the assistance of mechanical appliances. These consisted of a large heavy pole, some 40 feet in length, known in the vernacular as a "gin pole," set with the heavy end in the ground by the side of the railroad track, and slanted over the track, so that the upper end reached a point immediately above its center. The pole was stayed with three steel cables; one end of each of them being fastened to the top of the pole and the other carried back and made fast to a tree or stump or some other fixed object sufficiently secured in the ground to withstand a strain. Fastened to the top of the gin pole so as to swing immediately under it was a heavy pulley. Some distance back from the track a donkey engine was stationed, from which another wire cable was run through the pulley fastened to the gin pole. It was by means of this cable that the logs were rolled and lifted onto the cars. The cable was also used for another purpose. Cars were brought to the loading station a number at a time. As they could be loaded only from a place on the track immediately under the gin pole, it was necessary, after loading a car, to move it forward on the track so that another might be brought in its place, and the practice was to leave the cars coupled together and move the entire train. This moving was done by hitching the cable used to load the logs onto the far

ther end of the car desired to be brought into position, and bringing it into place by a pull on the cable from the donkey engine. At the time of the accident the men had for loading a group of five cars. Four of these had been loaded, and preparations were made for bringing the fifth one into place. The track at this point was somewhat steep, and the cars were held in place by their brakes, which had to be loosened before the cars could be moved. Preparatory to loosening the brakes, the cable was hitched to the lower end of the empty car and made tight by a pull from the donkey engine. The respondent then mounted the cars, and proceeded to loosen the brakes with a short piece of gas pipe which he used as a lever. He was just loosening the last one when a pull was made in an attempt to move the cars. This pull caused one of the stay cables fastened to the gin pole to give way, letting the pole fall. In falling the pole struck the respondent on the back, bearing him down upon the piece of gas pipe which he happened to be holding in an upright position, forcing the pipe entirely through his body, and causing the injury for which he sues. It appears from the record also that the appliances described were furnished by the appellant; that they were being used at the time of the accident for the purposes for which they were intended, and were so used under the direction of the appellant's foreman.

In his complaint the respondent charged that the accident was caused by the defective and dangerous condition of the stay cable which gave way and let the gin pole fall, alleging that it was carelessly and negligently fastened to the gin pole, and had become old, worn, weakened, and rusted and in need of repair, all of which was known to the appellant, or by reasonable diligence ought to have been known by it, but which was unknown to the respondent; further alleging that "by reason of the negligence of the defendant in failing to provide the plaintiff with a safe place in which to work, and by reason of the negligence of the defendant in failing to provide a sufficient and suitable guy rope or cable to sustain the gin pole and perform the service required of the same, and by reason of the negligence of the defendant in failing to properly secure the said guy rope or cable," the gin pole fell, etc. The only evidence offered at the trial in support of these allegations was that above outlined, and the further fact that the cable gave way at the point where it was spliced to the gin pole, three of the strands of the splice breaking, and three pulling out. On the trial at the conclusion of the respondent's case, the court granted a nonsuit and discharged the jury, and later, on respondent's motion for a new trial, set the nonsuit aside and granted a new trial. This appeal is from the last-mentioned order. The trial judge based its ruling on two grounds: First, that he had

failed to show any negligence on the part of the appellant; and, second, that he had erred in excluding certain evidence offered by the respondent, and, as these propositions involve matters of law in which the question of discretion does not enter, they are reviewable on appeal to this court.

On the question of the sufficiency of the evidence, the appellant contends that the respondent has shown nothing more than that the cable broke and that he was injured thereby, and argues that this is not sufficient to charge the respondent with negligence; that, in order to make a *prima facie* case, he was required to go further, and show that the breaking was caused by some defect of construction or material; and that the respondent knew or by reasonable diligence could have known of such defect. But it seems to us that the appellant has placed a too narrow construction upon the respondent's evidence. The evidence, in addition to showing that the cable broke and caused an injury to the respondent, showed that it was furnished to the respondent by the appellant for a particular purpose, and that it broke while being used in a proper manner for the purpose for which it was intended. This is some evidence of negligence on the part of the appellant. Instrumentalities intended for a particular purpose, and suitable and proper for that purpose, do not break when put to the use for which they are designed when used in a proper manner. So the converse of this proposition must be true. If the instrumentality does break when put to the use for which it is designed and used in a proper manner, it is evident that it was either defective in material or construction in the first instance, or has become so since it was put to use. Therefore, when the servant shows that the master furnished him an instrumentality to be used for a particular purpose, that he used it for the purpose intended in the manner intended, and that it broke when being so used and injured him, he makes out a *prima facie* case of negligence against the master. *Coleman v. Mechanics' Iron Foundry Co.*, 168 Mass. 254, 46 N. E. 1065; *Moynihan v. Hills Company*, 146 Mass. 586, 16 N. E. 574, 4 Am. St. Rep. 348; *Tennessee Coal, Iron & Railroad Co. v. Hayes*, 97 Ala. 201, 12 South. 98; *Armour v. Golkowska*, 95 Ill. App. 492; *Solarz v. Manhattan Railway Co.*, 31 Abb. N. C. (N. Y.) 426, 29 N. Y. Supp. 1123; *Highland Boy Gold Min. Co. v. Pouch*, 124 Fed. 148, 61 C. C. A. 40; *Cincinnati, I., St. L. & C. Co. v. Roesch*, 26 N. E. 171, 126 Ind. 445.

With reference to the second question, we think the evidence offered was properly excluded under the issues as made. The allegation to the effect that the appellant failed to provide the respondent with a safe place in which to work was rather a deduction from the specific acts of negligence theretofore alleged than a general allegation of negligence. As such it did not widen the scope

of the inquiry so as to admit evidence of negligence not covered by the specific allegations. *Henne v. Steeb Shipping Co.*, 37 Wash. 331, 79 Pac. 938; *Redford v. Spokane St. Ry. Co.*, 9 Wash. 55, 38 Pac. 1085.

In so far therefore as the order for a new trial was based on the latter ground it was erroneous, but, since it is sustained by the first ground stated, it must be affirmed. It is so ordered.

HADLEY, C. J., and CROW and RUDKIN, JJ., concur. ROOT, J., dissents.

(47 Wash. 121)

McCLELLAN v. O'CONNOR.

(Supreme Court of Washington. Sept. 7, 1907.)

DEEDS—EVIDENCE—VALIDITY—FRAUD.

Evidence in an action by a sister against her brother to set aside a deed to the brother from their mother on the ground of fraud held to support findings for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Deeds, § 615.]

Appeal from Superior Court, Pierce County; A. E. Rice, Judge.

Action by Mary Agnes McClellan against Thomas G. W. O'Connor. Judgment for defendant, and plaintiff appeals. Affirmed.

Sol Smith, for appellant. Welsh & Welsh, for respondent.

CROW, J. The plaintiff, Mary Agnes McClellan, brought this action against her brother, Thomas G. W. O'Connor, to cancel and set aside a deed executed by one Mary O'Connor, a widow, the mother of plaintiff and defendant, to recover the title to and possession of one-half of the realty thereby conveyed, and to also recover certain personal property. From a decree quieting the title of the defendant, and refusing to cancel the deed, the plaintiff has appealed.

The evidence shows that on April 5, 1898, one William O'Connor, a single man, brother of appellant and respondent, died intestate; that certain land in Pacific county of which he died seised descended to his mother, Mary O'Connor; that on November 1, 1898, Mary O'Connor, by quitclaim deed, conveyed the land to the respondent, Thomas G. W. O'Connor; and that thereafter, on October 27, 1903, Mary O'Connor died intestate; that on November 27, 1905, more than seven years after the execution of the deed, and more than two years after the death of Mary O'Connor, the appellant, Mary Agnes McClellan, instituted this action, alleging that the respondent had procured the execution of the deed by fraud and misrepresentation; that Mary O'Connor, the grantor, was without business capacity; that she did not know what she was doing; that the deed was without consideration; that the land therein described still belonged to her estate; and that the appellant as her heir at law was entitled to a one-half interest therein. Appellant demanded that the deed

be canceled and set aside, and that she be awarded an undivided one-half interest in the land. The trial court found that the deed was the valid and voluntary act of Mary O'Connor, that she was of sound mind, and that she intended to convey all of the realty to the respondent. Although many assignments of error have been presented, and numerous points are discussed in the briefs, the one controlling question on this appeal is whether the findings are sustained by the evidence. Having carefully examined and weighed all of the evidence, we conclude that they are supported by its clear preponderance. The appellant by two marriages, both contracted against the opposition of her parents then living, had become estranged from them. She had been divorced from her first husband, and the evidence shows that her mother determined that neither she nor her second husband should receive any of the land; that Mary O'Connor voluntarily executed and delivered the deed to her son, the respondent, with whom she lived, and by whom her support was provided; and that she was at the time in complete possession of all her faculties, being of sound mind. There is an utter failure of competent evidence tending to show any fraud on the part of the respondent, or that he overreached his mother in any manner. No good purpose would be accomplished by discussing the evidence in detail. It is sufficient to state that it clearly sustains the findings made by the trial court, and the final decree entered.

The judgment is affirmed.

HADLEY, C. J., and FULLERTON, RUDKIN, MOUNT, and DUNBAR, JJ., concur.

(47 Wash. 108)

GRUBB v. STEWART et al.

(Supreme Court of Washington. Sept. 6, 1907.)

1. USURY—PLEADING—NECESSITY FOR PLEA OF USURY.

Usury is unavailable as a defense unless pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Usury, § 276.]

2. SAME—PERSONS ENTITLED TO PLEAD.

Where defendants were not creditors nor in privity with an investment company which was complainant's debtor under a contract on which complainant's claim was based, they could not avail themselves of the defense that the contract sued on was usurious; such defense being personal to the debtor and his privies.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Usury, § 364.]

Appeal from Superior Court, Clallam County; Geo. C. Hatch, Judge.

Suit by Betsy P. Grubb against James Stewart and others. From a decree in favor of complainant, defendants appeal. Affirmed.

James Stewart and Graves, Palmer & Murphy, for appellants. Trumbull & Trumbull, for respondent.

MOUNT, J. On the 5th day of January, 1899, the United States Savings & Loan Company, a corporation located at St. Paul, Minn., entered into a contract with the Pacific & Oriental Investment Company, a corporation located at Port Angeles, in this state, to sell to the last-named corporation lot 3, in block 13, of the town of Port Angeles, for a consideration of \$1,700. According to the terms of this contract, \$425 was to be paid in cash upon delivery of the contract, and thereupon possession of the property was to be delivered to the purchaser. Four hundred and twenty-five dollars was to be paid on or before January 1, 1900, and like amounts on January 1, 1901, and 1902. The deferred payments were to bear interest at 8 per cent. per annum, and the purchaser was to keep the improvements on the premises insured and the taxes, etc., paid. Time was made the essence of the contract, and, in case of noncompliance by the purchaser, all payments thereon were to become forfeited to the selling corporation. This first payment upon this contract was made by Mrs. Grubb, the respondent in this case, and thereupon she and the investment company entered into the following agreement: "Port Angeles, Washington, March 28, 1899. To Whom It May Concern: This is to certify that the sum of four hundred and twenty-five dollars (\$425) has been paid by Mrs. Betsy Grubb, of the city of Port Angeles, Washington, as first payment of purchase of lot three (3), block thirteen (13), of the original government townsite of Port Angeles, with the buildings thereon. And the agreement of sale made to the Pacific & Oriental Investment Company by the United States Savings & Loan Company is held in trust by the said Pacific & Oriental Investment Company for the said Mrs. Betsy Grubb upon the following conditions, to wit: The said Pacific & Oriental Investment Company to have and to hold possession of said property for the term of one year from January 1, 1899, in consideration of said company paying taxes for the year 1898 and paying interest and insurance on same. And it is further expressly agreed and understood that should the said Pacific & Oriental Investment Company at any time during the year 1899, or up to the 4th day of January, 1900, pay the said Mrs. Betsy Grubb the sum of seven hundred dollars (\$700) gold coin, then the said Mrs. Betsy Grubb relinquishes all claim to said property and invests the title in the Pacific & Oriental Investment Company." This contract was duly signed and acknowledged. On December 26, 1899, Mrs. Grubb sought advice from appellant Stewart, who was then a practicing lawyer in Port Angeles, as to what she should do in case the Pacific & Oriental Investment Company should fail to pay the \$700 named in said contract on or before January 4, 1900. Mr. Stewart advised her, and drafted a letter to be sent to the United States Savings & Loan Company at St. Paul, notifying that company

of the interest of Mrs. Grubb in the contract of sale. This letter was accordingly sent and receipt thereof acknowledged by the savings and loan company. Thereafter, on January 5, 1900, the trust agreement was placed of record in Clallam county where the land was located; but thereafter no payment of the sum of \$700, or any part thereof, was made to Mrs. Grubb. The Pacific & Oriental Investment Company subsequently, up to the year 1902, paid the United States Savings & Loan Company on the purchase price of the lots about \$800 in principal and interest, besides the first payment above named; but, notwithstanding payments were not made as agreed to in the contract, no forfeiture was claimed. On the 11th day of July, 1902, the Pacific & Oriental Investment Company, in consideration of \$10, assigned its contract of purchase to the respondent Stewart, and the assignment was approved by the savings and loan company. Mr. Stewart thereafter completed the payments due on the original contract, and on July 14, 1903, took title in himself from the United States Savings & Loan Company. Thereafter, on November 26, 1904, Stewart conveyed the premises to the appellants Nellie Mastick and husband for an alleged consideration of \$1,800, and took a mortgage back for \$1,300. Thereafter this action was begun by respondent, alleging that she was the equitable owner, and praying that the appellants be decreed to hold the legal title in trust for her. She did not offer to repay Stewart the money he had advanced on the purchase price of the lots. The appellants answered, alleging, in short, that the \$425 advanced by respondent to the Pacific & Oriental Investment Company was advanced as a loan, and that the same had been fully paid, and, if not paid, was barred by laches. The trial court found that the amount advanced, viz., \$425, to the Pacific & Oriental Investment Company, was a loan, and that the trust agreement amounted to a lien on the lot for said sum of \$425, with interest at 7 per cent., and ordered the property sold to satisfy this claim, provided the amount was not paid by the appellants within 60 days. This appeal is prosecuted from that judgment.

The principal point contended for by the appellants is that the contract between respondent and the Pacific & Oriental Investment Company was usurious, and for that reason the principal should have been reduced by the amount of usurious interest contracted for under section 3671, Ballinger's Ann. Codes & St. It is not necessary for us to decide the question whether the contract between respondent and the Pacific & Oriental Investment Company as set out above was usurious, because the appellants cannot be permitted to raise this question in this case, for two reasons: First. The defense of usury was not pleaded in the answer. "When usury is relied upon as a de-

fense, it must be pleaded," especially where usury does not appear upon the face of the record. *Brundage v. Burke*, 11 Wash. 679, 40 Pac. 343. Second. The appellants acquired the property with full notice, both actual and constructive, of the claim of the respondent. The deed from the United States Savings & Loan Company to Mr. Stewart recited that it was made "subject to any liability which may arise by reason of anything which may have been done by the parties under the contract issued to the Pacific & Oriental Investment Company, or any one claiming under them, and by reason of which contract this conveyance is made to the second party as assignee thereof." The appellants were not creditors, nor in any way in privity with the Pacific & Oriental Company, the debtor of the respondent, and therefore could not plead the defense of usury, because such defense is personal to the debtor or his privies, and cannot be set up by a stranger. 29 Am. & Eng. Enc. of Law (2d Ed.) p. 534; 2 Current Law, p. 1766; *Lamoille County Nat. Bank v. Bingham*, 50 Vt. 105, 28 Am. Rep. 490, and authorities cited in note to page 491 of 28 Am. Rep. (50 Vt. 105).

Under the facts stated above, which are substantially undisputed, we are satisfied the judgment was right. It is therefore affirmed.

HADLEY, C. J., and CROW, FULLERTON, and DUNBAR, JJ., concur.

STATE ex rel. HARDIN et al. v. GROVER. (Supreme Court of Washington. Sept. 5, 1907.)

1. ATTORNEY AND CLIENT—DISBARMENT OF ATTORNEY—JURISDICTION.

Where defendant, a regular practicing attorney of the superior court, in proceedings in bankruptcy in the federal court solicited and collected money from his client on the pretense that it was needed to bribe the referee in bankruptcy, the offense was one directly involving his integrity and professional honor, so that the superior court had jurisdiction to disbar him, though the offense was committed in another jurisdiction.

2. TRIAL—FINDINGS—SEPARATION.

Where a petition for disbarment contained two distinct charges or specifications, the court was not required by Ballinger's Ann. Codes & St. § 4942, requiring different causes of action, when united in one complaint, to be separately stated, nor by any other section of the Code, to separate its findings with reference to the separate charges specified; it being sufficient that the findings of fact and conclusions of law were separately stated as required by section 5029.

Appeal from Superior Court, Whatcom County; A. W. Frater, Judge.

Disbarment proceedings by the state of Washington, on relation of Ed. E. Hardin and others, against E. J. Grover. From a judgment of disbarment, defendant appeals. Affirmed.

Healy & Slentz and McCaferty, Bell & Godfrey, for appellant. Ed. E. Hardin, H. M. White, and Lin H. Hadley, pro se.

PER CURIAM. This is a proceeding in disbarment brought against E. J. Grover, a practicing attorney of this state, by the respondents, who are also practicing attorneys of this state and members and representatives of the Whatcom County Bar Association. Specific charges of unprofessional conduct were made in writing, filed in the superior court, and a citation issued to the appellant requiring him to appear and show cause on a day named therein why he should not be disbarred from further practice as an attorney at law. The appellant appeared, and put in issue the allegations of misconduct charged against him, and also set up new matter by way of an affirmative defense. A reply was filed denying the new matter alleged, and on the issues thus made a trial was had resulting in a judgment disbarring the appellant from practicing his profession for a term of two years. This appeal is from that judgment.

The appellant first assigns error on the ruling of the court refusing to dismiss the proceeding for want of jurisdiction. This assignment is based on the fact that the acts of misconduct charged against the respondent related to his conduct with reference to certain claims against a bankrupt whose estate was then pending before a referee in bankruptcy appointed by the District Court of the United States for the Western District of Washington; the charges being that the appellant had solicited and collected money from his clients under the pretense that the same was needed for the purpose of bribing the referee in order to induce him to render a favorable decision on the client's claim. It is argued that this is in the nature of a contempt to the referee in bankruptcy, and consequently the only court authorized to punish the offense was the District Court of the United States, by which the referee in bankruptcy was appointed. But this contention mistakes the nature of the offense. The offense committed by the appellant was not a contempt committed before the referee in bankruptcy. It was in the nature of a substantive offense, directly involving his integrity and professional honor, and his fitness to practice as an attorney at law. Any court, the bar of which the delinquent is a member, has jurisdiction to disbar for unprofessional conduct, when and wherever committed, whether the unprofessional conduct relates to matters occurring in court, or to a purely private and personal transaction between the attorney and his client, and the superior court in this instance had jurisdiction.

The petition for disbarment contained two distinct charges or specifications. In making its findings the trial court did not make these the subject of distinct findings, but found the facts as if the charge contained but one specification, numbering the findings serially from 1 to 14. It is argued that this is fatal to the validity of the judgment, as the find-

ings on the different specifications should have been separate, distinct, and independent, inasmuch as the charges were separate, distinct, and independent. But there is no rule of law or practice that requires the findings to be different than they were made by the court. The Code, of course, requires different causes of action when united in one complaint to be separately stated (Ballinger's Ann. Codes & St. § 4942), but there is no such requirement with reference to findings of fact. These are sufficient when given in writing and separately stated from the conclusions of law (Id. § 5029), and this latter requirement was complied with by the trial court.

Finally, it is contended that the evidence does not justify the findings of fact; but, while a large space in both briefs is devoted to an argument of this question, we do not feel that a discussion of it here would serve any useful purpose. We have already indicated the nature of the charges, and it is sufficient to say that a careful examination of the testimony convinces us they were substantially proven.

The judgment appealed from must be affirmed; and it is so ordered.

SCHNEIDER v. GREAT NORTHERN RY. CO.

(Supreme Court of Washington. Sept. 5, 1907.)

1. TRIAL—RECEPTION OF EVIDENCE—REMARKS OF JUDGE.

A remark by the court in overruling an objection to evidence that he did not think it was very material nor entitled to much weight, but that the jury might consider it, was objectionable as a comment on the evidence, prohibited by Const. art. 4, § 16.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 81.]

2. APPEAL—MISCONDUCT OF COURT—PREJUDICE.

Where the court in ruling on the evidence remarked that it was not very material nor entitled to much weight, but the jury might consider it, and on exception taken did not withdraw the same, nor give any caution to the jury that it was their duty to judge as to the weight and credibility of the evidence, the remark was prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4135.]

3. WITNESSES—CREDIBILITY—EVIDENCE.

Where, in an action for ejection of a passenger, there was a sharp conflict between plaintiff and the conductor as to what occurred when plaintiff was required to leave the train, evidence concerning plaintiff's condition as to sobriety at the time was admissible as bearing on his credibility.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1101, 1102.]

4. SAME—CROSS-EXAMINATION.

Where, in an action for ejection of a passenger, plaintiff claimed to have suffered severe physical injuries, and testified that after the injury, on the same day, he visited another town, going and coming on defendant's trains, before he consulted a physician concerning his injuries, evidence as to the purpose of his visit was ad-

missible as bearing on the question whether he was exaggerating his condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1106-1108.]

Appeal from Superior Court, Spokane County; Miles Poindexter, Judge.

Action by William A. Schneider against the Great Northern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

M. J. Gordon and Charles A. Murray, for appellant. A. G. Gray, for respondent.

FULLERTON, J. The respondent, on July 3, 1906, being then a resident of Newport, Wash., purchased a round-trip ticket from that place to Sandpoint, Idaho. His purpose in going to Sandpoint was to attend a celebration of the national holiday. He reached Sandpoint some time in the evening of the 3d, stayed there over the 4th, and started for home on an early train which passed through Sandpoint at about 5 o'clock on the morning of the 5th. He was somewhat late when he reached the station, and boarded the train, with the assistance of the brakeman, after it had started to move out. The conductor was taking tickets in the car into which the respondent entered, and took up the respondent's ticket without giving him a seat check in return. On reaching a seat the respondent immediately went to sleep. When the train arrived at Priest River, a station between Sandpoint and Newport, the conductor approached the appellant, woke him up, and insisted that he get off the train. There is a sharp conflict in the evidence as to what occurred at that time, but the controversy ended by the respondent's getting off the train assisted by the conductor. After they reached the station platform, some further talk was had, when the respondent was permitted to reboard the train and ride to the destination called for in his ticket. It is the respondent's contention that he was removed from the train with such force and violence as to injure him physically, and he brought this action to recover for his physical injuries, as well as the shame and disgrace of having been wrongfully expelled from the train. The trial resulted in a verdict and judgment in respondent's favor in the sum of \$700, and this appeal is prosecuted therefrom.

On the trial, the appellant put the conductor on the witness stand and proceeded to question him concerning the plaintiff's condition as to intoxication at the time he was put off the train at Priest River. To this the respondent objected, and the court, ruling upon the objection, said: "I don't think it is very material, or entitled to much weight, but the jury may consider it." The appellant thereupon excepted to the remarks as a comment upon the evidence, but the court neither withdrew the remarks from the jury, nor gave them any caution as to whom the duty belonged of judging the weight and credibility of the evidence. Manifestly the

remark was a comment on the evidence, and as such prohibited by section 16, art. 4, of the Constitution. Was the remark prejudicial? We think it was. As we have said, there was a sharp conflict between the respondent and the conductor as to what occurred when the respondent was made to leave the train, and clearly it would aid the jury in determining which of them told the truth to know their respective conditions as to sobriety. It is no justification to say that the comment occurred when the court was ruling on the admission of evidence and not in the charge to the jury, as it is just as harmful to the party offering the evidence to have it discredited by the trial judge in advance of its admission as it is to have it discredited afterwards. For cases from this court when the general question is discussed, see *State v. Walters*, 7 Wash. 246, 34 Pac. 933, 1098; *State v. Wroth*, 15 Wash. 621, 47 Pac. 106; *State v. Hyde*, 20 Wash. 234, 55 Pac. 49; *State v. Surry*, 23 Wash. 655, 63 Pac. 557; *Miller v. Dumon*, 24 Wash. 648, 64 Pac. 804; *French v. Seattle Traction Co.*, 26 Wash. 264, 66 Pac. 404; *State v. Bliss*, 27 Wash. 463, 68 Pac. 87; *State v. Eubank*, 33 Wash. 293, 74 Pac. 378; *State v. Mander-ville*, 37 Wash. 365, 79 Pac. 977; *Patten v. Auburn*, 41 Wash. 644, 84 Pac. 594.

The respondent testified that on the afternoon of the day of the injury he visited Priest River, going and coming on the appellant's trains. On cross-examination the appellant sought to ascertain the purpose of this visit, but objections to its questions directed to that end were sustained. It would seem that this might properly have been gone into. The respondent was complaining of physical injuries which his own testimony indicated were somewhat severe. As he paid this visit before he consulted with a physician concerning his injuries, and on the afternoon of the day he received them, it would have thrown some light on the question whether or not he was exaggerating his condition to know whether this visit was one of necessity or one of mere convenience. The cross-examination should have been permitted at least to that extent.

Since there must be a new trial, it is not necessary to inquire whether or not the verdict is excessive.

The judgment is reversed, and a new trial granted.

HADLEY, C. J., and CROW and RUDKIN, JJ., concur.

(47 Wash. 62)

COLLINS et al. v. GLEASON et al.

(Supreme Court of Washington. Sept. 6, 1907.)

1. JUDGMENT—RES JUDICATA.

A judgment granting the relief prayed for in a suit to specifically enforce a contract for the conveyance of real estate by compelling a conveyance is a bar to a subsequent suit for the

conveyance of other lands described in the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1108.]

2. SAME.

Where, in a suit to specifically enforce a contract for the conveyance of real estate, plaintiff in his supplemental reply alleged the rendition of a judgment granting the relief prayed for in a prior suit to specifically enforce the contract, defendant, though failing to plead the former judgment not rendered until after the filing of his answer, was entitled to avail himself of the former judgment as a bar to the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1787.]

3. SAME.

A party seeking to specifically enforce a contract for the conveyance of real estate discovered, before the entry of judgment granting the relief prayed for, a failure to convey other lands as required by the contract, but he failed to ask the additional relief in an amended complaint. *Held*, that the former judgment was a bar to a suit for the specific performance of the contract so far as the same related to such other lands.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by John Collins, prosecuted after his death by Angie B. Collins and others, executors and trustees under his will, against James P. Gleason and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

William Martin and Jas. F. McElroy, for appellants. John B. Hart and Maurice D. Leehey, for respondents.

CROW, J. This action was commenced on June 22, 1901, by John Collins, now deceased, against James P. Gleason, H. S. Connor, and the Fidelity Trust Company of Seattle, a corporation, to compel the conveyance of certain lands in sections 25 and 30, township 21 N., of range 5 E., W. M., in King county, Wash. The plaintiff in his amended complaint, dated October 2, 1902, alleged: That Connor and Gleason were the president and secretary of the defendant corporation; that on or about January 22, 1901, an action, No. 31,138, had been commenced by John Collins, as plaintiff, against the same defendants, to compel the defendants to transfer to him certain stock in the Fidelity Trust Company, or to reconvey certain property theretofore conveyed by him to such company. That the cause was afterwards settled, a written memorandum or agreement being made as follows: "Seattle, Washington, May 3rd, 1901. Collins surrender 6240 shares, stock and trust certificate on Island County land. Fidelity Trust Company make special warranty to Collins for all real estate conveyed by him to company, mortgage on tide land assumed by Collins & take property in mortgage. Company also to convey to Collins one half interest in Anacortes judgment. All monies now on hand belonging to corporation, except Colman money now in court to go to plaintiff. Collins vs. Fidelity Trust

Company to be dismissed, each party to pay own costs. Defendants to have Colman money now in court, and to have no other money from plaintiff. Defendants to pay no cost of receivership. Martin vs. Fidelity Trust Company to be dismissed without cost to either party. Connor vs. Collins to be dismissed without cost to either party. Fidelity Trust Company vs. Colman to be dismissed without cost and release of all claims against each other, growing out of any of said suits. Roberts & Leehey, Attorneys for Defendant. William Martin, Attorney for Plaintiff." That the plaintiff fully performed the agreement on his part. That the plaintiff had theretofore conveyed to the defendant company the land above mentioned, but that the defendant neglected and refused to reconvey it to him in pursuance of the terms of the written agreement. The defendants in their answer, after making certain denials, in substance, alleged that the defendant company never authorized the written agreement; that it had never ratified the same; that the plaintiff was not entitled to any conveyance, and that the defendant company, by its answer, offered, by placing all parties in statu quo, to rescind any action its officers had taken towards part performance of the written agreement. To this answer the plaintiff originally replied by denials only. On July 11, 1903, it having been suggested to the trial court that the plaintiff John Collins had died testate, an order was entered substituting Angie B. Collins, John Francis Collins, and R. L. Hodgdon, his executors and trustees, as parties plaintiff. On March 30, 1904, the substituted plaintiffs, with leave of court, served and afterwards filed a supplemental reply, in which they affirmatively alleged that theretofore, to wit, on May 7, 1901, John Collins, as plaintiff, instituted action No. 32,452 against the Fidelity Trust Company of Seattle, one of the defendants herein, to compel specific performance on the part of the Fidelity Trust Company, of the above contract, by requiring it to assign to Collins a certain lease from the state of Washington to the Fidelity Trust Company of a certain harbor area in King county, Wash., in said lease and in the pleadings of said action particularly described, being lease No. 64, the said contract upon which said action was brought being the same contract and agreement set forth in the amended complaint and the answer in this action; that thereafter such proceedings were had in said cause No. 32,452, that on August 20, 1902, a final decree was entered in favor of the plaintiff Collins, requiring the defendant Fidelity Trust Company to specifically perform the contract by assigning the lease; that the Fidelity Trust Company appealed to the Supreme Court of the state of Washington; that on October 3, 1903, subsequent to the filing of the original reply herein, the Supreme Court

affirmed said decree, and that all issues raised by the affirmative defense herein were raised in said cause No. 32,452, and determined in favor of the plaintiff Collins. Upon these issues trial was had and, after the plaintiffs had introduced their evidence and rested, the defendants declined to offer any evidence, but moved for judgment. The trial court thereupon, without making any findings of fact, entered a final judgment dismissing the action. The plaintiffs have appealed.

The appellants contend that the trial court erred in dismissing the action. The respondents contend (1) that the act of the attorneys in making the memorandum of settlement was unauthorized; (2) that the same was never ratified by the Fidelity Trust Company; and (3) that, even if it was executed with full authority and subsequently ratified, this action cannot be maintained, as the appellants' testator during his lifetime maintained one action to enforce the same agreement in which he obtained judgment, and that if the testator ever had any cause of action against the respondent company, as alleged in the complaint herein, the same was split by the former action, and the present one cannot be maintained.

The last point being conclusive of this case, the others will not be considered. It appears from the evidence, as well as the allegations of the supplemental reply, that action No. 32,452 in the superior court of King county was instituted for the purpose of securing the specific performance of the identical agreement upon which the present action is based, and that the decree entered therein, in favor of appellants' testator, was afterwards affirmed by this court. Collins v. Fidelity Trust Company, 33 Wash. 136, 73 Pac. 1121. This is a subsequent and independent action, brought on the same contract. Although appellants' testator heretofore compelled the respondent, the Fidelity Trust Company, to specifically perform the contract by assigning to him the tide land lease, they are now seeking to compel it to further specifically perform by conveying to them the land in dispute. Appellants' testator never had more than one cause of action on the contract. The failure of respondent to convey all the lands contemplated thereby was but one breach which authorized one action only. For one breach of an indivisible contract there can arise but one cause of action, and, if in such action the plaintiff does not demand the entire relief to which he is entitled, he cannot afterwards complain. If this action can now be maintained, the appellants can hereafter maintain any number of additional actions upon the same contract. The recent case of Kline v. Stein (Wash.) 90 Pac. 1041, is controlling here.

Appellants contend that the respondents cannot claim they are estopped by the former

judgment, for the reason that the respondents did not plead such former judgment. The appellants themselves pleaded it in their supplemental reply, and, when they did so, the respondents demanded judgment upon the pleadings. The former judgment had not been entered when the original answer was made herein. The facts were all before the court in this action, and we fail to see why it should not apply the law to the facts pleaded and admitted, whether pleaded by the respondents or the appellants. The appellants further contend that, at the time of the bringing of the former action, they had not discovered the failure of the respondents to convey the land now in dispute; that they learned of such omission later but prior to the commencement of this action. The amended complaint, however, contains no allegation that such want of knowledge was due to the fraud or deceit of the respondents. Appellants' testator did discover such failure to convey, not only before the former judgment was entered, but also before he filed his amended complaint in this action. He had ample opportunity to ask the additional relief, by specific performance, in such amended complaint, but failed to do so. It is a general rule in both law and equity that, where a party inadvertently or by reason of his own negligence or mistake, and without fault or fraud of the adverse party, takes judgment or decree for less than he is entitled to recover, he is estopped from bringing a second action for the residue. When the appellants' testator discovered the omission or failure of the respondents to make an assignment of the tide land lease, it was his duty to immediately ascertain whether other omissions or breaches of the contract existed, and to bring his action for all remedies to which he was then entitled. Having failed to do this, he certainly could in his amended complaint have demanded the further specific performance now sought, as the record discloses that he did actually learn all the facts in ample time to do so. In *Kline v. Stein*, supra, we said: "But the appellants assert that the allegation to the effect that this tract was left out of their original complaint through accident and mistake was made advisedly, and, inasmuch as the respondents' motion for judgment on the pleadings concedes it to be true, this fact alone is sufficient to show the inconclusiveness of the original judgment. This contention, also, mistakes the rule. If the appellants have by accident or mistake on their part failed to recover all of the land that they were entitled to recover, their remedy is not to sue for the omitted portion, but is rather to seek relief in the original action by opening up the judgment amending their pleadings, and trying anew their rights to the property." The appellants in this action have not only elected to retain the original judgment and its fruits, but they have also

rejected the offer and tender of the respondents to place the parties in statu quo.

The judgment is affirmed.

HADLEY, C. J., and FULLERTON, RUDKIN, MOUNT, and DUNBAR, JJ., concur.

COLLINS et al. v. GLEASON et al.

(Supreme Court of Washington. Sept. 6, 1907.)

JUDGMENT—RES JUDICATA—SPECIFIC PERFORMANCE.

A judgment granting the relief prayed for in a suit to specifically enforce a contract for the conveyance of real estate is a bar to a suit to reform a deed executed in part performance of the contract, since actions to reform the deed and specifically enforce the contract may be joined.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by John Collins, prosecuted after his death, by Angie B. Collins and others, executors and trustees under his will, against James P. Gleason and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

William Martin and Jas. F. McElroy, for appellants. John B. Hart and Morris D. Leehey, for respondents.

PER CURIAM. This action, which was commenced on June 22, 1901, arises upon the same memorandum of agreement upon which cause No. 6,561, *Collins v. Gleason et al.* (decided by this court on this date), 91 Pac. 506, is based. The plaintiffs here sue to reform a deed executed by the defendant, the Fidelity Trust Company, in part performance of that agreement; it being alleged that certain land was by mutual mistake incorrectly described therein. From a judgment in favor of the defendants, the plaintiffs have appealed.

The appellants have heretofore recovered a judgment for specific performance in a separate action on the same contract; hence on the authority of *Collins v. Gleason et al.*, No. 6,561, supra, the judgment herein must be affirmed. Although the appellants here seek to reform the original contract, there has nevertheless been a splitting of actions, as actions to reform and specifically enforce the same contract may be joined. We will, however, state that we do not find the evidence sufficient to sustain the appellants' allegation of mutual mistake.

The judgment is affirmed.

STATE ex rel. CLIFFORD v. SUPERIOR COURT OF PIERCE COUNTY et al.

(Supreme Court of Washington. Sept. 5, 1907.)

CERTIORARI—DISMISSAL—TERMINATION OF CONTROVERSY.

Where, pending a writ of review for the revision of an order dismissing an application to show cause why a witness should not be compelled to give testimony by deposition in response to a subpoena duces tecum in a pending action, the action was dismissed without prejudice, the

controversy was thereby terminated, and the writ would be dismissed.

Application by the state, on relation of M. L. Clifford, for the revision of an order of the superior court of Pierce county and others dismissing a petition to compel a witness to give testimony by deposition under a subpoena duces tecum. Petition dismissed.

R. F. Laffoon, for plaintiff. G. C. Israel, for respondents.

PER CURIAM. A commission, with interrogatories annexed, to take the deposition of a witness, was issued by the district court of the district of Alaska, Division No. 1, at Juneau, Alaska. The cause wherein the commission issued was then pending in said court, and the witness whose testimony was sought was the plaintiff in the action and resided in Pierce county, Wash. The commission was directed to M. L. Clifford, a notary public residing in Pierce county. Upon receipt of the commission the commissioner attempted to take the testimony of the witness, and it is claimed that the witness refused to honor a subpoena duces tecum to produce certain letters and documents, and refused to answer certain interrogatories propounded to him. The commissioner thereupon applied to the superior court of Pierce county for an order requiring the witness to show cause why he should not be compelled by order of said court to produce the documents and answer the interrogatories aforesaid. An order to show cause was issued, and, upon return thereto, the court held that it was without jurisdiction to make any order in the premises, and dismissed the petition. Application was then made by the commissioner to this court for a writ of review to review the action of the superior court. During the pendency of the proceeding before this court, a certificate from the said district court for the district of Alaska has been filed here, showing that the original cause in which the commission to take the deposition was issued was by that court dismissed without prejudice on the 8th day of January, 1907. The relator, in an affidavit filed, does not controvert the fact of dismissal, but asserts that the testimony should still be taken to preserve it for future use in any action that may be brought concerning the same subject-matter. Inasmuch as the action in which the commission to take testimony was issued has been discontinued, we think it should be held here that the controversy presented by the relator's application here has ceased.

The relator's petition is therefore dismissed.

POWERS v. WEBSTER et al.

(Supreme Court of Washington. Sept. 6, 1907.)

1. PUBLIC LANDS—SUIT TO CANCEL DEED FROM STATE—PARTIES.

The state is a necessary party to a suit to cancel a deed from it, the property reverting to it if the deed is canceled.

2. SAME.

A private citizen, having no special interest in land deeded by the state to another, but merely claiming that he was prevented by fraud from bidding for it at the public sale, and not being able to require it to be resold if the deed be set aside, and as a taxpayer not having suffered an injury different from that suffered by the public at large, cannot maintain a suit to set aside the deed.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by W. W. Powers against Edward E. Webster and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Million & Houser, for appellant. John D. Atkinson, Atty. Gen., for respondent land commissioner.

MOUNT, J. The appellant brought this action to set aside a sale of school lands, to cancel a deed therefor executed by the state to respondent Croft, and to compel the respondent Ross, the state land commissioner, to reoffer the land for sale. The lower court sustained a demurrer to the amended complaint, upon the grounds that the court had no jurisdiction, that plaintiff had no legal capacity to sue, that there is a defect of parties, and that the complaint fails to state facts sufficient to constitute a cause of action. The plaintiff refused to plead further, and the action was dismissed.

The complaint alleges, in substance, that the state has been, and now is, the owner of the school land in question, being 10 acres situate in King county; that prior to June, 1906, Joseph I. Croft was in possession of the land under a lease, and had a sawmill thereon of the value or \$1,000 and no more; that on June 1, 1906, said Croft applied to the state board of land commissioners for appraisal and sale of the lands, and thereafter the land was appraised at \$350 per acre, and ordered sold; that thereafter certain of the defendants and E. W. Ross, land commissioner, entered into a conspiracy to obtain said land at less than its real value; that, in pursuance of that conspiracy said Ross caused the appraisal to be reduced to \$100 per acre, and fraudulently caused the sawmill thereon to be appraised at \$5,453.34; that said land at said time was worth \$1,000 per acre, exclusive of the improvements; that on June 30, 1906, at the time and place where the sale was fixed, the plaintiff and certain of the defendants appeared and the land was offered for sale by the deputy auditor of King county, where the land was located, whereupon Joseph I. Croft bid the sum of \$6,453.34, the amount of the appraised value as reduced as aforesaid; that thereupon the respondent Raymond made a bid of \$14,453.34, and there being no other bids, the land was struck off to said Raymond; that said Raymond fraudulently refused to make payments upon his bid, and thereafter the said Ross fraudulently and unlawfully reported the sale of

said land to said Joseph I. Croft for the sum of \$1,000, and induced the Governor and Secretary of State to issue a patent for said land to said Croft; that said bid of said Raymond was a fraudulent bid, for the purpose of preventing the plaintiff from bidding at said sale; that said Ross knew that the interests of the state had been injuriously affected by fraud and collusion, and that said Croft was not the highest bidder at said sale; that the defendants knew that plaintiff was desirous of bidding on said property at said sale, and was present with \$10,000 to bid for said land, but was prevented from bidding by the conduct of said Raymond, who was in collusion with the other respondents; that appellant had no knowledge of the conspiracy or fraudulent acts of respondents, and therefore filed no affidavit with the commissioner of lands setting forth fraud or asking for a resale; that, if said land is offered for resale, plaintiff will bid \$10,000 therefor; that plaintiff has demanded of the Attorney General that he bring an action to set aside said sale, but the Attorney General refuses to do so; that plaintiff is a resident and taxpayer of King county, and will suffer irreparable injury if defendants are permitted to retain said land, and brings this action as a taxpayer and as an intending buyer and on behalf of others similarly situated.

The trial court properly sustained the demurrers. The first object of the action is to set aside the deed from the state to respondent Croft. If the deed of the state is set aside, the property reverts to the state. Therefore the state is a necessary party to such an action. The action cannot be maintained at the suit of a private person who has no interest in the property. *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *Welsh v. Callvert*, 34 Wash. 250, 75 Pac. 871; *Horsky v. Moran*, 21 Mont. 345, 53 Pac. 1064; *Tacoma v. Bridges*, 25 Wash. 221, 65 Pac. 186; *State ex rel. Shores v. Ross* (Wash.) 87 Pac. 262. In the case of *St. Louis Smelting Co. v. Kemp*, supra, the court said: "If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he was thereby aggrieved. He must resort to a court of equity for relief, and even then his complaint cannot be heard unless he connects himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands. *Boggs v. Merced Mining Co.*, 14 Cal. 279, 363. It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dis-

satisfied, it can, on its own account, authorize proceedings to vacate the patent or limit its operation." If the patent may be avoided for fraud, the appellant has no interest in the land except as a citizen of the state. When the deed of the state is set aside, the land reverts to the state. The appellant cannot even require the land to be resold, because the power of resale rests in the discretion of the board of state land commissioners. *State ex rel. Bussell v. Bridges*, 30 Wash. 268, 70 Pac. 506; *State ex rel. Pelton v. Ross*, 39 Wash. 309, 81 Pac. 865. Nor can appellant maintain the action as a citizen and taxpayer. *Jones v. Reed*, 3 Wash. St. 57, 27 Pac. 1067; *Birmingham v. Cheetam*, 19 Wash. 657, 54 Pac. 37; *Tacoma v. Bridges*, 25 Wash. 221, 65 Pac. 186; *State ex rel. White v. Fish Company*, 42 Wash. 409, 85 Pac. 22; *State ex rel. Shores v. Ross* (Wash.) 87 Pac. 262. In the case of *Tacoma v. Bridges*, supra, this court said: "Whatever may be the rule elsewhere, it is the rule in this state that a taxpayer and citizen suing in a private capacity cannot maintain a suit to enjoin a state officer from committing a breach of his public duty, without showing that he would suffer an injury thereby differing in kind from that suffered by the public at large." And in *State ex rel. Shores v. Ross*, supra, we said: "If the deed to these tide lands had been delivered after the respondent was reliably informed that the application and bidding were fraudulent, to the detriment of the state, it would be the duty of the respondent [commissioner of public lands] or of some official of the state to immediately cause an action to be brought to cancel said deed, and to recover the property, title to which was thus fraudulently acquired." 26 Am. & Eng. Enc. of Law (2d Ed.) pp. 395-397.

The complaint, having shown that the appellant has no special interest in the lands and not being authorized to maintain the action as a taxpayer, fails to state a cause of action.

The judgment is therefore affirmed.

HADLEY, C. J., and CROW, ROOT, RUDKIN, and DUNBAR, JJ., concur.

FREDERICK & NELSON v. SPOKANE GRAIN CO. et al.

(Supreme Court of Washington. Sept. 6, 1907.)

ASSIGNMENTS — EQUITABLE ASSIGNMENTS — BILL OF EXCHANGE.

Laws 1899, p. 362, c. 149, § 126, defines a bill of exchange as an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom addressed to pay on demand or at a fixed or determinable time a sum certain to order or to bearer. Section 127, p. 363, provides that a bill of itself does not operate as an assignment of the funds in the hands of the drawee, and that the drawee is not liable unless he accepts the same. *Held*, that a writing addressed by one to another, requesting him to pay a third

person at the end of each month the amount due for boarding such other's horses, was within section 126, and that the mere delivery of the same to such third person was not an assignment of the funds in the hands of the person to whom addressed, and that he would not be liable thereon until it was accepted in writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, § 121.]

Appeal from Superior Court, King County; Jeremiah Neterer, Judge.

Complaint in Interpleader under the statutes by Frederick & Nelson against the Spokane Grain Company and E. B. McGill, trustee in bankruptcy of the estate of James Madsen, a bankrupt. On payment into court of the amount in controversy, Frederick & Nelson were released from liability, and from a judgment that E. B. McGill, trustee, was entitled to the same, the Spokane Grain Company appeals. Affirmed.

James McNeny, for appellant. Samuel Morrison, for respondent.

MOUNT, J. Prior to August 10, 1905, one JAMES MADSEN was conducting a boarding stable for horses in the city of Seattle. He had an agreement with Frederick & Nelson to feed for them about 24 head of horses, at the price of \$18 per head per month. It was customary for Frederick & Nelson to pay their bill for each month about the 5th of the succeeding month. On or about August 10, 1905, the Spokane Grain Company agreed to furnish Madsen with hay and grain for an indefinite time. Thereupon Madsen executed and delivered to the Spokane Grain Company the following order: "August 10, 1905. Frederick & Nelson, City—Gentlemen: Please pay to Spokane Grain Company at the end of each month the amount due me for boarding your horses. Their receipt shall serve as a receipt from me. Pay them what will be due me for the month of August. Also pay them all moneys that will be due me each successive month until otherwise notified by Spokane Grain Company. Yours very truly, Club Stables, by James Madsen, Proprietor." Thereafter, up to August 29, 1905, the Spokane Grain Company sold and delivered to Madsen hay and grain to the value of \$451.50. During the month of August, 1905, Frederick & Nelson's bill with Madsen amounted to \$440.90. The existence of the above-mentioned order was not known to Frederick & Nelson, and was not presented to them for acceptance and payment until August 31, 1905, at which time payment was refused for the reason that the amount due Madsen from Frederick & Nelson had been previously garnished in an action on a promissory note for \$315.60, wherein E. B. McGill was plaintiff and Madsen was defendant. Madsen was afterwards, on September 6, 1905, declared a bankrupt, and E. B. McGill was appointed trustee in bankruptcy. Thereafter the Spokane Grain Company notified Frederick & Nelson not to pay to McGill as trustee in bankruptcy the money garnished

in their hands. Frederick & Nelson thereupon filed a complaint in interpleader under the statutes, and, upon paying into court the amount they owed Madsen, were released from liability. The case was then contested as to whether the trustee in bankruptcy or the Spokane Grain Company was entitled to the fund. The trial court held that the former was entitled to the money. From a judgment to that effect, this appeal is prosecuted by the Spokane Grain Company.

The appellant contends that the order set out above was not a draft or bill of exchange the acceptance of which is required to be in writing, but was an order drawn on a particular fund, covered the amount of the fund drawn upon, and amounted to an equitable assignment in present of the fund, notwithstanding it had not been accepted by the drawee; and some authorities are cited which apparently sustain this position. But our statute seems to place the question beyond controversy, for it provides: "A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same." Laws 1899, pp. 362, 363, c. 149, §§ 126, 127. These sections are plain, and it follows therefrom that the mere delivery of the order by Madsen to the Spokane Grain Company did not operate as an assignment of the funds in the hands of Frederick & Nelson, nor would Frederick & Nelson be liable on the order until it was accepted by them in writing. *Nelson v. Nelson Bennett Co.*, 31 Wash. 116, 17 Pac. 749; *Wadhams v. Portland, etc., R. R. Co.*, 37 Wash. 86, 79 Pac. 597.

This being true, it follows that the appellant had no title or claim upon the fund after it was garnished or paid into court by Frederick & Nelson. The judgment of the lower court must therefore be affirmed.

HADLEY, C. J., and FULLERTON, CROW, RUDKIN, and DUNBAR, JJ., concur.

WRIGHT v. COMPUTING SCALE CO. et al. (Supreme Court of Washington. Sept. 6, 1907.)

1. CONTRACTS — SALES — CONSTRUCTION — CITY ORDINANCE AS PART OF CONTRACT.

Where defendants sold a computing scale to plaintiff under a warranty, a city ordinance at the time making it unlawful for any person to use any scale to weigh articles for sale, without first having procured a certificate from the city inspector of weights and measures that the scale had been inspected and found correct, constituted a part of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 750.]

2. EVIDENCE—PAROL—VARYING WRITTEN CONTRACT.

Defendant sold plaintiff a computing scale under a warranty that it would weigh correctly, and plaintiff sued to recover damages for losses sustained by the underweight of the scales on sales made by him. An ordinance of the city prohibited the use of scales until inspected by the city inspector of weights and measures and found correct. *Held* that, as such ordinance constituted a part of the contract of sale, it was admissible on the part of defendant to show a non-compliance with the provisions thereof, and was not objectionable as an attempt to vary or contradict the terms of the written contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1887.]

3. SALES—RESCISSION.

Where plaintiff purchased a computing scale from defendants under a written warranty that it would weigh correctly, it was plaintiff's duty, on receiving the scale, to have the same inspected by the city inspector of weights and measures as required by a city ordinance of the place where the contract was made, and, if found defective, to rescind the contract and recover his money before any loss accrued to him through the sale of articles improperly weighed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1227.]

4. SALES—BREACH OF WARRANTY—DAMAGES—NONCONTEMPLATED LOSSES.

Where plaintiff purchased a computing scale from defendants under a warranty that it would weigh correctly, losses sustained by plaintiff because of underweights of such scale while being used by plaintiff for four months before he discovered that it underweighed did not naturally arise from a breach of the warranty, and were not within the contemplation of the parties when making the contract, so as to authorize a recovery thereof.

Appeal from Superior Court, Spokane County; Mitchell Gilliam, Judge.

Action by E. F. Wright against the Computing Scale Company and another. From a judgment for plaintiff, defendants appeal. Reversed.

J. W. Graves and A. G. Gray, for appellants. Willis H. Merriam, for respondent.

MOUNT, J. The respondent brought this action in the court below to recover damages for an alleged breach of warranty of a set of scales for weighing meats. The cause was tried to the court without a jury, and findings and a judgment were entered for the plaintiff as prayed for. Defendants appeal.

Upon the trial the court found the facts substantially in accordance with the allegations of the complaint, the material findings being as follows: "(2) That on the 2d day of December, 1903, the plaintiff purchased from the defendants, through their authorized agent at the city of Spokane, Wash., one computing scale at the agreed price of \$85; that at the time of said purchase the defendants, as a part of the contract of said purchase, guaranteed the plaintiff in writing that said scale would weigh correctly any article capable of being weighed upon it, which contract of guaranty is shown in plaintiff's Exhibit No. E." This exhibit is as follows: "Received from Robert Turn-

bull, 103 S. Howard, \$15, as cash payment on one 63-scale, balance of \$70 to be paid at the rate of \$7 per month, without interest, or a discount of ten per cent. of balance will be allowed if balance is paid within thirty days of date hereof. Guaranty: The Computing Scale Co., of Dayton, O., manufacturers of the Moneyweight Scale, together with the Moneyweight Scale Co., of Chicago, do hereby guarantee said computing scale to weigh correctly any article capable of being weighed on it, and should the scale get out of order at any time within two years from the date of shipment, with ordinary use (not dropped or broken), we will repair the same gratis, the purchaser paying the freight or express charges to and from the factory. Money Weight Scale Company, by T. Delafield, Salesman." "(3) That on the 2d day of December, 1903, the said scale was delivered to plaintiff by the defendants, and the plaintiff paid the defendants on the purchase price thereof the sum of \$43. (4) That the plaintiff bought said scale for the special purpose of using it in his place of business, to wit, a meat market situated in the city of Spokane, Wash., which purpose was known to the defendants, and plaintiff began to use it immediately upon the delivery and continued to use it down to the 24th day of March, 1904, and during the time between the said 2d day of December, 1903, and the 24th day of March, 1904, caused to be weighed upon said scale, 2,768 sales of beef, 852 sales of pork, 401 sales of mutton, 343 sales of veal, 342 sales of sausage, 75 sales of bacon, 153 sales of ham, 205 sales of poultry, 47 sales of weinernerwurst, 92 sales of liver, 45 sales of headcheese, 145 sales of fish, and 158 sales of lard, relying at all times during said period on the guaranty of the defendants that said scales would weigh correctly. (5) That said scale was, in fact, defective at the time it was delivered to plaintiff on account of being improperly constructed and remained defective and did not at any time between the dates of December 2, 1903, and the 24th day of March, 1904, weigh correctly any article that was weighed upon it, and, in fact, on account of such defect and improper construction, the said scale weighed each and every article weighed upon it one-half pound less than its true weight, resulting in a loss to the plaintiff on account of such defects on every article weighed the value of a half a pound of the article weighed. (6) That on the 24th day of March, 1904, the aforesaid scale was inspected by the inspector of weights and measures of the city of Spokane, Wash., and said inspector found that the said scale was defective and weighed every article that had been weighed upon it one-half pound less than its true weight, and he, therefore, condemned the said scale, and the plaintiff was prohibited from using said scale by said officer. (7) That the plaintiff had no knowledge that said

scale was defective or was not weighing correctly until the 24th day of March, 1904, when it was inspected, and that he immediately thereafter notified said defendants of said defects, and the defendants removed the said scale from plaintiff's place of business, but failed and refused to pay to plaintiff the \$43 plaintiff had paid to them on account of the purchase price of said scale, or to pay plaintiff the amount of the losses he sustained on account of said defects in said scale." The court then found the prices at which the beef, etc., were sold, and concluded that plaintiff should recover \$43 paid for the scales and \$338 losses sustained by the underweight of the scales. In the answer the defendants pleaded as an affirmative defense a city ordinance of the city of Spokane in force at the time the contract was made, making it unlawful for any person to use any weight or scale used in weighing articles for sale without first having procured a certificate from the city inspector of weights and measures that such scales had been inspected and found correct, that the contract of warranty was made with reference to said ordinance, and that plaintiff failed and neglected to have said scale inspected. This defense was stricken by the court upon motion of the plaintiff.

It was error, without doubt, to strike this defense. The law of the place where a contract is made is as much a part of the contract as though it were expressed therein. 9 Cyc. 582, and cases cited; *Holbrook v. Ives*, 44 Ohio St. 516, 9 N. E. 228. There was nothing in this defense which in any way tended to vary or contradict the terms of the written contract. The warranty was: Defendants "do hereby guarantee said computing scale to weigh correctly." This certainly did not imply that the scale had been tested and adjusted by the city inspector and his certificate issued to that effect. It was the duty of the plaintiff, under the law, to have an inspection made by that officer before the plaintiff was authorized to use the scale. If he had done so, the scale would have been condemned, and he could have rescinded the sale and recovered his money back before any loss had accrued to him. This was clearly his duty and his remedy. Furthermore, the rule in construing contracts of this kind is: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally; i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it." 30 Am. & Eng. Enc. of Law (2d Ed.) p. 209; *Puget Sound Iron, etc., Works v. Clemmons*,

32 Wash. 36, 72 Pac. 465. It is unreasonable to suppose that the contract of warranty above set out contemplated that the appellant should be liable for mistakes and underweights for a period of four months and for more than five thousand sales. Such damages did not arise naturally, nor were they in contemplation of the parties when the contract was made. But, conceding that there was a breach of the warranty and that respondent was entitled to some damages, "the buyer owes an active duty to exercise ordinary care in order to render the damages arising from the breach of warranty as light as possible. He cannot recover for expenses or losses unnecessarily incurred, nor for any damages of which his own negligence was the proximate cause. If by the exercise of ordinary care the damages might have been prevented, the measure of the buyer's recovery is the reasonable cost and expense of exercising such care, whether he exercised it or not." 30 Am. & Eng. Enc. of Law (2d Ed.) 223. Ordinary care would have discovered the error in these scales before they were used at all. A mere compliance with the city ordinance would have discovered the error. In either view of the case, upon the facts found, the plaintiff was entitled to recover back only the money he had paid on the purchase price.

The judgment is therefore reversed, and the cause remanded, with instructions to enter a judgment in favor of the respondent for \$43. The appellants are allowed their costs of this appeal.

HADLEY, C. J., and CROW, FULLERTON, and DUNBAR, JJ., concur. RUDKIN, J., concurs on the second ground stated in the opinion.

PORTLAND & SEATTLE RY. CO. v. LADD et al.

(Supreme Court of Washington. Sept. 6, 1907.)

1. APPEAL—CONTINUANCE—DENIAL—REVIEW.
The denial of an application for a continuance will not be reviewed on appeal, except for abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3837.]

2. CONTINUANCE—ABSENCE OF PARTIES.

Where, in condemnation proceedings, the actual owners of an undivided two-thirds interest in the property sought to be condemned were present, and there was no showing that defendant's counsel were dependent on L., who, with his wife, owned the other one-third, or that they had relied on him to furnish evidence or that he was a material witness, or that other witnesses were not at hand, the court's refusal of a continuance because of L.'s absence was not an abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Continuance, § 41.]

3. EVIDENCE — DOCUMENTARY EVIDENCE — MAPS.

Where, in a proceeding to condemn land for a railroad right of way, there was no dispute in the evidence as to the exact location of the

railroad line on the ground or of the amount of land sought to be appropriated as staked, certain maps, shown to be an accurate description of the location of the road as laid out on the land, were admissible as illustrative of the testimony of the witnesses, though not made by the person who made the surveys on the ground.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1500, 1501.]

4. APPEAL—ADMISSION OF EVIDENCE—PREJUDICE.

Where, in proceedings to condemn land for a railroad right of way, there was no dispute as to the location of the line or the amount of land sought to be taken, defendants were not prejudiced by any error in the admission of certain maps of the location which did not coincide in all particulars.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4153.]

5. LIS PENDENS—CONDEMNATION PROCEEDINGS.

Ballinger's Ann. Codes & St. § 4887, authorizing the filing of a lis pendens in actions affecting the title to real property, applies to proceedings to condemn land for a railroad right of way.

6. SAME—PURCHASERS WITH NOTICE.

Ballinger's Ann. Codes & St. § 5637, provides that any corporation authorized to appropriate land may present a petition to the superior court of the county where the land is located, describing the land and setting forth the claim of every person interested in the land, as ascertained from the public records, and section 5638 requires that notice shall be served on every person named in the petition as interested in the land. *Held*, that no notice is required to be served on subsequent purchasers and incumbrancers, but subsequent purchasers and incumbrancers are charged with notice thereof.

7. EMINENT DOMAIN—COMPENSATION—MEASURE—USE OF PROPERTY.

Where, in a proceeding to condemn land for a railroad right of way, defendants claimed injury to a quarry, and it appeared that the rock could not be quarried without injury to lands which defendants did not own, but which belonged to the railroad company, the court properly charged that, if the rock could only be profitably quarried by injury to the land owned by the railroad company, the jury should disregard all evidence of the value of the rock as a quarry.

Rudkin, J., dissenting in part.

Appeal from Superior Court, Skamania County; W. W. McCredie, Judge.

Condemnation proceedings by the Portland & Seattle Railway Company against Charles E. Ladd and others. From a judgment assessing damages to which defendants were entitled, they appeal. Affirmed.

Teal & Minor and W. A. Johnson, for appellants. James B. Kerr and George T. Reid, for respondent.

MOUNT, J. This appeal is prosecuted from a judgment based upon an award for damages in condemnation. The errors assigned will be considered and decided in the order assigned in appellants' brief. The facts necessary to an understanding of the points made will be stated as each point is considered.

It is first argued that the court erred in denying a motion for a continuance. The

legal title of the land sought to be appropriated stood in the name of Charles E. Ladd and wife, but the equitable title was in Ladd and wife and the Columbia Contract Company, a corporation, in the proportion of one-third in Ladd and wife and two-thirds in the Columbia Contract Company. On June 8, 1906, a preliminary order was made in condemnation, adjudging the land sought by the railroad company a necessary public use, and ordering a jury to assess the damages in favor of the owners. On June 21, 1906, notice was served on appellants' attorneys that a jury would be summoned for the 12th day of July, 1906, to determine the question of damages, and the jury was accordingly summoned for that day. On July 12, 1906, at the time fixed for the trial, a motion was filed by attorneys for Mr. Ladd, asking for a continuance of the trial upon the ground that Mr. Ladd was absent in some eastern state and was not advised of the time when the trial was to take place and counsel could not locate him. The affidavit in support of the motion showed diligence of counsel in trying to locate Mr. Ladd; but there was no showing that counsel were dependent upon Mr. Ladd, or had relied upon him, to furnish evidence or the facts in the case, or that Mr. Ladd was a material witness, or that other witnesses were not at hand to fully establish all the facts upon which the appellants relied. The granting or refusing of a continuance of a trial rests largely in the discretion of the trial court, and will only be reviewed for abuse. *Maloney v. Stetson & Post Mill Co.* (Wash.) 90 Pac. 1046. We are satisfied the court did not abuse its discretion in this case, because of the failure to show the facts above stated, and because the actual owners of an undivided two-thirds interest in the property were present. In fact, the pleadings show that the whole property was purchased by the Ladds and the Columbia Contract Company for use as a stone quarry, and that the same was to be operated by the appellant Columbia Contract Company, which company was present at the trial by its officers. There was therefore no error in denying the motion for a continuance.

Appellants next contend that the court erred in receiving in evidence certain maps, marked Exhibits A, B, D. and F, and in denying the motion to exclude these maps after they had been received in evidence. The points made are that the maps were not prepared by the engineers who made the surveys upon the ground, and also that the maps did not agree with themselves. There seems to have been no dispute in the evidence as to the exact location of the railroad line upon the ground, or of the amount of land sought to be appropriated, which was fifty feet on each side of the center line of the railway as staked upon the ground. The maps were not offered or received as evidence in themselves of the location of the

line, but only as illustrative of the testimony of the witnesses testifying in relation thereto, and therefore were admissible, even though they were not made by the persons who made the surveys upon the ground, where they were shown to be accurate. 17 Cyc. 412. The witnesses who testified in regard to these maps all testified that the maps were accurate, and showed the location of the line as laid out upon the land. It is true these persons neither surveyed the ground nor made the maps, but they testified that they scaled the maps and compared them with the government and other field notes, and found them to be accurate. This was sufficient to entitle the maps to go in evidence as a part of the testimony of the witnesses. It is true one of the maps offered did not coincide with the others in all particulars, but this variance was explained so as not to mislead any one. But, if all the maps were improperly in evidence, it is difficult to see any prejudicial error, because there was no dispute as to the location of the railway line or the amount of land sought to be taken. The questions for the jury were, what is the value of the land taken, and the damage to the land not taken? Neither question was affected by the maps when the line was actually staked upon the ground and had previously been adjudged necessary for a public use. It is true the appellants claim their land extended further east than was admitted by the respondent, and therefore gave them 90 or 100 feet more land to the east of the base of Castle Rock, which appellants sought to show is a rock quarry which is greatly damaged by the construction of the railway line; but the evidence of appellants on this subject showed conclusively that the stone could not be quarried from Castle Rock profitably unless the stone was thrown by a blast a distance of from 200 to 400 feet beyond the appellants' line, even if the east line were located 100 feet further east than the line claimed by respondent. The exact location of this line is therefore immaterial, because, in any event, the quarry could not be profitably operated without destroying property which appellants did not own and could not acquire.

Appellants next contend that the court erred in giving the following instruction: "If the petitioner commenced a suit to appropriate a right of way across the Snooks donation land claim and filed its lis pendens thereof in the auditor's office in Skamania county, Wash., and subsequent thereto claimants obtained an option or agreement to purchase a part of said donation land claim, through which said proposed road extends, and subsequent thereto said case came on to be heard and the damages were assessed and paid and the right of way appropriated by the petitioner, then the petitioner is the owner of said right of way and claimants' said right to purchase is subsequent and subordi-

nate thereto." The trial court was evidently of the opinion that section 4887 of the practice act (Ballinger's Ann. Codes & St.), relating to the manner of commencing actions, applies to cases of this character. It is argued by appellants that proceedings in condemnation are special proceedings, and therefore that section 4887, which relates to the filing of a lis pendens in actions affecting the title to real property, does not apply to this class of cases. We are of the opinion that the section does apply to cases of this kind. While it is true that proceedings in condemnation are special in this state and are therefore governed by all the requirements stated in the statute, yet, where no provision is made for the protection of parties to such proceedings, the rules of common practice must necessarily apply. The statutes relating to the exercise of the right of eminent domain provide, at section 5637, Ballinger's Ann. Codes & St., that any corporation authorized to appropriate land may present to the superior court of the county where the land is located a petition describing the land sought and setting forth the name of each owner, incumbrancer, or other person interested in the land, "so far as the same can be ascertained from the public records." The record owners or incumbrancers are therefore the only parties made necessary by this statute. The next section provides that a certain notice "shall be served on each and every person named therein as owner, incumbrancer, tenant, or otherwise interested" in the land. No provision is made in the act for the service of notice upon incumbrancers or purchasers of the land after the proceedings are begun. It is, no doubt, required that tenants or persons in possession are required to be served with notice; but incumbrancers or purchasers with notice after the proceedings are begun are, of course, bound by the record and take subject thereto. In *Re Smith's Petition*, 9 Wash. 85, 37 Pac. 311, 494, this court said: "It has been frequently said by courts that the taking of land by eminent domain is a proceeding in rem, and the service of a constructive notice has been justified by the practice which prevails in that class of cases. But it is well known that proceedings in rem presuppose that the complaining party has a superior right to the subject of the suit, or a right to have it subjected to his claim and that the first requisite is a seizure of the thing itself, after which follows notice. 'The theory of the law is that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him.' *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914." It follows, of course, if these proceedings are in rem, subsequent purchasers are bound by the proceedings pending, and are bound to take notice thereof where possession is taken *prima facie* by staking the line upon the

ground, as was the fact here. It is conceded by appellants that, in some states where there is no statute regarding *lis pendens*, the courts have held that one who purchases land after the proceedings are commenced takes subject to the proceedings. 2 Pomeroy's Equity Jurisprudence (2d Ed.) § 632 et seq.; 2 Lewis on Eminent Domain, 338. But it is argued that the common-law rule is repealed by section 4887, which does not apply to this class of cases. Either the statute or the common-law rule, one or the other, must be in force as regards this class of cases, because, as seen above, no provision in reference thereto is made by the statute relating to eminent domain. We think the Legislature used the term "actions affecting the title of real property" as applying to all actions and proceedings relating to such property, and for that reason made no provision in the eminent domain act for notice to purchasers or subsequent incumbrancers pending the suit. The giving of this instruction was therefore not error.

Appellants allege, further, that the court erred in giving the following instruction: "You are instructed that, if you find from the evidence that Castle Rock can only be profitably worked by blasting it in such a manner that portions of it would fall upon land now owned by the railroad company, then you may disregard all the evidence of value as a quarry. The owners of Castle Rock are by law required, if they desire to quarry the same, to so quarry their rock as not to interfere with the rights of others. If you find from the evidence that petitioner herein owns a right of way across the Snooks donation land claim and up to the land of defendants, then it is the duty of the defendants or claimants to quarry the rocks so as not to interfere or trespass upon this right of way, and you are not to consider the inability of defendants or claimants to use this right of way on the Snooks donation land claim as an element of defendants' damages whereby the property not taken by this action is damaged. The damage you are to consider is confined to that which arises and naturally flows from the appropriation of the land for a right of way across defendants' land, which is sought by this suit." The evidence shows that the right of way of the railway runs close to the base of a large rock, several hundred feet in height, the exact measurement not being shown, known as "Castle Rock"; that one face of this rock is toward the Columbia river, which is 400 or 500 feet distant from the rock; that the railway runs between the rock and the river; that the appellants did not own all the land between the river and the rock; that a large portion thereof was

owned by the railway company. There was apparently no dispute that the land of the appellants sought by the railway company was not worth to exceed \$50 per acre for agricultural purposes. The appellants claim that the land taken by the railway was a great damage to other lands of appellants not taken, by reason of the fact that Castle Rock was valuable as a stone quarry, because it contained about 18,000,000 tons of stone, and that the construction of the railway prevented appellants from quarrying the stone at a profit. The great burden of appellants' evidence was to the effect that, in order to work the rock known as Castle Rock at a profit, it was necessary to blast down great quantities of the rock at a time and throw the same toward the river. Otherwise the property could not be worked at a profit, and was therefore of no value. This same evidence showed without question that, in order to do this, the rock would be piled high upon lands which appellants did not own, and could not acquire because such lands were already owned by the railway company. It requires no argument to show that, if appellants' property was so situated that it could not be utilized without injury to others, its use would not be permitted at all; and, if the value of appellants' property was dependent upon other property which they did not own and could not acquire, then, as shown by the appellants themselves, the property had no value, and, of course, was not damaged. We think the instruction was proper in this case.

The verdict and award of damages in this case was \$5,000. Appellants contend that this amount is too small, and that a new trial should be granted on that account. After a careful reading of all the evidence in the case, we are satisfied that the appellants have no good reason to complain on this account, and that a much smaller award would have been sustained.

The questions presented which we have not noticed are either decided by what we have said above or are not deemed of sufficient importance to warrant a reversal.

We find no reversible error in the record, and the judgment is therefore affirmed.

HADLEY, C. J., and ROOT, CROW, and DUNBAR, JJ., concur.

RUDKIN, J. (dissenting). I do not think that the mere fact that a stone quarry cannot be profitably worked at the present time, without blasting and casting rock on the property of others, entirely destroys its value as such; and I therefore dissent from the judgment.

STEVENS v. BENSON, Secretary of State.

(Supreme Court of Oregon. Sept. 3, 1907.)

1. CONSTITUTIONAL LAW—LEGISLATIVE ACTION—DIRECTION—SELF-EXECUTING PROVISIONS.

Const. art. 4, § 1, as amended in 1902, reserving to the people initiative and referendum powers, and providing for the submission of legislation to the voters of the state or other political subdivision, is self-executing.

2. SAME—ENFORCEMENT—STATUTES.

Laws 1907, p. 399, providing the procedure to facilitate the enforcement of the initiative and referendum powers reserved to the people by Const. art. 4, § 1, as amended in 1902, was a proper exercise of legislative power, though the constitutional provision was self-executing.

3. STATUTES—DIRECTORY PROVISIONS.

Laws 1907, p. 399, providing for the carrying into effect of the initiative and referendum powers reserved to the people, provided (section 1) a form of petition, which was required to be substantially followed. The form contained a warning clause that it was a felony for any one to sign any such petition with any name other than his own, or to knowingly sign his name more than once to the same measure, or to sign such petition when he was not a legal voter; and section 2 declared that the form given was not mandatory, and if substantially followed in any petition it should be sufficient, regardless of clerical or mere technical errors. *Held*, that the form, in so far as it contained the warning clause, was merely directory, and that a referendum petition omitting such clause was not thereby fatally defective.

Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Suit by Robert L. Stevens against F. W. Benson, as Secretary of State. From a decree in favor of complainant, defendant appeals. Reversed. Suit dismissed.

A. M. Crawford, L. R. Webster, and S. Smith, for appellant. Dan J. Malarkey and John F. Logan, for respondent.

EAKIN, J. On May 18, 1907, there was filed in the office of the Secretary of State a petition for referring to a vote of the people of the state, under the referendum provision of the Constitution, an act passed by the legislative assembly in February, 1907, providing for the custody and control of persons confined in county jails, etc.; and this suit was brought by plaintiff to enjoin defendant, as Secretary of State, from filing said petition tendered. Demurrer to the complaint was overruled, and final decree thereupon rendered enjoining the filing of the petition.

The objection to the petition was that it did not contain the warning clause required by section 1 of the act of the legislative assembly of 1907 (Laws 1907, p. 399), which provides for carrying into effect the initiative and referendum. Section 1 of that act provides that:

"The following shall be substantially the form of petition for the referendum to the people on any act passed by the legislative assembly of the state of Oregon, or by a city council:

"Warning.

"It is a felony for any one to sign any initiative or referendum petition with any name other than his own, or to knowingly sign his name more than once for the same measure, or to sign such petition when he is not a legal voter.

"Petition for Referendum.

"To the Honorable, Secretary of State for the State of Oregon (or to the Honorable Clerk, Auditor, or Recorder, as the Case may be, of the City of):

"We, the undersigned citizens and legal voters of the state of Oregon (and the district of, county of, or city of, as the case may be), respectfully order that the Senate (or House) Bill No. ..., entitled (title of act, and if the petition is against less than the whole act then set forth here the part or parts on which the referendum is sought), passed by the legislative assembly of the state of Oregon, at the regular (special) session of said legislative assembly, shall be referred to the people of the state (district of, county of, or city of, as the case may be), for their approval or rejection, at the regular (special) election to be held on the ... day of, A. D. 19.., and each for himself says: I have personally signed this petition. I am a legal voter of the state of Oregon, and (district of, county of, city of ... , as the case may be). My residence and post office are correctly written after my name.' * * *

"Sec. 2. * * * The forms herein given are not mandatory, and if substantially followed in any petition it shall be sufficient, disregarding clerical and merely technical errors."

The provisions of the Constitution involved are as follows: section 1, art. 4, amendment of 1902, namely: "The legislative authority of the state shall be vested in a legislative assembly, consisting of a Senate and House of Representatives, but the people reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the legislative assembly and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent. of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safe-

ty), either by the petition signed by five per cent. of the legal voters, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded.

* * * Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment until legislation shall be especially provided therefor."

The question arises: Is this section of the Constitution self-executing? A constitutional provision is said to be self-executing if it enacts a sufficient rule by means of which the right given may be enjoyed and protected. The language used, as well as the object to be accomplished, is to be looked into in ascertaining the intention of the provision. As said in *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626: "The question in every case is whether the language of a constitutional provision is addressed to the courts or the Legislature. Does it indicate that it is intended as a present enactment, complete in itself as definitive legislation, or does it contemplate subsequent legislation to carry it into effect? This is to be determined from a consideration both of the language used and the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed are fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, then the provision should be construed as self-executing." To the same effect are *Acme Dairy Co. v. City of Astoria* (Or.) 90 Pac. 153; *Swift & Co. v. City of Newport* (Va.) 52 S. E. 821, 105 Va. 108, 3 L. R. A. (N. S.) 404; *Taylor v. Hutchinson*, 145 Ala. 202, 40 South. 108; *Logan et al. v. Parish of Ouachita*, 105 La. 490, 29 South. 975. As expressed by one court, whether it is intended thereby to declare personal rights of a citizen or to define a rule for the government of the Legislature; and, if the former, it is legislative, and needs no legislation to give it force. It is plainly expressed in the provision itself in this case that its reserved rights are to be independent of the Legislature, and is sufficiently specific that it may be carried out without legislative aid (*Logan et al. v. Parish of Ouachita*, supra); and in the last clause it provides that the Secretary of State, in submitting to the people the matter referred, shall be governed by the general laws until further provision is made by the Legislature, thus not only contemplating that such legislation is not necessary as to procuring and presenting the

petition, but also forestalling any possibility of defeat, by inaction of the Legislature in regard to the manner of its submission to the people. As said in *Willis v. Mabon*, supra: "The object being to put it beyond the power of the Legislature to render them nugatory by refusing to enact legislation to carry them into effect." If it were not self-executing, even though it were mandatory upon the Legislature to make provision to carry it into effect, there is no power to compel it to do so. The exercise of that power in any particular case must depend on the volition of the Legislature. *Cooley's Const. Lim.* (7th Ed.) 121; *In re State Census*, 6 S. D. 540, 62 N. W. 129; *People ex rel. v. Rumsey*, 61 Ill. 44. Thus a strong reason appears why it was intended to be self-executing, and it should be so considered.

2. But, when a provision of the Constitution is self-executing, legislation may be desirable for the better protection of the right secured and to provide a more specific and convenient remedy for carrying out such provision, and it is plain that the statute in question was intended for that purpose, and reduces to a system and simplifies the proceeding, makes every step definite, as well as placing safeguards around it to protect it from abuse, without curtailing the right or placing any undue burdens upon its exercise. As said by Judge Cooley, in his work on *Constitutional Limitations* (page 122), a constitutional provision that is self-executing may admit of supplementary legislation in particulars where in itself it is not as complete as may be desirable. It will also override and nullify whatever legislation, either prior or subsequent, would defeat or limit the right. *Reeves v. Anderson*, 13 Wash. 17, 42 Pac. 625; *Beecher v. Paldy*, 7 Mich. 488; *Willis v. Mabon*, supra; *Swift & Co. v. City of Newport News*, supra. And so the Legislature may enact laws to facilitate the enforcement of constitutional provisions that are self-executing, and such laws will be obligatory upon the court when intended by the Legislature to be mandatory, so long as they do not curtail the rights reserved or exceed the limitations specified therein. *Ordronaux's Constitutional Legislation*, 262-265; *People v. Draper*, 15 N. Y. 532. *Cooley's Constitutional Limitations* (7th Ed.) 126, lays down a fundamental rule as to the power of the Legislature in such cases as follows: "In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in and may be exercised by the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is intrusted with the general authority to make laws at discre-

tion." And in *Willis v. Mabon*, supra, the court holds, that the remedy for enforcement of a self-executing constitutional right is always within the control of the Legislature to modify, change, or make exclusive, provided only it remains adequate, but is beyond the power of the Legislature to defeat its object. *Hickman v. City of Kansas*, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684.

3. It is claimed by defendant, however, that the statute in this case, in so far as it relates to the warning clause contained in the form for the petition, is directory only, and that it constitutes no element of the petition proper, and therefore its omission from the petition in this case is not fatal. The statute has not in terms enacted that there shall be a warning clause upon the petition, but only in giving the form of the petition included a warning therein, which it provides "shall be substantially the form of petition," and further provides that "the forms herein given are not mandatory, and if substantially followed in any petition it will be sufficient, disregarding clerical and merely technical errors." This part of the statute is only a provision of a form to aid in carrying out a right already existing independent of the statute, and expressly states that it is not mandatory. *Lewis' Sutherland's Statutory Const.* § 627, says: "When the proceeding is permitted by the general law, and an act of the Legislature directs a particular form and manner in which it shall be conducted, then it will depend on the terms of the act itself whether it shall be considered merely directory, subjecting the parties to some disability if it be not complied with, or whether it shall render the proceeding void." If the Legislature creates a right, and at the same time prescribes the mode of its exercise, then such mode would be mandatory and exclusive; but when the right exists, and may be exercised effectually without such provision, and the legislative provision only relates to its better enforcement, the intention of such provision must be gathered from the act and its declared purpose, whether it shall be construed mandatory or directory. Section 611 of *Sutherland* provides: "Unless a fair consideration of a statute, directing the mode of proceeding of public officers, shows that the Legislature intended compliance with the provision in relation thereto to be essential to the validity of the proceedings, it is to be regarded as directory merely. Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by the failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it will still be sufficient if that which is done ac-

complishes the substantial purposes of the statute." To the same effect are 23 Am. & Eng. Ency. 438; *Thomson v. Harris*, 88 Hun, 481, 34 N. Y. Supp. 885; *Custer County v. Yellowstone County*, 6 Mont. 39, 9 Pac. 586. Negative words, or words of prohibition, or a penalty affixed to the requirements of a statute, make such provision mandatory, and must be complied with, or where the requirement is a necessary element of the thing to be done, or affects the rights or burdens of the persons interested, it must be observed. *People v. Supervisors of Ulster*, 34 N. Y. 288; *Corbett v. Bradley*, 7 Nev. 108. But the directions in a statute which are not of the essence of the thing to be done, but which are given with a view to the orderly and prompt conduct of the business, and by a failure to do which the rights of those interested will not be prejudiced are not commonly to be regarded as mandatory. 5 Words and Phrases, 4332; *Custer County v. Yellowstone County*, supra; *Bladen v. Philadelphia*, 60 Pa. 464. But there is an absence of anything indicating an intention that it shall be mandatory. On the contrary, it is clear that it is only directory. It is not of the essence of the thing to be done, viz.: Direct the Secretary of State to submit to the vote of the people at the next election the act known as "House Bill No. 243." There is no affirmative provision for it in the act, nor negative or prohibitive words relating thereto, and the statement following the forms that they shall not be mandatory leads us to the conclusion that the statute providing the warning clause in the form of petition is only directory, and its omission from the petition does not render it void; and the Secretary of State properly received the same for filing, and the lower court erred in overruling the demurrer and in granting the injunction.

Therefore the decree of the lower court is reversed, and, this being the only question involved in the case, decree will be entered here dissolving the injunction and dismissing the case.

BEAN, C. J., did not take part at the hearing of this case and *Palmer v. Benson*, infra, being a regent of the University of Oregon, the party interested in the latter case, and the question here being involved in both.

PALMER et al. v. BENSON, Secretary of State.

(Supreme Court of Oregon. Sept. 3, 1907.)

STATUTES—REFERENDUM—PETITION.

Laws 1907, p. 390. § 1. provides a form of petition for the carrying into effect of the referendum powers reserved to the people, and section 2 declares that every sheet of the petition for petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure so proposed by the initiative petition, but such petition may be filed with the Secretary of State in numbered sections, for convenience

in handling, and referendum petitions shall be attached to a full and correct copy of the measure on which the referendum is demanded and may be filed in numbered sections in like manner. *Held* that, while an initiative petition is required to contain a correct copy of the title of the act, a referendum petition containing a full and correct copy of the act without the title is sufficient.

Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Mandamus, on petition of Eugene Palmer and another, against F. W. Benson, as Secretary of State. From a judgment denying the writ, petitioners appeal. Reversed and remanded, with directions.

Tilmon Ford and M. E. Pogue, for appellants. A. M. Crawford and Geo. G. Bingham, for respondent.

EAKIN, J. On the 23d day of May, 1907, the plaintiffs and others presented to the Secretary of State for filing a petition directing a reference to the people, under the referendum provision of the Constitution, of a measure passed by the legislative assembly in February, 1907, known as "House Bill No. 37," to increase the annual appropriation for the support of the University of Oregon. Defendant refused to receive or file the said petition, and the plaintiffs bring this proceeding by mandamus to compel defendant to file said petition. Defendant answered to the writ of mandamus, denying the allegations of the same and alleging affirmatively that said petition is not in the form prescribed by section 1 of the act of the legislative assembly of 1907 (Laws 1907, p. 399), providing for carrying out the initiative and referendum, in that it did not contain the warning clause provided for in said act, and, further, that it does not contain a full and correct copy of the title and text of the measure sought to be referred. A reply was filed to the answer, and the cause tried in the court below upon the pleadings alone, and only two questions raised by the answer are suggested upon this appeal.

The objection made by defendant that the petition does not contain the warning clause provided by the statute has been fully considered in the case of *Stevens v. Benson*, 91 Pac. 577, just decided, and the decision in that case disposes of the objection here adversely to defendant. The only other question for consideration is whether the petition for the referendum must be attached to a full and correct copy of the title and text of the measure to be referred, or whether a full and correct copy of the text of the measure is sufficient.

The constitutional provision and the form of petition provided by the statute, upon which the proceeding is based, are set out in full in *Stevens v. Benson*, supra. Section 2 of the act to provide for carrying into effect the initiative and referendum (Laws 1907, p. 399), so far as it relates to the question

here discussed, is: "Every such sheet for petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure so proposed by the initiative petition; but such petition may be filed with the Secretary of State in numbered sections for convenience in handling, and referendum petitions shall be attached to a full and correct copy of the measure on which the referendum is demanded and may be filed in numbered sections in like manner. Not more than twenty signatures on one sheet shall be counted," etc. The petition in this case did contain a full and correct copy of the text of the act, but erroneously gave the title of the act as "A bill for an act to increase the annual appropriation for the support and maintenance of the University of Oregon," when the real title of the act as passed is "An act to amend section 3529 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon, by increasing the annual appropriation for the support and maintenance of the University of Oregon," and this discrepancy in setting out the title of the act is the ground assigned for the insufficiency of the petition. The purpose of the title to a bill or measure before the Legislature is, as stated in *Clemmensen v. Peterson*, 35 Or. 48, 56 Pac. 1016, "to prohibit the Legislature from combining in one act subjects wholly incongruous, diverse in their nature, and having no perceptible or necessary connection with each other, and to obviate the practice of inserting in an act clauses involving matter of which the title is not calculated or adequate to give or convey any intimation. Thus it was designed by the framers of the Constitution that in every case the proposed measure should stand upon its own merits, and that the Legislature should be fairly satisfied of its purpose by an inspection of the title, when required to pass upon it, so as not to be surprised or misled by the subject which the title purported to express." Neither the reason nor the necessity for such a title to a bill before the Legislature exists with reference to the referendum proceeding. The purpose of the petition for referendum is to identify a particular enactment of the legislative assembly which the petitioners desire to have referred to the people—a question of identity, not of legislation. There is a distinction in that regard between the referendum and the initiative, in which latter legislation is initiated and the whole matter must be formulated just as it is to be submitted to the people, while in the referendum it is only a question of the approval or disapproval by the people of what the Legislature has already enacted as a law. Section 1 of article 4 of the Constitution recognizes this distinction by providing that the initiative petition shall "include the full text of the measure," while as to the referendum no reference is made as to the manner in which the measure shall be mentioned in the peti-

tion. Section 2 of the legislative act of 1907 (Laws 1907, p. 400) recognizes the same distinction, providing that the initiative petition "shall be attached to a full and correct copy of the title and text of the measure," etc., and "a referendum petition shall be attached to a full and correct copy of the measure," etc. And when we consider the purpose of the petition, namely, to bring to the attention of the Secretary of State a particular act for reference to the people, a petition that will identify such act and shall be sufficiently plain, that neither the signers of the petition nor the Secretary of State may be mistaken as to what is meant, will accomplish all that the Constitution contemplates, and the "full text of the measure" fills this requirement.

Considering this fact in connection with the constitutional requirement as to the contents of the initiative petition, as compared with those of referendum petition, helps to explain the difference in such requirements as prescribed by the statute. There can be no doubt that the term "measure," as used here, means an act as it comes from the hands of the Legislature at the close of the session, complete so far as it is concerned. It is the enactment with which we have to do, and we do not think that the term "measure," in this connection, necessarily includes the title of the act; but, if the term is broad enough to do so, it is immaterial. The title is not an element to be submitted to the voter, or even considered by him. The measure is to be placed upon the ballot only by a ballot title in the nature of a statement of the purpose of the measure, and the Legislature could have no purpose in requiring that the title of the act should be contained in the petition, other than as a matter of identity, which they evidently considered complete without it. In the form of petition prescribed by the statute provision is made for inserting the title of the act, but in that particular the form is only suggestive. It contemplates placing the act in the body of the petition, at least when less than the whole act is attacked; but clearly the Legislature did not so intend. The initiative petition is not so arranged and the statute does not contemplate it, but provides that the "referendum petitions shall be attached to a full and correct copy," etc. Evidently the petition must be on every sheet on which signatures are placed, but the act will be on a separate sheet, as clearly appears further on in said section 2, so that the mention of the title of the act in the form for the petition can only be taken as suggestive, and is of but very little aid in interpreting the text of this statute. It must be conceded that the Legislature intended to make a distinction between the manner of setting out the act in initiative petitions and in referendum petitions, as in relation to the former it declares that the petition shall contain a copy of the title and

text of the measure, and as to the referendum petition, being a part of the same sentence, it shall contain a copy of the measure, and we deem it a compliance with the requirement of the statute to attach the referendum petition to a full and correct copy of the text of the measure.

The judgment of the lower court will be reversed, and the cause remanded, with directions to said court to make peremptory the mandate of the alternative writ.

BEAN, C. J., did not take part at the hearing of this case, being a regent of the University of Oregon, the real party interested herein.

LOGAN v. BENSON, Secretary of State.

(Supreme Court of Oregon. Sept. 3, 1907.)

Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Suit by John F. Logan against F. W. Benson, as Secretary of State. From a decree in favor of plaintiff, defendant appeals. Reversed. Suit dismissed.

This is a suit to enjoin the defendant, as Secretary of State, from filing a referendum petition, which seeks to invoke the referendum upon House Bill No. 241, requiring transportation companies to grant free transportation to public officials.

A. M. Crawford, L. R. Webster, and S. Smith, for appellant. Dan J. Malarkey and John F. Logan, for respondent.

EAKIN, J. This suit was argued and submitted with the case of *Stevens v. Benson*, 91 Pac. 577, and involved the same question; and upon the authority of that case the decree of the lower court is reversed, and a decree will be entered here dissolving the injunction and dismissing the suit.

CHRISTENSEN v. COLORADO INV. LOAN CO

(Supreme Court of Utah. Aug. 24, 1907.)

1. BUILDING AND LOAN ASSOCIATIONS—CONTRACTS WITH BORROWING MEMBERS—VALIDITY—FAIRNESS.

A building association advanced \$200 to a member, receiving a note for \$2,000, secured by a mortgage. It assumed to pay the note previously executed by him to a third person for \$1,800, with 8 per cent. interest per annum, provided the member complied with an agreement which required him to pay \$6,908, payable in equal monthly installments for a period of 18 years. *Held*, that the contract was unconscionable, and would not be enforced.

2. SAME—CONSIDERATION.

A building association advanced \$200 to a member, receiving a note for \$200, secured by a mortgage. It assumed to pay a note previously executed by the member to a third person for \$1,800, with interest, provided the member made the payments called for by his agreement. *Held*, that the only consideration for the note and mortgage given to the association was the

\$200 advanced by it, for its assumption of the note to the third person was conditional on the member paying a sufficient amount to discharge the obligation.

3. SAME—SETTLEMENT WITH BORROWING MEMBER.

A building association loaned \$200 to a member, and received a note for \$2,000, secured by a mortgage. It assumed to pay a note previously executed by him to a third person for \$1,800, with 8 per cent. interest, provided the member made the payments called for by his agreement. The member, at the time the \$200 loan was made, had paid to the association \$128, and thereafter he paid \$1,320; \$568 representing monthly installments on his stock, and \$880 representing interest in accordance with the note. *Held*, that the member was entitled to a credit for \$1,448, with interest on the installments paid in excess of the interest due on the note to the third person from the date of a demand for an accounting, and must be charged with \$504 paid by the association to the third person and the \$200 loan, with interest on \$72, the amount actually advanced by the association on making the loan.

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by A. F. Christensen against the Colorado Investment Loan Company. From a judgment for plaintiff, defendant appeals. Modified.

Grant H. Smith and Ernest L. Williams, for appellant. C. S. Patterson, for respondent.

MCCARTY, C. J. This is an action for an accounting. Judgment was rendered for plaintiff, and defendant appeals.

The defendant is a corporation organized and existing under the laws of the state of Colorado, and is doing business as a building and loan association in this and other states. The abstract of the record filed in this court contains only a part of the proceedings had in the lower court. The transcript on appeal, containing the bill of exceptions and the judgment roll, was withdrawn from the clerk's office by appellant and was not returned; the same having been misplaced or lost. Therefore the record before us is not as complete as it should be, and we have assumed to be true certain matters of a minor character not in the abstract, but referred to in appellant's brief, and over which there appears to be no contention. It appears that on December 12, 1901, a life membership certificate for 20 shares of stock of appellant company was issued to respondent, Christensen. This stock was not loan stock, but was held by Christensen solely as an investment. Afterwards Christensen, plaintiff below (respondent here), applied for 20 shares of "Class F" stock (presumably for the purpose of enabling him to procure the loan herein referred to). While the record does not so disclose, we think it may be fairly inferred, from the subsequent transactions between the parties, that at the time he applied for "Class F" stock the respondent surrendered and had canceled the 20 shares of stock issued to him

by the company on the 12th day of December, 1901, upon which he had paid \$128 as dues. On the 16th day of January, 1902, respondent applied for a loan of \$2,000 from appellant. On the 11th day of March, 1902, the company issued to the respondent a certificate for the 20 shares of "Class F" stock for which he had theretofore made application. Appellant procured one Stuckl to lend respondent \$1,800 of the \$2,000 applied for. Respondent gave Stuckl a note for the amount (\$1,800), payable five years from the date thereof, with interest at the rate of 8 per cent. per annum, secured by a mortgage on certain real estate situate in the county of Salt Lake, state of Utah. Appellant then loaned to respondent \$200, the balance of the \$2,000 applied for, taking his note for \$2,000, secured by a second mortgage on the real estate covered by the Stuckl mortgage heretofore mentioned. The note, so far as material here, recites: "This note is given in consideration of a loan of two hundred (\$200) dollars. * * * As a part of the consideration hereof the payee herein agrees to assume and pay or discharge, for the makers hereof, on or before the maturity hereof, a certain promissory note for the principal sum of eighteen hundred (\$1,800.00) dollars, dated. * * * It is understood and agreed that if the makers hereof shall fail, neglect, or refuse to keep and perform each and all of the covenants and agreements herein contained, or shall fail, neglect, or refuse to make any payment herein provided for, in the amount and at the time and in the manner herein provided, then the payee herein shall be under no further legal obligation to assume or pay the said prior promissory note, or the interest thereon." After the loan was made the respondent paid \$10 per month on his 20 shares of stock, for which he was supposed to receive credit on the books of the company, and in addition thereto he paid \$20 per month interest, as provided for in his note and mortgage to appellant company. Forty-four monthly payments of \$30 each were thus made, which amounted in all to \$1,320. To this we may add the \$128 paid before the loan was made, and it makes a total of \$1,448 paid by respondent to appellant. Five hundred and sixty-eight dollars of this amount (including the \$128 referred to) represented the monthly installments paid by respondent on his stock, and the balance (\$880) the interest paid in accordance with the terms of his note to appellant. Out of the \$880 thus received as interest, appellant paid the interest as it accrued on the Stuckl note and mortgage, which payments were made with the knowledge and consent of respondent, and amounted in all to \$504. The balance (\$376, received as interest) appellant retained as interest on its loan of \$200 to plaintiff and as consideration for its alleged assumption of the Stuckl note and mortgage. On the ——— day of

December, 1935, respondent made a demand on appellant for an accounting. In answer to this demand appellant, on March 19, 1936, rendered an account or statement, which, according to appellant's construction of the contract under which the loans were obtained, showed a balance in favor of respondent of only \$61.45 of the alleged withdrawal value of his stock, which sum would be payable in about one year from that date. Respondent refused to settle with appellant on that basis, and on April 6, 1936, began this action for an accounting.

The principal ground upon which respondent based his demand for an accounting was that his contract with appellant was "grossly unfair, unjust, inequitable, and unconscionable." Stating the results of the contract between appellant and respondent, as construed by appellant, in round numbers only, both as regards amounts and time, we would have the following: Respondent made 44 monthly payments of \$30 each. Ten dollars of each payment, or \$440, was to be applied in maturing his stock; and \$20 of each payment, or \$880, was to be applied as interest on the \$2,000 loan. When respondent stopped payments after 44 months, his accumulations, according to appellant, amounted to \$389. If we divide this \$389 by 44, the number of months respondent made payments, it will give us the exact amount each monthly payment produced toward maturing his stock, the fund with which the original debt was to be paid. This would be \$8.84 each month. Taking this as a basis, it would require as many months as \$8.84 is contained in \$2,000, or a little over 226 months in all, to accumulate the \$2,000. If we now reduce these months to years, we find that it would take 18 years and 10 months to mature respondent's stock and to pay off the original debt. To pay off the debt respondent would thus have to pay 226 times \$30, which would be \$6,780, to which should be added the \$128 that respondent had already paid, which would bring the total payment up to \$6,908. If we now assume that the appellant would carry the Stucki loan of \$1,800 until respondent's stock matured or his accumulations canceled his debt, namely, 18 years and 10 months, it would require, at the rate of 8 per cent. per annum, the sum of \$2,712 to pay the interest thereon. If we add this interest to the principal sum, or the original loan of \$2,000, it makes \$4,712; and deducting this from the entire amount that respondent would be required to pay, according to appellant's construction of the contract, it would leave a balance in the hands of appellant of \$2,068 as a profit on the actual investment made by it of \$72, and to secure which appellant had a second mortgage on respondent's property for \$2,000. It requires no argument to show that a contract which imposes obligations so one-sided and oppressive as the one under consideration is unconscionable and ought not be upheld.

It is contended on behalf of appellant that its assumption of the Stucki note and mortgage is a sufficient consideration to uphold the unconscionable features of the contract to which we have referred. It will be seen, however, by an examination of the "assumption" clause contained in the note, that appellant incurred no liability whatever, and that its promise to pay the Stucki note was, in effect, made conditional upon respondent continuing to make regular monthly payments of \$30 each. When respondent ceased making these payments, appellant's liability, if any existed, for the payment of the Stucki note, ceased. In other words, appellant in effect agreed to eventually pay the debt represented by the Stucki note and mortgage and canceled the \$200 loan it made to respondent, provided he would pay into its treasury a sufficient amount of money to discharge these obligations and give appellant a bonus of \$720, which bonus, however, according to appellant's construction of the contract, would, as we have shown, amount to nearly three times \$720 by the time respondent's stock matured. In the case of *Cain v. Reeve and the Colorado Investment Loan Co.* (appellant herein), 30 Utah, 56, 83 Pac. 568, this court, in construing a contract the same as the one under consideration, held that money thus received by the company in excess of the amount required to pay the interest on the loan could not be retained by it as consideration for the conditional assumption of that portion of the loan made by a third party, which assumption involved neither risk nor liability on the part of the company. It follows, from what we said in that case, that the only consideration for the note and mortgage given by respondent to appellant was the \$200 advanced by the latter to make up the loan of \$2,000 applied for by respondent.

Counsel for appellant have devoted much space in their brief to the discussion of the status of a withdrawing member and the respective rights and obligations existing between such member and the company, and they insist that the company should be permitted to account and settle with respondent for the money received from him on the terms and conditions provided in its by-laws for the settlement with withdrawing members generally. The record in this case is so meager and unsatisfactory that we refrain from in any way passing upon the question involving the rights and liability of a withdrawing member as fixed by his contract of membership. Our conclusions in this case are based entirely upon appellant's own construction of the contract, and for the purposes of this case we have assumed that the contract is open to the construction placed thereon by appellant. This being so, it is so harsh, oppressive, and unconscionable that the whole contract must be held bad, and appellant required to account to respondent as for money had and received.

Therefore, as we view the case, respondent is entitled to credit for \$1,448 paid by him to appellant, and should be charged with the \$504 paid by appellant on the Stucki mortgage and the \$200 loan made by appellant to respondent, with interest on \$72 at the rate of 8 per cent. per annum, making a total debit of \$705.20. Interest is allowed on the \$72 only because, at the time appellant made the \$200 loan, it had in its possession \$128 of respondent's money, and therefore it actually advanced only \$72 out of its own funds; and the interest is computed on the theory that respondent was entitled to have the \$18 paid as monthly installments in excess of the interest due on the Stucki note applied on the \$72 as the payments were made. It would take four months to thus pay off the \$72; and, applying the rule of partial payments, the interest in round numbers would be about \$1.20. The difference between the amount respondent paid (\$1,448) and the \$705.20 with which he should be charged is the sum to which he was entitled at the time he made his demand for an accounting, on which sum (\$742.80) he is entitled to interest at the rate of 8 per cent. per annum from the time the demand was made, December, 1905, to the entry of judgment, and as to such amount the judgment of the court below is affirmed. The difference between the result which we have arrived at and the amount for which judgment was entered by the trial court is probably due to the fact that the trial court may have allowed interest on that portion of the different installments paid in excess of the interest due on the Stucki note from the time such payments were made. However that may be, we think that interest should be allowed only from the date of the respondent's demand for an accounting, in December, 1905.

The cause is therefore remanded, with directions to the trial court to modify its findings and judgment, so as to correspond with the views herein expressed. Each party to pay his costs on this appeal.

STRAUP and FRICK, JJ., concur.

YOULE v. THOMAS (ROSS et al., Interveners). (L. A. 1,557-1,564.)

WILKES v. SAME (BRADLEY et al., Interveners). (L. A. 1,565-1,572.)

(Supreme Court of California. March 19, 1907
Rehearing Denied April 18, 1907.)

APPEAL—AGGRIEVED PARTIES.

As in an action to determine a contest between applicants to purchase public lands interveners are not entitled to litigate, they are not parties aggrieved by the judgments dismissing their complaints in intervention, and so cannot appeal therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 947.]

In Bank. Appeal from Superior Court, Kern County; M. L. Short, Judge.

Two actions, one by W. E. Youle and the other by Albert R. Wilkes, against Mary . . Thomas. In the first action T. P. Ross and seven others, and in the second action J. D. Bradley and seven others, separately intervened. From judgments dismissing the complaints in intervention, interveners appeal. Affirmed.

See 80 Pac. 914, 1133.

James F. Peck, Solinsky & Wehe, and Charles C. Boynton, for appellants. Laird & Packard, Galpin & Bolton, T. M. McNamara, and Charles G. Lamberson, for respondents.

HENSHAW, J. For the facts of these cases reference may be made to Youle v. Thomas, 146 Cal. 537, 80 Pac. 714. W. E. Youle contested the right of defendant Thomas to purchase the north half of the section, for which she had made application and held the certificate of purchase. Albert R. Wilkes in like manner contested her right to purchase the south half. These appellants are the interveners, who, as noted in Youle v. Thomas, by leave of court filed complaints in intervention; each claiming as an applicant for the purchase of a 40-acre tract under the acts for the purchase of mineral lands. When the case came on for trial, the court on motion dismissed these 16 complaints in intervention, and the interveners appeal. Youle v. Thomas, above cited, dealt with the right of the intervener Clarke to be heard in the contest between Youle and Thomas. The same proposition that was presented in that case touching the intervener Clarke is here presented in but slightly changed form as regards these appellants. The reasoning adopted and the conclusion reached in that case are strictly applicable to the present cases. No elaboration of the views expressed in Youle v. Thomas is called for.

As under no circumstances would these interveners have been entitled to litigate in the contest between Youle and Thomas, or in Wilkes v. Thomas, it follows that they were not aggrieved by the orders and judgments dismissing their complaints in intervention, which orders and judgments are therefore affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; SLOSS, J.; LORIGAN, J.

COHEN v. LA CANADA LAND & WATER CO. et al. (L. A. 1,861.)

(Supreme Court of California. Aug. 16, 1907.)

1. APPEAL—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

A finding on conflicting evidence that waters diverted by defendant would not have fed springs, the waters of which plaintiff had appropriated, will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

2. SAME—REVERSAL—NEW TRIAL—ISSUES.

Where, on appeal by plaintiff in an action by one who had appropriated waters of a spring to restrain diversion of waters claimed by plaintiff to have fed the springs, the only question was as to the correctness of the rule relative to percolating waters applied by the trial court, and it was held that such rule was wrong, and the cause was remanded for new trial, it is a question of fact at issue on the new trial, to be determined by the evidence then introduced, without regard to any finding on the first trial, whether the percolating waters diverted would have fed the springs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4713.]

3. WATERS AND WATER COURSES—PERCOLATIONS—TUNNELS—RIGHTS OF LANDOWNER.

Though defendants, for the purpose of collecting and carrying away percolating waters, constructing a tunnel commencing on plaintiff's land, without her permission, and then extending through defendants' land, plaintiff is not entitled to have adjudged to her the waters which percolated into the tunnel on defendants' land.

4. SAME—DIVERSION—RIGHTS OF ADJOINING OWNERS.

Percolating waters may be developed by a tunnel and conducted away from land, as against owners of adjoining lands, where the waters would otherwise in their natural flow sink into the ground and be lost.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 113.]

Department 2. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by E. G. Cohen against the La Canada Land & Water Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. J. Scrivner, Alfred H. Cohen, and Lawler, Allen & Van Dyke, for appellant. Munson & Barclay, W. S. Wright, and Anderson & Anderson, for respondents.

LORIGAN, J. This action was brought to restrain the defendants from diverting and carrying away certain waters of which plaintiff claimed to be the owner and for the recovery of damages for such diversion. Judgment went for the defendants, and this appeal is taken therefrom, and also from an order denying the motion of plaintiff for a new trial.

The main question on this appeal is addressed to the sufficiency of the evidence to sustain certain findings of the court. Referring first to the general features of the case as disclosed by the evidence before referring particularly to the findings, it appears that about 1891 one Mrs. Gould became the owner of a tract of land containing 160 acres situated at La Canada, in Los Angeles county. This tract, 60 acres of which was useful for agricultural purposes embraced the lower portion of what is known as "Snover Canyon" and extended some distance up it. At the time of her purchase there was lying, contiguous to and northerly of this tract of 160 acres, a 40-acre tract of unappropriated government land of the United States extending across the canyon, and on this tract were

several small springs. This 40-acre tract was worthless for agricultural purposes. In 1891 and 1892, while said 40-acre tract was still unappropriated public land, Mrs. Gould appropriated the waters of said springs, conducted them by pipes to her house and lands, and used them for irrigation and domestic purposes. Subsequently, and in 1899, the present plaintiff became the owner of said 160-acre tract, together with its appurtenances. In the years 1898 and 1899 the predecessors of defendants went upon said 40-acre tract, and with the assent of those who in the meantime had acquired title thereto from the United States government dug several tunnels thereon, and conducted the waters obtained thereby to lands belonging to them some two miles distant, for the purpose of irrigating their lands and selling the surplus waters to their neighbors. The plaintiff thereupon brought this action, the amended complaint having been filed in 1904, claiming that the defendants had, by constructing such tunnels, intercepted and diverted the waters of the springs, the right to which she and her predecessors had prior thereto acquired and owned by appropriation and use. Presenting this as a general situation, we now come to a more particular consideration of the findings made by the court bearing on the controversy between the parties relative to the waters of such springs.

The court found that the springs referred to in the complaint were situated, two of them in or near the throat of the canyon, and two on the steep mountain side thereof, which springs for convenience sake may be designated as springs Nos. 1, 2, 3, and 4. And it may also here be mentioned that the tunnels involved are designated upon the plat filed in evidence as tunnels 2, 3, 4, 6, and 7. The area of the watershed of Snover canyon is about three-fourths of a mile square; the area above the tunnels, the construction of which are involved here, amounting to about 200 acres. Relative to the springs, it was found that as they existed in 1896 the waters therefrom, if not diverted, would flow in a small stream upon the lands of the plaintiff for a short distance, but that since 1897 there had not been sufficient water issuing from said springs during the irrigating seasons to form a stream, or flow over and upon the lands of plaintiff, and that no stream had flowed thereon, and aside from the waters of said springs no stream would flow, or has flowed, down said canyon, except a temporary flow caused by rainfall; that the predecessor of plaintiff appropriated the waters of said springs in 1891 and 1892, and in the early part of the irrigating season of 1893 conducted said waters to the extent of 1½ inches to a reservoir constructed by her, but from said date, owing to the effects of fire and of drouth and other natural causes, the flow from said springs steadily diminished, so that at the time the defendants and their predecessors began the work of

constructing tunnels in said canyon in 1898, one of said springs had entirely ceased to flow, others had greatly diminished, and the total amount supplied by said springs had been reduced to less than one-half inch of water, miner's measurement, constant flow that the tunnels constructed by respondents were constructed by and with the consent of the owner of the said 40-acre tract upon which said springs were found; that by means of said tunnels certain waters were developed near and at the end or face of said tunnels; that all of the waters so found and developed were and are percolating waters, which issue from the seams and fissures of the granite dyke or wall in which the same were found, and none of said tunnels intercepted any known stream of water running in any defined channel; that said tunnels were run in the vicinity of and at points below the plane of said springs, and one of said tunnels is at one point near its mouth directly under one of said springs, on the side of the canyon, but said tunnel is 75 feet long, and is in granite strata, and the waters therein are found within 8 feet of the face thereof; that neither of the other tunnels is under a spring; that the said tunnels are run nearly at right angles with and away from the thread of the canyon, and the water which issues from said tunnels was found in granite dykes, which cross said canyons, the strata and main seams of which stand almost perpendicular; that said springs were not and are not, nor is either of them, fed by any known stream running in a defined channel; that no part of said waters which were developed or found in said tunnels would, if said tunnels were not there, issue from said springs, or either thereof, or feed or support the same in any way, and no part of said waters found or developed in said tunnels would, if said tunnels were not there, find its way into the Snover canyon, so as to feed or support in any way any stream, either surface or subflow, in said canyon, but said waters of said tunnels would, except for said tunnels, disappear into the crevices of the mountains and be lost; that said springs have not, nor has either of them, been destroyed by the defendants, or any of them; that the amount of water found or developed in said tunnels upon said 40-acre tract was about 1.50 of an inch of water measured under a 4-inch pressure, and the said flow of said tunnels has not increased during the irrigating seasons since the construction thereof; that the lands upon which the defendants have used the water of said tunnels are not riparian, and do not abut or adjoin the lands upon which said springs and tunnels are situated, or the lands of plaintiff, or the lands upon which the waters from said springs would naturally flow.

We have set forth these findings of the court as applicable to all the springs referred to in the complaint and the various tunnels run by defendants which are claimed to have

diverted the water therefrom. This appeal, however, involves only springs Nos. 3 and 4 and tunnels 2, 6, and 7. Tunnel 6, it is claimed by appellant, diverts the waters of spring No. 4, and tunnel No. 7 the waters of spring No. 3; and, the court having found that these tunnels did not divert the waters of either of said springs, the main question arising now is concerning these particular springs and tunnels, and the sufficiency of the evidence to sustain the findings relative to them. Nothing with reference to other tunnels constructed by defendants is involved on this appeal, as far as the diversion of waters of other springs is concerned, although a question as to the rights of appellant to the waters developed by the construction of tunnel No. 2 is presented. That, however, does not involve the waters of any spring, and there is no dispute as to the sufficiency of the evidence to sustain the finding relative to it. It presents purely a question of law, arising from the finding as made by the court concerning it and the evidence on which it was based. It appears that this tunnel No. 2 was commenced on the land of appellant, ran in a northerly direction about 80 feet through her lands and then upon the land of respondents, and near the face of the tunnel upon the land of respondents water was developed which was conducted in a pipe line through the tunnel to another pipe line on the land of respondents. The court found as to said waters that said tunnel did not intercept or cut off any of the waters of any of said springs, and none of the waters which were found or developed in said tunnel would, if said tunnel were not there, issue from said springs, or either thereof, or tend to feed or support said springs, and no part of said water would find its way into Snover canyon, so as to feed or support any stream, but such water so found or developed would, except for said tunnel, be lost and disappear into the crevices of the strata in which they were found. As conclusions of law the court decided from these findings that as far as tunnels 6 and 7 were concerned the defendants were entitled to all the waters developed by their construction, and as to tunnel 2 that the respondents were entitled to all waters issuing from adjoining rocks in that portion of the tunnel constructed on the lands of respondents and plaintiff to all water issuing into said 80 feet of said tunnel from her land.

Many other findings were made by the court as to other springs and other tunnels and on the subject of damages; the court finding as to the latter that any damages sustained by plaintiff or her predecessor were caused through failure on their part to either obtain an adequate water supply from the springs, or through their own negligence in applying such water as they had to the irrigation of their premises, and not to any action on the part of defendants. On the subject of damages the findings and conclusion of the court are not seriously question-

ed, and we are satisfied could not be under the evidence. So, as we have said, no questions arise in the case save as to springs 3 and 4 and tunnels 2, 6, and 7. Now, as to the claim of appellant that the evidence was insufficient to warrant the findings of the court relative to the construction of tunnels 6 and 7. The findings as to the waters obtained by the construction of these tunnels were, in effect, that such tunnels did not intercept any stream of water running in any defined channel, nor any water which would feed any stream, either surface or subflow, in said canyon; that the waters which were obtained by the construction of said tunnels were new or developed waters found in formations in the mountain differing from those existing in the vicinity of the springs; that such waters were developed at or near the face of the tunnels, and were waters percolating through seams and fissures in granite dykes intercepted by the tunnels at long distances back in the mountain side from the springs; that such waters would not, even were the tunnels never dug, support or feed said springs, or issue therefrom, but would follow the crevices of the strata through which they were percolating and be lost.

The appellant's contention is that the evidence does not support such findings, either as to the source or trend of these percolating waters; that the formation through which said tunnels were driven is of a broken and seamy granite character, saturated with water which, percolating through the broken rock, supported and fed these springs; that the driving of these tunnels in the mountain in the vicinity of these springs did not develop any water existing in other formations or whose trend would not reach the springs, but the direct effect was to penetrate the saturated body of earth through which the waters feeding the springs flowed, or which supported the flow of water thereto, and to draw such waters into the tunnels, with the result that the springs dried up. But the principal controversy at the trial was as to whether these waters were percolating waters, the natural flow of which, but for the interference of the respondents' tunnels, would have fed these springs, or were they waters percolating through fissures in the mountain and developed by the construction of these tunnels from sources entirely disconnected with, and separate and distinct from, the sources from which the springs in controversy were supplied? Very much of the evidence in the case was addressed to this question, and was largely made up of the testimony of expert witnesses—civil and hydraulic engineers—called on both sides. The views of the witnesses called to this point were widely divergent on the subject. Some were confident that the waters which supplied the springs, and were taken by the tunnels, were found in the same formation or material, which consisted of a saturated mass of earth extending into the mountains;

that from and through this mass the waters in their natural flow percolated and fed the springs, and that the effect of driving the tunnels was to drain into them the waters from this saturated mass, and from no other source; that the waters which fed the springs and flowed in the tunnels belonged to this same body of saturated earth and had the same water plane, and the draft on it by the tunnels had the direct effect of drying up the springs. Others were equally confident that the waters obtained by driving the tunnels were not waters obtained by the penetration of any saturated plane through which the springs were supported, or any saturated plane at all, but were obtained by running the tunnels into the mountain until they struck granite walls, through the seams or fissures of which water percolating was intercepted and taken into the tunnels, and which water, but for its interception by the tunnels, would have gone in a natural course into the depths of the earth and would never have flowed towards the springs, but, on the contrary, would have continued in a different direction and away from them.

In this condition of the evidence it is apparent that whatever conclusion the trial court reached must be resolved out of a conflict of the evidence. While this conflict is obvious from an inspection of the record, we have the opinion of the judge of the trial court presented in the transcript, in which he notes the conflict, refers to it, and gives his conclusion drawn from it and subsequently embodied in the findings: In that opinion the court said: "Aside from matters disposed of at the trial by rulings on the admissibility of evidence, the questions of fact to be decided by the court now are whether the defendants, by the said tunnels, divert water to which the plaintiff has a better right by virtue of said appropriations or by virtue of her riparian privileges. The defendants, by the construction of tunnels in 1898, did not at that time deprive Mrs. Gould or the plaintiff of any of the said appropriated water. The water yielded from the tunnels has not increased since that time. Plaintiff is now enjoying the use of as much water as she or Gould did at the time of the construction of the tunnels. The amount of this appropriated water is less than previously, but the decrease is not due to acts of the defendants or their predecessors, or any of them. The other question, whether the water abstracted by the defendants would, if not interfered with, flow as an underground stream or by percolation, and thus reach the plaintiff's land, is not so easy of determination. The canyon is fan-shaped, as is usually found in mountains of southern California. The sides of the canyon are very precipitous and covered to a considerable extent with vegetation. The bottom of the canyon is filled up to some extent with detritus, and is moist, and at the lower end is covered by a dense growth of vegetation common under

similar conditions in southern California. The earth's formation here is cyanite (resembling granite), folded by volcanic action into layers of more or less regularity and continuity. These layers rest at an angle of 80 degrees or more (sometimes nearly perpendicular), and dip towards the south. Between the layers the main seams or fissures trend east and west and downward to an unknown, but presumably great, depth. These layers, as they near the surface, are somewhat decomposed and also broken, so as to form many irregular fissures in every direction. The rock lying at a greater depth is also more or less broken, but the fractures are quite well defined. Several experts testified in the case for each side, giving an opinion as to the course of the water known to be within the watershed of the canyon. Those on behalf of the plaintiff contend that all of the water taken by the defendants, if not interfered with, must find its way out of the canyon through the plaintiff's land; that such is the usual course of water in the canyons of southern California; and that this is not an exceptional case. The experts testifying for the defendants take a radically different view, and insist that such water would pass out of the canyon through the main seams or fissures behind the rocks, without coming in contact with plaintiff's land; that the water taken by the defendants by means of tunnels is water passing through the fissures behind the layers of rock, and, except the same was thus intercepted would pass out of the canyon and find its way to the surface at some distance from plaintiff's land without passing through it, or would follow the vertical seams to a great depth, contributing to form the great body of subterranean water observable in all mining operations; that the water known to be within Snover canyon watershed is greater than could exist from the rainfall alone; and that the excess must come from other watersheds, accounting for this by the peculiar formation at this point. From the evidence I am unable to conclude that the plaintiff has met the requirements by proving by a preponderance of evidence that she is deprived by the defendants of any of the appropriated water or any to which she may assert rights as riparian waters; but, on the contrary, I am constrained to find that the water which the defendants are taking is 'developed' water abstracted from their own land, and which, if not so taken, would be of no benefit to the plaintiff either directly by flowing onto her lands or by forming a support for other water which would so flow, and, from the evidence, find that, except for the fact that it was intercepted in the manner employed by the defendants, it would be entirely lost."

This conflicting condition of the evidence with reference to the main point in controversy between the parties to which the trial judge called attention in his opinion—the

source from which the waters taken by the tunnels was diverted—is amply borne out by the record and is sufficiently pointed out there so as to obviate any discussion by us upon the subject, which could only amount to detailing the evidence which raises it without accomplishing any other result than to make it apparent that such conflict exists. The opinion sufficiently refers to the evidence out of which it arose, and, as the record shows that there was in fact a conflict in it, the familiar rule applies that a finding by the trial court based on conflicting evidence is not subject to review by this court. In this connection it may be said that this case was was here before (142 Cal. 437, 76 Pac. 47). While it appears from an examination of the decision on that appeal that the trial court found "that part of said waters which were developed in said tunnels would, except for said tunnels, have found its way by some unknown subterranean stream to said springs and been discharged therefrom," still on the appeal the only question was as to the correctness of the rule relative to percolating waters applied by the trial court to that and other findings. It was held that the rule applied was wrong and the cause remanded for a new trial. It is not important to a consideration of the present appeal that upon a previous trial the court made a different finding from the one made on the last trial as to the source of the waters developed by said tunnels. It is probable that upon the first trial counsel for defendants, believing the law as they then contended for, and as the court applied it, to be that percolating waters were part of the soil and could be removed by the owner of the land at pleasure, and without consideration as to the rights of plaintiff as an appropriator of the water of the springs, did not devote as much evidence to prove that the source from which the tunnels were supplied was different from that which fed the springs. Under the rule of law as contended for by the defendants upon the first trial, if it were the correct rule as they then believed it to be, it was immaterial from what source the waters came as long as they were percolating waters. Or it may be, as asserted by respondents in their brief and not questioned in the closing brief of appellant, that much additional evidence, both of expert engineers and others familiar with conditions in Snover canyon when the tunnels were constructed, was introduced by the defendants on the second trial. In any event, it was a question of fact again at issue on the second trial as to the source of said waters, and the sufficiency of the finding upon it is to be determined from a consideration of the evidence then introduced, which, as we have said, was sufficient to sustain it.

Now, as to tunnel No. 2, it is contended by appellant that, because this tunnel commenced on her land, the waters brought through

it by respondents belonged to her. It is not claimed that the construction of this tunnel affected the water supply of any spring claimed by appellant. Her position is that as the tunnel commenced on her land and is cut through it for a distance of 80 feet till it runs into the land of respondents, and respondents conduct through it for that distance water developed upon their own land, that appellant is entitled to said waters, notwithstanding they are not found anywhere within the 80 feet of tunnel through her land, but wholly on that of respondents. Counsel for appellant content themselves with the assertion that appellant is entitled to said water, but refer to no principle of law upon which their claim is based, and, of course, cite no authority which supports any. Whatever appellant's claim may be against respondents for trespass upon her land in the construction of said tunnel and their right to maintain a pipe line through it, certainly the fact of such trespass and the use of the 80 feet of tunnel as a conduit did not give appellant the right to the waters developed on respondents' own land. The right of respondents to this water follows from their development of it on their own premises and control and conduct of it through their pipes. It is immaterial to any question of ownership of the waters that respondents are trespassing upon the lands of appellant in conveying them from the point of development on their land through her land to their pipes at another point. Respondents may be guilty of trespass to the extent claimed by appellant, but the penalty for such trespass is not to deprive respondents of their ownership of waters taken from their own property. In its decision the trial court gave appellant all the waters which might percolate into the tunnel along the 80 feet of its construction on her property, and, so far as ownership of waters developed by the construction of this tunnel was concerned, this was all to which she was entitled. She was not entitled to have it adjudged that waters developed on respondents' land belonged to her from the mere fact that it was piped through her land without her permission. This disposes of all matters relative to the construction of said tunnels, or their effect upon the springs.

We come now to the last point made by appellant. It will be noticed the court found that the land upon which the respondents have used the waters from said tunnels are not riparian to and do not abut or adjoin the lands upon which said tunnels are situated, and it is insisted by appellant that though the waters developed by said tunnels were not part of the waters supplying said springs, or waters which would have reached Snover canyon by percolation or otherwise, nevertheless the respondents were only entitled to use such waters upon the lands where they were developed; that the waters could be ap-

plied and used by respondents upon their 40-acre tract, where they were developed, and could not be taken for use to other lands. In support of her position the broad proposition is contended for that percolating waters can never be taken away from the land where they exist, although adjoining proprietors are not injured or damaged thereby; and it is asserted this rule finds support in the decisions of this court in *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, *McClintock v. Hudson*, 141 Cal. 275, 74 Pac. 849, *So. Cal. I. Co., v. Wilshire*, 144 Cal. 63, 77 Pac. 767, *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. 1113, and *Gutierrez v. Wege*, 145 Cal. 730, 79 Pac. 449. But these cases do not lay down the doctrine as broadly as appellant contends for. They lay down the rule that waters of a stream, or percolating waters, cannot be taken away from the lands on which they flow, or from lands upon which they are found, for use elsewhere, where the result of such taking would be to injuriously affect adjoining property owners. The principle which enters into this rule is the protection to be given the superior natural rights of adjoining property owners to the flow and use of such waters. Where, however, there can be no injury worked to such adjoining owners by the taking and use elsewhere of such waters, no limitations should be placed upon the right of one developing them as to their use. In the case at bar the waters which were secured by the construction of these tunnels of respondents were not waters which, but for their interception, would have reached any stream in Snover canyon, or which would have reached or supported any of the springs in question in the case. They were not waters which would follow the natural watershed of the canyon and have trended down in the canyon by way of the springs or otherwise. They were waters trending through the fissures of the granite dykes away from the direction of the natural watershed of Snover canyon, and would never have reached it, nor reached the springs in question, but, if uninterrupted in their flow, would have continued down through the strata in which they were percolating, and in their natural flow would, as the experts testified and the court found, have passed down into the crevices of the mountains and been lost. Under these circumstances, as the waters developed by the tunnels were not waters which would have trended towards or supported or affected any stream flowing by the land of appellant, nor any springs in or to the waters which she had any claim or interest, she was not injured as an adjoining proprietor or as an appropriator, and hence could not complain, or insist upon the application of the rule announced in the cases cited to prevent the respondents from taking such developed waters to any lands to which they might see fit to conduct them. For authority

sustaining this proposition we cite *Hanson v. McCue*, 42 Cal. 306, 10 Am. Rep. 299, *Gould v. Eaton*, 111 Cal. 639, 44 Pac. 319, 52 Am. St. Rep. 201, and *Montecito, etc., Co. v. Santa Barbara*, 144 Cal. 585, 77 Pac. 1113.

There are other points made by counsel for appellant and referred to in their brief. They are, however, simply referred to, and are not discussed. We have examined them, and do not think them tenable, or that they merit particular reference or discussion.

The judgment and order appealed from are affirmed.

We concur: MCFARLAND, J.; HENSHAW, J.

(151 Cal. 693)

KOYER v. BENEDICT et al. (L. A. 1812.) (Supreme Court of California. Aug. 19, 1907.)

MORTGAGES—FORECLOSURE—EVIDENCE TO WARRANT.

Evidence in an action to foreclose a mortgage held sufficient to authorize a finding that it was a valid lien for the amount found.

In Bank. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by A. S. Koyer against C. E. Benedict and others. Judgment for plaintiff. Defendant Gertrude Stull appeals. Affirmed.

See 87 Pac. 231.

Gertrude Stull, in pro. per. Harris & Harris, for respondent.

LORIGAN, J. This action was brought to foreclose a mortgage made by the defendant Benedict in favor of plaintiff on March 14, 1900, upon a lot in the city of Los Angeles to secure payment of \$3,250. The complaint contained the usual allegations in an action for foreclosure. The defendant Gertrude Stull, who appears to have drafted her own pleadings and tried the case in her own behalf in the trial court, alone answered, denying specifically all the allegations of the complaint save that she claimed an interest in the premises, and setting up as an affirmative defense the following facts: That immediately prior to the making of the mortgage in question plaintiff and the defendant Holway were her agents, having under their control, with the Title Insurance & Trust Company of Los Angeles, \$1,150 of her money to be invested by them in the purchase for her of a lot somewhere in the city of Los Angeles, for which lot \$1,100 was to be paid and the balance of \$50 to be retained (and the defendant alleges it was retained) by plaintiff; that thereafter plaintiff agreed with defendant to purchase for her the lot described in the mortgage for \$1,550, her \$1,100 with an additional \$450 to be loaned her by plaintiff to be paid for that purpose; that she thereupon notified the Title Insurance & Trust Company to accept the written instructions of said plaintiff and Holway for the purpose of the transfer of said property to her; that

thereafter, acting adversely to the interests of defendant and for his own interest, plaintiff carried forward \$200 of her \$1,100 deposited with said Title Insurance & Trust Company, placed therewith \$1,350 of his own money, and instructed the trust company to pay over the sum to the owner of the property, one Claybrooke, when a deed was executed by him in favor of defendant; that in depositing said sum of \$1,350, instead of \$450, plaintiff aided and was accessory to the withdrawal and misapplication of \$900 of the \$1,100 intrusted to her agents as the purchase price of said lot; that plaintiff and Holway procured a deed to be executed by Claybrooke to the defendant Benedict; that Benedict then executed the mortgage in question and subsequently conveyed the lot to the defendant; that Benedict paid no consideration for the deed to himself, and acted solely for the benefit of plaintiff and Holway; that Benedict held the property in trust for her, and executed the mortgage without authority from her; and that said mortgage was void. The issues presented were tried, and the court found that the mortgage was executed by Benedict, that he was the owner of the premises at the time of its execution, that the defendant Gertrude Stull subsequently acquired title to the lot from him with knowledge of the mortgage, and found against defendant upon all the allegations set up in her affirmative defense. Judgment was entered for the sum of \$3,631.92 and costs in favor of plaintiff; and from an order denying her motion for a new trial, defendant appeals.

Her attack is directed against the findings in favor of plaintiff, the claim being that none of them were justified by the evidence. The record on appeal is not the most satisfactory. The evidence on the trial was apparently presented in a rather desultory way, arising, doubtless, from the fact that defendant was her own attorney and not familiar with legal procedure. Exactly on what theory she presented her case in the lower court, or in what particular respect the findings of the court are challenged here, it is difficult to readily perceive. The position of plaintiff on the trial regarding the mortgage in question was that the lot described in it was purchased for \$1,550 by Holway, who desired a deed from Claybrooke to be made to Benedict; that Holway put up \$250, plaintiff advancing the remainder of the purchase price—\$1,300—it being further agreed between them that plaintiff should advance, as required, an additional \$1,950 to pay for the construction of a building to be erected on the lot; that the mortgage was given to secure the amount of the purchase money advanced by plaintiff and to secure the advances to be made for the building. We will discuss this matter later, and mention it now as premising a reference to the claim of defendant relative to the lot described in the mortgage. In her answer presenting her affirmative de-

fense she alleged that the plaintiff paid, as part of the purchase price of the lot mortgaged, the sum of \$1,350 of his own funds, but asserted that, by reason of further allegations in the answer, the entire transaction culminating in the giving of the mortgage was a fraud upon her, perpetrated by the plaintiff and the other defendants, Holway and Benedict, and that the mortgage was, therefore, void. Upon the trial, and here, as we understand her position, it is claimed that \$1,150 of her money went into the purchase price of the lot, together with \$400 she borrowed from plaintiff; that the deed from Claybrooke should have been made directly to her, as per agreement; that the deed to Benedict was without any consideration, was unauthorized, and that the mortgage, for all purposes for which it was given, was equally unauthorized by her, and fraudulent and invalid; or, at least, the entire scheme of plaintiff, Holway, and Benedict was a conspiracy to obtain her money, after the mortgage was executed and given priority, and to put it into the lot, either towards the purchase price, or to be expended in the construction of the building, and at the same time including it in the mortgage.

We have examined the record carefully and perceive no reason why the findings should be disturbed. The evidence upon all the main issues in the case was, as usual, conflicting. It was for the trial court to determine from the conflict what facts it deemed satisfactorily proven, and an examination of the record shows that sufficient evidence was presented to justify the findings upon which the judgment was based, and to warrant the trial court in further concluding that the affirmative defense alleged was not sustained by it. There was evidence, which was accepted by the court as true, to the effect that plaintiff was in no respect the agent of defendant in the purchase of this property; that he was engaged in selling real estate, and had been requested by defendant to look out for the purchase of a lot for her in Los Angeles; that Holway, one of the defendants, was her agent, and had her money under his control; that Holway had given plaintiff \$50 of the money of defendant long prior to the purchase of this lot, not as a commission, but as a deposit to be used by him in the event of securing a lot which defendant might wish to buy; that he (plaintiff) had listed with him by Claybrooke the lot described in the mortgage which he was authorized to sell for \$1,550, and asked defendant if she would purchase it, but she declined to do so. He then tried to dispose of it to several parties without success, until Benedict and Holway agreed to purchase it on the following terms: Holway to pay \$250, the plaintiff to advance \$1,300 to complete the purchase, and plaintiff to take a mortgage upon the lot for \$3,250 at 11 per cent. per annum interest. This mortgage

was to secure \$1,300 of the purchase price advanced by plaintiff, and to further secure an advance of \$1,950 to be paid to Holway and Benedict for the purpose of building a small two-story house on the premises according to plans acceptable to plaintiff; the money to be paid out on the construction of the house as it progressed. Holway and Benedict were also to pay plaintiff \$100 commission. These terms for the purchase of the lot by Holway and Benedict were accepted by plaintiff, who paid \$1,800 and Holway \$250 of the purchase price, and, under an arrangement between Holway and Benedict themselves as to who should take the conveyance, it was agreed that Benedict should do so. Accordingly the deed was made from Claybrooke directly to Benedict, and the mortgage in question for \$3,250, as agreed for, was immediately made by the latter in favor of plaintiff. The evidence warranted the court in finding that up to this time defendant Stull had no interest in the transaction, nor was in any manner connected with it, or, if so, it was by some arrangement with Holway of which plaintiff knew nothing. It does appear that Holway was at the time the agent of defendant and had the control of her money on deposit with the Title Insurance & Trust Company, and it is no doubt the fact that the sum put up by him towards the purchase price was a portion of it; but the evidence warranted the court in concluding that plaintiff did not know this fact, and did not know that defendant had any interest in the property until he ascertained, subsequent to the execution of the mortgage that Benedict had deeded the lot to her. It is true that an escrow order to the Title Insurance & Trust Company was signed by Koyer and Holway, directing payment of the money (it is to be presumed to Claybrooke; the order does not recite) to be made by the company when it could issue a certificate of title which would show "that the title of said property is vested in Gertrude Stull free from all incumbrances * * * except a mortgage executed by Charles E. Benedict and wife in favor of A. S. Koyer. * * *" The plaintiff testified that instructions as to the contents of this order were given in the office of the company by Holway, that plaintiff signed it after it was prepared, without reading it closely, and did not notice any reference in it to the defendant nor knew at that time that she was concerned in the matter. The court accepted this explanation as reasonable, and it had a right to do so. It is true, also, that, when plaintiff and Holway got together to arrange for the payment of the purchase price of the lot, Holway, though he had agreed to pay plaintiff \$250, was only ready to pay \$200. Plaintiff insisted that he should put up the additional \$50, and Holway said—so plaintiff testified—"There is \$50 more in your hands I let you have," to which plaintiff replied, "That belongs to

Mrs. Stull," and continuing, he testified: "After some more conversation, I turned that money into the Title Insurance & Trust Company." This is the \$50 which has heretofore been referred to as paid to plaintiff by Holway as a deposit to be used in the contemplated purchase of some lot for defendant. While these circumstances might raise a suspicion that plaintiff had some knowledge that defendant was connected with the transactions with reference to the purchase of this lot, still it could hardly be sufficient to warrant the court in disregarding the positive statement of plaintiff and Holway that at this time plaintiff knew nothing of her connection with it. This \$50 was not included in the mortgage nor involved in the suit to foreclose it.

Added to all this evidence is this further fact that several agreements were drawn up between Benedict, Holway and the defendant relative to this lot. Some of them while they were unsatisfactory to defendant in some particulars and rejected by her for that reason, all practically contained the same recitals, and all of them contained reference to this mortgage as a recognized subsisting lien on the property. The agreement which was finally executed recited that Benedict had conveyed this lot to defendant; that his purpose in doing so was to secure defendant the payment of \$1,150 and interest thereon at the rate of 10 per cent. per annum, payable monthly, said sum to be payable only on the sale of the land so conveyed to her; that Benedict as owner, and Holway as builder, agreed to erect a two-story frame house of a certain description; that upon the sale of the premises defendant would be entitled to one-half of the net profits of the transaction, based on the sum the property might be sold for "over and above the existing mortgage of \$3,250 made by Charles E. Benedict to A. S. Koyer, and over and above the \$1,150 advanced by Gertrude Stull, and interest on such sums." This agreement states that she took the conveyance to the lot subject to and with the knowledge of the existence of this mortgage from Benedict to the plaintiff, and no doubt, from the discussion had between herself and Holway and Benedict as to the various agreements which were prepared between them and in which this mortgage was referred to, the defendant was fully aware of the circumstances under which it was given. The agreement as executed was acted upon, and it appears that the defendant received payments of interest on the \$1,150 mentioned in it, according to its terms. This \$1,150, aside from the \$250 of it which undoubtedly was used by Holway as his advance of the purchase price of the lot, would appear from the evidence to have gone with the amount plaintiff was to advance, and did advance, towards payment for the construction of the house, which cost at least \$3,000. We might pursue this matter further, but think these facts which the evi-

dence presents, and which the trial court obviously accepted as true, justify the findings as made by it in every particular.

It is claimed, however, that, conceding that the mortgage was a valid lien upon the property, still the evidence is insufficient to support the finding of the court as to the amount due under it. In this regard it is insisted that, as the mortgage was given, not only to secure the purchase price advanced by plaintiff, but also to secure the additional advance to be used for the specific purpose of erecting a house upon the lot, and as the plaintiff, after the execution of the mortgage and before any sums were advanced for that purpose, had notice that the agreement in that respect was for the benefit of defendant, he was only entitled to enforce his mortgage to the extent that he had actually made payments for that purpose alone. And it is claimed the evidence does not show that he advanced all the moneys for that purpose which the court found to be due under the terms of the mortgage. But the evidence is uncontradicted that the full amount of money specified in the note and mortgage was paid out by plaintiff for the benefit of defendant, that \$1,300 of it went into the purchase price, and the rest into the construction of the house on the lot. Defendant does not contend that there was in fact no evidence to show this. Her point is that the evidence upon the subject was too general to be accepted as satisfactory. It is true the statement was a general one. Plaintiff testified that he had paid out the full amount mentioned in the mortgage, less the \$1,300, all for the construction of the house. He did not go into details—did not particularize as to amounts paid, to whom paid, or the character of the work or materials for which payment was made. But, in connection with his general statement, he further testified that he had all the checks with him showing such payments, and they were in fact handed to defendant for examination. She looked over some of them and cross-examined him as to them, and then practically the inquiry on the subject ended. If defendant questioned the general statement of plaintiff in regard to such payments, she could have pursued the matter in detail and had his vouchers at hand from which to determine how far his general statement was supported by them. Not having done so, she is not in a position to claim that sufficient proof of payment was not made by his general statement.

These are the only points made on this appeal of sufficient merit to require consideration.

The order denying the motion of defendant for a new trial was properly made, and is affirmed.

We concur: SHAW, J.; SLOSS, J.; ANGELLOTTI, J.; MCFARLAND, J.; HENSHAW, J.

151 Cal. 733

CALIFORNIA FARM & FRUIT CO., Limited, et al. v. SCHIAPPA-PIETRA et al.
(L. A. 1,687.)

(Supreme Court of California. Aug. 19, 1907.)

1. VENDOR AND PURCHASER—ACTION TO RESCIND CONTRACT—OFFER TO RESTORE PROPERTY.

An offer to restore the property received before suit by the purchasers to rescind for fraud a contract of sale of lands is unnecessary; plaintiffs, in case their claim is well founded, being entitled, on delivery to defendant of the lands, to receive, not only the money and obligations they gave therefor, but also the amounts they had properly expended in the management of the property according to their contract with defendant, who had received all the income of the property, and the facts being complicated and a judicial accounting necessary, and defendant being unable to restore some of the obligations received by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Vendor and Purchaser, § 209.]

2. SAME—NOTICE OF RESCISSION.

Even if notice of rescission is a condition, precedent to an action to rescind a contract of sale, a prior action in the federal court, dismissed on defendant's plea to the jurisdiction, is sufficient notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Vendor and Purchaser, §§ 216, 217.]

3. SAME—DELAY IN COMMENCING ACTION.

A delay of three months after knowledge of the facts before bringing an action to rescind, for fraud, a contract of purchase, does not constitute undue delay; plaintiffs in that time having commenced a suit for the same purpose in the federal court, which was dismissed on defendant's plea to the jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Vendor and Purchaser, § 213.]

4. PLEADING—COMPLAINT AND SUPPLEMENTAL COMPLAINT.

Though a complaint and supplemental complaint are incorporated in one document, styled an "amended and supplemental complaint," the supplemental complaint being distinguished only by being contained in separately, but consecutively, numbered paragraphs, they are to be considered as separate pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 636-640.]

**5. SAME—ELIMINATION OF PARTIES—DEMUR-
RER.**

Where persons were properly made defendants as the facts existed when an action was commenced, the complaint is not demurrable as not stating a cause of action against them, or on the ground of their improper joinder, on the appearance in a supplemental complaint of other matters occurring after commencement of the action.

6. PARTIES—MISJOINDER—MODE OF OBJECTION.

Where the presence of certain defendants becomes unnecessary because of facts occurring after commencement of the action, the proper practice to eliminate them is by motion to dismiss the action as to them.

7. SAME—MISJOINDER OF DEFENDANTS—PERSONS WHO MAY OBJECT.

The presence in an action of a defendant entitled to have the action dismissed as to him is not ground of objection by other defendants, protected from additional costs because thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 149.]

8. CANCELLATION OF INSTRUMENTS—PARTIES.

Where plaintiffs bought land and gave a deed of trust to secure the unpaid purchase money, the trustees are proper parties to an

action to rescind the contract of purchase for fraud, with complicity in which they are charged, though they have divested themselves of title to and possession of the property by sale under the power in the deed of trust.

9. PARTIES—MISJOINDER OF PLAINTIFFS.

It is not a fatal misjoinder to make plaintiff, in an action to rescind a contract of purchase of land, with the corporation which bought the land, one who owns stock of the corporation and bonds thereof, which are a lien on the property, and who might have been made a defendant; it being a part of the relief asked that the stock and bonds of the corporation be produced and canceled, or transferred to the vendor.

10. PLEADING—STRIKING OUT ALLEGATIONS OF COMPLAINT.

Matters material to the accounting to which plaintiff, under the facts alleged in the complaint, is entitled, and proper, though not necessary, subjects of averment to lay the foundation for that part of the relief, should not be stricken from the complaint.

11. COSTS—TAKING OF DEPOSITIONS.

Under Code Civ. Proc. §§ 2021, 2031, authorizing either party to have a deposition taken any time after service of the summons, it is not ground of objection to the taxing of costs for a deposition that defendant had taken before answer, and while a demurrer that the complaint did not state a cause of action was pending.

In Bank. Appeal from Superior Court, Ventura County; Felix W. Ewing, Judge.

Action by the California Farm & Fruit Company, Limited, and another, against Leopoldo Schiappa-Pietra and others. From an adverse judgment, plaintiffs appeal. Reversed and remanded for further proceedings.

John S. Chapman and J. H. Shankland, for appellants. Lynn Helm, Barnes & Selby, and Edward M. Selby, for respondents.

PER CURIAM. In this action demurrers interposed by defendants to plaintiffs' amended complaint were sustained, with leave to plaintiffs to amend. Plaintiffs failed to amend, and judgment was thereupon given for defendants. Plaintiffs appeal from such judgment.

The amended complaint, as we read it, states substantially the following facts: Defendant Schiappa-Pietra (hereafter referred to as Pietra) was the owner of a tract of land in Ventura county, consisting of 6,962.31 acres, part of the Rancho Santa Clara del Norte, and 5,375 shares of the capital stock of the Santa Clara Water & Irrigating Company. On March 20, 1902, through the medium of defendant Temple, he sold all of said property to plaintiff corporation; the terms agreed on being as follows: The total purchase price was \$1,113,880, of which \$125,000 was to be paid in cash, \$925,000 was to be evidenced by promissory notes payable at various times between that date and January 1, 1912, and \$63,880 was to be evidenced by a promissory note, which was to be replaced, and which was in fact replaced, on July 5, 1902, by 64 interest-bearing bonds of the corporation, 63 for \$1,000 each and 1 for \$880, issued to Pietra. The transaction was had as of the date of January 2, 1902. Ple-

tra executed to Temple a conveyance of the property, and an assignment of all the leases and rents reserved thereon; such leases covering all but about 800 acres of the land. Temple executed and delivered to Pietra the promissory notes. As security for the payment of the indebtedness he executed to defendants Power and Foster deeds of trust, covering all of said property and conferring power on them to collect all rents and apply them to the indebtedness. He caused the shares of stock of the water company to be transferred on the books of the company to said trustees as security. He further agreed to cultivate the portion not covered by leases, and executed to Pietra a crop mortgage covering the crops to be raised. He then transferred all the property, subject to the incumbrances thus created, to the corporation. It was stipulated in the trust deeds that a sale of the property by the trustees under the terms of the deed should be a full satisfaction of the indebtedness other than that evidenced by the bonds; no personal liability thereon surviving. The corporation was thereupon placed in possession of the property, and, so far as appears, continued in such possession until March 2, 1904, a few weeks subsequent to the commencement of this action, when Pietra, under a deed executed in pursuance of a sale made by the trustees, entered into possession of all thereof. During the whole period of the possession by the corporation, all of the proceeds, income, revenue, and every other receipt of money or property accruing from the possession and farming operations of the land, amounting to \$109,928.73, were delivered to and received by Pietra. The transaction thus had was induced, so far as plaintiffs were concerned, by the solicitations and representations of Temple. He had gone from California to Manchester, England, where plaintiff Scott resided, holding a purported option for the purchase of the property at a specified sum, and in the guise of one seeking financial help in a matter in which he himself desired to participate as an investor had there sought to interest Scott. He made certain representations in regard to the value of the property and its income capacity, and the adaptation of portions thereof for town site purposes, which need not be recited here, as it clearly appears from the complaint that Scott, through agents of his own, examined the property and the merits of the proposed enterprise, and, further, that he was satisfied, as a result of those investigations, that the property was not worth exceeding \$900,000. Temple did, however, represent himself as a man of means, desirous of joining in this purchase, and able to respond to any call made upon him for funds in the matter. He persuaded Scott to join him, and they caused the plaintiff corporation to be organized under the laws of the kingdom of Great Britain for the purpose of carrying out their plans and purposes, in the event that

the purchase should be made. It was agreed that they would at all times subscribe for an equal number of shares in the corporation. It was further agreed, as an inducement to the purchase, that Temple would personally pay, from his share of the profits or otherwise, the excess over \$1,000,000 paid to Pietra, with interest thereon. Temple agreed to subscribe and pay for 15,000 shares of £1 each, and it was further agreed between Scott and Temple that they would provide such further sums as might be necessary from time to time.

It was the understanding of plaintiffs, induced by the representations of defendants, that Temple paid to Pietra \$75,000 of the \$125,000 cash payment for the property, Scott advancing the remaining \$50,000, and stock of the corporation for that amount was subsequently issued him upon that theory. As a matter of fact, Temple was at all times acting as agent of Pietra for the sale of this property. The purported option was given him by Pietra solely for the purpose of enabling him to appear in the capacity in which he represented himself. He had not the financial ability to pay any of the amounts that he agreed to pay, or to keep his part of the agreement with Scott and the corporation. His \$75,000 portion of the \$125,000 cash payment was not required by Pietra to be paid at all, and such payment was never intended to be required; the representations in regard thereto being made solely for the purpose of inducing the payment by Scott of the \$50,000 portion and the entering by him and the corporation into the transaction. Scott personally advanced the \$50,000 so paid, and subsequently received from the corporation stock thereof for that amount. The promissory note for \$63,880, to be replaced and which was replaced by the bonds of the corporation, was executed not as a part of the purchase price, but solely for the purpose of requiring the plaintiffs to pay this amount to Temple for his services rendered to Pietra in the matter of such sale; it being the intent of Pietra and Temple that said bonds should subsequently be transferred to Temple. The actual purchase price to be received by Pietra was thus only \$975,000. Temple never paid to the corporation any portion of the money he had agreed to pay. Upon the claim made by him that he had paid for the corporation the \$75,000 at the time of the transaction, and various other sums, aggregating \$19,213, 19,213 shares were issued him by the corporation, 5,000 of which he subsequently sold to Scott. Temple subsequently became indebted to defendant Newhall, and transferred to him as security his remaining 14,213 shares, and also 20 of the \$1,000 bonds issued by the corporation to Pietra, and which had been transferred to Temple. Pietra still holds 33 of said \$1,000 bonds, Scott 5, and Temple 1. As to the whereabouts of the remaining 5 bonds, plaintiffs have no knowledge. Scott holds all the stock of said

corporation, except the 14,213 shares now held by Newhall as security for Temple's indebtedness, and some 150 shares which are subject to his control. Plaintiffs never discovered that any of Temple's representations, all of which are alleged to have been the result of a conspiracy between Pietra and the other defendants, except Newhall, were false, until in November, 1903. On December 26, 1903, they commenced an action against the defendants here in the United States Circuit Court in and for the Southern District of California for a rescission of the transaction and an accounting, and in their bill asked "that said trustees be directed to reconvey the said property to the said Schiappa-Pietra, and did offer to surrender up the same, and everything obtained by, through, or under the said transaction, and offered to surrender up to be canceled all the stock * * * upon such terms and conditions as to the said court might seem just." This suit was so brought under the belief that all the defendants were citizens of the state of California; but, it subsequently appearing upon a plea made by the defendants therein that Pietra was a subject of the kingdom of Italy, the court dismissed the suit upon the ground of want of jurisdiction.

In February, 1904, this action was commenced by plaintiffs in the superior court of Ventura county, against Pietra, Temple, George C. Power, and Eugene P. Foster, trustees under said deed of trust, and W. S. Newhall. In the supplemental and amended complaint filed April 15, 1904, is contained the allegation of the sale by the trustees under the trust deed on March 2, 1904, and the delivery of the property thereunder to Pietra. Except for the allegation as to the offer made in the bill filed in the United States Circuit Court, this is the only allegation as to any restoration of the property or offer to restore or notice of rescission. The action is primarily for a rescission of the transaction on account of the fraudulent representations, and the restoration of the parties, so far as possible, to the position they occupied at the time of entering into the same. To this end the setting aside of the deed of the property, the cancellation of the notes and bonds given upon the purchase, and an accounting to determine the amounts due plaintiffs are asked. As to the defendant Newhall, it was alleged that he took the stock and bonds from Temple with notice of the frauds, and it is asked that, if it be found that he took in good faith, the amount due thereon be decreed a lien on the property of Pietra, conveyed by the trust deed. Subject to this claim of Newhall, it is also sought to have the stock of the corporation issued to Temple canceled. The demurrers interposed were based on various grounds, among which was the general ground that the complaint did not state facts sufficient to constitute a cause of action. Under this, the principal question discussed is as to

whether the complaint failed to state a cause of action for failure to allege a rescission, and restoration or offer to restore what plaintiffs had received under the contract, before bringing this suit.

Section 1691 of the Civil Code states the general rule applicable to one desiring to rescind. He must rescind promptly upon discovering the facts which entitle him to rescind, and he must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so. It will be assumed, in accord with the views expressed by this court in several cases, that one invoking the aid of equity to obtain a decree of rescission must comply with this rule as a condition precedent to action, except in exceptional cases, where, by reason of the circumstances, restoration or offer to restore is not essential, and that, in this regard, there is no distinction between an action on the equitable side of the court to obtain a decree of rescission and an action maintained on the theory that a rescission has been fully accomplished by the acts of the party. *Kelley v. Owens*, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797; *Westerfeld v. N. Y. Life Ins. Co.*, 129 Cal. 68, 84, 58 Pac. 92, 61 Pac. 667; *Toby v. Oregon Pac. R. R. Co.*, 98 Cal. 490, 499, 33 Pac. 550. These rules are based on the equitable doctrine that he who seeks equity must do equity, and are applicable in every case where compliance therewith can be had without injury to the rights of the rescinding party, and is essential to the protection of the other party. There are, however, exceptions to the rule as to restoration, also founded on equitable considerations. In *Kelley v. Owens*, supra, this court recognized the existence of such exceptions in the following language: "There are exceptional cases where restoration or an offer to restore before suit brought is not necessary—as, for instance, where the thing received by the plaintiff is of no value whatever to either of the parties, or where the plaintiff has merely received the individual promissory note of the defendant, or where the contract is absolutely void, or where it clearly appears that the defendant could not possibly have been injuriously affected by a failure to restore, or where, without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may by a final decree fully adjust the equities between the parties—and it will be found that such instances, or others similar to them in principle, are those to which the authorities cited by appellants generally relate." Some of the cases thus instanced are excepted by the terms of the statute, as in the case where the thing received by the plaintiff is of no value whatever to either party, but others are not. It is

settled by our decisions that one attempting to rescind a transaction on the ground of fraud is not required to restore that which, in any event, he would be entitled to retain. See *Matteson v. Wagoner*, 147 Cal. 739, 743, 82 Pac. 436, and cases there cited. This is upon the theory that the defendant could not possibly have been injuriously affected by the failure to restore, and the plaintiff might be; for he might not be able to again collect the amount from the defendant, if it should be so restored to the defendant. One of the exceptions recognized in *Kelley v. Owens*, supra, is where, without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may by a final decree fully adjust the equities between the parties. See, also, *Thackrah v. Haas*, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. Ed. 486; *Wills v. Porter*, 132 Cal. 516, 521, 64 Pac. 896. Another exception recognized by this court is that of the case where the taking of an account is necessary for the ascertainment of the sum to be repaid, or the sum is to be liquidated by an adjudication based on evidence of facts independent of the terms of the contract itself.

In such a case, as the plaintiff cannot determine in advance of the suit the amount by him to be repaid, an offer to refund such sum as shall be decreed is a sufficient offer to do equity. *Sutter St. R. R. Co. v. Baum*, 66 Cal. 44, 4 Pac. 916. The authorities fully sustain the proposition that an offer to restore before action is not essential where the rights of the other party can be fully protected by the decree, and such restoration cannot be made without injuriously affecting the rights of the party seeking rescission, or the relative rights of the parties in the event of a rescission cannot be determined without an accounting. The statute itself dispenses with the necessity of such an offer, where the other party is himself unable to restore what he has received. In such event an offer on the part of the rescinding party would be a vain thing, and the respective rights of the parties can be fully guarded by the decree.

We think it is manifest that this case falls within the exceptions to the rule as to restoration or offer to restore. If their claims in regard to the contract were well founded, plaintiffs were entitled, upon delivery to Pietra of the property transferred to them, to receive, not only the money and obligations they had given therefor, namely, the \$50,000 and the 64 bonds of the corporation, but also such amounts as they had properly expended in the management of the property in accordance with their contract with Pietra, who had himself received all the proceeds. They were entitled to be reimbursed for all amounts they had properly expended under their contract with Pietra, and thus put in the position they occupied at the time of entering into the same. An accounting was undoubtedly essential to the determination

of the amount to which they were so entitled, for no one could undertake to determine that amount in the absence of such an accounting. A restoration of the property received by them, viz., the possession of the property and the title thereto, subject to the trust deeds and other incumbrances, upon the restoration of the property received by Pietra from them, namely, the \$50,000 and the 64 bonds, would not have reimbursed them as to any portion of the amount so expended. We think, too, that they were entitled to look to this property for such reimbursement, and for protection against such outstanding bonds as could not be recovered, and, consequently, entitled to retain possession of it for that purpose until the amount due them could be determined and their rights protected in a proceeding in which the rights of Pietra also could be fully guarded. In addition to this, we think it sufficiently appears from the allegations of the complaint that Pietra himself was, at the time of the commencement of this action, unable to restore certain of the property received by him from the plaintiffs, namely, certain of the bonds of the corporation which had been transferred to other parties. As is said by plaintiffs' counsel, the facts of this transaction are exceedingly complicated, and it is very clear that the terms upon which a rescission should be had, and the property received restored, can only be determined upon a judicial investigation, in which the rights of all the parties can be fully guarded. We are therefore of the opinion that the circumstances shown by the complaint fully justify the failure of plaintiffs to offer to restore possession of the property before the commencement of the action, and bring the case within those classes of cases in which no such offer is necessary as a condition precedent to action.

Under the facts of this case, it is clear that there was no undue delay on the part of plaintiffs in moving for rescission. Their delay of some three months in commencing this action was fully excused by the allegation showing the commencement of a similar suit in the United States Circuit Court under the misapprehension that Pietra was a citizen of California, and the dismissal of the same by the court upon the plea made by him that he was a subject of the kingdom of Italy. If we concede that notice of rescission was a condition precedent to action, we are of the opinion that such action in the Circuit Court was a sufficient notice to satisfy all requirements as to this action.

As we read the brief of counsel for the defendants, it is not contended that the complaint fails to state a cause of action against any defendant, other than as to the matters hereinbefore discussed, except as to defendants Power and Foster as trustees under the trust deed. It is claimed that, as the supplemental and amended complaint shows that, after the commencement of the action, they sold the property to Pietra under the terms

of the trust deed, and, so far as appears, in full accord therewith, and delivered possession thereof to him, and no longer make any claim thereunder, such complaint fails to state a cause or action against them. Herein counsel fail to note the distinction between a complaint and a supplemental complaint. Although in this instance they are both incorporated into one document, styled an "amended and supplemental complaint," and the supplemental complaint is distinguished only by being contained in separately, but consecutively, numbered paragraphs, they are, nevertheless, to be considered as separate pleadings. The complaint, whether original or amended, can properly speak only of things which occurred either before or concurrently with the commencement of the action. The office of a supplemental complaint is to bring to the notice of the court and the opposite party things which occurred after the commencement of the action, and which do or may affect the rights asserted and the relief asked in the action as originally instituted. If, upon the conditions existing when the action was begun, Power and Foster were proper parties to the action, they do not become improper parties, in the sense that they were improperly joined, by reason of the fact that after the action was begun they parted with their interest in the subject-matter and thereby terminated their liability. The propriety or necessity of joining them was a matter which the plaintiffs were obliged to determine when the action was begun. Having been properly joined as parties, as matters then stood, they are proper parties to the action thereafter, until something occurs which dispenses with their further presence, in which case the proper course is to dismiss the action as to them, and not to sustain a demurrer to the complaint because of the supposed improper joinder. In such a case the sufficiency of a complaint, with respect to the question of the proper joinder of all the parties originally included, is to be determined by reference to the facts existing and disclosed by the complaint at the beginning of the action. At the time this action was begun Power and Foster still held the title to the property involved in the action, and they were properly joined. While the sustaining of a demurrer on this ground is often a convenient way of excluding a party from further participation in the case, practically equivalent to a dismissal, and therefore to be deemed harmless error, it is not the technically correct method of dealing with the proposition that such party is no longer interested in the outcome of the action, nor liable to judgment therein. Such joinder is not a matter of which the other parties can complain, unless it causes additional cost to them. 15 Ency. Pl. & Pr. p. 698. We can perceive no harm that can result from their retention as parties, especially in view of the power of the court to adjust the costs so that, if their presence proves to be un-

necessary, the costs of bringing them in and keeping them in shall fall on the plaintiffs.

We think, however, they are proper parties to the action, although they have divested themselves of title to and possession of the property. They are charged with complicity in the frauds perpetrated and in the conspiracy by which it was carried out. It is possible that, upon the accounting, the presence of the trustees in court, or the continued jurisdiction of the court over them, may be necessary to fully accomplish the relief necessary to protect the plaintiffs, or to enforce their rights. Their expenditures as trustees will necessarily come under review, and certain claims made by them as trustees or otherwise must needs be settled and provided for, if found just, and they are proper parties to any investigation of those subjects.

The joinder of Scott as a plaintiff was not, under the rules prevailing in courts of equity, a fatal misjoinder. It is true that the corporation plaintiff is the only party shown to be entitled to affirmative relief, and that it is the party in whom the cause of action is vested; but it appears that the plaintiff Scott holds bonds of the plaintiff corporation of the face value of \$5,000, which were a lien upon the property, and \$50,000 of its stock, and that in order to effect a complete rescission it may become necessary or desirable to have this stock and all these bonds produced and canceled, or transferred to the defendant Pietra, and this is a part of the relief asked. Scott offers to deliver them up for that purpose, or for any disposition of them which the court may deem proper. He would be a proper party defendant, in order to answer as to any title he may have to them, or to oppose or advocate any proposed disposition of them; and, if some disposition of them is essential to complete relief, he would be a necessary party. He, of course, took them with knowledge of the facts, except the alleged fraud of the defendants. If he desires now to make common cause with the plaintiff corporation, which is for many purposes his agent, and in which he holds the majority of stock, and makes profert of the stock and bonds for the purposes of the suit, it is immaterial to the other defendants whether he is plaintiff or defendant. A court of equity can mold its decree to suit the exigencies of the case, and may determine the ultimate rights of the parties on either side as between themselves or the opposing party and render a decree accordingly. 15 Ency. of Pl. & Pr. 672, 673. Inasmuch as the effect of joining him as plaintiff was to avoid the cost of service of process upon him, if he was a necessary or proper party, it was to that extent beneficial to the defendants, if the plaintiffs should prevail and recover their costs.

It is unnecessary to consider further the question of the misjoinder of parties. The distinct relief asked as to some of the defendants is incidental to the main case, and

necessary to effect a complete settlement of the matters involved in the transaction sought to be rescinded. All of the defendants were properly joined. There is really but one cause of action stated, and hence there is no misjoinder of causes of action.

A motion to strike out certain parts of the complaint was sustained. It is alleged in the complaint that certain sums were paid by the plaintiff on account of the transaction, including interest to the defendant Pietra, expenses of operating the ranch, and expenses of agents transacting the business, and that certain claims are outstanding against the said plaintiff for similar expenses and other expenses incurred in the enterprise, some of which are in dispute, and that all these moneys were paid out and these liabilities incurred in good faith, while the plaintiffs believed the false representations complained of to be true, and before discovery of the falsity thereof. These matters are all material to the accounting, to which the plaintiff corporation, under the facts alleged, is entitled, and were proper, though not absolutely necessary, subjects of averment to lay the foundation for that part of the relief. The court erred in striking out these allegations. It also erred in striking out the allegations of paragraph 42½ of the complaint, containing a statement of some of the facts constituting diligence on the part of the plaintiff in promptly prosecuting the action.

The plaintiff moved to strike out of the cost bill of the defendants an item of \$193.10 for costs incurred in the taking of the deposition of a witness, H. G. Mirfin. The objection to this item was that the deposition was taken before any answer was filed, and while an issue of law upon a demurrer to the complaint, on the ground that the facts stated did not constitute a cause of action, was undetermined. There is no provision or rule of law to the effect that a deposition may not be taken before an issue of fact has been raised. The Code provides that a deposition of a witness may be taken in an action at any time after the service of the summons or the appearance of the defendant (Code Civ. Proc. § 2021), and that either party has the right to obtain evidence in this manner in the cases specified (Code Civ. Proc. § 2031).

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

(151 Cal. 711)

McKANNAY v. HORTON, Auditor. (S. F. 4,856.)

(Supreme Court of California. Aug. 19, 1907.)

1. MANDAMUS—QUESTIONS DETERMINABLE.

There being no other speedy and adequate remedy, the right to salary as secretary of the mayor of a city may be determined by mandamus, though the question of who is the mayor is incidentally involved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 33.]

2. MUNICIPAL CORPORATIONS—OFFICERS—VACANCY IN OFFICE—CONVICTION OF FELONY.

Under the provisions of the charter of San Francisco that an office becomes vacant when the occupant is convicted of a felony, there is a vacancy in the office of mayor when a verdict of guilty has been entered on trial of the mayor for a felony, and the board of supervisors has, on the judgment thereon being certified to them, declared the office vacant, though an appeal from the judgment is perfected and a certificate of probable cause granted.

3. SAME—REMOVAL OF MAYOR'S SECRETARY.

The secretary of the mayor of San Francisco, who holds his position only during the mayor's pleasure, is removed when, after his appointment, a vacancy in the mayor's office occurs, and the mayor elected to the vacancy appoints another secretary.

In Bank. Petition of Harry G. McKannay for mandamus to Samuel W. Horton, auditor of the city and county of San Francisco. Peremptory writ ordered.

Wm. B. Kollmyer, for petitioner. Maurice L. Asher (Wm. H. H. Hart, of counsel), for respondent.

BEATTY, C. J. This is a petition for a writ of mandate to compel the allowance of a claim for salary of the secretary of the mayor of San Francisco. There are two persons claiming to be mayor de jure of the city, and each is assuming to act in that capacity. Each has appointed a secretary, both of whom have presented claims for salary for the month of July, 1907. The auditor cannot approve more than one claim, and, being uncertain which is valid, refuses to approve either. Practically he takes the position of a stakeholder, willing to allow and certify the lawful claim as soon as it shall be determined which is lawful. Recognizing the difficulty of his position, the court, in ordering the issuance of the alternative writ, directed service to be made of a copy of the writ, together with a copy of the petition, upon John J. Boyle, the rival claimant to the office of secretary, and upon Eugene E. Schmitz, who was the de jure and acting mayor at the time of his appointment. Acting upon this suggestion, said Boyle has made himself a party to the proceeding by filing an answer to the petition, setting forth the facts upon which he founds his claim to be rightfully in the exercise of the duties of the disputed office. The cause has been submitted for decision upon demurrers to the answers of respondent and Boyle, and upon facts stipulated by the parties where not admitted by the pleadings.

The case is as follows: At the general election in November, 1905, Eugene E. Schmitz was elected mayor of San Francisco for the next regular term of two years, and in pursuance of said election he duly qualified and entered upon the duties of the office on the 8th day of January, 1906. Thereafter he continued to discharge the duties of the office without question until July 9, 1907. (The fact that he was absent from the state on two occasions during this period, and that

the president of the board of supervisors acted at such times as mayor pro tem., is not material in this case.) On the 13th of June, 1907, in the superior court of San Francisco, said Eugene E. Schmitz was found guilty of a felony—the crime of extortion—by the verdict of a jury, and on July 8th he was sentenced by the judgment of the court to a term of imprisonment for five years in the state's prison at San Quentin. On the following day the judge of the superior court, presiding in the department in which the trial and conviction of said Schmitz took place, in obedience to the requirements of section 997 of the Political Code, caused to be delivered to the board of supervisors a formal notice of said trial, conviction, and judgment, together with a duly authenticated copy of the judgment as entered. On the same day, July 9, 1907, the said board of supervisors regularly adopted a preamble reciting the election of Schmitz, his assumption of the office of mayor, his subsequent conviction of the crime of extortion, the judgment of conviction, and the fact that he was then actually confined in jail. They thereupon resolved that a vacancy existed in the office of mayor and that they would proceed forthwith to elect a mayor to fill the vacancy for the unexpired term. Immediately after passing this resolution they did actually elect Charles Boxton as mayor for such unexpired term, who immediately qualified, and on the 11th day of July took possession of the rooms in the city hall which had been set apart by a resolution of the board of supervisors for the use of the mayor, and designated as the office of the mayor of San Francisco, together with the records and papers therein. On the 9th day of July he had appointed the petitioner to the office of secretary, who on the same day duly complied with all the legal conditions and requirements relating to the qualification of such appointees and entered upon the discharge of the duties of the office. On the 16th of July Boxton resigned the office of mayor, and on the same day Edward R. Taylor was elected by the board of supervisors to fill the vacancy for the balance of the unexpired term. He immediately qualified, and took possession of the office and records in the city hall, and has since continued to act as mayor, retaining the petitioner in his service as official secretary. In the meantime Mr. Schmitz has never conceded that his conviction of a felony, or the judgment and sentence of imprisonment, as above stated, have occasioned any vacancy in the office of mayor, but, on the contrary, notwithstanding his confinement in the county jail in the custody of the sheriff, has been insisting on his continued right to the office, and actually discharging the duties of the office so far as under the circumstances he has been able to do so. Some of the city officials have continued to recognize his authority as the rightful mayor. Others, including the respondent, whose duty it is to act, and whose authority

to act depends, in some instances, upon written orders of the mayor, have refused to act, unless upon concurrent orders from Schmitz and from Boxton or Taylor, and accordingly Schmitz has been certifying demands upon the city treasury. But Mr. Taylor, since he succeeded Mr. Boxton, has refused to act in conjunction with Mr. Schmitz in any official matter, and he alone is recognized by the board of supervisors as the rightful incumbent of the office of mayor. On the day of his sentence—July 8, 1907—Schmitz took and perfected an appeal to the District Court of Appeal for the First District—the proper court—and at the same time applied for and obtained from the judge of the superior court a certificate of probable cause for his appeal, which is still pending and undecided. Thereafter he continued and still continues to retain control of, and by his secretary, Boyle, remains in possession of, the office at Post and Franklin streets, which, subsequent to the earthquake and fire, and down to the 11th of July, 1907, was the only office of the mayor of San Francisco. He also has in his possession the mayor's official seal.

The question we have to decide is: Who is entitled to the salary of secretary to the mayor for the last 21 days of July? But one salary can be paid, and that is claimed at the same time by McKannay, the appointee of Boxton, and by Boyle, the appointee of Schmitz. Each of the claimants has performed the duties of the office so far as he has been allowed to do so—Boyle in the service of Schmitz, and McKannay in the service of Boxton and Taylor. It is conceded to be the duty of the respondent to allow the claim and direct its payment out of the city treasury, when duly certified by the mayor that it is correct. Taylor has certified that McKannay's claim for services from July 10th to July 31st is correct, and Schmitz has certified that Boyle's claim for a full month's salary is correct. The question, therefore, reduces itself to this: Who is mayor of San Francisco?

With reference to this question Mr. Boyle makes the preliminary objection that in this proceeding by mandamus we cannot try the title either of the secretary or mayor. We are not cited to any authority for the proposition that the title to an office cannot be tried—that is, inquired into—when it is incidentally involved in a proceeding which a third party has a right to institute. The doctrine which Mr. Boyle means to invoke is more correctly stated in these terms: Title to an office cannot be determined in mandamus, where there is another specific remedy prescribed, or where there is another plain, speedy, and adequate remedy at law. This doctrine is very fully and learnedly discussed in *People ex rel. Smith v. Olds*, 3 Cal. 167, 58 Am. Dec. 398, where the subject, the rule, its reasons, and its limitations are elaborately considered, and where it is shown to be merely a rule of procedure, even in cases

where it is sought to establish title to an office by a judgment which will operate as an estoppel in favor of a claimant and against an actual incumbent. Here, although we are obliged to decide, for the purposes of this and like cases, who is de facto mayor of San Francisco, we cannot determine, by a judgment which will operate as an estoppel between Dr. Taylor and Mr. Schmitz, who is the de jure mayor, however little doubt there may be as to the proper decision of that question. And as to the title of the secretary we are not required to determine that. When we have once decided who is de facto mayor, we shall have no difficulty in determining whose order the respondent must obey in the matter of allowing such claims against the treasury as must be allowed on presentation of the mayor's certificate that they are correct. This whole question as to the right to decide incidentally upon the title to an office in a proceeding by mandamus was fully and carefully considered in *Morton v. Broderick*, 118 Cal. 481, 482, 50 Pac. 644, and the result of the decision there is the same as in the case of *People v. Olds*, viz.: That the rule in such cases as the present is, as above stated, merely a rule of procedure—the rule, that is to say of our statute; that the writ of mandamus will issue only in cases where there is not another plain, speedy, and adequate, or specially prescribed statutory, remedy. Code Civ. Proc. § 1086. The rule is not jurisdictional, and its application to a particular case involves only the exercise of sound legal discretion. In *Morton v. Broderick*, supra, it was held, as it must be held here upon even weightier considerations, that the gravity and urgency of the situation afforded ample ground for holding that there was no other remedy adequate or available to relieve the situation except mandamus, which was accordingly allowed, notwithstanding the effect must be practically to end the dispute as to which of two rival bodies was rightfully the board of supervisors of the city. The situation here is certainly as grave as it was then. The government of the city must come to a standstill if claims of public creditors cannot be paid, and many important matters essential to the public welfare must be left uncared for, unless some person is recognized as properly entitled to exercise the varied and important functions pertaining to the office of mayor.

This preliminary objection being disposed of, we return to the question: Who is mayor of San Francisco? Dr. Taylor and Mr. Schmitz are each claiming to be at the same time the de jure and de facto mayor. It will appear from the facts above stated that each has some claim to be the de facto mayor. Dr. Taylor is in possession of the offices provided for the mayor by the board of supervisors—the governing body of the city and county—and is recognized by that board as the rightful mayor. Mr. Schmitz is in con-

trol through his secretary of the premises occupied by the mayor at the date of his conviction; but he is himself a prisoner in the county jail, where it is the duty of the sheriff to keep him closely confined. Nevertheless his right to act is maintained by some at least of the other city and county officers and by many private persons who resort to him for the purpose of transacting official business. He also is in possession of the official seal used by him up to the time of his conviction, while Dr. Taylor has been provided with a new seal. If these facts alone were considered, it might be difficult to decide which of the two is de facto mayor. But in such cases the law affords a rule of decision which in this case is not difficult of application. There cannot be two de facto incumbents of one office at the same time, and where two are acting simultaneously, each under claim of right, that one alone will be recognized who appears to have the better legal title. *Morton v. Broderick*, 118 Cal. 485, 486, 50 Pac. 644. For the purpose, therefore, of determining who is mayor de facto of San Francisco, we must inquire who appears to be mayor de jure.

By the charter of the consolidated city and county it is provided that "an office becomes vacant when the incumbent thereof dies, resigns, is adjudged insane, convicted of a felony or of an offense involving a violation of his official duties," etc. Article 16, § 10. And by section 996 of the Political Code it is provided that "an office becomes vacant on the happening of either of the following events before the expiration of the term: (1) The death of the incumbent. * * * (8) His conviction of a felony or of any offense involving a violation of his official duties." It will be seen that with respect to the case in hand the provisions of the charter and the state law are identical. Either, in the absence of the other, would give the same effect to any one of the enumerated contingencies, including conviction of a felony, that ensues in the case of the death of the incumbent; that is to say, the office ipso facto becomes vacant. *People v. Shorb*, 100 Cal. 540, 35 Pac. 163, 38 Am. St. Rep. 310; *People v. Brite*, 55 Cal. 79. On the 13th of June, 1907, the verdict of guilty in *People v. Schmitz* was returned and recorded; but we are not required to decide in this case that the entry of a verdict of guilty constitutes a "conviction" in the sense of the statute, for here a vacancy was not declared by the board of supervisors, and Borton was not elected, until the 9th of July, after the entry of judgment on the 8th had been duly certified to the board. At that date certainly, if not before, Mr. Schmitz was convicted. The event had occurred which by the terms of the statute and of the charter vacated the office.

It is contended, however, that the perfecting of an appeal from the judgment and the

granting of a certificate of probable cause by the trial judge, prior to the election of Boxton and prior to the declaration of a vacancy in the office, suspended the operation of the judgment for every purpose until the appeal, which is still pending, shall be finally determined. We are clearly of the opinion that the statute will not bear that construction. An office becomes vacant when the incumbent is convicted of a felony, and also it becomes vacant when he is convicted of any offense—whether felony or misdemeanor—if it involves a violation of his official duties. There are felonies which involve no violation of official duty; there are felonies, such as extortion by a public officer, which do involve a violation of official duty; and there are simple violations of official duty, which are misdemeanors solely for that reason. Whether a felony does or does not involve a violation of official duty, the indictment will charge the facts constituting the felony, and a verdict of guilty will import a sentence of imprisonment in the state's prison, to be executed at once unless a stay of proceedings pending an appeal is obtained through the medium of a certificate of probable cause; and even in that case the defendant is committed to close custody in the county jail to await the result of his appeal, unless the court, in the exercise of a discretion rarely exercised and only in exceptional cases, admits him to bail. The result is that a public officer convicted of a felony is placed by the verdict in a position and under a physical restraint which prevents him from performing the duties of his office. But if the misconduct alleged against a public officer is a misdemeanor only, and only such because it is a violation of official duty, the proceeding against him is under the provisions of chapter 2 of part 2 of the Penal Code (sections 758 to 772). A verdict of guilty upon an accusation based upon the provisions of that chapter does not involve imprisonment of the defendant or any other penalty except removal from office. It does not, in other words, disable the officer to discharge the duties of the office pending the appeal, and accordingly it is specially provided that in such cases he is not even suspended from office until 30 days after the entry of judgment, and not then if in the meantime he shall have taken an appeal and obtained a certificate of probable cause. Pen. Code, § 770. This special provision for an entire suspension of the operation of the judgment in an exceptional case shows what the rule is in all other cases, and the ground of the exception affords conclusive evidence of the meaning and motive of the rule. It means that, since a prisoner in close custody cannot administer a public office, he cannot be allowed to stand in the way of the appointment of one who can perform its duties. No man has a property right in an office para-

mount to the public interest. He has a property right in the salary and emoluments of an office while he is capable of discharging and actually discharges its duties; but when, by his fault or misfortune, he is no longer able to render the service, the public interests demand that he shall give way to some one who can. An official who is declared insane is simply unfortunate; but he ceases to be an official. An innocent man who is unjustly convicted of a felony is doubly unfortunate; but the fact that he may by means of an appeal ultimately succeed in establishing his innocence does not entitle him in the meantime to hold on to a public office which he is no more capable of serving than if he were insane. The law allows an appeal from a conviction of felony because, so far from being against the public interest, it is promotive of the public interest that a person accused of crime should have every reasonable opportunity of vindicating his innocence. But, if the person so convicted is the incumbent of a public office, these considerations do not weigh in favor of retaining him in that position pending an appeal. The pendency of the appeal does not affect the presumption of guilt, which arises immediately upon the rendition of the verdict; and it would be strange indeed if a state which gives such weight to that presumption as to deprive the defendant of the right to bail, and to require in all but rare and exceptional cases that he be detained in close custody in the common jail, should at the same time provide by law for his continuance in an office the duties of which he cannot discharge. There is no such law. The only effect of an appeal and certificate of probable cause is to stay the execution of the judgment. Removal from office is not part of the judgment of conviction in cases of felony, though a consequence which flows from it, and the statute in express terms defines and thereby limits the effect of the appeal and certificate of probable cause. "If the certificate provided for in the preceding section is filed, the sheriff must, if the defendant be in his custody, upon being served with a copy thereof, keep the defendant in his custody without executing the judgment, and detain him to abide the judgment on appeal." Pen. Code, § 1244.

We are cited to a number of cases decided in other jurisdictions which are supposed to conflict with these views. We do not think there is any conflict or discordance, except such as follows necessarily from different statutory provisions. On the other hand, there are numerous decisions by courts of the highest authority which fully sustain our conclusions. We do not consider it necessary to review these cases. We have only to construe our own statutes and the charter of San Francisco, the terms and policy of which are plain and identical, and there is no decision of this court which is in the least degree at variance with what is here held. The

case of *People v. Treadwell*, 66 Cal. 400, 5 Pac. 686, comes as near as any other to supporting the contention of respondent; but it is distinguishable on several grounds. Treadwell, an attorney at law, was convicted of a misdemeanor in a justice's court and immediately appealed to the superior court. There was no law making his conviction operate ipso facto to deprive him of his license. It was only the foundation for a new proceeding in the Supreme Court to revoke his license, involving the issuance of a citation to show cause why he should not be removed and a hearing upon the rule day. The justice of the peace, notwithstanding the appeal, forwarded to the Supreme Court a certified copy of his docket, and a citation was issued to Treadwell to show cause why he should not be removed. In response to the citation he alleged the pendency of his appeal. The court held, and properly held, that the proceeding under section 288 of the Code of Civil Procedure could not be instituted until the judgment became final. This is the rule generally in civil cases, and the rule was held applicable to a proceeding to revoke a license to practice law, which is essentially a property right. An attorney at law is not a public officer. He does not, as such, discharge any public function. His license, like the license of a physician, a druggist, a dentist, or an architect, merely enables him to engage in his vocation, for the service of private employers and for his private emolument. The public is not concerned in depriving him of the right to practice his profession in the service of those who choose to employ him until it has been finally determined that he is unfit for the profession. The decision in *Treadwell's Case* was clearly right; but a loose and inaccurate expression occurs in the opinion, which, if it were a correct statement of the law, might afford some support to respondent's contention. It is said—arguendo—that an appeal to the Supreme Court operates a suspension of the judgment of the lower court for all purposes. This, as every lawyer knows, is not true. If, in a civil cause, the appellant does not file a sufficient undertaking to stay proceedings upon the judgment, execution will issue, notwithstanding the pendency of the appeal, and may be levied upon the property of the judgment debtor, and the property may be sold, and an indefeasible title vested in the purchaser at the execution sale, notwithstanding the result of the appeal may be a complete and final reversal of the judgment of the trial court; and, as in civil cases, so in criminal cases, a judgment not final may be proved for every purpose for which it is effectual. It may be proved for the purpose of showing a vacancy in office, just as in a civil case it may be proved to justify the levy of an execution, or to establish the title of the purchaser at the execution sale; and this, even after it has been reversed on appeal.

The last objection urged by the respondent may be answered very briefly. He says the petitioner is not secretary to the mayor, because it is conceded that Boyle was duly appointed to the place, and it does not appear that he has ever been removed. It would be a sufficient answer to this objection to say that the petitioner's claim is certified by the de facto mayor; but it may be added that in the case of the mayor's secretary, who holds the position only during the mayor's pleasure, he is removed whenever a new secretary is appointed and assumes the duties of the office.

It is ordered that the peremptory writ of mandate issue as prayed.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

ANGELLOTTI, J. While I have concurred in the foregoing, I deem it proper to add that I am satisfied that the effect of the charter provision declaring that an office "becomes vacant when the incumbent thereof dies, resigns, is adjudged insane, convicted of a felony," etc., was to create a vacancy in the office of mayor upon the rendition and entry of the verdict of conviction against the then incumbent. One is "convicted" of a crime when a verdict of guilty has been so given and entered against him, or when a plea of guilty has been given and entered. This is the well-settled meaning of the term as ordinarily used in our constitutional and statutory provisions, and I can see no warrant for concluding that it was used in any other sense in the charter provision under discussion. Under this view, it is entirely immaterial whether or not judgment has been given upon the conviction, or whether or not the execution of any judgment so given has been stayed by an appeal. The vacancy in the office is in no way dependent upon any judgment given on the conviction, but was fully and finally created by the happening of the event specified, viz., the rendition and entry of the verdict of conviction.

There can, of course, be no question as to the power of the people of the city and county of San Francisco to make such provision in their charter as to purely municipal offices. As is shown in the opinion of the Chief Justice, the provision for the ouster of the incumbent in the contingency named is in no degree by way of punishment for any offense alleged to have been committed by him, but is solely for the purpose of securing an efficient, orderly, and decent discharge of the duties of the office, which, doubtless, it was deemed could not be had during the incumbency of one under a verdict of conviction of felony.

We concur: SLOSS, J.; SHAW, J.

151 Cal. 763

DONLON BROS. v. SOUTHERN PAC. CO.

DELANEY v. SAME.

(L. A. 1,724.)

(Supreme Court of California. Aug. 22, 1907.)

1. CARRIERS—CARRIAGE OF GOODS—CONTRACT OF SHIPMENT.

A shipper requested a carrier to accept a shipment of horses of the value of \$20 each, and stated that he desired to procure a certain contract of shipment, which referred to the request with the valuations therein and limited the liability of the carrier for loss to an amount not in excess of such declared value. *Held*, that the request of the shipper must be deemed a part of the contract of carriage.

2. SAME—LIMITING LIABILITY—VALIDITY.

Under Civ. Code, § 2175, providing that a carrier cannot be exonerated by any agreement from liability for gross negligence, a contract which attempts to relieve a carrier from liability for gross negligence, or which attempts to fix a liability for half the actual value of the property carried, or any other proportion less than the actual value, is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 654, 663, 664.]

3. SAME—STATUTES.

The common-law rule that a carrier cannot make a contract which exempts it from liability for any kind of negligence is abrogated by Civ. Code, § 2174, providing that the obligations of a common carrier may be limited by special contract, and the prohibition against a carrier limiting its liability applies, by section 2175, only to limitation for gross negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 654.]

4. SAME—LIMITING LIABILITY—CONTRACTS—VALIDITY.

A contract of carriage of horses, which stipulates that the carrier shall not be liable for any damage not caused by its gross negligence, and that the amount of recovery shall be adjusted on the basis of value not exceeding the declared value, based on a consideration of a rate of transportation lower than the rate otherwise would have been, is not in conflict with Civ. Code, § 2175, providing that a carrier cannot be exonerated from liability for gross negligence, and the contract, if freely made, limits the recovery for damages resulting from gross negligence.

5. SAME.

The court, in determining whether a contract of carriage, which stipulates that the carrier shall not be liable for damage not caused by its gross negligence, and that the amount of recovery shall be adjusted on the basis of value not exceeding the value stated in the contract, is reasonable, will not consider the question whether the agreed value reasonably approximates the real value, and the contract establishing the value will be construed to embrace the real value.

Shaw, J., dissenting.

In Bank. Appeal from Superior Court, Ventura County; Felix W. Ewing, Judge.

Actions by Donlon Bros. and by Henry Delaney against the Southern Pacific Company. From judgments for plaintiffs in each action, defendant appeals. Reversed, and new trial ordered.

Canfield & Starbuck, for appellant. Thomas O. Toland and Merle J. Rogers, for respondents.

LORIGAN, J. These two cases were tried together and are presented here on the same

record. The complaints alleged that defendant, as a common carrier, contracted to transport from Salinas to Sacramento, in this state, certain race horses belonging to plaintiffs; that through its gross negligence in the management of its train while en route one horse was killed and another injured, to plaintiffs' damages in the sum of \$1,500 and \$1,200, respectively. The answer of defendant denied that it had been guilty of gross or any negligence in the transportation of said horses, and for a further and separate defense set out a special contract entered into by the plaintiffs with defendant relative to the carriage of said property, and under which it averred that, if liable at all, it was not liable beyond the sum of \$20 in each case, the agreed valuation of each horse as fixed in such contract of shipment. Upon the trial, aside from other evidence in the case, the execution of a special contract relative to the carriage of these horses as averred by defendant was proven; in fact, its execution was not questioned. In that regard it appeared that plaintiff Delaney, in his own behalf and as agent for the other plaintiffs, the Donlon Bros., applied to defendant at Salinas on August 24, 1902, for the transportation from that point to Sacramento of five horses, including those involved in this action. The result of the negotiations between them was that Delaney chartered for \$42 charges a whole car to transport the horses, and a certain document in relation thereto was executed by himself and the agent of the defendant. This document was divided into several parts, and was in form such as was generally provided by the defendant for execution where a special rate for transportation on an agreed valuation was obtained. The first part consisted of a request by the shipper to the carrier to accept a specified shipment, which, in the present instance, Delaney stated in his own handwriting, inserted in blanks left for that purpose, consisted of five horses consigned to himself at Sacramento from Salinas, and of the value of \$20 apiece. The request contained a further statement by him that he desired to procure the form of contract set out below the request and constituting the second part of the sheet, the provisions of which he declared had been read by him, were freely understood, and accepted in consideration of the lower shipping rate thereby to be obtained. This request was filled out by him and, containing the statements indicated, was signed by Delaney. The next part of the document, which immediately followed the request as signed, consisted of a contract, which referred to the request and the valuation of the horses stated therein and was signed by the defendant and Delaney. This contract provided that Delaney should load, feed, and water the stock, etc., and that the defendant should transport it between the points named for \$42 freight charges, and then further provided: "And second party [plaintiffs] hereby

specially agrees that in no event is first party [defendant] * * * to be liable for any loss or damage to said live stock not proven to have been caused by the gross negligence of first party in the performance of or failure to perform some duty which under the terms of this contract is due from first party to second party as to said live stock. And it is expressly agreed by second party that the amount to be by him claimed for each animal as described herein for loss or damage shall be adjusted on the basis of value at the time and place of shipment, not exceeding the declared value as hereinbefore set forth, and on which declared value the rate or rates of transportation hereinbefore named by first party are based, and in no event is there to be any recovery from first party * * * for any loss of or damage to said live stock from whatsoever cause arising in excess of the declared value hereinbefore set forth." This contract was followed by the third part of the document, which consisted of a statement that the published rates of transportation under these special contracts applied only to ordinary live stock, and set forth two schedules, the first of which enumerated the ordinary kind of live stock to which such rates applied, and fixed what was deemed the ordinary valuations of such animals, and declared that such rates only applied in the case of ordinary animals, and as to horses applied only to race horses sent by passenger train whose actual and declared value did not exceed \$100, and to other horses whose actual and declared value did not exceed \$20. It was further stated that values of animals in excess of those specified in this schedule should be deemed extraordinary, and subject to increased charges as compared with charges for such ordinary live stock, and the second schedule, as set forth, showed what these charges should be—that for every 100 per cent. increase in valuation of such live stock over the ordinary valuation there would be under these special contracts an increase of 10 per cent. in the freight charges. These statements and schedules were a portion of the matters referred to in the request signed by Delaney, and which he stated therein he had read and agreed to. The last portion of the document is immaterial to the question presented here, and hence is not stated. These papers having been executed and delivered, the defendant undertook the carriage of the horses to their destination, and on the journey an accident happened to the train, occasioning the loss of the two horses mentioned in the complaint under circumstances which—the plaintiffs claim, and the jury found—constituted gross negligence on the part of defendant. Aside from the evidence relative to the making of the special contract, the cause was fully tried upon the other issues involved and a general verdict returned by the jury in favor of the Donlon Bros. for \$350, found by them to be the value

of the horse killed, and in favor of Delaney for \$200 damages for the horse injured. Judgments having been entered on the verdicts, defendant appeals therefrom; its appeals being accompanied by a bill of exceptions in which the errors relied on for a reversal are presented.

The principal question arising on this appeal relates to the effect which is to be given to the special contract proven to have been entered into between plaintiffs and the defendant, conceding, as we think it must be, that there was sufficient evidence in the case warranting the jury in finding that the defendant was guilty of gross negligence occasioning the loss and injury complained of. At the close of the evidence the defendant requested the court to instruct the jury that, if they should find for the plaintiffs, their verdict should not exceed \$20 damages in favor of each. This instruction the court refused to give, but instructed them that, if they found the defendant was guilty of gross negligence in the carriage of the horses, they should find in favor of plaintiffs for their value, not exceeding the amount stated in the complaint. The defendant excepted to the action of the court with relation to these instructions, and under these rulings is presented the question as to what extent the liability of the defendant was affected by the execution of the special contract. The view taken by the trial court was, and it is the position taken by counsel for respondent here, that while, under the provisions of the Civil Code, a common carrier may limit its liability for ordinary negligence (section 2174), it is prohibited by section 2175 thereof from doing so as to its gross negligence, this latter section providing that "a common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud or willful wrong of himself or his servants"; and in the light of that section it is claimed by respondents that the special contract relied on was an attempt to limit the liability of defendant for damages for gross negligence to the agreed value of the horses as stated in it, and was therefore void, and for that reason plaintiffs were entitled to recover for the actual value of the horses, if gross negligence of defendant occasioned their loss, independent of the terms of the special contract providing that such liability of defendant should not exceed that agreed amount. On the other hand, the position of appellant as to such contract, or, rather, as to the several instruments executed by plaintiffs and defendant—the request for the shipment signed by plaintiffs alone and the bilateral special contract executed by plaintiffs and itself—is, first, that aside from the special contract, and eliminating its consideration from the case entirely, the plaintiffs were estopped by their statement of value in the request for shipment from subsequently claiming that the horses injured were of any

greater value than as stated therein; and, second, that as to the special contract itself it did not attempt to limit the liability of defendant for gross negligence, but, on the contrary, the defendant thereby assumed full liability for any loss occasioned to the extent of the full value of the property shipped, and which value was fixed by the terms of the agreement. While we are satisfied that both positions of appellant are correct, we perceive no reason why they should be considered separately. The special contract refers to the request, with the valuations stated therein, and limits the liability of defendant for loss to an amount not in excess of such declared value, and hence is to be deemed a part of the contract. The authorities, also, to which we shall presently refer, discuss both the effect of such statements of value by the shipper as representations constituting an estoppel and as agreed valuations purely matter of contract affecting the responsibility of the carrier for negligence. These cases involved the consideration of special contracts such as the one involved here, and, although the execution of such contracts was not preceded by a request for shipment in which the valuation of the property was declared by the shipper (the valuations there being only mentioned in the contract executed by the parties), still such valuations, as creating an estoppel and also as a matter of contract, were considered and discussed.

Now, to examine the contract under the terms of section 2175 of the Civil Code, to see if it comes within its prohibition. That section prohibits the carrier from entering into any contract in anticipation of gross negligence exonerating itself from liability therefor. Undoubtedly a contract which attempted to relieve the carrier from liability for gross negligence, or attempted to fix a liability for only half the actual value of the property carried, or any other proportion less than such actual value, would be obnoxious to the prohibition of the section and void. But the contract in question here does not attempt to relieve the carrier from liability for the actual value of the property shipped, nor does it provide for any partial exemption from liability, nor does it provide for exemption from responsibility at all. On the contrary, the carrier assumes full responsibility for loss or injury to the property occasioned through its gross negligence to the full extent of the actual value of the property as declared by the shipper and which valuation by the contract between them was agreed to be its actual valuation for all purposes. As to these purposes it is not correct to assume that the special contract was made solely in anticipation of liability, or that liability was the principal subject-matter of the contract. It was not entered into with a view of providing solely for exemption, nor was that by any means its contemplated purpose. While it is true that the actual value of property may in fact be in excess of an agreed valuation

in a contract, and as to that excess it may be said that the carrier is exonerated from liability, this does not render the contract, otherwise fairly entered into, fixing the agreed valuation, invalid. If to that extent exemption may be said to result in some instances under an agreed valuation, it only follows indirectly, because it is not the main or chief object of the contract to attain it. The primary purpose of this contract was, as the rates of transportation charged by the carrier were measured by the valuation of the property shipped, to fix an agreed valuation of the horses in question as a basis upon which freight rates should be charged and paid, on condition that in case of loss the responsibility of appellant should be measured by such agreed valuation. The contract is one in which the valuation of the property was agreed to for the purpose of fixing transportation charges and as measuring the responsibility of appellant. It was not a contract limiting liability. It was a contract dealing primarily with value—the value of the horses shipped. That was agreed to, and, of course, the agreed valuation must be deemed to be the actual valuation of the property, its actual valuation for all purposes of the contract; and, as appellant assumed responsibility for loss to the full extent of such valuation, there is no room for claiming that the contract was an attempt to exonerate it from the liability which the statute imposed. On the contrary, it assumed under it full liability for the actual value as that actual value was agreed on. Under this view of the contract we cannot see how it violates the section of the Code relied on. That section, while it prohibits contracts relieving the carrier from liability for the value of property intrusted to it for carriage and lost through its gross negligence, was not intended to limit the right of contract between shipper and carrier as to what that value may be. It prohibited only the making of a contract limiting liability. The limitation of liability necessarily imports a responsibility less than full responsibility. Full responsibility under the statute for the loss of the property carried could not exceed its actual value, and while, under the statute, a carrier cannot by contract exonerate itself from liability for such value, there is nothing in the statute which prohibits the parties by contract from determining freely in advance what the actual value of such property is as the measure of the responsibility of the carrier when it attaches.

Now, as to the authorities: At common law a common carrier might make any other contract relative to the carriage of property intrusted to it, save one exempting it from liability for any kind of negligence. This rule was founded upon considerations of public policy; it being deemed derogatory thereto to allow a common carrier to contract against its own negligence, because to permit this had a tendency to promote negligence.

In fact, as far as ordinary negligence is concerned, the rule at common law has been abrogated by our Code (section 2174) to the extent that the shipper and carrier may now contract for the purpose of limiting the liability of the latter therefor. The prohibition of the common law against a carrier limiting his liability from any kind of negligence is declared in this state by section 2175 only to apply to the limitation for gross negligence. But, in so declaring, our statute has added nothing to the restrictive force of the common-law rule. Declaring the same rule as it existed at common law, and nothing more, the section should not be construed as restricting the right of contract to any narrower compass than the common law restricted it. In fact, section 2175, as it is but a declaration of that rule, as far as it applies to contracts limiting liability for gross negligence, should not be interpreted as restricting the right of contract as to an agreed valuation of property for the purpose of fixing responsibility any further than it was restricted under the common-law rule. At common law such agreed valuation was not considered a limitation of liability for either ordinary or gross negligence. In jurisdictions in this country where the common-law rule obtains, it is the prevailing doctrine that there is a wide distinction between a contract by a carrier providing for exemption from liability for its negligence and a contract, fairly entered into, whereby, in consideration of a reduced rate of compensation for the transportation, the shipper and carrier agree upon a fixed valuation therefor under which the responsibility of the carrier in case of loss shall be measured. In his work on Carriers, Hutchinson, at section 250, notes the distinction, where, after discussing cases involving the question of contracts providing for total exemption of carriers in cases of negligence, he says: "To be distinguished from these cases, however—though the distinction is not always observed—are those cases, obviously different, in which, for the purpose of determining the shipper's liability for freight and the carrier's responsibility for damages, the value of the property is agreed upon."

The leading case marking this distinction is that of *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717. The distinction is further pointed out and approved in many of the state courts; most of them, like the Supreme Court of the United States, holding that agreements such as are involved here do not constitute contracts limiting liability on the part of the carrier, and all holding that in any view the shipper is estopped from questioning the value as represented by him and agreed on. In the *Hart Case*, where the provision of the contract under consideration was that "the carrier assumes liability on the stock [horses] to the extent of the following valuation," the court said relative to it "that where the contract of the kind signed by the shipper is fairly made, agreeing on the

valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuation. * * *

There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement fairly made as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage if there is no loss, and the effect of disregarding the agreement after a loss is to expose the carrier to a greater risk than the parties intended he should assume. * * *

The limitation as to the value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purpose of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contract, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss. * * *

The distinct ground of our decision in the case at bar is that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives and of protecting himself against extravagant and fanciful valuations."

In the case of *Graves v. L. S. & M. S. R. R. Co.*, 137 Mass. 33, 50 Am. Rep. 282, where the valuation was contained in a bill of lading in which it was stipulated that the goods were

"shipped at an agreed valuation of \$20 per barrel," it is said: "If we adopt the general rule that a carrier cannot * * * exempt himself from responsibility, * * * we are of opinion that it does not cover the case before us, which must be governed by other considerations. The defendant has not attempted to exempt itself from liability for the negligence of its servants. It has made no contract for that purpose, but admits its responsibility. * * * The care to be exercised in transporting property and the reasonable compensation for its carriage depend largely on its nature and value. * * * It is just and reasonable that a carrier should base his rate of compensation to some extent upon the value of the goods carried. This measure, and is an important element in fixing his compensation. If a person voluntarily represents and agrees that the goods delivered to a carrier are of a certain value, and the carrier is thereby induced to grant him a reduced rate of compensation for the carriage, such person ought to be barred by his representations and agreement. Otherwise, he imposes upon the carrier the obligations of a contract different from that into which he has entered. * * * We are of opinion that the plaintiffs are estopped to show that 'the property shipped' was of greater value than was represented. The plaintiffs cannot recover a larger sum without violating their own agreement. Although one of the indirect efforts of such a contract is to limit the extent of the responsibility of the carrier for the negligence of its servants, this was not the purpose of the contract. We cannot see that any consideration of a sound public policy requires that such contracts should be held invalid, or that a person who in such contract fixes a value upon his goods, which he intrusts to the carrier, should not be bound by his valuation."

In two cases in this court, while the particular section of our Code as to contracts limiting liability for gross negligence was not directly involved, still, discussing the effect of an agreed valuation in a contract between a shipper and carrier, the court expressed itself in approval of the rule laid down in the Hart Case. Said this court: "There is a wide distinction between a contract for exemption from liability in case of negligence, which is usually held in derogation of public policy, tending to encourage negligence, and a contract fairly made whereby, in consideration of a lower freightage, the parties agree upon a fixed or determinate value to be placed upon the article to be shipped, in case of its loss." *Pierce v. S. P. Co.*, 120 Cal. 156, 166, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350. Also: "It would be unreasonable for a shipper to expect his packages to be carried for a compensation based upon an agreed valuation much less than the actual value, and then, in case of loss, recover the full value. * * * Where * * * the shipper agrees to a certain value, he should not be heard,

in case of loss, to claim a greater value. Such a contract is fair and reasonable, and is not contrary to public policy. It is not a contract that relieves the carrier from responsibility for his own misbehavior. He is liable in case of loss for the value of the packages as agreed to by the shipper, and upon which value he pays a reduced compensation for the carriage. Limitation as to value does not excuse negligence." *Michalitschke v. W. F. & Co.*, 118 Cal. 683, 688, 50 Pac. 847.

We content ourselves with thus quoting at length from these authorities. They discuss the matter fully, and declare principles which should govern in construing contracts of this nature. To the same effect are *St. Louis, etc., Ry. Co. v. Weakly*, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104; *Zimmer v. N. Y. C. & H. R. R. Co.*, 137 N. Y. 460, 33 N. E. 642; *Jennings v. Smith*, 106 Fed. 139, 45 C. C. A. 249; *Bermel v. N. Y., N. H. & H. R. R. Co.*, 172 N. Y. 639, 65 N. E. 1113; *Hill v. N. P. Ry. Co.*, 74 Pac. 1054, 33 Wash. 697; *O'Malley v. Great Northern Ry.*, 86 Minn. 380, 90 N. W. 974; *Railway v. Sowell*, 90 Tenn. 17, 15 S. W. 837; *Normile v. O. R. & N. Co.*, 41 Or. 177, 69 Pac. 928. It is true that there are some authorities holding to a contrary doctrine, as there are those which sustain contracts exempting carriers from all liability for negligence; but the weight of American authority is in support of the doctrine announced in the Hart and other cases cited. While the authorities referred to discuss the effect of such contracts arising in cases where only ordinary negligence was involved, that can make no difference in the application of the principle to cases involving gross negligence. It is obvious that in principle it can make no difference what the character of the negligence may be. As it is pertinently said in *Calderon v. Atlas S. S. Co.*, 69 Fed. 574, 578, 16 C. C. A. 332: "Such a valuation would necessarily, in the absence of fraud, conclude both the shipper and the carrier upon any inquiry as to the amount of damages arising from a loss, and the contract would therefore extend to any kind of a liability." It will be observed in the authorities quoted that they speak of a contract which is reasonable and freely made between the parties. In the case at bar there can be no question of the reasonableness of the contract. It was based upon a consideration of a rate of transportation much lower than it would have been had the valuation been higher, or if the carrier assumed all the risk which the shipper now seeks to charge it with. The impracticability of establishing one rate for the transportation of stock of different values is universally recognized. Rates for transportation are based upon the value of the property, and it is only natural that the amount of care which is to be exercised by the carrier in the protection of the property will be largely determined by its value. In the case at bar, following the general rule, defendant established freight rates under these

special contracts of shipment which were proportional to the value of the property shipped—an increase of 10 per cent. in the freight charges for a rise of 100 per cent. in the value of horses to be transported, which cannot be said to be an unreasonable charge.

As to the contract being freely and fairly made: Delaney had shipped these horses over the road of the defendant before, and on just such a contract, containing the same valuations as appear in the one in question here. Before this latter contract was entered into, he had discussed with the agent of the defendant the shipment and the rate of shipment of these horses. He was not required to ship them under the contract. If he did not consider the rates thereunder reasonable, he was not required to take them. He could have shipped them under an ordinary bill of lading, though at a higher rate of freight, and in case of loss could have recovered whatever they were worth. Even under the contract he was not required to place the valuation on them that he did. He fixed the valuation on them himself. The defendant had nothing to do with it. And he knew, when he signed the contract, that it provided that the liability of defendant was limited by its terms to the value of \$20 for each horse, as he had valued them. As we have said, these special contracts provided for freight rates proportionate to the value of the horses shipped. Delaney could have put their valuation at any higher rate than \$20 which he deemed they were worth. There was nothing to prevent him from doing so. It was solely a matter of choice with him, and in fixing the valuation he did he could have been prompted only by a desire to obtain a low freight rate based on this low valuation. Nor, in determining whether such a contract is fair or reasonable, can there be taken into consideration the fact whether the agreed value of the property reasonably approximated its real value. That question was presented in some of the cases cited. In *Hill v. N. P. Ry. Co.*, supra, in reply to a contention of counsel for appellant urging that it should, the court said: "An examination of the cases cited we do not think sustains this contention, and, even where there has been an attempt to make this distinction, it has been in principle a failure. The contract establishing the released valuation must be construed to embrace the real valuation." In the *Hart Case*, supra, which was a suit relative to the value as here of race horses, the court dismisses that contention as without merit, saying: "Although the horses, being race horses, may, aside from the bill of lading, have been of greater value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation it fixed. * * *" In *Steers v. L. N. Y. & P. S. S. Co.*, 57 N. Y. 1, 15 Am. Rep. 453, the agreed valuation of the trunk in question was \$50, whereas it was shown that the value

of its contents exceeded \$1,000. In *Zimmer v. N. Y. C. & H. R. R. Co.*, supra, the agreed valuation was \$100, though the value thereof found by the jury was over \$3,000. And in all the other cases cited sustaining such special contracts, necessarily the actual valuation must have exceeded the agreed valuation, and the question whether it did or not must have been held to be immaterial.

We do not think that this matter requires any further discussion. Under the authorities the special contract entered into between plaintiffs and defendant cannot be held invalid as one exempting the defendant from liability for gross negligence. It does not do so, nor pretend to do so, but, on the contrary, must be sustained as a reasonable contract freely entered into by the shipper and under which the defendant assumed full responsibility for the actual value of the property as such value was fixed by the parties, and defendant cannot be made responsible for loss in an amount exceeding that agreed valuation.

The court erred in refusing to instruct the jury that they could not return a verdict exceeding the agreed valuation in each case—\$20—and for that reason the judgment is reversed, and a new trial ordered.

We concur: BEATTY, C. J.; McFARLAND, J.; HENSHAW, J.; ANGELLOTTI, J.; SLOSS, J.

SHAW, J. (dissenting). In the absence of a special contract on the subject, when goods under shipment are destroyed by the gross negligence of the carrier, the extent of the liability of the carrier in damages is the actual value of the goods. If a carrier makes an agreement in advance that its liability for such destruction by its own gross negligence shall not be the actual value of the goods, \$1,000 for instance, but a smaller amount, which the carrier and the shipper agree shall be considered, for the purposes of the shipment, the value of the goods, \$100 for instance, I am unable to perceive why such a contract does not exonerate the carrier from liability for its gross negligence to the extent of \$900. And, if a contract has that effect, I cannot see why the fact that the effect desired is not directly contracted for in express terms, makes it any the less a violation of section 2175 of the Civil Code, which prohibits the making of such contracts. The exemption from liability to the extent of the difference between the actual value and the stated value is expressly contracted for in the agreement in question here, however. If we hold that this contract is not forbidden by the provision of the Code, then that provision is practically annulled. Theoretically no person is compelled to avail himself of the services of common carriers, for he may walk, or hire his own conveyance; but practically the thing is compulsory, and the terms must be those fixed by the car-

rier. If the provision were made solely, or chiefly, for the benefit of the shipper or passenger, the theory that he might waive his right, or that he might be estopped to assert it by his conduct or by his contract freely made, would be perfectly sound and reasonable. But the law is not made for the benefit of the shipper or passenger alone. It is founded on public policy, having for its object the safety of human beings from death or injury and the prevention of the destruction of property. Where a course of conduct is required by law in furtherance of such public policy, it is not within the province of the individual immediately interested to dispense with an obedience to its provisions by any agreement, or to obviate its effects by his conduct making it inequitable, as between himself and the other party, to enforce it. The law in such cases makes use of his interest as a means of enforcing the provisions adopted for the purpose of securing the safety of the traveling public and preventing the negligent destruction of property. He is to that extent a public agent, and as such he should not be permitted to divest himself of the right and power to act.

In those jurisdictions where this policy exists solely by virtue of the common law, which is the creature of the judicial power, I concede that the same power is competent to qualify it, or limit its application, although the modification may render the policy practically fruitless. But in this state the policy is the creature of the legislative power. It has been established by legislative act, which in such matters is superior to the judiciary, and I do not believe that it should be within the power of the courts to declare that the parties immediately concerned may, by their previous conduct or by agreements made in advance, defeat the purpose of the law.

151 Cal. 746

IVERSON v. METROPOLITAN LIFE INS. CO. (L. A. 1902.)

(Supreme Court of California. Aug. 20, 1907.)

1. INSURANCE—APPLICATIONS FOR LIFE POLICIES—WARRANTIES—WAIVER.

Where the insurer, with knowledge that any representations of the insured are untrue, consummates the contract of insurance by issuing a policy, it waives the right to subsequently assert the falsity of the representations and avoid liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 966-997.]

2. SAME.

Where a soliciting agent of an insurer has neither actual nor ostensible authority to waive the falsity of statements in an application for a life policy, his knowledge of the falsity of statements therein, not communicated to the insurer, is not knowledge of the insurer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 969.]

3. SAME—AUTHORITY OF SOLICITING AGENT.

An application for a life policy stipulated that the answers of the applicant were true, and that they were the basis of the contract of insurance, and, if untrue, that the policy should

be void; that only officers at the home office of the insurer had authority to determine whether a policy should issue; and that no statements made to the soliciting agent should be binding on the insurer, unless reduced to writing and presented to the officers of the insurer at the home office. *Held*, that the soliciting agent had no authority to waive misrepresentations in the application.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 969.]

4. SAME — WARRANTIES — MISREPRESENTATIONS—WAIVER.

The applicant for insurance stated that he had never had paralysis, while as a matter of fact he had had partial paralysis, which fact was known to the soliciting agent, who did not communicate the knowledge to the insurer. *Held*, that the insurer, by issuing a policy on the application, did not waive its right to rely on the falsity of the statement to defeat liability.

In Bank. Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Annie P. Iverson against the Metropolitan Life Insurance Company. From a judgment for defendant, plaintiff appeals. *Affirmed*.

Porter, Sutton & Cruickshank, for appellant. Seward A. Simons, for respondent.

LORIGAN, J. This action was brought by plaintiff as beneficiary to recover upon two policies of life insurance issued by defendant in favor of James E. Iverson, her husband. The case was tried by the court and from a judgment in favor of defendant, plaintiff appeals; the appeal being presented on the judgment roll.

The applications for both policies of insurance, which were made and signed by the assured, contained the following: "(2) I have never had any of the following complaints or diseases: Apoplexy, asthma, bronchitis, * * * hemorrhage, insanity, * * * paralysis, pneumonia, rheumatism. * * * (12) I agree that this application has been made, prepared, and written by myself, or my own proper agent, and that inasmuch as only the officers at the home office of the company in the city of New York have authority to determine whether or not a policy shall issue upon any application, and as they act on the written statements, answers, warranties, and agreements herein made, no statements, promises, or information made or given by or to the person soliciting or taking this application for a policy, or by or to any person, shall be binding on the company or in any manner affect its rights, unless such statements, promises, or information be reduced to writing and presented to the officers of the company at the home office. And I further declare, warrant, and agree that the representations and answers made above are strictly correct and wholly true, that they shall form the basis and become part of the contract of insurance, if one be issued, and that any untrue answer will render the policy null and void, and that said contract shall not be binding upon the company unless upon

its date and delivery the insured be alive and in sound health." The policies issued were based on these applications and contain the following provision: "This policy is void if any of the statements or warranties in the application for this policy be not true."

The court found that at the date of the policies Iverson was alive and in sound health, and that he and plaintiff had complied with all the terms and conditions of the policy to be performed by them, except as further stated in the findings, and in that regard the court made the following finding: "(3) The defendant issued the said policies of insurance, induced by the warranties and agreements made in the application, a copy of which is attached to the said policies. * * * (7) The statement made by said James E. Iverson in his application that he had 'never had any of the following complaints or diseases, to wit: Apoplexy, asthma, bronchitis, * * * hemorrhage, insanity, * * * paralysis, pneumonia, rheumatism * * *'—was untrue, in this: that he had had a partial paralysis in August, 1900, and was seriously ill at that time from said stroke of partial paralysis, and was attended by Dr. C. A. Briggs." The court further found: "(8) That Harvey L. Clark was the agent who solicited the said James E. Iverson to take an insurance policy with the defendant company, and that he was an agent for the purpose of soliciting insurance only; that he had known James E. Iverson for more than two years, and at the time he solicited said insurance, and at the time of making said application, he knew that James E. Iverson had had said stroke of partial paralysis, and communicated said fact to his immediate superior, who was a soliciting agent of the defendant in charge of the other soliciting agents in Pasadena, but who was under the general agent in Los Angeles, to whom he reported; but the fact that said James E. Iverson had had a partial stroke of paralysis as aforesaid was not communicated to said general agent at Los Angeles, or to any other agent or officers of the defendant company." As a conclusion of law the court held "that the said policies of insurance were null and void by reason of the statement of said James E. Iverson in his application that he had had no paralysis."

There can be no question but that the written answers in the application for insurance, made by the insured in response to the questions asked him relative to whether he had ever had any of the diseases specifically mentioned in the questions, were material to the risk assumed by the respondent; that the contract of insurance was based on them, and on the agreement of the insured that if any answer was untrue the policy to be issued thereon should be void. As the insured stated in response to an inquiry on the subject in his application that he had not had paralysis, and this statement was untrue, the con-

clusion of the court that the policy was void was proper, unless the contention made by appellant is to be sustained. That contention involves the legal effect to be given to the finding of the trial court that Clark, the soliciting agent of the defendant, who solicited the insured to apply for the policy, knew, when the insured made his application to the company in which he stated that he had not had paralysis, that that applicant had in fact suffered a stroke of paralysis. The position of appellant relative to this finding is that this knowledge of the soliciting agent, Clark, was knowledge of the company, and that the company, having issued the policy with knowledge that the statement of the insured in his application that he had not had paralysis was untrue, must be deemed to have waived the warranty with respect to it, and cannot be heard to insist upon the falsity of the statement to avoid the policy. Undoubtedly, if the company did have such knowledge, the issuance of the policy after possession of it would amount to a waiver. Warranties in an application of insurance are for the benefit of the insurer, in order that it may determine whether it will accept the risk, and if, with knowledge that any representations or statements made therein are untrue, it consummates the contract of insurance, it is deemed to have thereby waived the right to subsequently assert their falsity to avoid liability. But the question always is, did the company have knowledge? and that is the question here. It is not pretended that any knowledge possessed by Clark was in fact communicated to any general agent of the defendant, or that it was communicated to the officers of the company at the home office in New York. The claim is, however, that the relation of Clark to the defendant as soliciting agent was such that, whether the knowledge was imparted to these agents or officers or not, this knowledge was in contemplation of law the knowledge of the company, because Clark had it, and binds it as effectively as if it was communicated. But this effect on the defendant of knowledge possessed by Clark would not follow from the fact simply that Clark was the soliciting agent. It could only follow if, as such soliciting agent of the company, he had either actual or ostensible authority from it to waive the truthfulness of statements, or the warranties accompanying them in the application for the policy. If he had neither actual nor ostensible authority to do so, mere knowledge on his part, uncommunicated to the officers of the company having conceded power to waive conditions or warranties, would not be binding on the company, because knowledge of the agent is only knowledge to the principal in matters which are within the scope of the agent's authority to act. *Westerfield v. New York Life Insurance Co.*, 129 Cal. 68, 79, 58 Pac. 92, 61 Pac. 667. And that Clark, as soliciting agent, had neither actual nor ostensible authority to act so as to waive

the truthfulness of any statement in the application for the policy, or to relieve the applicant from any warranties therein, or to bind the company by any knowledge he might possess in relation to such statements or warranties, is clearly shown by the terms of the application itself, which expressly limits the power and authority of soliciting agents in those and in all particulars relative to matters pertaining to such application.

An insurance company can, like any other principal, prescribe limitations upon the power and authority of agents, and persons dealing with such agents with knowledge of the limitations upon their authority are bound by the restrictions imposed. Now, in the application made and signed by the insured it was expressly agreed by him that all his answers therein were true; that they should form the basis of the contract of insurance, and, if any were untrue, the policy should be void. He was informed by it plainly that only the officers at the home office had authority to determine whether a policy should issue on the application, and that they acted on the written statements, answers, warranties, and agreements contained in it in determining that matter. It was further expressly declared in the application and agreed to by the applicant that no statements, promises, or information given to the person soliciting the application for the policy should be binding on the company, or in any manner affect its rights, unless reduced to writing and presented to the officers of the company at the home office. Clearly, by these provisions of the application, express notice was given to the applicant that the officers at the home office reserved the exclusive right to determine whether the company would be bound by any statement or information made or presented by its soliciting agents, and then only when such statements were presented to them in writing, and that soliciting agents had no authority or right at all to bind it by any statements, promises made, or information possessed by them. The company had a right to thus limit the authority of its soliciting agents, and the beneficiary under the policy cannot now assert that the company was bound by the information possessed by its soliciting agent and undisclosed to it, when it was expressly declared in the application that the agent had no authority thereby to bind the company, that the company would not be affected by it unless it was forwarded to the officers at the home office for their consideration and action upon it, and the insured had knowledge of this when he made his application. As by the terms of the application and to the knowledge of the insured the soliciting agent had no authority to bind the company in any way, either by express agreement or the possession of any knowledge or information concerning the falsity of any of the statements or warranties contained in the application, mere

possession of knowledge of such falsity was not knowledge acquired within the scope of his authority, and therefore cannot be said to be the knowledge of the company.

Counsel for appellant cites us to cases where the company has been held bound by the conduct of its soliciting and other special agents. But these are cases where either the agents had ostensible authority to act in the matters in question there or had deceived the insured, been guilty of some misrepresentation, or perpetrated some fraud upon him; the insured not being in fault and acting in good faith without notice of any limitation upon the authority of the agent. But the case at bar presents none of these situations. It is not claimed that the agent perpetrated any fraud on the insured, or that he represented he would or had authority to waive the truthfulness of any statements in the application or the accompanying warranty respecting its truth. The position taken here by appellant simply is that, because the agent had information that a statement the assured warranted to be true was false, the mere possession of this knowledge bound the company and relieved the assured from his warranty, notwithstanding it was expressly provided in the application, and the insured knew that the company could not be so bound, and could only be bound by having such information imparted in writing to the home officers, who were authorized to act upon it. This position could only be sustained by holding that it was not competent for the company to limit the authority of its agents and that the insured is not bound by the knowledge of such limitations. Of course, it cannot be so held. In the case at bar there is no question of fraud, deception, or misrepresentation practiced by the agent. The sole question is one of contract. The application contained a limitation on the authority of the agent expressly providing against the company being bound by any information possessed by him not disclosed in the application and declaring the only way it could be bound, namely, by written statements furnished the officers at the home office for their action upon them. The assured knew all this and agreed to it. It was the contract of the parties upon the subject of the agent's authority, and prescribed the only method in which the company could be bound, which it is not pretended was followed; and we know no reason why the assured should not be controlled by the terms of the contract and the limitations on the authority of the agent imposed thereby. *New York Life Insurance Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934; *Northern Assurance Co. v. Grand View Ass'n*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; *McCoy v. Metropolitan Life Ins. Co.*, 133 Mass. 82; *Clemens v. Supreme Council*, 131 N. Y. 485, 30 N. E. 496, 16 L. R. A. 33; *Dimick v. Met. Life Ins. Co.*, 69 N. J. Law, 384, 55 Atl. 291, 62 L. R. A. 774.

In discussing this matter we have referred simply to the finding of the court as to the knowledge possessed by Clark, the soliciting agent, who actually solicited the application for the policy by the assured. We have in mind the fact that the court found that Clark had imparted this information to his immediate superior, also a soliciting agent of defendant in charge of the other soliciting agents in Pasadena. That he imparted this information to him does not affect the question. The knowledge of the superior soliciting agent, under the limitation as to the authority of such agents, bound the defendant no more than did the knowledge possessed by Clark.

It follows, from the view we take of the law applicable here, that the insurance company had not waived the warranty made by the assured in his application for a policy relative to paralysis; that knowledge by the soliciting agent of the falsity of this statement as to that matter did not have that effect, in view of the limitation on his authority contained in the application and known to the assured, and the further provision as to the only method by which the warranty might be waived by the company; that the judgment is supported by the finding that there was a breach of such warranty, and is affirmed.

We concur: MCFARLAND, J.; SLOSS, J.; HENSHAW, J.

ANGELLOTTI, J. I concur in the judgment, and generally in what is said in the opinion. I, however, base my concurrence solely upon the presence in the application for the policy of the provision set forth in the opinion, and the knowledge thereof which, by the record before us, must be imputed to the applicant at the time he made the application. Mr. Cooley, in his Briefs upon the Law of Insurance, states that the general rule that the knowledge of an insurance agent is imputable to the company applies also, in most instances, to a soliciting agent with reference to matters made known to him prior to the execution of the policy. Volume 3, p. 2524 et seq. This declaration appears to be supported by many decisions. But where the company has, to the knowledge of the applicant, expressly provided that it shall in no way be bound by any knowledge possessed by the soliciting agent, and that, as to matters covered by the questions asked the applicant, it acts solely upon the written information furnished by the applicant to the home office, in determining whether or not a policy shall issue, which is the effect of the provision in question, I do not see how the company can be held to be bound by the mere knowledge of the soliciting agent of the falsity of an answer knowingly made by the applicant.

I concur: SHAW, J.

151 Cal. 701

WOOLLACOTT et al. v. MEEKIN. (L. A. 1808.)

(Supreme Court of California. Aug. 19, 1907.
Rehearing Denied Sept. 18, 1907.)

1. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—CONTRACTS—VALIDITY.

A contract for a street improvement, providing that all damage arising from the nature of the work to be done should be sustained by the contractor and that the latter should indemnify the city from all suits against it on account of any damages from the actions of the contractor, was void as imposing conditions naturally tending to increase the cost of the work and add to the burden of the property owners.

2. SAME—ACTION TO ANNUL ASSESSMENT—PARTIES—MISJOINDER.

In an action to annul an assessment for street improvements and bonds issued thereunder constituting a lien on land owned by plaintiffs, on the ground that the contract for the improvements was void, no substantial right of defendant was affected by the joinder as plaintiffs of several owners of separate lots of land not claiming under a common source of title.

3. APPEAL AND ERROR—MISJOINDER OF PARTIES—HARMLESS ERROR.

A judgment, after trial on the merits, will not be reversed because the court improperly overruled a demurrer on the ground of misjoinder of parties, where such misjoinder did not affect any substantial right of a party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4098.]

4. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—VOID ASSESSMENTS.

Where proceedings for street work were void ab initio, there was no moral obligation on the part of the owners of land abutting on the street to pay any part of an invalid assessment made for such street work, so that a tender of the amount properly due was not a condition precedent to the right to sue to set aside the assessment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1200.]

Beatty, C. J., and Shaw and Lorigan, JJ., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by H. J. Woollacott and others against Cora L. Meekin, substituted for D. A. Meekin. Judgment for plaintiffs, and defendant appeals. Affirmed.

Munson & Barclay, for appellant. O. B. Carter, for respondents.

ANGELLOTTI, J. This is an action by 12 persons, owning separate lots of land in the city of Los Angeles, to obtain a decree declaring void and annulling a certain assessment upon their land for street work done on Mott street, in said city, and the bonds issued thereon, constituting a lien on said land. Judgment was given in favor of plaintiffs, and defendant appeals therefrom.

Upon the question as to the validity of the assessment and bonds it will be necessary to notice but one of the objections of plaintiffs. The street work done consisted of the grading and graveling of a portion of Mott street, and the construction therein of a cement curb, a redwood curb, a cement sidewalk, and a cobble-paved gutter. The vari-

ous proceedings of the city officials, from and including the resolution of intention to and including the contract for the work, provided that the work should be done in accordance with certain described specifications on file in the office of the city clerk of said city. By reference, these specifications were expressly made a part of the contract, and this inclusion of such specifications as a part of the contract was, of course, authorized by the reference thereto in the anterior proceedings. The specifications so referred to in all the proceedings were separate specifications for the different kinds of work. Each of these specifications contained the following provisions: "*All loss or damage arising from the nature of the work to be done under this agreement, or from any unforeseen obstruction or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from any incumbrances on the lines of the work, or for any act or omission on the part of the contractor, or any person or agent employed by him, not authorized by this agreement, shall be sustained by the contractor.*" * * * The contractor shall indemnify and save harmless the city of Los Angeles from all suits and actions of every name and description brought against it for or on account of any damages received or sustained by any party or parties, or by or from any of the acts of or anything done by said contractor, his servants, or agents in the prosecution of said work." The italics are ours. These two provisions were in no way connected, and were apparently separate and independent stipulations.

The question as to the effect on the assessment and bonds of the italicized portion of the first of these provisions is determined by the decision of this court in *Blochman v. Spreckels*, 135 Cal. 662, 67 Pac. 1061, and *Goldtree v. Spreckels*, 135 Cal. 666, 67 Pac. 1091. These were actions to restrain a purchaser at sales made on bonds issued on an assessment for street work in the city of Coronado from applying for a deed, and to quiet the owner's title as against such sales. There was an ordinance of the city providing that the work "shall be done in accordance with the following specifications," which ordinance was held to constitute a part of the contract for the work. That ordinance, after specifying the manner of doing the work and the materials to be used, provided, among other things, as follows: "All loss or damage arising from the nature of the work to be done under these specifications shall be sustained by the contractor." It will be observed that the only difference between this and the italicized portion of the provision in the case at bar is in the use of the words "these specifications," instead of "this agreement." This difference in verbiage is clearly immaterial. The provisions are substantially the same, and necessarily mean the same thing, unless the connection in which they are used makes a difference. There

was also a provision in the cases cited that the contractor "shall hold the city harmless for any and all suits for damages arising out of the construction of said improvements." This court held that, while a fair construction of the other provisions might warrant a conclusion that they referred only to damages resulting from the negligence of the contractor in prosecuting the work, the provision as to loss or damage arising from the nature of the work had a broader meaning, and included practically any damage for which the city would be liable which might originate "in the nature of the work to be done." It was held, citing *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701, and *Alameda Macadamizing Co. v. Pringle*, 130 Cal. 226, 62 Pac. 394, 52 L. R. A. 264, 80 Am. St. Rep. 124, that such a provision was not only unauthorized by statute, but that it imposed conditions naturally tending to increase the cost of the work and increase the burden of the property owner, and the judgments giving the owners the relief sought on account of the invalidity of the assessment and bonds were affirmed.

So far as the question as to the proper construction of the provision under discussion is concerned, there is no material difference between the case at bar and the cases of *Blochman v. Spreckels*, supra, and *Goldtree v. Spreckels*, supra. The added clauses present in the case at bar in no degree tend to affect the force or meaning of what is clearly a separate and independent provision as to the loss or damage arising from the nature of the work to be done. The words "which may be encountered in the prosecution of the same" can be read only as applicable to the clause "or from any unforeseen obstruction or difficulties," immediately preceding. The second provision in the case at bar is obviously a separate and distinct provision, having no reference to the provision relating to damages arising from the nature of the work, and in no degree affecting the meaning thereof. No principle of construction would justify the conclusion that this provision was intended to detract from the effect of the former provision, and relieve from the burden thereby imposed. There is no merit in the contention that the unauthorized provision was not a "specification" as to the materials to be used, and the manner of doing the work, and, therefore, was not included in the reference to the specifications made in the preliminary proceedings. Whether or not the provision is, in strictness, a "specification," it was a part of each of the documents on file referred to, entitled simply "Specifications No. 68, for the Construction of Graveled Streets in the City of Los Angeles," "Specifications No. 54, for the Construction of Cement Curbs in the City of Los Angeles," etc., and was manifestly included in that term, both in the documents entitled "Specifications" and the references thereto, just as it was in the ordinance involved in the *Spreckels* Cases above

cited. See, also, *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701. It is apparent that, unless the decisions in *Blochman v. Spreckels*, supra, and *Goldtree v. Spreckels*, supra, are to be overruled, the assessment and bonds here involved must be held void. While those cases were decided in department, the decisions were practically by the court in bank, for *Blochman v. Spreckels* was decided by department 1, and *Goldtree v. Spreckels* was decided on the same day on the authority of the *Blochman* Case by department 2. All of the then justices of this court except the Chief Justice then gave their adherence to the views there expressed, and applications for a rehearing in bank denied. These decisions, given February 28, 1902, constitute a rule of property declared by this court, upon the faith of which, we must assume, parties have acted in their dealings in regard to lands. The construction given by these decisions to the provision in question was certainly a permissible one. Under these circumstances, we would not feel warranted in overruling such decisions, even if we felt that a different construction might have been given to that provision. It is to be noted in this connection that the proceedings for the street work here involved were inaugurated by the city of Los Angeles nearly one year after the decisions above referred to.

A demurrer was interposed to the complaint in the court below, and overruled. We have deferred consideration of the points made relative to this ruling, as they can be disposed of more briefly in the light of the knowledge afforded by what we have said as to the merits of the case. It was urged by the demurrer that there is a misjoinder of parties plaintiff and causes of action, in that several owners of separate lots of land not claiming under a common source of title are joined in an action to have the assessment and bonds issued thereunder, constituting liens on the several parcels, declared void. It is unnecessary to consider the argument of learned counsel for plaintiffs in support of this joinder. Assuming, for the purposes of this decision, that there was a misjoinder, it is apparent that no substantial right of the defendant was affected thereby. Defendant's claim as to each and all of the lots was based entirely upon the validity of the legal proceedings, common to all the lots, leading up to the assessment. Those proceedings were, as we have seen, ineffectual for any purpose, and void. No prejudice could possibly result to defendant from having that question determined in a single proceeding maintained by the different owners. On the contrary, in at least one respect, such a course was manifestly to his advantage, namely, in the matter of costs and attorney's fees. It seems to be thoroughly settled that a judgment after trial upon the merits will not be reversed because the court improperly overruled a demurrer on the ground of misjoinder of parties, where it is plain that such mis-

joinder did not affect any substantial right of a party. See *Daly v. Ruddell*, 137 Cal. 671, 674, 70 Pac. 784; *Hirschfeld v. Weill*, 121 Cal. 13, 15, 53 Pac. 402; *Asevado v. Orr*, 100 Cal. 293, 300, 34 Pac. 777; *Reynolds v. Lincoln*, 71 Cal. 183, 185, 9 Pac. 176, 12 Pac. 449. This is but an application of the rule declared by section 475, Code Civ. Proc., that the court must disregard errors and improper rulings not affecting the substantial rights of the parties.

It is urged that the complaint is fatally defective, in that there is no allegation that plaintiffs ever offered to pay what the street improvements were reasonably worth to their lots. It is said that they cannot have the equitable relief sought without doing equity. The equitable maxim thus invoked has no application under the facts shown by the complaint. We have here proceedings for street work had, presumably, without the consent of the landowner, which were void ab initio. They could not serve as a sufficient foundation for any assessment, and for this reason the entire assessment was void. It cannot be held upon the facts shown that there was any moral obligation on the part of the owner to pay any part of such an invalid assessment. The mere fact that the street work called for by the invalid proceedings and contract has been done does not create such a moral obligation. The case in this respect is the same as *Chase v. Treasurer*, etc., 122 Cal. 540, 55 Pac. 414, where it was held, in an action by the owner to restrain a sale on such a bond, that, as the entire assessment was void and there was no tax to be tendered, no tender was essential to the maintenance of the action. The case here does not fall within the doctrine of the cases cited by defendant, nor within that of the later cases (not cited) of *Ellis v. Witmer*, 134 Cal. 249, 66 Pac. 301, and *Couts v. Cornell*, 147 Cal. 560, 82 Pac. 194, 109 Am. St. Rep. 168, in the latter of which the application of the maxim relied upon is fully discussed.

There is no merit in the claim that, if the assessment and bonds are void, they cast no cloud upon the title of plaintiffs. The invalidity is not apparent upon an inspection merely of the assessment, warrant, and diagram, and the bonds, which constitute prima facie evidence of the validity of the proceedings, and the owners of the land, in any action founded upon a deed issued in proceedings to enforce the lien of the bonds, would be required to offer evidence to defeat a recovery. The precise point here made was made in *Chase v. Treasurer*, etc., supra, and decided against the contention of defendant.

There is no other point requiring consideration.

The judgment is affirmed.

We concur: SLOSS, J.; McFARLAND, J.; HENSHAW, J.

I dissent: BEATTY, C. J.

SHAW, J. I dissent. In my opinion the clauses of the so-called specifications, upon which the validity of the assessment in the prevailing opinion is based, were not incorporated in the contract and proceedings leading up to the assessment and formed no part thereof. In the first place, the reference in the proceedings and in the contract are to things designated therein as "specifications," and the extent of the incorporation of the documents thus designated into those proceedings and contract must be confined to that which constitutes the specifications alone. In *Baltimore & O. R. Co. v. Stewart*, 79 Md. 487, 29 Atl. 964, speaking of a reference of this character in a building contract, the court says: "The term 'specifications,' as thus used in contracts of this kind, ordinarily means a detailed and particular account of the structure to be built, including the manner of its construction and the materials to be used." In the second place, the purposes for which the documents called "specifications" are referred to are limited by the words in which the several references are couched. The proceedings and contract called for five separate classes of work, for each of which separate specifications were referred to. These specifications were evidently general specifications prepared in pursuance of some city ordinance and filed with the clerk, to be made applicable to all subsequent proceedings for the particular classes of work. The work required to be done by the contract and proceedings included the grading and graveling of the street, the construction of a cement curb along part of its course, a redwood curb along another part, a cement sidewalk, and a cobble paved gutter. As an illustration of the method of reference, the ordinance of intention provided, with respect to grading and graveling, that the street should be "graded and graveled in accordance with the plans and profile in the office of the engineer and specifications for the construction of graveled streets in the city of Los Angeles on file in the office of the city clerk of said city, said specifications being numbered 68," and provided, with respect to curbing, that "a cement curb be constructed * * * in accordance with specifications for constructing cement curbs, on file in the office of the city clerk, said specifications being numbered 54." Similar language was used with respect to each of the other classes of work. In the notice for street work, in the ordinance declaring that the work should be done, in the notice inviting proposals for the work, and in the notice of award of the contract, the language above quoted was repeated word for word with respect to each class of work. In the contract the references with respect to each particular class of work are again repeated in the same language as in the resolution of intention and other documents. It further provides that the contractor "promises and agrees * * * that he will do and perform, or cause to be done and performed, in a good and workman-

like manner, under the direction and to the satisfaction of the said street superintendent, all of the following work [here follows the description with references as above mentioned] * * * according to the specifications on file in the office of the city clerk of said city, which are known as 'specifications Nos. 68, 54, 52, 55, and 51,' and made part of this contract."

The specifications provide with great detail the manner in which the work is to be done and the materials of which it is to be composed. Each is prefaced by a heading indicating the purpose for which they were originally adopted by the council. For instance, that relating to the cement curbs is as follows: "Specification No. 54, for the Construction of Cement Curbs in the City of Los Angeles." The others are in the same language, thus demonstrating that the specifications were prepared as specifications of construction alone. There is nothing in the proceedings, or in the contract, expressing any purpose to refer to the specifications for the details respecting the rights, obligations, or liabilities of the contractor or of the city. The two clauses in the documents called "specifications," which are supposed to create liabilities against the contractor, and which are declared to have the effect of making the entire proceedings invalid, have no reference whatever to the construction of the work required to be done, nor to the materials of which that work is to be composed. It is true that the contract, after referring to the specifications, contains the statement that they are made part of the contract. This language, by grammatical construction, is limited in its meaning to the specifications previously referred to, and manifestly relates solely to the specifications of the manner of doing the work and the materials to be used therein. It does not have the effect of incorporating into the contract other parts of the document called "specifications," which have no reference whatever to the work, but only to the rights and liabilities of the parties. In *Short v. Van Dyke*, 50 Minn. 286, 52 N. W. 643, the court, referring to the extent to which a separate document was made a part of a contract by a reference thereto, states that "if the reference be made for a particular purpose, expressed in the contract, it becomes a part only for that purpose." In *Neuval v. Cowell*, 36 Cal. 650, where other documents were referred to for matter of description, the court said that the other documents were admissible in evidence as part of the agreement, to aid the contract in regard to the description, and that "for any other purpose they were foreign to the case." This rule is in strict accordance with the rules by which contracts are to be construed. The document referred to, not being signed by the parties, is incorporated in it only for the purpose of supplementing the contract to the extent to which the contract itself is deficient, and its use must be confined and lim-

ited to the purpose for which it is adopted. The following cases are of similar effect: *Riley v. Brooklyn*, 46 N. Y. 444; *Hopkins v. Rogers*, 11 Tenn. 457.

There is nothing in the cases referred to in the prevailing opinion upon this subject. In all of those cases it was assumed without argument that the matter contained in the specifications, whether referring to the manner of doing the work, or to the materials therefor, or not, were a part of the proceedings or contracts in the particular case. It does not appear that the proposition that the references did not include the specifications for the purposes of incorporating the foreign clauses in the contract or proceeding was brought to the attention of the court. The clauses quoted in the prevailing opinion constitute no part of the contract entered into by the contractor, nor of the proceeding upon which it was based. They did not refer in any respect to the manner of doing the work, the plan by which it was to be constructed, or the quality or character of the materials. It cannot be presumed that they would have any effect whatever upon the various bidders who may have intended to bid upon the work. These clauses are not in fact incorporated, either in the proceedings referred to or in the contract. They could only become a part thereof by reason of the reference, and as the reference was not made for that purpose, but solely to describe the work and materials they were entirely foreign to the case, and could have no effect upon the validity of the assessment.

I concur: LORIGAN, J.

151 Cal. 723

MOORE v. GOULD et al. (L. A. 1,790.)
(Supreme Court of California. Aug. 19, 1907.)

1. BILLS AND NOTES—CONSIDERATION—PRESUMPTIONS.

A presumption of consideration for a note and mortgage securing it arises from the note and mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1652.]

2. EVIDENCE—PRESUMPTIONS—CONFLICTING EVIDENCE.

In an action to foreclose a mortgage securing a note, the testimony that there was no consideration for the note was not contradicted, but it had in itself inherent elements of improbability. *Held*, that in view of a presumption of consideration arising from the note and mortgage, which under Code Civ. Proc. § 2061, subd. 2, is evidence, there was a conflict in the evidence on the issue of consideration sufficient to support a finding of consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1816, 1819.]

3. MORTGAGES—EXTENSION OF TIME OF PAYMENT.

An instrument reciting that a debtor is desirous of extending the loan, and declaring that a mortgage, together with the note and debt secured thereby, is renewed for a specified period, and signed by the debtor, is a renewal of the note and mortgage, within Civ. Code, § 2022, providing that a mortgage can be renewed only by writing, etc.

4. LIMITATION OF ACTIONS—ACKNOWLEDGMENT OF DEBT—SUFFICIENCY.

An instrument reciting that a debtor is desirous to extend a mortgage, and that it is renewed for a specified time, signed by the debtor, is an acknowledgment of the debt, and operates to start a new period of limitation, within Code Civ. Proc. § 360, providing that no acknowledgment is sufficient evidence of a new contract, unless the same is contained in some writing signed by the party to be charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 601.]

5. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—POWER OF ATTORNEY—CONSTRUCTION.

A power of attorney, authorizing the grantee therein to prosecute every kind of business and for and in the name of the grantor execute and deliver agreements, mortgages, notes, etc., empowers the grantee to execute for the grantor an instrument renewing a mortgage executed by the grantor and the note thereby secured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 364.]

6. SAME.

A payee of a note secured by a mortgage may, after the transfer of the note and mortgage, act as an agent of the maker to renew the note and mortgage, since, under Civ. Code § 3116, the maker is bound to pay the debt, and the payee is liable only to the subsequent holder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 465.]

7. SAME—ACT OF AGENT—LIABILITY OF PRINCIPAL.

A payee of a note secured by a mortgage transferred the note and mortgage. The maker subsequently executed a power of attorney authorizing the payee to renew the mortgage. The payee executed in the name of the maker an instrument renewing the mortgage for a specified period. *Held*, that the renewal of the mortgage was binding on the maker only, under Civ. Code, § 2343, holding an agent liable only when he enters into a contract in the name of his principal without having authority so to do, etc.

8. MORTGAGES—FORECLOSURE—EVIDENCE—PRESUMPTIONS.

Under Code Civ. Proc. § 1962, subd. 2, providing that facts recited in an instrument shall be conclusively presumed to be true as between the parties, a recital in a mortgage is conclusively presumed to be true as between the parties thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 211; vol. 16, Deeds, § 258; vol. 19, Estoppel, §§ 41-45.]

9. MORTGAGES—CONSTRUCTION—TIME OF PAYMENT.

A payee of a note secured by a mortgage transferred the note and mortgage, and thereafter executed to the transferee a mortgage, which set out the note and recited that the payment thereof had been extended, and which stated that the payee promised to pay the note according to the terms and conditions thereof. *Held*, that the mortgage executed by the payee contained a promise by the payee to pay the note as extended, and an action commenced within four years thereafter was not barred, under Code Civ. Proc. § 337, limiting actions on obligations founded on instruments in writing to four years.

10. SET-OFF AND COUNTERCLAIM—CROSS-DEMANDS—AVAILABILITY—SECURED CLAIMS.

In a suit under Code Civ. Proc. § 726, to foreclose a mortgage, a claim for services and for goods sold is not available as a cross-demand under section 440, providing that, when cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim could

have been set up, the two demands shall be deemed compensated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, § 70.]

11. SAME—DEMANDS BARRED BY LIMITATIONS.
Under Code Civ. Proc. § 438, subd. 2, providing that in an action on contract any other cause of action arising on contract and existing at the commencement of the action may be set up as a counterclaim, a demand barred by limitations is not available as a counterclaim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, § 41.]

12. SAME.

Under Code Civ. Proc. § 438, subd. 2, providing that in an action on contract any other cause of action arising on contract and existing at the commencement of the action may be set up as a counterclaim, and section 1500, providing that no holder of a claim against an estate shall maintain any action thereon unless the claim is presented to the executor or administrator, a demand against an estate of a decedent not presented to his representative is not available as a counterclaim in an action by the representative.

13. PLEADING — DEMURRABLE PLEADING — STRIKING OUT.

Where a demurrer to pleadings should have been interposed and sustained, there was no prejudicial error in striking out the pleadings, or in refusing to receive evidence in support of their allegations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4110.]

Beatty, C. J., and Lorigan, J., dissenting in part.

In Bank. Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by Rebecca W. Moore against Will D. Gould and others. From a judgment for plaintiff, defendants appeal. Affirmed.

James H. Blanchard, William E. Cox, and Will D. Gould, for appellants. Miller & Page, for respondent.

SLOSS, J. This is an action on two promissory notes, secured by two mortgages of real estate and by a pledge of stock of a corporation. Plaintiff had judgment of foreclosure, and the defendants, Will D. Gould, Mary L. Gould, Samuel Peterson, and James H. Blanchard, appeal from the judgment and from an order denying their motion for a new trial.

On July 18, 1892, the defendant Peterson executed to the defendant Will D. Gould a note for \$700, payable on or before one year after date, and at the same time executed and delivered to said Gould a mortgage of certain real property in the county of Los Angeles to secure the said note. On the 28th day of September, 1892, Will D. Gould assigned and transferred the said note and mortgage to plaintiff, and at the same time indorsed the note to the order of plaintiff. On June 28, 1897, the defendants Will D. Gould and Mary L. Gould, his wife, made, executed, and delivered to the order of P. R. Moore, the husband of plaintiff, a promissory note in the sum of \$550, payable on or before July 18, 1899. Together with their note, they executed and delivered to said P.

R. Moore and to plaintiff, as mortgagees, a mortgage of certain real property in Los Angeles county, which mortgage stated that it was made as security for the payment of the Peterson note of \$700, as well as the \$550 note. In said mortgage the mortgagors furthermore promised to pay the \$700 note according to the terms and conditions thereof. The mortgagee P. R. Moore died, and the \$550 note and the mortgage executed contemporaneously with it passed to the plaintiff by virtue of the decree of distribution in his estate. Other facts will be stated in connection with the various points made by appellants.

1. The answers of the appellants allege that there was no consideration for the second note and mortgage, and that said note and mortgage had been executed upon the agreement with the mortgagee P. R. Moore that the sum of \$550 should be applied and credited as a partial payment on the \$700 note and mortgage. The court found against these allegations. The defendants Will D. Gould and Mary L. Gould gave testimony that there had been an agreement, as averred in the answers, between them and P. R. Moore. This testimony was not directly denied, as, indeed, it could not be; the other active party to the transaction, P. R. Moore, being dead. But the claim of these defendants had in itself inherent elements of improbability. The theory that the second note and mortgage were given to reduce the amount due upon the first note is not readily reconcilable with the form of the mortgage itself, which declares that it is given to secure both notes, and that the mortgagors undertake to pay both. As to the plea of want of consideration, a presumption of consideration arises from the writing itself. Such presumption is itself evidence. Code Civ. Proc. § 2061, subd. 2. There is thus raised a conflict, which is sufficient to support the finding of the court. *People v. Milner*, 122 Cal. 171, 54 Pac. 833; *Sarraille v. Calmon*, 142 Cal. 651, 76 Pac. 497; *Adams v. Hopkins*, 144 Cal. 19, 36, 77 Pac. 712.

2. The statute of limitations (Code Civ. Proc. § 337) is set up as a defense to both notes. The finding of the court is against this plea. The \$550 note was payable July 18, 1899. The complaint was filed February 27, 1903, less than four years after the maturity of the note. As to this note, therefore, it is plain that the bar of the statute had not attached. As to the \$700 note, which by its terms fell due July 18, 1893, the complaint alleges, and the court found, that on the 28th day of June, 1897, the defendant Peterson and the defendant Will D. Gould in writing extended the time of maturity and payment until the 28th day of June, 1899, and that on the 25th day of May, 1900, the said defendants similarly extended the time of payment of said note until the 18th day of July, 1902. It appears that on July 18, 1892, the defendant Peterson had executed a power

of attorney to Will D. Gould. On June 23, 1897, Gould, acting as attorney in fact of Peterson, executed an instrument in writing reading as follows: "Know all men by these presents, that Samuel Peterson, being desirous of extending the loan and in consideration of the same being extended, does hereby certify and declare that a certain mortgage, together with the promissory note and debt secured thereby, bearing date the 18th day of July, 1892 (describing the mortgage first set out in the complaint), is hereby renewed and extended for the further term of two (2) years from this date, provided that this agreement shall not affect or impair any other covenant or condition in said promissory note or mortgage contained, but that they shall remain in as full force and effect as if this agreement had not been made. In witness whereof, the said Samuel Peterson, by Will D. Gould, his attorney in fact, has hereunto set his hand and seal this 28th day of June, in the year of our Lord one thousand eight hundred and ninety-seven. Samuel Peterson [Seal], by Will D. Gould, His Attorney in Fact." On May 25, 1900, Gould, as attorney in fact, executed a similar instrument purporting to renew and extend the note and mortgage to the 18th day of July, 1902.

Each of these instruments constituted a renewal of the note and mortgage within section 2022, Civ. Code. *German S. & L. Soc. v. Hutchinson*, 63 Cal. 52, 8 Pac. 627; *London, etc., Bank v. Bandmann*, 120 Cal. 220, 224, 52 Pac. 583, 65 Am. St. Rep. 179; *Seaton v. Fiske*, 128 Cal. 549, 61 Pac. 666. Furthermore, each of them contained an acknowledgment of the debt, and thus operated to start a new period of limitation. *Code Civ. Proc.* § 360; *Concannon v. Smith*, 134 Cal. 14, 66 Pac. 40; *Dearborn v. Grand Lodge*, 138 Cal. 653, 72 Pac. 154. In either aspect these writings were sufficient to take the case out of the operation of the statute of limitations so far as the defendant Peterson is concerned, if Gould was authorized to execute them as Peterson's agent and in his behalf. Whether or not he was so authorized depends upon a consideration of the terms of the power of attorney. This instrument was in the form in common use in this state and usually described as that of a "general power of attorney." It authorized Gould, in the name of Peterson, and for his use and benefit, to perform any of a great variety of acts set forth in the instrument. These acts include almost every conceivable mode of dealing with real and personal, tangible and intangible, property, and their enumeration is followed by these words: "And to make, do, and transact all and every kind of business of what nature and kind soever, and also for me and in my name, and as my act and deed, to sign, seal, execute, deliver, and acknowledge such deeds, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes,

receipts, evidences of debt, releases and satisfaction of mortgage, judgment, and other debts, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises." This power authorized the execution by Gould of the two instruments in question. The purpose and effect of a power of attorney of this kind is to vest in the attorney full authority to transact any and all kinds of business for the principal. Every phrase in it, defining the authority of the attorney, is in broad and unrestricted terms, and such terms are to be given an interpretation in harmony with the scope and purpose of the instrument, read as a whole. It is true that, where a power is given for a limited or specific purpose, general words following the declaration of the particular purpose are to be limited to such acts as may be necessary to accomplish such particular purpose. *Washburn v. Alden*, 5 Cal. 463; *Billings v. Morrow*, 7 Cal. 171, 68 Am. Dec. 235; 1 Am. & Eng. Ency. of Law (2d Ed.) 1000. But this rule has no application to such an instrument as the one now under consideration. Nowhere in this power of attorney is there any language limiting the scope of the business which may be performed by the attorney, and the generality of the terms employed clearly includes authority to execute the instruments of renewal. *Ward v. Kentucky Bank*, 7 T. B. Mon. 93, cited by appellants, is not in point. The power of attorney there considered was closely limited in its terms. Furthermore, the act of the agent was not similar to that of Gould in this case.

It is urged that Gould, by reason of his position as payee of the \$700 note, could not act as Peterson's agent to renew the note. This position would have much force if Gould at the time of executing the instruments of renewal or "extension" (as they are termed in the record) had still been the holder of the note and mortgage. *Wolford v. Cook*, 71 Minn. 77, 73 N. W. 706, 70 Am. St. Rep. 315. His disability in such case would have rested on the rule that one who acts in a fiduciary capacity cannot be permitted to deal with himself in his individual capacity. *Davis v. Rock Creek Co.*, 55 Cal. 359, 36 Am. Rep. 40; *Sterling v. Smith*, 97 Cal. 343, 32 Pac. 320. The interest of his principal would have been adverse to his own. Here, however, Gould had already transferred the note and mortgage. Acting for Peterson, he was dealing, not with himself, but with the plaintiff. Even if the renewal might have resulted in his release as indorser or guarantor, such release could have operated only to the disadvantage of plaintiff, not to that of Peterson. Peterson's liability as maker was primary; that of Gould merely secondary. Peterson was at all times bound to pay the note, and was not entitled to recourse against Gould, who was liable only to subsequent holders. *Civ. Code*, § 3116. The action was therefore com-

menced in time as against the defendant Peterson; and this without regard to the allegation and finding of his absence from the state (Code Civ. Proc. § 351) for periods sufficient to prevent the statute of limitation from running in his favor.

Whether the action on the \$700 liability was barred as to the defendants Will D. and Mary L. Gould depends on different considerations. The two instruments executed by Gould as attorney in fact for Peterson could have no effect as against any person other than Peterson. In executing them Gould was assuming to act, not in his individual capacity, but only as agent for Peterson. Since the acts were lawful, and within the scope of his authority, the principal only, and not the agent, was bound by them. Civ. Code, § 2343. The evidence, therefore, did not support the finding that Gould extended the maturity of the \$700 note. But the mortgage of June 28, 1897, in which the Goulds undertook to pay both notes, contains the following provisions. It declares that the mortgagors mortgage certain real property as security for the payment of the two notes, which are set out in full. Following the copy of the \$700 note signed by Peterson, the mortgage reads as follows: "Said last note of \$700 is secured by mortgage, * * * and time of payment of said note has been extended to July 18, 1899. And the mortgagors promise to pay said notes according to the terms and conditions thereof. * * *" Here is a direct promise to pay the note, following a recital that the time of payment has been extended to July 18, 1899. This recital is, as between the parties to the mortgage, conclusively presumed to be true. Code Civ. Proc. § 1962, subd. 2. In promising to pay the note "according to its terms and conditions," the mortgagors must be taken to have referred to the terms and conditions, not merely as they appeared on the face of the note itself, but with such modifications as had been recited. To hold otherwise would require us to construe their promise as an agreement to perform an impossibility; i. e., to pay money at a date already past. If the promise to pay was not intended to be a promise to pay at the date to which payment had, as recited, been extended, it is difficult to see why the recital of extension should have been inserted at all. Construing the language as importing a promise to pay the \$700 note on July 18, 1899, the action, commenced on February 17, 1903, was not barred by section 337 of the Code of Civil Procedure. Under this view, the finding of an extension by Gould becomes immaterial.

3. The answer of the Goulds and Blanchard set up eight separate "cross-demands and counterclaims." At the trial the plaintiff moved to strike them out, and the court granted the motion as to all but one. This ruling is assigned as error. Two of the counterclaims stricken out set up payments on account of the indebtedness sued on.

Whether or not such matter was properly denominated a "counterclaim," the plea of payment was undoubtedly one that the defendants had a right to make. But the order striking out was not prejudicial to the appellants, since the answer had, in another place, affirmatively alleged payment in full. The remaining counterclaims alleged indebtedness from P. R. Moore to the defendant Will D. Gould for services rendered by the latter as an attorney at law in various matters not connected with this litigation, and for hay and other personal property delivered by said Gould to P. R. Moore. It appeared upon the face of said counterclaims that each of the causes of action therein set forth would, if made the basis of an independent action, have been barred by the statute of limitations. The grounds of the motion to strike out were that said claims were so barred, and that they had not been presented for allowance to the personal representative of P. R. Moore, deceased, in the course of the proceedings for the settlement of his estate. Either ground afforded sufficient reason for the granting of the motion, unless these counterclaims are to be treated as partial payments of the mortgage debt, compensating it pro tanto, under the provisions of section 440 of the Code of Civil Procedure. That section provides that, "when cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other."

Is this a case of cross-demands which may be mutually compensated, under this section? We think not. The plaintiff was suing on an indebtedness secured by mortgage, an indebtedness which could be recovered only by means of the action of foreclosure prescribed by section 726 of the Code of Civil Procedure. In such action the mortgaged premises must first be applied to the satisfaction of the debt, and there is no personal liability on the part of the mortgagor unless the security shall prove insufficient to satisfy the debt. The land is made primarily liable for the payment of the obligation, and the mortgagor can be called on to pay only where the proceeds of a sale of the land are insufficient. *Bartlett v. Cottle*, 63 Cal. 366; *Biddel v. Brizzolara*, 64 Cal. 354, 30 Pac. 609; *Crisman v. Lanterman*, 87 Pac. 89, 149 Cal. 647. For this reason it has been held that in an action upon a simple contract debt (a bank deposit) the defendant cannot set off against such debt a liability of the plaintiff secured by mortgage. *McKean v. German-American Sav. Bank*, 118 Cal. 334, 50 Pac. 656. The two claims, said the court, could not be deemed compensated under section 440, because "the action of respondent for the deposit, and the right of action of appellant to foreclose its

mortgage, are not cross-demands as contemplated by that section." In that case the action was brought by the holder of the unsecured indebtedness, and the defendant sought to set up a debt secured by mortgage. Here the plaintiff sues on the mortgage, while the defendant relies on a simple debt as a cross-demand. But this difference does not make the principle of the McKean Case any less applicable here. If the demands, at their inception, were of such a nature that they were compensated, such compensation affected both parties alike. The rights of the parties under section 440 are necessarily mutual. One claim could not be compensated, without the other being compensated to the same extent. If the existence of the mortgage debt in favor of plaintiff was not available to reduce the amount of Gould's claims, his claims had no greater effect in discharging the mortgage debt.

The alleged cross-demands not being such as could be pleaded as an extinguishment of plaintiff's claim under section 440, they can be supported, if at all, only as counterclaims under subdivision 2 of section 438. As such they failed to state a ground of counterclaim, because (1) they were barred by the statute of limitations (*Lyon v. Petty*, 65 Cal. 325, 4 Pac. 103); and (2) they had not been presented to the executor or administrator of P. R. Moore's estate (Code Civ. Proc. § 1500). While it might have been better practice to demur to these pleadings, there was, therefore, no prejudicial error in the order striking them out, or in the refusal of the court to receive evidence in their support.

The foregoing discussion deals with all the points presented and argued by appellants in their brief.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; HENSHAW, J.; McFARLAND, J.; ANGELLOTTI, J.

I dissent from the judgment, and from that part of the opinion of the court which holds that cross-demand of a mortgagor against the mortgagee are not within the protection of section 440, Code of Civil Procedure: BEATTY, C. J.

I concur: LORIGAN, J.

151 Cal. 754

KINSEL v. BALLOU. (L. A. 1962.)

(Supreme Court of California. Aug. 20, 1907.)

1. PLEADING—FAILURE TO DENY ALLEGATIONS—EFFECT.

Defendant may not attack the finding of the giving of a notice; the complaint having alleged the giving of such notice, and the answer not having denied it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1223.]

2. EVIDENCE—PAROL EVIDENCE—VARYING INDORSEMENT OF NOTE.

In the absence of fraud or mistake, it cannot be shown by oral evidence that an indorsement in terms "with recourse" was intended by the parties as one "without recourse."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1799.]

3. BILLS AND NOTES—CONSTRUCTION—TERMS OF PAYMENT.

A note for \$900 provided for payment of that sum six months after date, with interest at 1½ per cent. per month, payable monthly, and that should interest not be paid when due, it should become part of the principal, and bear interest, or at the option of the holder of the note the whole principal and interest should become immediately due and payable, and concluded: "Principal and interest payable in gold * * * in sums of \$25 or more monthly, together with interest monthly." Held, that the provision as to payment of \$25 or more monthly was merely an option to the makers to make partial payments of principal in advance of maturity of the note, and did not limit their obligation to pay interest monthly, or destroy the holder's right to declare the entire sum due in case of default in interest.

4. SAME—INDORSEMENT—DEMAND FOR PAYMENT.

Under the provision in a note that, in case of default in payment of an installment of interest when due, the whole sum of principal and interest shall become immediately due and payable at the option of the holder of the note, the holder has a reasonable time as against the indorser of the note, as well as its maker, to exercise the option, at least for the purpose of making the indorser liable for the principal and interest accruing after exercise of the option.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1327.]

5. SAME—ACTIONS—PRESENTMENT FOR PAYMENT—PLEADING.

The complaint against the indorser of a note, alleging presentment of it for payment at the place where the maker had her place of business and residence at the time of her death, and that payment on behalf of her was refused, is not demurrable on the ground of uncertainty, because not showing to whom the demand was delivered; this being a matter of evidence.

6. SAME.

Where the complaint in an action on a note alleges the place where demand of payment on behalf of the deceased maker was made, but not the person to whom demand was delivered, defendant, on proof of the person being made, being without evidence to meet it and desiring time therefor, should ask for a continuance.

7. SAME—ACTION AGAINST INDORSERS—PRIOR RESORT TO MORTGAGE.

Though the makers of a note give a mortgage to secure it, an indorser may be sued on the note without prior resort to the mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 605.]

8. SAME—ACTION AGAINST GUARANTOR—PRIOR RESORT TO MORTGAGE.

A guarantor of payment of a note may be sued thereon, without prior resort to the mortgage security given by the makers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 605.]

In Bank. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by E. F. Kinsel against L. M. Ballou. Judgment for plaintiff. Defendant appeals. Affirmed.

Tanner, Taft & O'Dell, for appellant. H. R. Hervey and W. W. Butler, for respondent.

SLOSS, J. Appeal from a judgment in favor of plaintiff in an action brought against the defendant as indorser of a promissory note. The appeal was taken within 60 days, and the evidence is brought up in a bill of exceptions.

The note, which is set out in full in the complaint, reads as follows: "\$900.00. Los Angeles, California, Feby. 18th, 1904. On or before August 18th, 1905, after date and for value received, we jointly and severally promise to pay to C. W. Hatch and E. E. Hatch, or order, at Los Angeles, California, the sum of nine hundred dollars, with interest from date until paid at the rate of 1½ per cent. per month, payable monthly. Should the interest not be so paid, it shall become a part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any installment of interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States in sums of twenty-five dollars or more monthly, together with interest monthly. E. M. Jennings. Mary S. Jennings." Indorsed: "Without recourse on us. C. W. Hatch. E. E. Hatch." "Pay to the order of E. F. Kinsel, with recourse to me. L. M. Ballou."

1. One of the defenses was that the defendant had indorsed the note without recourse to him, by simply signing his name below that of the prior indorsement without recourse, and that the words, "Pay to the order of E. F. Kinsel, with recourse to me," had, after the delivery of the note, been written above his signature without his knowledge or consent. The court found against this allegation, and there was ample evidence to sustain the finding.

2. The defendant attacks the finding that notice of default had been given him; but the complaint alleges the giving of such notice, and the answer fails to deny it.

3. The answer alleges that at the time the defendant transferred the note to plaintiff it was understood and agreed that the plaintiff should have no recourse to the defendant, should such note not be paid when due, and that plaintiff should rely solely upon the security of a chattel mortgage by which the note was secured. The evidence fully supports the findings of the court against such agreement, if it could be conceded that the defendant was entitled to introduce evidence of an oral understanding directly controverting the terms of his written agreement. It is true that, as between himself and his immediate indorsee, the indorser may sometimes show that the indorsement was made merely for the purpose of transferring the instrument. *Allin v. Williams*, 97 Cal. 403, 32 Pac. 441; *Kendall v. Parker*, 103 Cal. 319, 37 Pac. 401, 42 Am. St. Rep. 117. These were cases dealing with a simple indorsement, which was not inconsistent with the verbal

agreement proven. But we are cited to no case holding that, in the absence of fraud or mistake, oral evidence may be introduced to show that an indorsement "with recourse" was intended by the parties to be "without recourse."

4. The complaint alleges that interest was paid to August 18, 1904; that on the 3d of October, 1904, default having been made in the payment of the interest installment due on September 18th, plaintiff elected to declare the whole sum of principal and unpaid interest immediately due and payable, and on said 3d day of October, 1904, notified the makers of such election and presented the note for payment; and that plaintiff on the same day notified the defendant of his election and of the nonpayment of the note. The last sentence of the note reads: "Principal and interest payable in gold coin of the United States in sums of twenty-five dollars or more monthly, together with interest monthly." The italicized words are in writing; the rest of the note, with the exception of the names and figures, being printed. It is urged that the provision quoted is in conflict with the provision allowing the principal sum to become due for default in payment of a monthly installment of interest, and that the note read as a whole should be construed to provide merely for monthly payments of \$25 for principal and interest together, at least until the 18th day of August, 1905. But we see no conflict between the different clauses. The provision for the payment of \$25, or more, was merely an option given to the makers whereby they were permitted, in advance of the maturity of the note, to make partial payments on account of the principal. It did not limit their obligation to pay the interest monthly, nor did it destroy or modify the holder's right to declare the entire sum due when there should be a default in the payment of interest.

5. It is argued that, since the unpaid installment of interest fell due on September 18th, demand should have been made on that day, and immediate notice given to defendant as indorser, in order to hold him. The demand was made, and the notice given, on October 3d, and the contention is that the delay of 15 days discharged the defendant. *Rauer v. Broder*, 107 Cal. 282, 40 Pac. 430; Civ. Code, § 3131, subd. 5. But this action was not brought to recover the interest due on September 18th alone. Its purpose was to enforce the liability arising under the provision of the note that, in the event of default being made in the payment of any installment of interest when due, "then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note." This liability did not arise until the latter exercised the option so given to him, and, as the complaint alleges and the court finds, he exercised it on the 3d day of October. On the same day he made his demand on the

makers and gave notice to the indorser. Under a clause of this kind, the holder is allowed a reasonable time in which to determine whether or not he will exercise his option and declare the principal of the note at once due and payable. *Hewitt v. Dean*, 91 Cal. 617, 28 Pac. 93, 25 Am. St. Rep. 227; *Fletcher v. Dennison*, 101 Cal. 292, 35 Pac. 868. *Crossmore v. Page*, 73 Cal. 213, 14 Pac. 787, 2 Am. St. Rep. 789, cited by appellant, declares nothing to the contrary. The court there said that "the holder was entitled to a reasonable time to exercise his option." In that case the holder had permitted 7 months to elapse, and the court held that this was more than a reasonable time. In *Fletcher v. Dennison*, supra, a delay of 59 days was held not to be unreasonable, as matter of law. Where the delay was 15 days, it certainly cannot be said that the trial court was not justified in finding, as it impliedly found here, that the holder had acted with reasonable promptness, especially in view of the evidence that prior installments of interest had been paid on the 1st day of the month succeeding the one in which they fell due.

It is argued that the rule allowing a reasonable time for the exercise of the option has no application to the indorser of a note; that as to him the option must be declared and the demand made on the very day the interest installment falls due. But we see no reason for this distinction. The indorser of a negotiable instrument warrants, *inter alia*, that if the instrument is dishonored he will, "upon notice thereof duly given to him, pay the same with interest." Civ. Code, § 3116. A negotiable instrument is dishonored when it is not paid on presentment for that purpose. Id. § 3141. The instrument must be presented on the day of its maturity. Id. § 3131, subd. 5. Notice of dishonor, when given otherwise than by mail, must be given on the day of dishonor, or on the next business day thereafter. Id. § 3147. If given by mail, it must be deposited in the post office in time for the first mail which closes after noon on the first business day succeeding the dishonor. Id. § 3143. In the present case, the principal sum was not due until the holder had exercised his option to declare it due. This he did on the 3d day of October, and on the same day he made presentment and gave notice of dishonor to the defendant. He thereby complied with every step required to fix the liability of the indorser. If it be said that an installment of interest was due on September 18th, and that as to this the holder could not delay presentment until October 3d, and still hold the indorser, it may be answered that the judgment did not include any interest accruing up to September 18th. The amount recovered was the principal of the note, with interest from September 18th. The interest accruing between said date and the 3d day of October, became due, like the principal, at the option

of the holder, for failure to pay the preceding installment.

6. Mary S. Jennings, one of the makers, had died prior to maturity of the note, and there had been no administration of her estate. We need not here decide whether, as to her, presentment was excused by these facts. The court found that the plaintiff presented the note for payment to the person in charge of the hotel in which Mary S. Jennings resided at the time of her death. The appellant attacks this finding. The only specification of insufficiency is that "no proof was introduced as to who was in charge of the Hotel Wheeler"—a specification that is not sustained by the record, since the plaintiff testified that he had presented the note to Mrs. Pool, "who was in charge of the Hotel Wheeler." The complaint alleges that the plaintiff had presented the note for payment at the place where Mary S. Jennings had her place of business and her residence at the time of her death, and that payment on behalf of the said Mary S. Jennings was refused. The defendant demurred on the ground of uncertainty, in that it did not appear to whom the demand on Mary S. Jennings was delivered. We think the overruling of the demurrer was proper. The name of the person to whom presentment was made was a mere matter of evidence. But, even if there may have been some want of certainty in the allegation, it was not of a character to injure the appellant. If, when the proof was made, he was without evidence to meet it, and desired time to procure such evidence, he should have asked for a continuance for that purpose.

7. As a separate defense the answer alleges that the makers of the note, at the time of its execution, executed and delivered to the original payees, as security for the note, a chattel mortgage of certain property, and that this mortgage was assigned and transferred to the plaintiff with the note. It is further alleged that no proceedings to foreclose this mortgage have been taken by the plaintiff. It is argued by the appellant that by reason of the existence of this mortgage the liability of the makers was not absolute, but was contingent upon a failure of the mortgaged property to realize, on foreclosure, an amount sufficient to pay the note, and that the indorsement of defendant imposed upon him no greater liability than that of the original mortgagors. On those grounds it is claimed that, so long as no sale of the mortgaged property had taken place, the defendant's obligation to pay had not become fixed. It is no doubt true that, so far as the mortgagors themselves were concerned, an action to recover the amount of the note could not have been maintained apart from a foreclosure of the mortgage. As to them the mortgaged property constituted a primary fund for the discharge of the debt, and no personal judgment could have been en-

tered against them, unless after foreclosure a deficiency had appeared. Code Civ. Proc. § 726; *Bartlett v. Cottle*, 63 Cal. 366; *Porter v. Muller*, 65 Cal. 512, 4 Pac. 531; *Bull v. Coe*, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235; *Barbieri v. Ramelli*, 84 Cal. 154, 23 Pac. 1086. But the defendant was not the mortgagor. His contract of indorsement was collateral to the original obligation of the mortgagors, and was not secured by the mortgage. In *Vandewater v. McRae*, 27 Cal. 596, the court said: "The mortgage given in this case was executed by the makers of the note, and the only personal liability secured by it, or intended to be secured by it, was that of the makers of the note as such. * * * The promise of the maker of a note is one thing, and the promise of an indorser is another. One is primary, and the other is secondary. One is absolute; the other turns upon conditions. Each may be secured by a separate mortgage, or one mortgage may be so framed as to secure them both. * * * On the ground, then, that the right which this action is brought to enforce is unsecured by mortgage, we consider that the plaintiff is at liberty to pursue the defendants in personam on their contract of indorsement." *Carver v. Steele*, 116 Cal. 116, 47 Pac. 1007, 58 Am. St. Rep. 156, was, like the present case, an action by the holder of a promissory note against indorsers. The defendants relied upon the plea that the note was secured by mortgage and that the holder had failed to enforce and foreclose his mortgage. The court, holding that this was no defense, used the following language: "In general, unless some agreement or special circumstance imposes diligence upon the creditor as a duty, he does not, by mere failure to pursue the person primarily liable, discharge the guarantor, surety, or indorser, even though his passivity in this regard may result in barring his remedy against the original debtor. *Whiting v. Clark*, 17 Cal. 407; *Bull v. Coe*, 77 Cal. 54, 60, 18 Pac. 808, 11 Am. St. Rep. 235. Accordingly the rule is that the creditor loses no rights against the indorser, whose liability has become fixed, by mere failure to enforce his lien against the property mortgaged for security for the debt. *First Nat. Bank v. Wood*, 71 N. Y. 405, 27 Am. Rep. 66; *Hoover v. McCormick*, 84 Wis. 215, 54 N. W. 505; *Fuller v. Tomlinson*, 58 Iowa, 111, 12 N. W. 127; *Colebrooke on Collateral Securities*, § 241, and cases cited." The court goes on to say that, even though the failure to foreclose the mortgage may have barred a personal action against the mortgagor, this consideration "does not reach respondents' case. Their contract to pay Montgomery was not the same as that of Staples (the mortgagor). 'The promise of a maker of a note is one thing and the promise of an indorser is another;' and their promise was not secured by the mortgage held by Montgomery. *Vandewater v. McRae*, 27 Cal. 596, 603." These

cases are directly in point, and establish the proposition that in this state the indorser of a note secured by mortgage may be sued upon his obligation without a foreclosure of the mortgage.

In what has been said in this opinion we have treated the contract of defendant as one of indorsement, and this is the aspect in which both parties have treated the case in their briefs. If, however, the defendants could be held to occupy the position of a guarantor (the view taken by the District Court of Appeal, when the case was pending in that court) it would make no difference in the result. "There is no privity, or mutuality, or joint liability, between the principal debtor and his guarantor." The defendant as guarantor, if he was such, made an independent contract, upon which he was liable without regard to foreclosure of the mortgage as against the principal debtors. *Adams v. Wallace*, 119 Cal. 87, 51 Pac. 14.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.; MCFARLAND, J.

SHEA v. SEATTLE LUMBER CO.

(Supreme Court of Washington. Sept. 6, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—UNSAFE APPLIANCES—ASSUMED RISK.

Where plaintiff objected to appliances furnished, and the foreman promised to give him something better, but requested plaintiff to continue work until the substitute could be made, defendant assumed all risk of danger arising from plaintiff's careful use of the appliance for such reasonable time thereafter as might be necessary to provide the new tool.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 638-644.]

2. SAME—REASONABLE TIME—QUESTION FOR JURY.

Where plaintiff continued to work for two days with an unsafe appliance after a safe appliance had been promised as soon as it could be made, whether such period was an unreasonable time was for the jury.

3. SAME.

Where plaintiff was injured while using a stick kept near an edger in defendant's mill for the purpose of cleaning away refuse under the machine, plaintiff cannot be held negligent in using the stick which was an unsafe appliance, instead of procuring another of larger dimensions, in the absence of proof that a stick of other dimensions was suitable or could have been used.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 723-742.]

4. SAME—METHOD OF WORK—STOPPING MACHINERY.

In an action for injuries to a servant, evidence held to show that plaintiff was not negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 981-986.]

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by John Shea against the Seattle Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Richard S. Eskridge and Philip Tindall, for appellant. Martin J. Lund and Vince H. Faben, for respondent.

CROW, J. This action was brought by John Shea against the Seattle Lumber Company, a corporation, to recover damages for personal injuries. From a judgment for \$8,000 in favor of the plaintiff, the defendant has appealed.

The appellant contends that the trial court erred (1) in refusing to take the case from the jury and enter judgment at the close of respondent's evidence, and again at the close of all the evidence; (2) in denying the appellant's motion for judgment notwithstanding the verdict; and (3) in denying appellant's motion for a new trial. The sole question presented is whether the evidence sustains the verdict and judgment. In passing on this question, we must consider the evidence in the light most favorable to the respondent. The facts thus disclosed show: That the respondent had for two years been an employé in appellant's lumber and shingle mill in the city of Seattle. In the mill was a certain edger machine provided with seven or eight circular saws, which were mounted on an axle or arbor. In front and to the rear were rollers used to convey lumber to the saws. Beneath the edger was a chute for sawdust, splinters, bark, and other refuse. In the lower portion of the chute was a grating through which sawdust and the smaller particles of refuse passed. The grating and chute sometimes became clogged, and it then became the duty of some employé to clear it by pushing down the refuse material. Prior to the accident, a wooden stick about 10 to 12 feet in length was used for this purpose. The saws were guarded at the top and front of the edger, but back of the saws and below the arbor and rear roller was an opening about 12 inches wide extending across the full width of the machine. In cleaning the chute an employé would shove a long stick into this opening, and by its use clear away the refuse. This had to be done frequently as conditions required. The respondent Shea had for some time been in charge of certain levers near the edgers, but not connected therewith. His evidence shows that the appellant's foreman shortly before the accident instructed him to clean the chute when clogged; that a wooden stick of 1 by 2 inches, about 10 or 12 feet long, was provided for his use; that a few days prior to the accident he broke the stick while using it; that he then realized its use was dangerous; that he immediately complained to the foreman and requested him to provide a long iron rod in place of the stick; that the foreman promised to do so, but requested the respondent to continue his work with the stick until an iron rod could be made; that, relying upon the foreman's promise, respondent continued using this stick, exercising the utmost care; that within two days thereafter the stick broke causing respondent to lose his

balance; that his fingers were thrown in contact with the unguarded saws; that his left arm was drawn under the machine, and so severely injured as to necessitate amputation about four inches below the shoulder. Although it is insisted that the appellant was negligent in having failed to properly safeguard the saws at the back of edger, we will only consider the respondent's contention that appellant's negligence also consisted in its failure to provide him with safe appliances for his work. He insists that the use of a wooden stick was hazardous, unsafe, and dangerous. The work of cleaning the chute had been required of the respondent but a short time prior to the accident. He had previously seen other employés using the stick. He testified that, when he afterwards learned and appreciated the unnecessary hazard to which he was subjected by its use, he would not have continued the work but for his reliance upon the foreman's promise to provide him with a safe appliance. He further testified that the foreman had repeatedly seen him and other employés using a stick, but interposed no objection. The foreman denied that the respondent asked him for an iron rod or that he promised one. An iron rod was provided immediately after the accident, either the same evening, or early the next morning. Appellant's president and manager testified that he, without request from any person, ordered this iron rod after the accident. The jury in response to a special interrogatory affirmatively found that the foreman did prior to the accident promise respondent to provide the iron rod. It is elementary law that it is the duty of a master to provide his servant with reasonably safe machinery, tools, and appliances with which to perform the work required of him, and to also keep the same in reasonably safe condition. Whether the stick used met this requirement was a question of fact to be submitted to the jury.

It is contended by the appellant that the respondent had just as much knowledge of the fact that the stick was a dangerous and unsafe appliance as had the master, and that the respondent therefore assumed the risk of all dangers which might result from its use. This would be true, had the respondent continued its use without objection or complaint, after he actually appreciated the danger, but he only did so for a reasonable time while relying on the promise of the master. After appellant's foreman had made this promise, it assumed all risk of dangers arising from respondent's careful use of the unsafe appliance during such reasonable time as might thereafter be necessary to provide the iron rod. In *Crooker v. Pacific Lounge & Mattress Co.*, 29 Wash. 30, 38, 69 Pac. 359, this court quoted with approval the following language from section 215 of *Shearman & Redfield on Negligence*: "There is no longer any doubt that, where a master has expressly promised to repair a defect, the servant does not assume the risk of an injury caused

thereby within such a period of time after the promise as would be reasonably allowed for its performance, or, indeed, within any period which would not preclude all reasonable expectation that the promise might be kept. And the same principle applies to a case where the master promises to a servant to discharge an incompetent fellow servant, but fails to do so, and the former servant is thereby injured, or where a servant, apprehending a particular danger, makes it known to the master, who assures him that he will provide against it. Nor, indeed, is any express promise or assurance from the master necessary. It is sufficient if the servant may reasonably infer that the matter will be attended to."

This doctrine must be applied to the facts before us, and it was the province of the jury to determine whether the respondent continued work for an unreasonable time after the promise was made. The appellant, however, strenuously urges that the respondent is not entitled to recover as he was guilty of contributory negligence in the following particulars: (1) In using a stick one by two inches in size, or a stick of any inadequate size, when he realized that it was apt to break, and knew, as shown by the evidence, that pieces of suitable dimensions were readily available; (2) in doing his work in such a manner as to cause the stick to break, and throw his hand against the saw; and (3) in attempting to clean the chute without first having the edger stopped, or the saws moved out of the way. As to the first contention, there is evidence that respondent used a stick which was kept near the edger for that purpose. There is no affirmative showing that one of any other dimensions was suitable or could have been used. In the absence of some positive evidence that a larger stick could have been used, negligence arising from its nonuse will not be presumed. As to the second contention, respondent's evidence shows that he exercised the utmost caution in using the stick after the foreman's promise had been made, and there is no evidence in the record which would justify us in holding him negligent as a matter of law in this regard. The question as to whether his manner of using the stick after the foreman's promise was careful or reckless was one of fact for the jury.

The appellant's main contention seems to be that the respondent should have caused the edger to be stopped or the saws to be moved before he attempted to clean the chute. It insists there were two ways in which the work could have been done—the one safe by stopping the edger or moving the saws, and the other unsafe by not stopping the edger or moving the saws—and that, as the respondent chose the latter method, he cannot recover. In support of this contention appellant cites *Hoffman v. American Foundry Co.*, 18 Wash. 288, 51 Pac. 385; *Johnson v. Anderson & Middleton Lumber Co.*, 31 Wash. 554, 72 Pac.

107; *Beltz v. American Mill Co.*, 37 Wash. 399, 79 Pac. 981; *Hunter v. Washington Pipe, etc., Co.*, 43 Wash. 167, 86 Pac. 171; *Laidley v. Musser Lumber Co.* (Wash.) 88 Pac. 124. We do not regard any of these cases as applicable to the peculiar facts before us. In all of them, except the *Hoffman* and *Hunter* Cases the injured plaintiffs had control of the machinery with the right and power to stop it. In none of the cases cited, except the *Johnson* Case, does it appear that any promise had been made similar to the one made to the respondent. In the *Johnson* Case, although the foreman had promised to fix the electric light, the plaintiff who had charge of the edger, with power to stop it, was shown to have been guilty of conduct which constituted contributory negligence as a matter of law, notwithstanding the promise made. The master's promise to provide safe appliances will not justify willful recklessness on the part of the servant. He must exercise reasonable caution while relying upon the promise and awaiting its fulfillment. The evidence here shows that the edger and saws were in the exclusive control of the edgerman, that they were not in the control of the respondent, and that it required three men to stop the edger. The evidence further indicates that the custom in appellant's mill was to clean the chute while the edger was running. It is not shown that the machinery was ever stopped, or that the saws were moved by respondent or any other employé, at any time in the history of the mill for the purpose of cleaning the chute. The fact that a long stick was provided indicates that it was to be used while the machinery was in motion. The foreman saw and permitted respondent to use the stick without stopping the edger or changing the saws, and even after the accident an iron bar was provided, showing that the appellant still intended to permit the cleaning of the chute without stopping the edger or moving the saws. The evidence discloses no rule of the mill for doing the work in any other manner. These facts clearly distinguish this case from those cited by the appellant. Courts do not hold plaintiffs guilty of contributory negligence as a matter of law unless the circumstances are such that reasonable men may not differ as to the existence of such contributory negligence. The question of the existence or non-existence of contributory negligence upon the part of the respondent was under the evidence before us an issue of fact to be submitted to the jury.

The appellant further contends that the damages awarded are excessive. The respondent a young man 27 years of age, in good health, lost his left arm. We cannot hold that for such an injury the damages were excessive.

The judgment is affirmed.

HADLEY, C. J., and FULLERTON, RUDKIN, MOUNT, and DUNBAR, J., concur.

CHICAGO, M. & ST. P. RY. CO. v. ALEXANDER et al.

(Supreme Court of Washington. Sept. 7, 1907.)

1. EMINENT DOMAIN—COMPENSATION—INJURY TO PROPERTY NOT TAKEN—REMOTE LOSSES.

In proceedings by a railroad company to condemn a right of way, it appeared that defendants' land had a frontage of 455 feet on a river bank, and was at a considerable distance inland from Puget Sound, that the river had but little depth, and that large vessels could not reach defendants' land unless the river was dredged between it and Puget Sound. It did not appear that any dredging of the river to any point within two miles of defendants' land had ever been contemplated, and it was shown that the possibility of the river being dredged was very remote, and that there was no certainty that the United States government would ever require a drawbridge near defendants' land, and that the government had authorized a stationary bridge which did not touch defendants' land. *Held*, that the possibility that the river would be thereafter dredged so as to be navigable for large vessels requiring the construction of a drawbridge which when open would obstruct defendants' water front to the extent of about 76 feet was too remote to constitute an element of damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 237, 238.]

2. EVIDENCE — ADMISSIBILITY — VALUE OF PROPERTY.

In proceedings by a railroad company to condemn a right of way testimony by one owning land near that of defendants as to what he held the same at is inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 267.]

3. DEPOSITIONS — EXAMINATION OF WITNESSES — OBJECTIONS TO QUESTIONS — RENEWAL AT TRIAL—NECESSITY.

Where a deposition was taken before the judge who subsequently tried the case, who ruled on objections then made and allowed exceptions, it was not necessary to renew the exceptions at the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Depositions, § 320.]

4. EVIDENCE — ADMISSIBILITY — VALUE OF PROPERTY.

In proceedings by a railroad company to condemn a right of way, neither a party who has made an offer for the land nor the owner should be permitted to testify to the same for the purpose of showing value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 267.]

5. EMINENT DOMAIN—ASSESSMENT OF DAMAGES—EVIDENCE—REBUTTAL.

Where, in proceedings by a railroad company to condemn a right of way, it was not advised by any pleading that defendants would make the claim that the tract was particularly valuable for a large sawmill and manufacturing plant, or that being divided by its right of way it would be of little or no value for that purpose, and did not offer any evidence on that subject, evidence in rebuttal that a sawmill and manufacturing plant could be constructed and profitably operated on the land after being divided by its right of way was erroneously excluded as improper rebuttal.

6. TRIAL—INSTRUCTIONS—UNNECESSARY REPEITION.

Instructions should not be unnecessarily repeated, thereby placing undue stress upon them before the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 513.]

7. EMINENT DOMAIN—COMPENSATION—USE FOR WHICH COMPENSATION MAY BE OBTAINED.

In arriving at the value of land taken for a public use, its market value may be shown, not merely for the use to which it may in fact be applied, but also with reference to the most available and valuable use to which it may be adapted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 371-377.]

8. SAME.

In proceedings by a railroad company to condemn a right of way, it appeared that defendants' land had a frontage of 455 feet on a river bank, and was at a considerable distance inland from Puget Sound, and that the river had but little depth, and large vessels could not reach defendants' land unless the river was dredged between it and Puget Sound. It did not appear that any dredging of the river to any point within two miles of defendants' land had ever been contemplated, and it was shown that the possibility of the river being dredged was very remote. *Held*, that any valuable use of the land, based on navigation of the river by large vessels, was too remote and speculative to be considered either in fixing the value of the land taken or damage to the land not taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 237, 238.]

Appeal from Superior Court, Pierce County; W. H. Snell, Judge.

Condemnation proceedings by the Chicago, Milwaukee & St. Paul Railway Company of Washington against Hubbard F. Alexander and others. From the judgment assessing the damages in a certain amount, plaintiff appeals. Reversed and remanded for a new trial.

H. S. Griggs, H. H. Field, and Wm. P. Reynolds, for appellant. Hudson & Holt and J. M. Ashton, for respondents.

CROW, J. Action by the plaintiff, Chicago, Milwaukee & St. Paul Railway Company, against Hubbard F. Alexander and others, to condemn land near the city of Tacoma for a right of way. After an order had been entered adjudging the proposed use to be public, a jury was impaneled, and awarded the defendants \$55,205 for the value of the land taken and damage to the land not taken. From a judgment assessing damages in this amount, the plaintiff has appealed.

Respondents' land, with a frontage of 455 feet on the east bank of the Puyallup river, consists of a little less than 9 acres. Its north line abuts on the interurban electric railway track, which crosses the Puyallup river near respondents' northwest corner. The appellant is condemning a right of way for its tide-water line, which crosses the nine-acre tract from southeast to northwest, dividing it into two parts, but does not cross the river. It is also condemning a right of way over the south side of respondents' land for its city line, which crosses the river from east to west. Appellant filed and served on respondents profiles of its proposed stationary bridge across the Puyallup river, together with a certificate of its approval by

the proper United States authorities. This bridge will not touch respondents' land or water front. The appellant is appropriating 2.35 acres, leaving 3.25 acres fronting the Puyallup river, and 3.21 acres separated from the river by appellant's tide-water line. Respondents' land is located a considerable distance inland from Puget Sound. Appellant's city line of railway will be constructed on an embankment from 25 to 27 feet in height, and its tide-water line on an embankment about 5 feet in height above the surface of respondents' land. The appellant, by stipulation on file, has agreed to construct and forever maintain a suitable crossing between respondents' two remaining tracts over appellant's tide-water line wherever respondents desire, and also such culverts and drains as may be necessary to afford the land as good drainage as it has by nature.

The respondents introduced one Nicholson, a civil engineer, who, over appellant's objections, was permitted to testify that if the Puyallup river should hereafter be made navigable for large vessels, and the United States government should require appellant to construct a drawbridge across the river on its city line, such drawbridge, when opened for the passage of vessels, would obstruct respondents' water front to the extent of about 76 feet. The purpose of this evidence was to show that such obstruction would interfere with steamships and other vessels that might come from Puget Sound and stop at respondents' water front. At present the river has but little depth. It is not shown that any vessels larger than steam tugs have ever passed the interurban bridge. The possibility of the river being dredged to respondents' land by the United States government is very remote. There is no certainty that the government will ever require a drawbridge near respondents' land. If it should do so, respondents can, in another action, then recover such damages as they may sustain by reason thereof. The appellant is not seeking to condemn or interfere with any of respondents' shore rights. The United States government has authorized a stationary bridge which does not touch their land. No other bridge may ever be required. This evidence was calculated to mislead the jury into awarding damages which the respondents were not entitled to recover, and its admission was therefore erroneous.

One Baker, who owns three or four acres of similar land near that of respondents, was, over appellant's objection, permitted to testify that he held the same at \$15,000 per acre. This evidence, admitted on direct examination, was improper and constituted error, not being a correct test of value. An owner might not be willing to sell at any price, and might, therefore, place an excessive value on his own property. The issue before the jury was the fair market value of the land taken, and not what some owner

might arbitrarily ask for similar land held by him.

The respondents introduced the deposition of one Stokes, a resident of Portland, Or., and manager of a large sawmill and manufacturing plant at Bucoda, Wash. This witness was not shown to be an expert on values, nor was he familiar by acquaintance and experience with lands in or near the city of Tacoma. He testified that, on a trip to Tacoma, he looked for a site for a large lumber mill and manufacturing plant where he could be near tide water with the advantages of navigation; that he investigated the respondents' nine-acre tract; that he priced some land on the Sound, near Old Town in Tacoma, several miles distant; that he regarded respondents' land as especially valuable for a large mill if the entire nine acres could be used in one tract without any railroad crossing it; that he examined the land after this condemnation proceeding had been commenced, when it was known that it would be divided into two tracts by appellant's tide-water line; and that the respondent Alexander wanted to know if he could use the tract as it would be thus divided. He was about to state a conditional offer he then made to Alexander, when appellant objected, but, its objection being overruled, the witness stated his offer, which he had made on condition that the land contained something over eight acres, and would not be divided by any line of railroad. Afterwards the appellant interposed a motion to strike this answer. Sustaining this motion the trial judge in part said: "If a man is offered a certain price in good faith by a man who is liable to carry the offer out, that would be the best criterion of the value of property." * * * The Supreme Court of the United States, however, reason that offers are not evidence of what property will bring, and it seems, in *Parke v. City of Seattle*, 8 Wash. 78, 35 Pac. 594, that our own Supreme Court has plainly affirmed that doctrine, although in that case the offer sought to be proven was proffered from the mouth of the plaintiff to whom the offer was made, and the man making the offer was not on the witness stand and subject to cross-examination. Yet I think they have very definitely settled the doctrine that that class of testimony is not competent to fix values. I think that the fact might be brought out in another way, and in a way which would avoid the error or the danger that the Supreme Court of the United States and the Supreme Court of this state seem to feel has followed that class of testimony. * * * I think that this testimony, or rather, this offer, as proven by this witness, is hypothetical and based on a condition which could not exist, and for that reason, and for the further reason that class of testimony is not a proper way to prove values, this question and this answer may be stricken. I think, however,

that you may ask this witness how much that property is worth, and he may answer what he considers it worth, and I think he might furthermore be permitted to back up his opinion by saying that he would give that for the property. * * * But, if this witness is willing to come on the stand and give it as his opinion that the property was worth just what he offered for it, I think that is proper testimony; he can testify what it is worth; * * * and I think he would be permitted to go further and say he is ready to take it at that price. * * * The question is what is the value, and, if he can testify that the value of the property is just what he offered, I think that would be competent." After further questions and objections, the witness testified, in substance, that the land as an entire tract was worth \$87,300, what he had offered for it, but that, divided by appellant's proposed tide-water line of road, it would be of but little value for a manufacturing plant. Counsel for respondents asked the witness whether he stood ready to pay for the land the value he had referred to, viz., \$87,300, assuming the acreage was about what he understood it to be, and over appellant's objection he was permitted to answer in the affirmative. This statement shows (1) that, in effect, the witness was permitted to state the conditional offer made by him; (2) that the evidence finally given was the direct result of a voluntary suggestion made by the court in the presence of the witness that he could base his estimate of value upon what he had offered for the land. The offer made by the witness was thus placed before the jury.

The respondents contend (1) that no proper exceptions were taken to this evidence; that appellant's only exceptions were in the deposition, and not renewed in court; (2) that the witness only testified as an expert to his valuation on the land; and (3) that, while an offer for the land may not be shown by evidence of the owner to whom it was made, it may be shown by the person making it, he being subject to cross-examination. The deposition had been taken before the trial judge, who ruled on the objections when made and allowed exceptions. It was not necessary to renew these exceptions at the trial, as it would have been had the deposition been taken before a notary public, or other officer than the judge himself. The witness was not shown to be qualified as an expert on land values in or near Tacoma; hence, the substance of his evidence was merely a statement of the offer made by him. Neither the party who makes an offer for land nor the party to whom it is made should, for the purpose of showing value, be permitted to testify to the same upon his examination in chief in an action of this character. In *Hine v. Manhattan Railway Company*, 132 N. Y. 477, 480, 30 N. E. 985, 15 L. R. A. 591, Mr. Justice Parker, quoting from *Keller v. Paine*, 34 Hun (N. Y.) 167, said: "But we pass to the

objection that in such a case as we have under consideration offers may not be proven even by the party making them. The General Term of the Fourth Department had the question before it in *Keller v. Paine* (N. Y.) 34 Hun, 167-177. And, in discussing the question, the court said: 'It has been intimated in some cases that offers are some evidence of value. But it is a class of evidence which it is much safer to reject than to receive. Its value depends upon too many circumstances. If evidence of offers is to be received, it will be important to know whether the offer was made in good faith, by a man of good judgment, acquainted with the value of the article and of sufficient ability to pay; also whether the offer was cash, for credit, in exchange, and whether made with reference to the market value of the article, or to supply a particular need, or to gratify a fancy. Private offers can be multiplied to any extent for the purpose of a cause, and the bad faith in which they were made would be difficult to prove.' The reasons thus assigned in support of the decision made we fully approve." *Parke v. Seattle*, 8 Wash. 78, 35 Pac. 594; *St. Joseph & D. C. R. R. Co. v. Orr*, 8 Kan. 419; *Sharp v. United States*, 191 U. S. 341, 24 Sup. Ct. 114, 48 L. Ed. 211.

The appellant on rebuttal introduced one Hobart, a competent expert in designing and laying out sawmills and manufacturing plants, and offered to show by his testimony that he had designed a lumber mill and manufacturing plant which could be constructed and profitably operated on the two tracts of land left to respondents, and produce from 75,000 to 90,000 feet of lumber a day in 10-hour shifts. Upon respondents' objection this evidence was erroneously excluded as not proper rebuttal. The appellant in its principal case had not offered any evidence as to the available character of the land for sawmill and manufacturing purposes, although some incidental remarks on that question were made by its witnesses, principally in response to the cross-examination conducted by respondents' counsel. The appellant had not been advised by any pleading or statement that the respondents would claim the entire tract was particularly valuable for a large sawmill and manufacturing plant, or that, after being divided by appellant's right of way, it would be of little or no value for any such purpose. After respondents had introduced such evidence to show value of the land taken and damage to the land not taken, the appellant should have been permitted to introduce in rebuttal the evidence offered.

Appellant contends that the trial court erred in unnecessary repetitions of its instructions, especially of those favorable to respondents. It contends that such action had a tendency to place undue and particular stress upon such instructions, was prejudicial to appellant, and constituted reversible error. The instructions were frequently and unnecessarily repeated. In view of the new,

trial to be granted herein, we will state that such a course should be avoided by trial judges. In *Meachem v. Hahn & Co.*, 46 Ill. App. 144, 149, the court, commenting on repeated instructions, well said: "Counsel may select the strong and salient points appearing, and seek in the argument to direct the thought of the jury to them as being the important and controlling features of the case, but the instructions of the court should not be made the medium for conveying such views to the jury." Although a judgment might not in every instance be reversed for such unnecessary repetitions, it might in furtherance of justice sometimes become necessary to grant a reversal. 1 *Blashfield on Instructions to Juries*, § 108; 2 *Current Law*, 470.

Much evidence was admitted to show that the entire and undivided tract was especially valuable for an extensive manufacturing plant by reason of its location on the Puyallup river, which, if dredged, deepened, and improved by the United States government, would become navigable for large ocean steamers, and that such vessels could then be taken to the respondents' water front for loading and unloading. Experts on land values took these possibilities into consideration when testifying to the market value of the land taken, and when estimating damage to the land not taken. In arriving at the value of land taken for a public use, its market value may be shown, not merely for the use to which it may in fact be applied, but also with reference to the most available and valuable use to which it may be adapted. The Supreme Court of the United States, in *Boom Company v. Patterson*, 98 U. S. 403, 408, 25 L. Ed. 206, said: "So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes that it is perhaps impossible to formulate a rule to govern its appraisalment in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." The words "immediate future," advisedly used, contemplate that the special use must be valuable, practical, and available within a reasonable time. The Puyallup river is not at present navigable except for rafts, sawlogs, and possibly small tugboats. Steamers cannot reach respondents' property unless the river is dredged between it and Puget Sound. It is not shown that any dredging plan, to any point within two miles of respondents' land, has ever been contemplated or considered. Such an improvement may not be made for many years, or perhaps never, so as to reach respondents' land. Any valuable use of the land, therefore, based upon such navigation, is remote, uncer-

tain, speculative, and an unreasonable circumstance to be considered either in fixing value of the land taken, or damage to the land not taken. The purpose of assessing damages in an action of this character is to award an owner fair, complete, and adequate compensation for land taken, based upon its actual market value, together with further and ample compensation for damages to land in the same tract not taken. The condemning corporation should not be permitted to appropriate the land for any less sum. On the other hand, it is not intended that owners of property may recover excessive damages based upon fictitious, visionary, or remote contingencies, which may or may not at some indefinite time in the future increase the value of the land. If the Puyallup river was navigable for large vessels at this time, or if it was reasonably certain that it would become so in the immediate future, the anticipated conditions above mentioned and valuations based thereon might become competent for consideration by the jury; but at present such conditions and circumstances, as a basis for valuation, are too remote, speculative, and improbable to warrant evidence of the character above mentioned. *Munkwitz v. Chicago, M. & St. P. Ry. Co.*, 64 Wis. 403, 25 N. W. 438.

The respondents contend that the appellant has not interposed proper exceptions to this evidence. Without passing upon the sufficiency of the exceptions taken, we make the above suggestions in view of the fact that a new trial will be necessary in this cause.

The judgment is reversed, and the cause remanded for a new trial.

HADLEY, C. J., and MOUNT, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

WITTLER-CORBIN MACHINERY CO. v. MARTIN et al.

(Supreme Court of Washington. Sept. 7, 1907.)

1. APPEAL—TIME FOR TAKING—MOTION FOR NEW TRIAL.

The time for taking an appeal begins to run from the date of the order denying a motion for new trial, and hence when taken within 90 days after the determination by the court of a motion for new trial, seasonably filed, is in time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1895.]

2. SALES—CONDITIONAL SALES—SUFFICIENCY OF DESCRIPTION.

Sess. Laws 1903, p. 6, c. 6, § 1, in amendment of Act 1893, provides that conditional sales of personal property shall be absolute as to purchasers and subsequent creditors in good faith, unless within 10 days after possession taken a memorandum is filed in the county auditor's office of vendee's residence at the date of taking possession. Section 2 provides that the county auditor shall enter the same in a book, etc. *Held*, that the description of an engine, conditionally sold, in a memorandum filed with the auditor, as "1 30-horse power stationary, side crank, slide valve engine, complete with all fittings, including governor and throttle, band

wheels, lubricator, oil cups, and all steam connections," was sufficient to give constructive notice of vendor's title.

3. SAME — REMEDIES OF SELLER — BURDEN OF PROOF.

In an action by a vendor to recover possession of property conditionally sold, a memorandum of such sale having been filed in the auditor's office, as required by Sess. Laws 1903, p. 6, c. 6, § 1, in amendment of Act 1833, the burden is on one claiming to be a bona fide purchaser from the conditional vendee or an incumbrancer to establish the same.

4. COSTS — PERSON ENTITLED — SEPARATE DEFENSES.

Where, in an action to recover possession of personal property, though both defendants appeared by the same attorney, each answered separately, each was entitled to the statutory attorney's fee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 678.]

Appeal from Superior Court, Whatcom County; Jeremiah Neterer, Judge.

Action by the Wittler-Corbin Machinery Company against Felix Martin and another to recover possession of certain personal property. Judgment for defendants, and plaintiff appeals. Reversed, and remanded for a new trial.

Rose & Craven, for appellant. Hardin & Hurlbut, for respondents.

CROW, J. On December 23, 1903, the plaintiff, Wittler-Corbin Machinery Company, a corporation of Seattle, Wash., made to one Earl B. Nims a conditional sale of one 30-horse power, stationary, side crank, slide valve engine, manufactured by L. L. Graves, of Streator, Ill. A written memorandum of the sale, stating its terms and conditions, signed by the vendor and vendee, was on December 31, 1903, filed in the office of the auditor of Whatcom county, the same being the county in which the vendee resided. This contract stipulated that the purchase money should be paid by Nims in installments; that the engine should be located and remain at Lynden, Whatcom county, Wash., where Nims intended to install a shingle mill; that it should not be removed without the consent of the vendor; that time was the essence of the contract; and that title should remain in the vendor until all payments were made. The engine was described as follows: "1 30-horse power stationary side crank slide valve engine, complete with all fittings, including governor and throttle, band wheels, lubricator, oil cups, and all steam connections." It was delivered to Nims on board cars at Getchell, Snohomish county, and shipped to Bellingham, Whatcom county. Nims, on its receipt in January, 1904, installed it in a small mill near Bellingham, instead of Lynden, as agreed. It does not appear that he ever owned or installed any mill at Lynden. Default was made by him in payments of purchase money, and the plaintiff finding the engine in the possession of the defendant's Felix Martin and Home Security Savings Bank,

a corporation, demanded its return, and commenced this action to recover its possession. The defendants the Home Security Savings Bank and Felix Martin answered separately; the former pleading a mortgage executed by Nims, and the latter claiming title by purchase from Nims subject to the mortgage. The defendants each alleged that they had acquired their interests in good faith, without any notice, actual or constructive, of the plaintiff's title. In reply, the plaintiff denied these allegations, and affirmatively pleaded the conditional sale, the filing of the contract with the county auditor, and constructive notice to the defendants. On trial before a jury, the plaintiff offered the memorandum of conditional sale in evidence, with proof of its filing. To this offer the defendants objected, insisting that the description was indefinite and defective, that the location of the property was not correctly stated, and that the memorandum was insufficient to give constructive notice. The trial court reserved its ruling until the plaintiff, by the testimony of its salesman, had shown that the conditional sale was actually made to Nims; that the engine was then in Snohomish county; that Nims was to establish it in a small mill near Lynden; that the plaintiff afterwards found it in defendants' possession near Bellingham; and that it demanded possession, which was refused. Thereupon the trial judge declined to admit in evidence the memorandum of sale or the proof of its filing. No further evidence being offered, a nonsuit was granted upon motion of the defendants, and a judgment of dismissal was entered. The plaintiff has appealed.

The respondents, claiming that oral notice of appeal was given at the time of the granting of the nonsuit, have moved to dismiss the appeal, for the reason that the appeal bond was not filed in time. The nonsuit was granted and judgment entered on September 13, 1905. We cannot ascertain from the record that any oral notice of appeal was then given. On September 14, 1905, within the statutory time, the appellant filed a motion for a new trial, which was not denied until July 16, 1906. The appellant served and filed written notice of appeal, and also filed its appeal bond on October 6, 1906. The seasonable filing and service of a motion for new trial suspends judgment to such an extent that it is not final until the motion is denied. *State ex rel. Payson v. Chapman*, 35 Wash. 64, 76 Pac. 525; *Rice Fisheries Company v. Pacific Realty Co.*, 35 Wash. 535, 77 Pac. 839. The time for appeal did not commence to run until the denial of the motion on July 16, 1906. The appeal was thereafter properly perfected within statutory time. The motion to dismiss is denied.

The appellant contends that the trial court erred in refusing to admit in evidence the memorandum of conditional sale with proof of its filing with the county auditor. Prior

to the enactment of chapter 106, Sess. Laws 1893, p. 253, conditional sales of personal property retaining title in the vendor were valid in this state, not only between the vendor and vendee, but also as against subsequent bona fide purchasers, incumbrancers, or creditors. *De Saint Germain v. Wind*, 3 Wash. T. 189, 13 Pac. 753; *Dodd & Co. v. Bowles*, 3 Wash. T. 383, 19 Pac. 156; *Quinn v. Parke & Lacy Machinery Co.*, 5 Wash. 276, 31 Pac. 866. To obviate the hardship of this rule, the Legislature passed the act of 1893, supra, which was afterwards amended by chapter 6, p. 6, Sess. Laws 1903. Section 1 of the last-mentioned act provides "that all conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to the purchasers, incumbrancers and subsequent creditors in good faith, unless within ten days after taking possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides." This statute did not invalidate conditional sales as between the original vendor and vendee, or as to third parties not bona fide purchasers or incumbrancers, where no memorandum was filed with the auditor, or where the description in any memorandum duly filed was indefinite. This being true, the written agreement was competent evidence as tending to sustain the appellant's allegation of title in itself. The respondents contend that the description of the engine contained in the memorandum was insufficient to give constructive notice of appellant's title; that it described the engine as being located at Lynden; that it never was located or kept there; that the respondents first saw it in Nims' possession and apparent ownership near Bellingham; that the description in the written memorandum would apply to any one of numerous engines located in Whatcom county; that the appellant had failed to mention the name of the manufacturer stamped on the engine; and that the description was so imperfect as to make the memorandum void for the purpose of giving constructive notice to respondents, who claim to be subsequent holders as bona fide purchaser and mortgagee. We are unable to agree with this contention. The property when sold was in Snohomish county, and was to be thereafter delivered to Nims, who was to locate it at Lynden, in Whatcom county. This he never did. Assume, however, that he had done so, and that thereafter, without the knowledge or consent of the appellant, he had removed it to Bellingham, where the respondents first saw it, appellant would not have lost its title by reason of such removal. Yet, if the respondents had

thereafter dealt with Nims, they would have been in no better position as to constructive notice than they now are. The 1903 statute, without referring to the location of the property, provides that the memorandum shall be filed in the office of the auditor of the county where the vendee resides, and section 2 provides that the county auditor "shall enter in a suitable book to be provided by him at the expense of his county, with an alphabetical index thereto, and exclusively for that purpose, ruled into separate columns with appropriate heads, 'The time of filing,' 'Name of vendor,' 'Name of vendee,' 'Date of instrument,' 'Amount of purchase price,' and 'Date of release.'" This contemplates that any person desiring to purchase personal property from one in possession thereof may, for protection, examine this book and index. Had the respondents done this, they would have learned of the memorandum of conditional sale, indexed in the names of appellant as vendor and Nims as vendee. It affirmatively stated that the vendor was a Seattle corporation, and that the vendee was a resident of Whatcom county. Respondents as intending purchasers could have applied to either for information. By doing so, they would have ascertained that Nims had no mill other than the one located near Bellingham, and that the engine they were about to purchase was the identical engine mentioned in the memorandum of conditional sale. By prosecuting inquiries suggested by the memorandum on file, they would have obtained all information necessary for their protection. The description should not be held insufficient as a matter of law. In *Willey v. Snyder*, 34 Mich. 60, Mr. Chief Justice Cooley, in commenting upon the sufficiency of descriptions in chattel mortgages, said: "But if a stranger is to be sent out to select property mortgaged, with no other means of identification than such as are afforded by the written description, and without being at liberty to supplement that information by such as can be gained in the mortgagor's neighborhood by inquiry of those who know what property the mortgagor was possessed of which would answer the description in the instrument when it was given, and by possessing himself of such other circumstances as persons usually avail themselves of in applying written descriptions to the things intended, it is much to be feared that the stranger would be so often at fault that chattel mortgages, if their validity depended upon his success in identifying the property, would seldom be of much value as securities. Written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties at the time. They are not prepared for strangers, but for those they are to affect—the parties and their privies. A subsequent purchaser or mortgagor is supposed to acquire a knowledge of all the facts, so far as may be need-

ful to his protection, and he purchases in view of that knowledge." Had respondents examined the index and files of the auditor's office, they would have learned of the conditional sale of an engine to Nims by appellant. As Nims resided in Whatcom county, this fact would have been sufficient to place a cautious business man on inquiry for the purpose of ascertaining what engine had been so sold. The evidence, however, fails to show that respondents either examined the records or made any investigation. As against Nims and all third parties not bona fide purchasers or incumbrancers, appellant was the owner, and respondents can only secure their alleged rights by showing that they were obtained from Nims in good faith. They severally alleged themselves to have been innocent holders, one as purchaser and the other as incumbrancer, without notice of appellant's title. These allegations being denied, the burden of proof to sustain them rested on respondents. No such proof was offered or made. A party seeking to avail himself of rights as an innocent purchaser must affirmatively plead and prove such rights. 2 Abbott's Trial Brief, p. 1634, § 43; Diemer v. Guernsey, 83 N. W. 1047, 112 Iowa, 393; Wilhoit v. Lyons, 98 Cal. 409, 33 Pac. 325. Under statutes of other states providing for the filing or recording of written memoranda of conditional sales, this rule has, in well-considered cases, been especially applied to defendants in replevin actions, who claimed to have purchased in good faith from vendees in possession of personalty under such conditional sale contracts. Crumrine v. Reynolds, 78 Pac. 402, 13 Wyo. 111; Singer Mfg. Co. v. Nash, 70 Vt. 434, 41 Atl. 429. The honorable trial court erred in refusing to admit in evidence the memorandum of conditional sale, with proof of its filing with the county auditor.

The respondents appeared by the same attorney, but answered separately. In their separate cost bills they each taxed a statutory attorney fee. The appellant moved the court to retax costs by allowing them but one fee. This motion being overruled, it assigns error, contending that respondents were entitled to one fee only. Assuming the respondents to be entitled to costs, this contention cannot be sustained. One respondent answered, claiming title by purchase, while the other pleaded a mortgage. These defenses were based on different contracts, and were properly presented by separate answers. The fact that both respondents were represented by the same attorney is immaterial. Koyukuk Mining Co. v. Van de Venter, 30 Wash. 385, 70 Pac. 966.

For error in refusing to admit the written memorandum in evidence with proof of its filing, the judgment is reversed, and the cause remanded for a new trial.

HADLEY, C. J., and RUDKIN, FULLERTON, MOUNT, and DUNBAR, JJ., concur.

STATE ex rel. AMALGAMATED REPUBLIC MINES CO. v. NICHOLS, Secretary of State.

(Supreme Court of Washington. Sept. 6, 1907.)

1. CORPORATIONS—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS—POWERS.

Ballinger's Ann. Codes & St. § 4291, providing that no foreign corporation shall be permitted to transact a real estate or brokerage business, and that the provision shall not extend to any other business for the transaction of which such corporation may be organized, does not permit foreign corporations to do business or to file articles of incorporation prohibited to domestic corporations.

2. SAME—EFFECT OF FILING.

The mere filing of articles of incorporation with the Secretary of State authorizes the corporation to do all the business named therein not expressly prohibited by law.

3. SAME—REAL ESTATE AND TRUST BUSINESS.

1 Ballinger's Ann. Codes & St. § 4291, provides that any foreign corporation incorporated for any of the purposes for which a domestic corporation may be formed shall have power to transact every kind of business in the state, in the same manner as domestic corporations, by complying with the provisions of the act, provided that such foreign corporation shall not transact business within the state on more favorable conditions than are prescribed for a similar domestic corporation, and that no foreign corporation subsequently organized empowered to deal in real estate or to carry on a real estate brokerage business shall transact such business in the state, etc. Held, that a foreign corporation organized after the passage of such act to buy and sell real estate and do a brokerage agency and trust business not organized under Laws 1903, p. 367, c. 176, providing for the organization of trust companies, was not entitled to file its articles of incorporation in the state and do business therein, such powers not being granted to domestic corporations not organized under that act.

Mandamus by the state, on relation of the Amalgamated Republic Mines Company, against Sam H. Nichols, as Secretary of State. Writ denied.

Geo. W. Belt, for plaintiff. A. J. Falknor and Cutts & Dorety, for respondent.

MOUNT, J. Action in mandamus to compel the Secretary of State to file in his office a certified copy of the articles of the Amalgamated Republic Mines Company, a corporation organized under the laws of the territory of Arizona. The Secretary of State refused to file the articles, because, among the many powers of the corporation as defined by its charter, were contained powers to deal in real estate, do a brokerage and agency and trust business. The corporation avers that the only business it desires or intends to transact in this state is to acquire mines and to establish and operate mills for the treatment of ores. It disavows any intention of performing, or attempting to perform, any powers enumerated in its articles of incorporation, which powers are prohibited by the laws of this state.

It is conceded that the relator has complied with all the provisions of the statute relating to the filing of articles of foreign cor-

porations, and that it is entitled to have its articles filed here, unless the Secretary of State may refuse to file the same because the articles enumerate the powers to do a real estate, brokerage, agency and trust business. If these were the sole powers of the corporation, it is clear that the writ would not issue, because foreign corporations organized after 1890 are prohibited from doing a real estate or brokerage business in this state, and this corporation, which was organized in Arizona on May 6, 1907, is concededly not organized in pursuance of the provisions of the act of 1903 relating to trust companies. Laws 1903, p. 367, c. 176. Section 4291, 1 Ballinger's Ann. Codes & St., provides that any corporation incorporated under the laws of any state for any of the purposes for which domestic corporations are authorized to be formed under the laws of this state shall have power to transact every kind of business in this state, in the same manner and to the same extent as domestic corporations, by compliance with the conditions prescribed by succeeding sections, "provided, however, that this chapter shall not be so construed as to allow such foreign corporation to transact business within the state on more favorable conditions than are prescribed by law for a similar corporation organized under the laws of this state, * * * provided, further, that no foreign corporation which is hereafter organized which has among its other powers the business of dealing in real estate, and buying and selling the same, and for the purpose of carrying on a real estate brokerage business, shall be permitted to transact such business of buying and selling and dealing in real estate, and carrying on a brokerage business therein, in this state; but this prohibition shall not extend to any other business for the transaction of which such corporation may be organized." The State Constitution also provides, at section 7 of article 12, that "no corporation organized outside the limits of this state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law for similar corporations organized under the laws of this state." In the case of *State ex rel. Osborne, Tremper & Co. v. Nichols*, 38 Wash. 309, 80 Pac. 462, where a domestic corporation sought to amend its articles so as to change its name from "Osborne, Tremper & Co., Inc.," to "Seattle Trust & Title Company," without complying with the act of March 17, 1903, relating to trust companies, we held that mandamus would not lie to compel the Secretary of State to file the amended articles. And in *State ex rel. Gorman v. Nichols*, 40 Wash. 437, 82 Pac. 741, where it was sought to form a domestic corporation to do a trust or agency business, where the corporation was not formed in accordance with the act of 1903 relating to trust companies, we refused to compel the Secretary of State to file the proposed articles. In this last-named

case some of the proposed powers of the corporation were powers for which the corporation might have been formed under the general incorporation laws, but most of the powers named were trust or agency powers. The formation of the corporation for those purposes was in violation of the trust company act, which provides that "hereafter no corporation shall be organized for the purpose of carrying on a trust company business in the state of Washington except under this act." Section 1, p. 367, c. 176, Laws 1903. In other words, we refused to permit a domestic corporation to be formed with trust powers among its other designated powers, where such corporation had not complied with the act relating to trust companies. It is clear, therefore, that, if the relator were a domestic corporation, the writ would not issue to require the respondent to file the articles. It seems to follow, from this decision and from the provisions of the statute and the Constitution, to the effect that foreign corporations shall not be allowed to transact business within the state on more favorable conditions than domestic corporations, that the writ ought not to issue in this case.

It is true the relator recites in the petition for the writ that it disavows any intention of doing any business prohibited by the laws of this state, but there is no provision of law by which such disavowal may become a public record, so that persons dealing with the corporation might be informed of the powers of the corporation outside of the recorded articles. It is also true that the statute provides, at section 4291 (Ballinger's Ann. Codes & St.), that no foreign corporation shall be permitted to transact a real estate or brokerage business, and that "this provision shall not extend to any other business for the transaction of which such corporation may be organized." This provision cannot be construed so as to permit foreign corporations to do business or to file articles of incorporation prohibited to domestic corporations. The mere filing of articles of incorporation may not be the transaction of business within the meaning of the Constitution, but the filing of the articles apparently authorizes the corporation to do all the business named therein not expressly prohibited by law. A trust business is not denied to either foreign or domestic corporations. Either may do such business, but before doing so the corporation must be formed under the provisions of the trust act. Where the articles designate trust powers and the act relating to such powers is not complied with, the articles are misleading upon their face. Neither a foreign nor a domestic corporation can do business in this state without first filing its articles with the Secretary of State. If a foreign corporation is permitted to file articles which a domestic corporation cannot, it would seem apparent that the former is shown a preference. For the purposes of business in this state, a foreign corporation

is "organized" by the filing of a certified copy of its articles. To allow the relator to file its articles with trust powers would be in effect to permit its "organization" in derogation of the act of 1903, and upon more favorable conditions than are allowed to domestic corporations. This would be opposed to the public policy of the state as evidenced by the trust statute and the Constitution, cited *supra*.

We are of the opinion, therefore, that, when a domestic or a foreign corporation designates trust or agency powers in its articles of incorporation, it is required by the act relating to such powers to be incorporated in a particular way. The Secretary of State ought not to be compelled to file articles which do not conform to the law in that respect.

The writ is denied.

HADLEY, C. J., and FULLERTON, CROW, ROOT, RUDKIN, and DUNBAR, JJ., concur.

In re PETRIDGE'S WILL. PETRIDGE v. KOLDERUP.

(Supreme Court of Washington. Sept. 6, 1907.)

WILLS—REVOCATION—FEME SOLE—MARRIAGE.

Ballinger's Ann. Codes & St. § 4598, declares that if, after making any will, the testator shall marry, and the wife shall be living at testator's death, such will shall be deemed revoked, unless provision shall have been made for her by marriage settlement, or she be provided for in the will, or in some way mentioned therein to show an intention not to make such provision, etc. Section 4615 declares that words used in the act which import the masculine gender may be extended to females, when such construction shall be necessary. *Held*, that where a feme sole made a will devising her entire estate to her brother, and afterwards married and died without issue, leaving her husband surviving, such will, which did not refer to the husband in any manner, was revoked by the marriage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 469.]

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Application by T. H. Kolderup for the probate of the will of Alexia Halvorsen Petridge, deceased, to which H. B. Petridge, filed objections. From an order admitting the will to probate and appointing Kolderup administrator with the will annexed, Petridge appeals. Reversed and remanded.

Fred H. Peterson and H. C. Force, for appellant. S. S. Langland, for respondent.

CROW, J. On April 27, 1903, Alexia Caroline Halvorsen, a single woman, residing in Seattle, executed her last will and testament, devising her entire estate to her brother, Emil Nelson, of Bordeaux, France. On October 11, 1905, she married H. B. Petridge, whom she did not know at the date of the will. They lived together as husband and wife until December 27, 1906, when she died

without issue. H. B. Petridge filed in the probate department of the superior court in and for King county a petition for his appointment as administrator, alleging that the will above mentioned had been revoked by subsequent marriage of the testatrix. T. H. Kolderup, on behalf of Emil Nelson, also filed a petition for the probate of the will and his appointment as administrator cum testamento annexo; the will having named no executor. From an order admitting the will to probate and appointing T. H. Kolderup administrator cum testamento annexo, H. B. Petridge has appealed.

The only question on this appeal is whether the will of Alexia Caroline Halvorsen was revoked by her marriage. At common law the subsequent marriage of a feme sole revoked her will, for by such marriage she was deprived of testamentary capacity, her will ceased to be ambulatory in its nature, and was therefore void. Subsequent marriage of a man did not revoke his will, for the common law made sufficient provision for his wife by her right of dower. But a subsequent marriage and birth of a child, taken together, revoked his will. 2 Greenleaf on Evidence, § 684; 4 Kent's Commentaries, §§ 521-527. The first Legislature of Washington Territory (Sess. Laws 1854, p. 312; Abbott's Real Property Statutes, 381) passed an act relating to wills which contained the following sections:

"Section 1. Be it enacted by the Legislature of Washington Territory, that every person of twenty-one years of age and upwards, of sound mind, may by last will devise all his estate, real and personal, saving to the widow her dower."

"Sec. 3. A married woman may by will dispose of any real estate held in her own right, subject to any rights which her husband may have as tenant by curtesy."

"Sec. 7. If, after making a will disposing of the whole estate of the testator, such testator shall marry and die, leaving issue by such marriage living at the time of his death, or shall leave issue of such marriage born to him after his death, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, and no evidence shall be received to rebut the presumption of such revocation.

"Sec. 8. A will made by an unmarried woman shall be deemed revoked by her subsequent marriage."

The enactment of the above sections 7 and 8 was an adoption of common-law principles by our first territorial Legislature. This statute was continued without change until the territorial Legislature passed an entirely new probate act (Abbott's Real Property Statutes, 385; Sess. Laws 1859-60, p. 165), chapter 2 of which related to wills. In this chapter, sections 3 and 8 of the act of 1854 were continued without change, while sections 1 and

7 were respectively succeeded by the following:

"Sec. 18. Every person who shall have attained the age of majority, of sound mind, may, by last will, devise all his estate, real and personal. This section shall not be construed as depriving a widow of her dower, nor a husband of his interest as tenant by the curtesy."

"Sec. 23. If, after making any will, the testator shall marry, and the wife shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for her by marriage contract, or unless she shall be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation, shall be received."

The acts of 1854 and 1860 both preserved to the widow and the husband, respectively, the common-law estates of dower and tenancy by the curtesy, which have since been abolished and no longer exist in this state. In Sess. Laws 1873, p. 252 (Abbott's Real Property Statutes 390), the territorial Legislature again enacted a probate practice act, of which chapter 3 (sections 22 to 43, inclusive) related to Wills. These sections, which were incorporated in the Code of 1881 without change, are now sections 4594 to 4615, Ballinger's Ann. Codes & St., and sections 2340 to 2361, Pierce's Code. Section 8 of the act of 1854, providing that subsequent marriage should revoke the previous will of an unmarried woman, was omitted from this act of 1873, while section 23 of the act of 1860 was re-enacted as section 26 (section 4598, Ballinger's Ann. Codes & St.; section 2344, Pierce's Code), with the exception that the words "marriage settlement" were substituted for the words "marriage contract." The chapter of the act of 1873 relating to wills also contained an entirely new section, numbered 43, being section 4615, Ballinger's Ann. Codes & St., and section 2361, Pierce's Code, reading as follows: "Sec. 43. Words in this chapter contained, or in this act which impart the singular number only, may also be applied to the plural of persons and things, and words imparting the masculine gender only may be extended to females also when such construction shall be necessary." Section 4597, Ballinger's Ann. Codes & St. (section 2343, Pierce's Code), relative to the revocation of wills, is to be found in all three of the territorial laws above mentioned, except that the words "testatrix" and "her" appeared first in 1873.

The respondent contends that the omission of original section 8 of the act of 1854 from the act of 1873 shows a legislative intent that the will of an unmarried woman should not thereafter be revoked in the event of her subsequent marriage. There might be some merit in this contention but for the fact that, at the identical time section 8 was

omitted, section 43 (section 4615, Ballinger's Ann. Codes & St.; section 2361, Pierce's Code) was first enacted. The appellant insists that, applying the rule of construction therein announced to section 4598, Ballinger's Ann. Codes & St. (section 2344, Pierce's Code), the latter should be construed under the facts of this case to read as follows: "If, after making any will, the testatrix shall marry and the husband shall be living at the time of the death of the testatrix, such will shall be deemed revoked, unless he be provided for in the will, or in some way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation shall be received." Having due regard to the language used in the two sections now being construed, and also considering the history of our legislation on wills, property rights of husband and wife, and the descent of realty and personalty, we hold that the construction urged by appellant is necessary and should be adopted. Endlich on Interpretation of Statutes, § 182. The acts of 1854 and 1860 relating to wills both protected the common-law estates of dower and tenancy by the curtesy from destruction by the will of either the husband or wife. The first Legislature (Sess. Laws 1854, pp. 305, 308), in chapters 11 and 12 of an act relating to executors, administrators, and the distribution of real and personal property, enacted a law of descents; chapter 11 making no provision for the inheritance of real property by the husband from the wife or by the wife from the husband, although chapter 12 did provide for such distribution of personalty under certain conditions. Section 242 of chapter 11 (page 308), however, reads as follows: "Nothing contained in this act shall effect the title of a husband as tenant by curtesy, nor that of a widow as tenant in dower." In 1860 the first separate and community property law defining the rights of married persons was enacted. Sess. Laws 1860, p. 318; Abbott's Real Property Statutes, 471. This statute was materially amended in 1871 (Sess. Laws 1871, p. 67; Abbott's Real Property Statutes, 474), but was re-enacted in 1873 (Sess. Laws 1873, p. 450).

It is evident from the separate and community property law, originally passed in 1860 and re-enacted in 1873, and the probate practice act of 1873, that the trend of legislation was a departure from the common-law principles, with a tendency towards an equalization of the property rights of husband and wife. An examination of the probate act and other statutes of 1873, however, discloses that no change in the law of descents was then made. The original act of 1854 relating to descents, with some immaterial amendments, was permitted to continue, doubtless by reason of legislative oversight or inadvertence. At the succeeding 1875 session, however (Laws 1875, p. 53), the Legislature passed an act to regulate the de-

scent of real estate and the distribution of personal property. This act for the first time provided for inheritance of realty by the husband and wife the one from the other, making no mention of the estates of dower or tenancy by the curtesy. This legislation discloses an evident intention to harmonize the statute relating to wills and the law of descents with existing property rights under the separate and community property act then in force. Later amendments to the law of descents and the law of separate and community property, perfecting such harmony, have resulted in our present statutes on these subjects. The entire trend of legislation since 1869 has been a departure from common-law rules, with the evident intention of placing the husband and wife as nearly as possible upon an equality the one with the other, not only in their property rights, but also in their testamentary capacity and their rights of inheritance; the only exception as to their property rights now being that the husband has the management and control of all of community property and the right to alienate community personalty. This exception, however, is necessary to enable him, as head of the family, to engage in business and trade for the benefit of the community of which he is a member. Although these various laws have been at times crude, incomplete and somewhat inconsistent, the ultimate purpose of the successive Legislatures has been to secure harmony and equality. While applying proper methods of interpretation, our laws should be construed, if possible, to promote this harmony. The construction of sections 4598 and 4615, Ballinger's Ann. Codes & St., urged by appellant, accomplishes this result without violence to any correct method of interpretation, while the construction asked by respondent would have the opposite effect. Many unfortunate conditions might result, were the contention of the respondent sustained. For instance, an unmarried woman could by will devise her entire estate. She might then marry, and, although she and her husband might thereafter accumulate a large community estate, her previous will, if not revoked, would, in the event of her death without issue, pass one-half of such community estate to her legatees. On the other hand, a husband's will being revoked by subsequent marriage, the entire community estate, in the event of his death without issue, would pass to his widow. Again, if a single woman devised her separate estate, and afterwards married, her will not being thereby revoked, her entire separate estate would, in the event of her death, pass to her legatees, while in the case of her husband, his will being revoked by subsequent marriage, one-half, or at least one-third, of his separate estate would, in the event of his death, descend to his widow by inheritance. These illustrations and others that might be suggested show that the construction for which the respondent contends does not pre-

serve that harmony and equality in our laws pertaining to wills, property rights, and descent intended by our Legislatures.

Testamentary incapacity in a married woman being the basis of the common-law rule revoking her will executed while a feme sole, various courts hold that when such testamentary incapacity has been removed by statute the reason of the rule ceases, and that the rule itself therefore ceases to exist. *Kelly v. Stevenson*, 85 Minn. 247, 88 N. W. 739, 56 L. R. A. 754, 89 Am. St. Rep. 545; *Emery*, Appellant, 81 Me. 275, 17 Atl. 68; *Will of Ward*, 70 Wis. 251, 35 N. W. 731, 5 Am. St. Rep. 174; *Roane v. Hollingshead*, 70 Md. 369, 25 Atl. 307, 17 L. R. A. 592, 35 Am. St. Rep. 438; *Morton v. Onion*, 45 Vt. 145; *Fellows v. Allen*, 60 N. H. 439, 49 Am. Rep. 328; *In re Tuller*, 79 Ill. 99, 22 Am. Rep. 164. The respondent has cited some of the cases mentioned above, and urges their application here. We do not regard them as pertinent under our present statutes, which make the husband and wife heirs one to the other. *In re Tuller's Will*, 79 Ill. 99, 22 Am. Rep. 164, is one of the cases cited by respondent; but the Supreme Court of Illinois, in *Tyler v. Tyler*, 19 Ill. 151, 155, says: "We hold that marriage, under our statute making the wife heir to the husband and the husband heir to the wife, where there is no child or descendant of a child, is, in the absence of facts showing an intention to die testate arising subsequent to the marriage, a revocation of a will of the husband, made prior to the marriage, disposing of his entire estate without making provision in contemplation of the relations arising out of it." The doctrine of this case is not only recognized in the *Tuller Will Case*, *supra*, but it has been frequently followed by the Illinois court, although at common law subsequent marriage and birth of a child, taken together, were required to revoke the will of an unmarried man. *American Board of Foreign Missions v. Nelson*, 72 Ill. 564; *Dur-yea v. Dur-yea*, 85 Ill. 41; *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552; *Hudnall v. Ham*, 172 Ill. 76, 49 N. E. 985. In harmony with these Illinois cases is *In re Teopfer*, 67 L. R. A. 315, 12 N. M. 372, 78 Pac. 53, in which the Supreme Court of New Mexico, under a statute making the husband and wife heirs to each other, applied the same rule to a will executed by a single woman who afterwards married and died without issue. See, also, *Durfee v. Risch*, 5 L. R. A. (N. S.) 1084, 142 Mich. 504, 105 N. W. 1114; *Brown v. Scherrer*, 38 Pac. 427, 5 Colo. App. 253; *Scherrer v. Brown*, 42 Pac. 668, 21 Colo. 481. Our construction of sections 4598 and 4615, Ballinger's Ann. Codes & St., we regard as being in complete harmony with former decisions of this court on kindred questions. *In re Murphy's Estate*, 30 Wash. 10, 70 Pac. 109; *In re Fease's Estate*, 30 Wash. 51, 70 Pac. 270. See, also, *Durfee v. Risch*, *supra*; *Ellis v. Darden*, 11 L.

R. A. 51, 86 Ga. 198, 12 S. E. 350; Owens v. Haines, 48 Atl. 859, 199 Pa. 137; Smith v. Allen, 31 Ark. 268.

Respondent contends that the word "necessary," found in section 4015, Ballinger's Ann. Codes & St., forbids the construction adopted by us, as no necessity for any such interpretation exists. There has been considerable discussion in the briefs of the correct definition of the word "necessary," as here used. Such discussion is immaterial, as a necessity for our interpretation does exist, to enforce evident legislative intent and to preserve the harmony of our laws pertaining to wills, property rights, and descents.

The honorable trial court erred in admitting the alleged will to probate and in appointing T. H. Kolderup administrator cum testamento annexo. The judgment is reversed, and the cause remanded, with instructions to enter an order refusing to probate the will, and also an order appointing the appellant administrator of the estate of his deceased wife.

HADLEY, C. J., and FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

STATE ex rel. SKAMANIA BOOM CO. v. SUPERIOR COURT FOR SKAMANIA COUNTY et al.

(Supreme Court of Washington. Sept. 13, 1907.)

1. EMINENT DOMAIN—NECESSITY—EVIDENCE.

Evidence in proceedings by a railroad to condemn a right of way across land of a boom company held sufficient to sustain a finding of reasonable necessity therefor, authorizing condemnation for one public service of land devoted to another public service.

2. SAME.

On the question of reasonable necessity for condemning a right of way for a railroad across the property of another public service corporation, the comparative expense of constructing and maintaining the road there and elsewhere may be considered, with the other circumstances.

3. SAME—PRIOR ATTEMPT TO AGREE ON COMPENSATION—NECESSITY.

Ballinger's Ann. Codes & St. § 4335, contemplating that, when a railroad company seeks to condemn a way for a crossing over the tracks of another railroad company, an effort to agree on the compensation shall first be made, does not apply in the case of a railroad seeking to condemn a right of way over the property of a boom company, another public service company.

4. SAME.

Even if Ballinger's Ann. Codes & St. § 4335, providing for prior effort to agree on compensation where a railroad company seeks to condemn a way over the tracks of another railroad company, applies in case of a railroad seeking to condemn a right of way over the lands of a boom company, another public service corporation, the effort need not be made where it will be fruitless, because the boom company wholly denies the right or power to condemn.

Writ of review, on the relation of the Skamania Boom Company, against the superior court for Skamania county and the judge and clerk thereof, to review condemnation proceedings. Judgment affirmed.

George S. Shepherd and Helmus W. Thompson, for relator. James B. Kerr, A. L. Miller, and L. C. Gilman, for respondents.

HADLEY, C. J. A writ of review was issued by this court for the purpose of reviewing the action of the superior court of Skamania county in certain condemnation proceedings. The action in the trial court was initiated by the petition of the Portland & Seattle Railway Company against the Skamania Boom Company and others. The said petitioner and also said boom company are corporations organized under the laws of this state, the former for railway purposes and the latter for booming purposes. The petitioner has surveyed and located a line of railroad and is now engaged in the construction thereof down the north bank of the Columbia river from a point at or near Kennewick, Wash., to Vancouver, Wash., and thence across said river to Portland, Or., which railroad it proposes to build and operate as a common carrier of freight and passengers. It claims that for the purposes of the construction and operation of said railroad it is necessary to condemn and appropriate for its use as a right of way a certain strip of land 200 feet in width, being 100 feet on each side of the center line of the railroad as now located across a tract of land owned by the said boom company. A preliminary hearing was had, and the court found that it is necessary for the petitioner to condemn and appropriate said strip of land for its use as a right of way, that the contemplated use is a public use, and that the public interest requires the appropriation of the land for said railway purposes. It was ordered that a jury should be impaneled for the purpose of ascertaining the damages resulting from such appropriation. The boom company thereupon filed its petition here as relator, and asked the writ of review. Meanwhile the trial of the question of damages has been suspended.

The situation is substantially as follows: The relator owns a tract of land containing about 38 acres, lying upon the east bank of Wind river and a short distance to the north of the confluence of said stream with the Columbia river. The relator's plat or survey as a boom company, filed in the office of the Secretary of State of the state of Washington, and which shows so much of the shore line of the waters of Wind river and lands contiguous thereto as are proposed to be appropriated by said boom company as necessary for its purposes, embraces the said tract. The location of the railway line is about the center of this tract, considered from the north to the south, and crosses the tract in an easterly and westerly direction, leaving practically equal parts of the tract to the north and south of the right of way strip sought to be appropriated. The relator claims that it needs this entire tract as a holding ground for logs in times of high

water, that when the waters of the Columbia are high the logs cannot be handled at the mouth of Wind river, and that the waters are forced up Wind river, which overflows the tract in question, forming a holding ground for the logs. The testimony shows that during a period of eight successive years the relator has actually used the ground twice in connection with handling logs. Each time the period of such use covered a few weeks by reason of the fact that the land was covered by water. So far as the evidence shows the land at all other times during the eight years has either been entirely uncovered by water or has not been under sufficient water to be used for logging purposes. It further appears that at the two times named the use that was made of the ground was for bralling or sorting logs. Under such circumstances the relator claims that the tract in question has been devoted to a public use; that the relator is a public service corporation, having previously devoted the land to a public purpose; and that the railway company cannot condemn it for another public purpose.

Assuming, without deciding, that the facts in evidence are sufficient to show that the tract had been actually appropriated by the boom company for a public use, still the strip sought to be taken by the railway company constitutes but a small part of the entire tract said to be devoted to the public purpose. The case is therefore not that of one public service corporation seeking to deprive another such corporation of its entire means of operation at a given location. Both to the north and south of the strip sought to be condemned is room remaining. In whatever manner the railway may be built across the tract, whether upon unfilled trestle work or with a filled embankment, the bed of Wind river must in any event remain open and unobstructed, through which the back water may flow, and then overflow the tract upon both sides of the railroad. Within the principles discussed in *Samish River Boom Company v. Union Boom Company*, 32 Wash. 586, 73 Pac. 670, the power exists for one public service corporation to condemn property held by another. Such power may not be exercised arbitrarily or indiscriminately, so as merely to take property away from one corporation and give it to another. It cannot be taken to be used for the same purpose, in the same manner; but, where there is a necessity for devoting it to some other public service, it may be condemned. As to the degree of necessity which must exist, there is difference of opinion. Some courts have held that the necessity must be an absolute one, but the weight of opinion is that it must be a reasonable necessity. *Lewis on Eminent Domain* (2d Ed.) § 276. The same section says: "But we should say that there was a reasonable necessity for the taking where the public interests would be better subserved thereby, or where the advantages

to the condemnor will largely exceed the disadvantages to the condemnee." To the same effect the relations of a condemning corporation to the property of another arising from reasonable public necessity, were discussed by this court in *State ex rel. Portland & Seattle Railway Company v. Superior Court*, 88 Pac. 201.

It being established that the power to condemn exists in favor of the railway company as against the relator if a necessity exists, we must next inquire if a reasonable necessity does exist. The trial court found that it does, and we think the evidence sustains the finding. The relator contends that a line which it proposes to the south of its tract of land would be a practicable route, and that by its adoption the appropriation of any portion of relator's tract would be avoided. The evidence does not show that it would be impossible to construct and maintain upon the proposed line, but it does show that the water line of the Columbia river extends a long distance beyond the proposed location, and from a profile shown on the map filed it appears that the track would have to be supported by a high fill or trestle. It is the relator's own contention that the current of the river at this point is such that in times of high water it cannot handle its logs there, and hence it claims the necessity for the ground sought to be condemned, in order that it may hold its logs upon it at such times. The relator's own argument shows that its proposed route for the railway would require the construction and maintenance of the line within this same current, making it necessary to operate freight and passenger trains upon some kind of structure that must resist the force of the current. The safety of the lives of passengers and the careful transportation of freight constitute great public necessity, and the public cannot reasonably be subjected to the hazards attending the proposed location, when they may be avoided by the use of a strip of relator's land. It also appears that the construction and maintenance upon the proposed route would be very expensive. While this may not of itself be a sufficient reason for taking relator's property, unless it amounts to a practical prohibition, yet, when it is considered in connection with the other elements mentioned, the comparative expense is not an improper matter for consideration in determining as a whole the reasonableness of the appropriation. All the circumstances, taken together, tested by the standards above mentioned, show a reasonable necessity for the appropriation.

It is also urged that the court erred in giving judgment for condemnation, for the reason that it was not shown that any effort was made to agree with the relator upon the amount of compensation prior to instituting the condemnation proceeding. By reference to section 4334, 1 Ballinger's Ann. Codes & St., it will be seen that the extent of the

right of appropriation in general on the part of a railway company is there stated, and it is not made a condition precedent to the bringing of condemnation proceedings that a prior attempt to agree upon compensation shall be made. Section 4335 does contemplate that, when one railway company seeks to condemn a way for a crossing over the tracks of another railway company, an effort to agree upon the compensation shall first be made. Relator argues that, by analogy, that section should apply here, for the reason that this is the case of a railway company seeking to condemn a crossing over the property of another public service corporation. The statute in its terms is confined to the case of two railway companies, and we are not authorized to extend its operation to other cases. In any event, even if it were construed as relator contends, this record shows that the relator wholly denies the right or power to condemn at all in this instance, and an effort to agree upon damages under such circumstances would have been fruitless. The case is therefore analogous to the absence of a tender of performance of an obligation when the facts show that a tender would have been fruitless. In such a case the tender may be excused. Under either view of the statute, relator is not entitled to urge this point.

The judgment as to the necessity for appropriation is affirmed, and the order of this court suspending further proceedings is hereby vacated.

RUDKIN, CROW, and MOUNT, JJ., concur.

STATE ex rel. LA FURGEY v. SUPERIOR COURT OF MASON COUNTY et al.

(Supreme Court of Washington. Sept. 9, 1907.)

PROHIBITION—OTHER ADEQUATE REMEDY.

Prohibition will not lie to prevent trial of a cause, though the trial court is without jurisdiction because of its erroneous denial of a change of venue; there being an adequate remedy by appeal, notwithstanding the delay and expense incident thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, § 5.]

Prohibition, on the relation of Glideon A. La Furgey, against the superior court of Mason county and the judge thereof. Writ denied.

Carr & Soderberg, for plaintiff. Frank D. Nash, for respondents.

HADLEY, C. J. Original application was made to this court for a writ of prohibition, directed to the superior court of Mason county. The application shows that in a certain cause now pending in said court the relator is defendant, and that an order granting a temporary injunction against him was entered therein; that the action is one for the cancellation of a contract and for an

accounting between the parties; that it is a transitory and not a local action, and is properly triable in Pierce county, where the relator herein, who is sole defendant in that action, resides; that within the time prescribed by law the relator, as defendant in said action, served and filed his demurrer to the complaint in the cause; that with the demurrer he also served and filed an affidavit of merits, showing the place of his residence as aforesaid, and demanding in writing that the cause be forthwith transferred to Pierce county for trial; that the demand was denied, and thereafter an answer was filed, and the temporary injunction aforesaid was issued; that thereafter, over the objection of relator, the court assigned the cause for trial in Mason county on the 11th day of September, 1907, and that, unless prohibited by this court, the trial court will proceed to try the cause at said time; that the said court is without jurisdiction of the relator and of the subject-matter. It is also shown that an appeal from the order granting the temporary injunction is now pending in this court.

Relator's contention is that the trial court of Mason county is without jurisdiction, for the reason that the action is transitory and has been commenced in the wrong county—that is to say, in a county where the sole defendant does not reside; timely objection to the jurisdiction having been made, and not subsequently waived. He therefore contends that, by reason of the absence of jurisdiction, this court should now prohibit the trial court from proceeding with the trial. The later decisions of this court are against relator's contention. In *State ex rel. Miller v. Superior Court*, 40 Wash. 555, 82 Pac. 877, 2 L. R. A. (N. S.) 395, 111 Am. St. Rep. 925, it was held that prohibition does not lie to prevent the trial court from proceeding to try a cause, even if the court is without jurisdiction by reason of the erroneous denial of an application for a change of venue, for the reason that there is an adequate remedy by appeal, which is the test to be applied upon all applications for extraordinary writs. It was also held that the delay and expense incident to an appeal do not affect the adequacy of the remedy. See, also, *State ex rel. Port Orchard Investment Co. v. Superior Court*, 31 Wash. 410, 71 Pac. 1100. Relator therefore has his remedy by appeal, and under the above decisions such remedy cannot be held to be inadequate. Moreover, he has already appealed, and by stipulation the briefs in the appeal are submitted for our consideration in the cause now before us. From those we are advised that the lack of jurisdiction to issue the temporary injunction is the chief ground of the appeal. Relator is entitled to one submission of that question here, and no more. The law has provided that it may be done by appeal, and he must be restricted to that remedy, since it is not inadequate to afford him relief. The fact

that the remedy by appeal may subject him to inconvenience and expense does not destroy its effectiveness to ultimately reach any unauthorized action the trial court may take.

The writ of prohibition is denied.

RUDKIN, CROW, and MOUNT, JJ., concur.

STATE ex rel. MARTIN v. HINKLE, Police Justice.

(Supreme Court of Washington. Sept. 11, 1907.

PROHIBITION—EXISTENCE OF OTHER REMEDY.

Prohibition will not lie to restrain a court from proceeding with a trial for violation of a city ordinance; the only question being whether the city, in the absence of special authority, had power to make an act an offense when it was such under a statute of the state, and there being an adequate remedy in the ordinary course of law, either by appeal from an adverse judgment or by habeas corpus.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, §§ 4, 5.]

Appeal from Superior Court, Spokane County: Henry L. Kennan, Judge.

Prohibition, on the relation of Fred Martin, against J. D. Hinkle, police justice of the city of Spokane. Writ denied, and relator appeals. Affirmed.

Happy & Hindman and Sullivan, Nuzum & Nuzum, for appellant. J. M. Geraghty, Lester P. Edge, and J. D. Campbell, for respondent.

PER CURIAM. The appellant was complained against in the police court of the

city of Spokane for keeping his place on business open on Sunday in violation of a city ordinance. Upon being arrested and brought before the police justice for trial, he applied to the superior court of Spokane county for a writ of prohibition to restrain the police justice from further proceeding with the trial of the cause. From an order denying the writ, the present appeal is prosecuted.

The only question presented by the appeal is thus stated in the appellant's brief: "Had the municipal corporation of Spokane authority and power to pass an ordinance which denounces an act to be an offense or crime, when the same act is also made an offense under the general statutes of the state, in the absence of a statute granting to the municipality the specific power to do so?" Manifestly questions of this kind cannot be determined on an application for a writ of prohibition. Such writs will only issue to arrest the proceedings of a tribunal, corporation, board, or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person, and where there is no plain, speedy, and adequate remedy in the ordinary course of law. Ballinger's Ann. Codes & St. §§ 5769, 5770; State ex rel. Miller v. Superior Court, 40 Wash. 555, 82 Pac. 877, 2 L. R. A. (N. S.) 395, 111 Am. St. Rep. 925, and cases cited. In this case the appellant had an adequate remedy in the ordinary course of law, either by appeal from an adverse judgment or by application for a writ of habeas corpus.

The application for the writ was properly denied, and the judgment is therefore affirmed.

BENEKE et al. v. BENEKE et al.

(Supreme Court of Washington. Sept. 18, 1907.)

1. HUSBAND AND WIFE—PROPERTY PURCHASED IN PART WITH COMMUNITY FUNDS.

Property purchased in part with community funds is community property to the extent and in the proportion that the consideration is furnished by the community.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 901.]

2. SAME.

That the community advanced money to compromise or procure the release of a disputed claim against the separate property of one of the spouses does not convert the same or any definite portion thereof into community property.

Appeal from Superior Court, Spokane County; Miles Poindexter, Judge.

Action by Anna W. Beneke, personally and as administratrix of the community property of Henry Beneke, deceased, and Anna W. Beneke, his wife, against Henry J. Beneke, as alleged executor of the estate of Henry Beneke, deceased, and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

See 89 Pac. 150.

W. D. Scott and H. M. Stephens, for appellants. Danson & Williams and Fred H. Moore, for respondents.

RUDKIN, J. In the month of August, 1895, Mary Zander Beneke died intestate in Spokane county. At the time of her death she and her husband, Henry Beneke, were possessed of the real property now in controversy, together with other property in Spokane county, all of which was either the separate property of the husband or the community property of the husband and wife. Soon after the death of the wife a dispute arose between the surviving husband and the four children of the marriage over the distribution of the estate; the surviving husband claiming the whole as his sole and separate property, and the children claiming an undivided one-half interest therein as community property and as heirs at law of their deceased mother. An action was thereupon commenced by the surviving husband in the superior court of Spokane county against the heirs of the deceased wife to establish title in himself. During the pendency of this action, and on the 19th day of May, 1897, said Henry Beneke and the plaintiff Anna W. Beneke intermarried and maintained the relation of husband and wife thereafter until the death of the husband on July 29, 1905. Soon after this marriage Henry Beneke and his children entered into an agreement or stipulation, reciting that Henry Beneke claimed all the real estate in process of administration as his sole and separate property, that the children claimed a one-half interest therein as community property, and that they deemed it for their best interests to settle their conflicting claims and to have the estate distributed without further delay or expense; and it was thereupon

agreed that the father should pay the sum of \$1,000 to each of the four children, and that upon the distribution of the estate certain described property should be awarded and decreed to each child. A decree of distribution was entered in pursuance of this agreement or stipulation, and the property now in controversy, subject to a mortgage of \$1,300, together with certain other property, was awarded to Henry Beneke. Upon the entry of the decree of distribution Henry Beneke and the plaintiff herein executed their promissory note in the sum of \$5,300 to pay each of the four children the sum of \$1,000 as agreed, and to take up the \$1,300 mortgage already on the property; and the land in controversy was mortgaged to secure the payment of the note. The note was afterwards paid, in part out of the separate funds of the plaintiff and in part out of the community funds of Henry Beneke and the plaintiff, according to the allegations of the complaint. Henry Beneke died testate in Spokane county on the 29th day of July, 1905, having by will disposed of the property in controversy to certain of his children. This action was thereupon prosecuted in the name of the surviving wife, as administratrix of the community property of herself and her deceased husband, against the executor of the will and the devisees named therein, to recover possession of the property as a part of the community estate. If community property, her right to recover should probably prevail; but, if not, it is manifest that her complaint should be dismissed. The court below gave judgment in favor of the defendants, and the plaintiffs appeal.

If we concede that the property in dispute was the community property of Henry Beneke and his first wife, we do not understand by what process it was converted into the community property of Beneke and his second wife. In any view of the case, Henry Beneke had an undivided one-half interest in the property as surviving husband, and, if it be conceded that he and the appellant purchased the undivided one-half interest belonging to the children, this would not convert the whole into community property. The utmost that can be said in favor of the appellant is that the community would have an interest in the property, in the proportion that the funds advanced by the community bore to the entire purchase price, under the decision of this court in *Heinz v. Brown*, 90 Pac. 211. But what would that interest be? The children were paid in part for their interest by the conveyance or distribution of property in which Henry Beneke confessedly had a one-half interest, and in which the appellant had none. One thousand three hundred dollars of the money went to satisfy an existing mortgage, and the remainder went to satisfy the claims of the heirs in part. What proportion this sum bore to the entire amount received by the heirs is uncertain and incapable of ascertainment; and

when we consider that the money was paid for the release of a disputed claim, which was very doubtful at best, the uncertainty is still further increased. If the community advances money to compromise or procure the release of a disputed claim against the separate property of one of the spouses, in the nature of things this cannot convert the whole or any definite portion into community property. If the appellant has any claim, it is in the nature of a claim against the separate estate of Henry Beneke for moneys advanced by the community, such as she is prosecuting in the action instituted after the dismissal of the present action in the court below. In view of the conclusion we have reached on the merits, we express no opinion on the motion to dismiss the appeal.

There is no error in the record, and the judgment is affirmed.

HADLEY, C. J., and CROW, FULLERTON, and MOUNT, JJ., concur.

CITY OF SEATTLE v. FOSTER.

(Supreme Court of Washington. Sept. 17, 1907.)

STATUTES—REPEAL—IMPLIED REPEAL.

Under the rule that repeals by implication are not favored, Laws 1899, p. 222, c. 121, § 15, requiring a pharmacist to enter in a book sales of intoxicating liquors, and providing that no liquors shall be sold except for medical, etc., purposes, which is a part of the statute relating to the practice of pharmacy, does not impliedly repeal Laws 1887-88, p. 125, c. 72, § 6 (Ballinger's Ann. Codes & St. § 2937), authorizing a pharmacist to sell intoxicating liquors without a license only on the prescription of a physician, which is a part of the chapter relating to intoxicating liquors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 229.

Appeal from Superior Court, King County; A. W. Frater, Judge.

C. Foster was convicted of selling intoxicating liquors without a license, in violation of an ordinance of the city of Seattle, and he appeals. Affirmed.

Morris, Southard & Shipley, for appellant. Ellis De Bruler, for respondent.

RUDKIN, J. The appellant, Foster, was convicted of the crime of selling intoxicating liquors without a license, in violation of an ordinance of the city of Seattle; and from the judgment of conviction the present appeal is prosecuted.

The case was submitted to the court below upon an agreed statement of facts, the material parts of which are as follows: The appellant conducted a pharmacy in the city of Seattle for the compounding, dispensing, and sale of drugs, medicines, poisons, wines, and malt and spirituous liquors, under the pharmacy laws of the state. On the 20th day of September, 1906, he sold to Mrs. John Kelly two bottles of malt liquor; the purchaser stating at the time of purchase that she pur-

chased the same for medical purposes. At the time of the sale the appellant kept in his place of business a registry book, in which he entered the name of the purchaser, the quantity purchased, the date, and for what purpose used, as required by section 15 of the pharmacy act of 1899 (Laws 1899, p. 222, c. 121); but such sale was not made on the written prescription of a reputable physician, as provided by section 6 of the act of February 2, 1888 (Laws 1887-88, p. 125, c. 72; Ballinger's Ann. Codes & St. § 2937), and by the ordinance of the city of Seattle, nor did the appellant have a license from the city for the sale and disposal of malt liquors. On these facts the appellant contends that the provisions of the act of February, 1888, and of the ordinance of the city of Seattle, which only authorize druggists and pharmacists to dispense spirituous, fermented, and malt and other intoxicating liquors without a license, when done in good faith upon the written prescription of a reputable physician, were superseded by the pharmacy act of 1899, supra, and that since the passage of the latter act druggists and pharmacists may sell intoxicating liquors without a license, by merely keeping and making the proper entries in the registry book above referred to.

With such a contention we are unable to agree. While the pharmacy act of 1899 provides that sale of wines and spirituous and malt liquors may be made by pharmacists and druggists for medical, scientific, mechanical, and sacramental purposes without a license, it does not in terms or by implication dispense with the necessity for a physician's prescription or certificate when the liquors are sold to be used for medical purposes. The well-established rule that repeals by implication are not favored in law has a peculiar application here, for the two acts under consideration relate to widely different subjects—the former, to the sale and disposal of intoxicating liquors; the latter, to the conduct of the drug business. We are firmly convinced that the Legislature did not intend to permit a drug store to become a grogshop by merely keeping a formal record of its sales, and such would be the ultimate effect of upholding the contention of the appellant.

There is no error in the record, and the judgment is affirmed.

HADLEY, C. J., and CROW, MOUNT, and FULLERTON, JJ., concur.

BALLARD et al. v. SLYFIELD et al. (Supreme Court of Washington. Sept. 18, 1907.) HUSBAND AND WIFE—COMMUNITY PROPERTY— PRESUMPTION.

Property acquired by purchase during marriage is presumed to be community property, and the burden rests on the spouse asserting its separate character to establish his or her claim by clear and satisfactory proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 913, 914.]

2. SAME—EVIDENCE—SUFFICIENCY.

Evidence held to show that certain property was the separate property of the wife, and not community property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 916.]

Appeal from Superior Court, King County; George E. Morris, Judge.

Action by Irving M. Ballard and others against Sarah Slyfield and others to quiet title and recover rents and profits. Judgment for defendants, and plaintiffs appeal. Affirmed.

F. A. Gilman, for appellants. Harold Preston, for respondents.

RUDKIN, J. Irving Ballard and Lucinda M. Ballard intermarried on the 20th day of December, 1870, and continued to reside together as husband and wife until the death of the husband in the city of Seattle on December 30, 1880. On the 15th day of April, 1875, Edward A. Thorndyke and wife conveyed the property now in controversy to Lucinda M. Ballard, the wife of Irving Ballard. The present action was instituted on the 30th day of January, 1906, by the heirs at law of Irving Ballard, deceased, against the grantees of Lucinda M. Ballard, to quiet title to an undivided one-half interest in the property and to recover the rents and profits for the six years next preceding the commencement of the action. The defendants had judgment below, and the plaintiffs appeal.

The court found, among other things: "That the consideration of said conveyance was the sum of \$900 then and there paid to the grantors therein by the said Irving and Lucinda M. Ballard. That said sum of \$900 was made up, either wholly or in large part, of money which was then and there the separate property of the said Lucinda M. Ballard, and which she had previously received as an inheritance from the estate of her maternal grandfather; and the remainder, if any, of said sum, was paid out of the community funds of the said Irving and Lucinda M. Ballard. That at the time of said conveyance it was the intention of both the said Irving Ballard and the said Lucinda M. Ballard, then expressed, that the conveyance should operate to vest the title to said property in the said Lucinda M. Ballard as her sole and separate estate, and, if any part of the purchase price therefor was paid out of community funds, it was then and there the intention of the said Irving Ballard to make a gift thereof to his said wife, and to make a gift to her of said property so far as any part of the consideration therefor may have been contributed out of the community funds, and the deed was made to run to the said Lucinda M. Ballard by the express direction, at the time, of the said Irving Ballard, and said conveyance then and there operated to vest the title to said property in the said Lucinda M. Ballard as her sole and separate

estate, and the title to said property remained thereafter unchanged until the conveyance thereafter to the defendant Sarah Slyfield, hereinafter referred to; and thereafter, during his lifetime, the said Irving Ballard regarded, considered, and declared said property to be the separate property of his said wife, and at the time of the death of the said Irving Ballard he had no right, title, or interest in or to, or made any claim to, said property, or any part thereof, so that, upon his death, no interest therein passed to the plaintiffs, or either of them, nor have the plaintiffs, or either of them, ever had any interest therein." This finding, of course, supports the judgment of dismissal; but the appellants earnestly insist that it is not supported by the testimony.

The law governing this class of cases is well settled in all the community property states. Property acquired by purchase during the marriage is presumed to be community property, and the burden rests upon the spouse asserting its separate character to establish his or her claim by clear and satisfactory proof. The difficulties of obtaining proof under the circumstances disclosed by this record are apparent. The property was acquired 30 years before the adverse claim was asserted. One of the parties to the transaction is dead, and the other is an adverse witness. The testimony of the surviving wife is of little importance, consisting largely, as it does, of a disclaimer of knowledge or recollection of either law or facts. But, in so far as it may tend to support the claim of the appellants, it is utterly inconsistent with the acts and conduct of the witness covering the period of 25 years since her husband's death. Soon after his decease she filed a petition for letters of administration on his estate, purporting to contain a list or statement of all his property; but no mention was made of the property in dispute. The same is true of the verified inventory filed. She twice mortgaged the property for her own benefit, and finally conveyed it by warranty deed, receiving the full consideration therefor. The conduct of the appellants was equally inconsistent. No claim against the property was asserted by any or either of them until 6 years after the property had passed into the hands of strangers. At the time of the assertion of this claim the eldest child was 32 years of age, or 11 years beyond his majority, and the youngest, a daughter, 24 years of age, or 6 years beyond her majority.

When we take into consideration the acts and conduct of the widow and children during all these years, the declarations made by the husband in his lifetime, and all the facts and circumstances in the case, we think the court was fully warranted in making the above finding, and its judgment is accordingly affirmed.

HADLEY, C. J., and CROW, FULLERTON, and MOUNT, JJ., concur.

STONE et al. v. MOODY et ux.
(Supreme Court of Washington. Sept. 11,
1907.)

VENDOR AND PURCHASER—CONTRACT—VALIDITY—MISTAKE—CANCELLATION—UNJUST PROVISION.

Where plaintiffs made a contract to sell land to defendants not knowing it contained a provision requiring them to accept as cash any contracts of sale which defendant might make of portions of the land to other persons, and plaintiffs afterwards gave receipts for contracts so made by defendant, relying on his interpretation of the provision of their contract with him that it did not prevent their receiving payment otherwise, if payments were not made on the contracts made by him with others, and subsequently he insists on the opposite construction, they may have their contract with him canceled unless he agrees to elimination of the provision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 35-37.]

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by Iredell S. Stone and others against H. L. Moody and wife. Judgment for defendants. Plaintiffs appeal. Reversed and remanded, with instructions.

M. F. Gose, T. P. Gose, and C. C. Gose, for appellants. W. H. Winfree, for respondents.

ROOT, J. This case was here once before, and may be found reported in 41 Wash. 680, 84 Pac. 617, 5 L. R. A. (N. S.) 799, to which reference is made for a more complete statement of the facts involved. Upon the first trial a motion for nonsuit was made at the close of plaintiffs' case, and no evidence was introduced by defendants. The court, having sustained the latter's motion, dismissed the action. This court reversed the judgment and remanded the case for a new trial. Upon the second trial both plaintiffs and defendants introduced evidence. The trial court made findings and conclusions in favor of defendants, and entered judgment and decree thereupon. From this the present appeal is prosecuted.

Appellants maintain that they did not know that the contract contained the provision requiring them to accept as cash any contracts of sale which respondent Moody might make of portions of the land to other persons. Taking into consideration the extraordinary character of this provision, the opportunity which it would afford for fraud, and considering the matter in the light of all the evidence adduced, we are satisfied that they did not know that said provision was in the contract. Subsequently, when they signed the receipt for \$22,500, on February 27, 1904, they learned that the provision above referred to was in the contract which they had signed. Moody, having sold or pretended to sell a portion of the land to one Heller for \$22,500 upon terms, requested appellants to sign a receipt for such sum as if the same were a cash payment. At first they declined to do so and asked time to

take legal counsel concerning the same. They testified that Moody refused to give them any time, but threatened to bring action against them at once for heavy damages in case they did not immediately sign the contracts to Heller and the receipt in question; that he thereupon proceeded to explain to them that they did not understand the matter aright; that it was merely a matter of form, and did not deprive them of the right to receive full payment in cash before parting with title to the land; that he had made a sale to Heller, and it was necessary to have the contracts and this receipt signed in order that Heller, upon making full payment, would be entitled to get a deed from them; that he intended to deal rightly and honestly by them, and that this was not a receipt for cash, but merely for the contracts which had been entered into by Heller; and that it was not intended to prevent them from getting full payment in cash before deeding the property. They also testified that they did not understand, in signing the receipt, that it was as a receipt for cash, but were told by Moody, and supposed and believed, that it was merely a receipt for the contracts with Heller; that they signed the receipt with the express understanding that it was merely a receipt for the contracts and a matter of form, that was necessary to be gone through in connection with respondent's deal with Heller, and not intended as evidence of a cash payment to them, and that they did not receive the Heller contracts as equivalent to a cash payment, nor intend to give credit upon their contract with Moody for the sum of \$22,500, or any sum whatsoever, by reason of said Heller contracts; that they relied upon the explanation and interpretation of the contract as thus given by Moody, and received the Heller contracts and signed the receipt only upon the understanding that their contract bore the interpretation which he had thus assured them of. We are satisfied that the contention of the appellants is substantially correct. It is almost inconceivable that appellants would have signed the contract, had they known it contained the clause requiring them to accept, as cash, contracts that respondent might make for the sale of certain portions of the land. That appellants, after discovering that the contract had this clause, would sign a receipt such as they did on February 27, 1904, with the purpose and intention of thereby giving respondent Moody a credit of \$22,500 upon the purchase price for the lands sold by them, when they received no cash, but only the contracts for the purchase of a portion of the land, would be a most remarkable circumstance. It would be unreasonable and inexplicable, unless done under some such understanding as that testified to by appellants. It appears from the evidence that Heller has paid nothing to appellants on the contracts made to him. Ap-

pellants have received only \$1,500 on account of the sale to Moody.

The judgment of the honorable superior court is reversed, and this cause remanded, with the following instructions: Within 90 days from the filing of the remittitur with the clerk of the superior court, the respondents may file with the clerk of that court a written statement that they accept the contract with appellants, with the elimination of the clause requiring appellants to accept as cash, or give them credit for as cash, the Heller contracts, or any other contracts made, or to be made, for the sale of any portion of the land involved, and that they will accept such contract with appellants with the interpretation that the payments therein provided for shall be made by or for them at the times therein provided in cash. If respondents file this statement in the manner indicated, and shall, within said 90 days, pay in to the clerk of the court for the benefit of these appellants the amount of all payments, with interest thereon, due under said contract up to said time, then said contract shall remain in force and effect, with the interpretation as herein given. If respondents do not file such statement, or do not within said 90 days pay into said court for appellants the amount of payments and interest due up to said date, then the trial court shall enter an order and decree annulling and canceling the contract entered into between appellants and respondents concerning said land, and appellants shall pay in to the clerk of that court for respondents all money, with interest, paid by respondents to appellants on account of such contract, less the amount of taxable costs allowed in this action to appellants against respondents. Appellants shall make said payment to the clerk of the court within 10 days from the expiration of the 90-day period hereinbefore mentioned.

HADLEY, C. J., and FULLERTON, MOUNT, CROW, DUNBAR, and RUDKIN, JJ., concur.

ADVANCE THRESHER CO. v. SCHIMKE et al.

(Supreme Court of Washington. Sept. 12, 1907.)

ATTACHMENT—ON DEMAND OTHERWISE SECURED.

Under Ballinger's Ann. Codes & St. § 5893, made applicable to chattel mortgage foreclosures by section 5879, and providing that plaintiff shall not prosecute any other action for the same matter while he is foreclosing his mortgage, and section 5351, requiring the affidavit for attachment to specify the amount of indebtedness, plaintiff in an action to foreclose a chattel mortgage may not have a writ of attachment issued before judgment, though an attachment is an ancillary proceeding; the intent of section 5893 being to prevent a mortgagee securing an additional remedy in anticipation of a deficiency judgment, while looking to the

mortgage security, and before exhausting the same, and it being impossible for plaintiff, prior to a deficiency judgment, to state in his affidavit the amount of indebtedness—that is, the deficiency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment. § 37.]

Appeal from Superior Court, Lincoln County; W. T. Warren, Judge.

Action by the Advance Thresher Company against John M. Schimke and another. An attachment was dissolved, and plaintiff appeals. Affirmed.

Martin & Wilson and W. M. Nevins, for appellant. Neal, Sessions & Myers, for respondent.

CROW, J. On August 27, 1906, the plaintiff, Advance Thresher Company, a corporation, sold to the defendants, John M. Schimke and Fred Knoblich, certain farm machinery. To secure the purchase price the defendants executed and delivered to the plaintiff two notes for \$855 and \$775, falling due October 1, 1906, and October 1, 1907, together with a chattel mortgage on the machinery and other personal property. On October 30, 1906, the plaintiff commenced this action to foreclose its mortgage, and forthwith caused a writ of attachment to be issued and levied upon property of the defendant Schimke other than that described in the mortgage. The trial court, upon motion of defendant Schimke, entered an order dissolving the attachment, and the plaintiff has appealed.

The controlling question before us is whether, in an action to foreclose a mortgage, a writ of attachment may be issued before judgment. Section 5893, Ballinger's Ann. Codes & St. (made applicable to chattel mortgage foreclosures by section 5879, Ballinger's Ann. Codes & St.), reads as follows: "The plaintiff shall not proceed to foreclose his mortgage while he is prosecuting any other action for the same debt or matter which is secured by the mortgage, or while he is seeking to obtain execution of any judgment in such other action; nor shall he prosecute any other action for the same matter while he is foreclosing his mortgage or prosecuting a judgment of foreclosure." Appellants contend (1) that an attachment may issue in an equitable action, citing *Bingham v. Keylor*, 19 Wash. 555, 53 Pac. 729; and (2) that the attachment, being a provisional remedy ancillary to the main action, is not another action for the same debt, in contemplation of section 5893. While in *Bingham v. Keylor*, supra, which was an action for the dissolution of a partnership, an accounting, and the appointment of a receiver, it was held that an attachment might issue in an equitable action, in so holding we said: " * * * Where the object of the action is to dissolve a partnership and for an accounting, and it is shown that upon such accounting a balance will be due the plaintiff, we perceive no reason why the plaintiff may not have an at-

tachment, provided, of course, he can and does specify in his affidavit the amounts of the indebtedness and some statutory ground for attachment." There the affidavit alleged the exact amount of indebtedness, which was on an unsecured claim. Here the appellant by foreclosure is primarily subjecting the mortgaged property to the payment of secured notes. It claims no remedy under the writ of attachment until it shall first exhaust the property covered by its mortgage. It does contend, however, that by reason of the inadequate value of the mortgaged property it will be entitled to a deficiency judgment for at least \$500, and that it is now entitled to a writ of attachment in advance of such judgment to secure the same. It cannot know that the contingency of a deficiency judgment will ever arise; for, while it may be unwilling to bid the full amount of its claim at foreclosure sale, some other person may do so.

Although appellant has by contract extended credit to respondents on the notes and mortgage, it is now pursuing two remedies at one and the same time—one by foreclosure on the mortgaged property, and the other by attachment of additional property to secure a possible deficiency judgment. How can it, in advance of such deficiency judgment, which it may never obtain, comply with section 5351, Ballinger's Ann. Codes & St., which requires that the affidavit for attachment shall specify the amount of indebtedness. While it is true that, strictly speaking, an attachment is not a separate action, but an ancillary proceeding, it would, if resorted to before judgment, be an additional remedy not contemplated in foreclosure proceedings under our statutes. The evident spirit and intent of section 5893 was to prevent plaintiffs from harassing defendants in foreclosure actions, with ancillary proceedings prosecuted before judgment, for the purpose of seeking additional and concurrent remedies other than those authorized by statute or arising in the usual course of procedure. It was to prohibit a mortgagee securing by writ of attachment or otherwise an additional remedy in anticipation of a deficiency judgment, while looking to the mortgage security, and before exhausting the same by foreclosure and sale. In *Rohrer v. Snyder*, 29 Wash. 190, 69 Pac. 748, it was contended that a mortgagee could not by attachment pursue an independent remedy for the collection of the mortgage debt while foreclosing. The validity of the attachment was not raised in the original foreclosure proceeding in which the writ had issued, but was raised in the collateral action, being the one then on appeal. In passing upon the appellant's contention we said: "The second [contention] is based upon section 5893 of the Code (Ballinger's Ann. Codes & St.). It is there provided that a mortgagee shall not 'prosecute any other action for the same matter while he is foreclosing his

mortgage or prosecuting a judgment of foreclosure.' Doubtless this provision of the statute would have furnished a sufficient ground for dissolving the attachment, had it been urged in the foreclosure action; and perhaps it might have furnished a ground for reversing the foreclosure judgment, had an appeal therefrom been taken. But such proceedings were voidable, not void, and to attack them in this way is to attack the judgment collaterally, where error, merely, cannot avail." Here the respondent moved the trial court to dissolve the attachment on the ground that it was issued while the appellant was proceeding with the foreclosure of its mortgage. In view of the inability of the appellant to anticipate the exact amount of any deficiency judgment to which it may or may not be hereafter entitled, or to state the same in its affidavit for attachment, and in view of our construction of section 5893, we hold that the trial judge rightfully sustained the motion to dissolve.

The judgment is affirmed.

HADLEY, C. J., and RUDKIN and MOUNT, JJ., concur.

LAMB v. WEBB, Atty. Gen., et al. (L. A. 1,864.)

(Supreme Court of California. July 29, 1907.)

In Bank. On rehearing. Denied.

For majority opinion, see 91 Pac. 102.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause, for the reason that the questions which the department has deemed it unnecessary to decide are the only questions presented by the record, while the ground upon which the decision is rested—the assumed exercise by the Attorney General of his discretion in deciding a question of fact—is shown by the record to have no existence. All the allegations of the petition for the writ of mandate are admitted to be true. They show, among other things, that there are certain standing rules of the Attorney General's office governing applications for leave to sue in the name of the people, and that this petitioner, in presenting his application for leave to sue, complied in every particular with the rules. One of their requirements is that the relator must produce with his application the sworn complaint which he proposes to file, and they require nothing more for the purpose of satisfying the Attorney General that there is a meritorious cause of action. In this instance a sworn complaint was presented with the application for leave to sue. If the Attorney General was not satisfied of the good faith of the petitioner, or of the truth of the matters alleged on his information and belief—matters which in cases of this kind can rarely be within the personal knowledge of the

relator—It would seem that he should have given him an opportunity of supporting his petition by corroborative affidavits, and no doubt he would have done so if he had deemed it material. But he did not consider this matter at all. He did nothing in the exercise of that discretion which the court assumes that he exercised in denying the application, and this is affirmatively shown by the record. The petition sets forth a copy of the written opinion of the Attorney General, giving his reasons, and his only reasons, for denying the application. In that opinion he assumes the truth of every fact alleged in petitioner's complaint and refuses leave to sue upon the ground, first, that the complaint does not state a cause of action, and, second, if there ever was a cause of action the petitioner ought not to be allowed to maintain it after having been a candidate at the special election. Whether these were good reasons for refusing leave to sue, and whether in any case the Attorney General may be compelled by mandamus to grant leave to sue in the name of the state, were the questions really involved in the appeal; but they are not decided, because it is assumed that the Attorney General was not satisfied of the existence of facts which he has made the basis of his written decision, and its sole basis.

151 Cal. 778

CORY v. SANTA YNEZ LAND & IMP. CO.
et al. (L. A. 1,898.)

(Supreme Court of California. Aug. 23, 1907.)

1. MORTGAGES—MORTGAGEE IN POSSESSION

Where a mortgagor places the mortgagee in possession of mortgaged premises as additional security, the mortgagee thereby acquires the right to retain possession as long as the secured debt is unpaid, though foreclosure be barred by limitations.

2. SAME—EVIDENCE.

Evidence in trespass held to show that defendant, the mortgagee of the premises, was in possession by the tacit, if not express, agreement of the mortgagor, for the purpose of additional security.

3. SAME—FORFEITING RIGHT—INITIATING ADVERSE CLAIM.

A mortgagee in possession may, without forfeiting his right of possession, initiate an adverse claim, which will ripen into a prescriptive title, in default of redemption.

4. SAME—RIGHT OF MORTGAGOR TO MAINTAIN TRESPASS—REGAINING POSSESSION.

The right to maintain trespass against the mortgagee in rightful possession was not gained by the mortgagor entering the inclosure of the mortgagee, which included other lands in addition to those mortgaged, pitching a tent on the mortgaged land, and marking the corners of it, and commencing to set fence posts, he then being notified by the mortgagee that he was trespassing, and warned to desist, and, disregarding this, being forcibly removed with his belongings 20 days after his entry.

5. SAME—EVIDENCE OF MORTGAGEE'S POSSESSION.

The inclosure by a mortgagee of the mortgaged land, with other lands belonging to the mortgagee, does not cease to be evidence of possession of the mortgaged land by the mortgagee

on his selling and giving possession to the vendee of a small part of the other land within the inclosure.

In Bank. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by Nathan T. Cory against the Santa Ynez Land & Improvement Company and another. From a judgment for plaintiff, and from an order denying a new trial, defendant company appeals. Reversed.

C. P. Robinson and W. S. Day, for appellant. Wm. G. Griffith, for respondent.

BEATTY, C. J. This is an action of trespass, in which the plaintiff recovered a judgment for \$368.50 and costs. The corporation defendant appealed to the District Court of Appeal from the judgment, and from an order denying a new trial. The justices of that court having been unable to agree as to the proper disposition of the appeal, the cause was transferred to this court for hearing and decision.

It appears from the pleadings and the uncontradicted evidence in the record that, prior to the 28th of January, 1888, the appellant had subdivided a large tract of land in Santa Barbara county, and that on that date it conveyed to J. S. Shoemaker, then a resident of Reno, Nev., a subdivision known as lot No. 13, containing 40 acres. The agreed price of the lot was \$3,000, of which \$1,000 were paid at the date of the conveyance. For the balance Shoemaker executed two promissory notes for \$1,000 each, payable respectively January 20, 1900, and January 20, 1901, and secured by mortgage of the land. Shoemaker leased the land to tenants who occupied it until the year 1892. In the meantime, he had paid no part of the principal or interest of the two purchase-money notes, and in May, 1893, they had been placed in the hands of defendant Robinson for foreclosure. He, as agent and attorney for the appellant, agreed with Shoemaker at that time to cancel the first note and to remit the accrued interest on both notes amounting to \$480, upon the agreement of the latter to pay the second note in the course of eight or ten months. This agreement was ratified by the corporation and the first note canceled. Robinson testifies that it was at the same time agreed by Shoemaker that appellant should have and maintain possession of the mortgaged premises until the remaining note was paid. Shoemaker denies that he made any such agreement, but the undisputed fact is that the corporation, through its agents, took possession of the lot about that time, and for fully 10 years kept the undisputed possession through tenants rendering rent to it. It is also an undisputed fact that the appellant permitted the second note to become barred by the statute of limitations on January 20, 1895, without any attempt to foreclose, and that afterwards, on Febru-

ary 27, 1895, Shoemaker gave a new mortgage to secure a new note for \$1,050, the amount of the second note and accrued interest. At the date of this new note and mortgage, the appellant was in the peaceable and undisputed possession of the land. No part of the principal of this renewal note was ever paid, and only part of the interest. In August, 1899, the right to foreclose was barred. But the corporation had been in possession all the time by its tenants and in receipt of the rents, and as its mortgage interest exceeded the assessed value of the land it paid all the taxes. Matters remained in this posture until 1901, when the appellant directed the assessor to omit any further mention of the mortgage, and to assess the land to it as a part of the larger tract of which it was a subdivision. In 1902 Shoemaker had the land assessed in his name, but down to the trial of this action in 1905 the appellant had paid all the taxes. In view of these facts it is difficult to believe that Shoemaker did not expressly agree, as testified by Robinson, that appellant should take and hold possession of the land, and it cannot be doubted that there was at least a tacit agreement to that effect. If not, why did Shoemaker, for a period of 10 years, acquiesce in such possession, actual, open and unequivocal? Men in their senses do not allow their land to be unlawfully occupied by other persons for so long a period without some sort of protest, and it must be concluded on the evidence that in October, 1903, the appellant was a mortgagee in lawful possession of the mortgaged premises, unless, as seems to be contended, its direction to the assessor in 1901, to omit any mention of the mortgage in assessing the land to it, deprives it of that status. When the respondent, as agent of Shoemaker, went upon the land for the purpose of taking and holding possession, October 20, 1903, the larger tract, 435 acres, of which lot 13 was a part, was completely inclosed by a fence sufficient to turn stock, and had been cultivated that season by tenants of the appellant. The crops, however, had been harvested, and it was being used only for the pasturage of stock. All the land within the large inclosure, except lot 13 and a similar subdivision which had been sold to a third party, belonged to appellant. Respondent under these circumstances entered the large inclosure with a camping outfit and a kit of carpenter's tools. He pitched his tent on lot 13, and proceeded to cut from trees growing on the premises posts for a fence. He had marked the corners of the lot, and was engaged in setting the fence posts, when, about a week after his entry, he was notified by agents of the appellant that he was trespassing and warned to desist. He disregarded this and other warnings, and on the 10th of November was, by order of the appellant, forcibly removed from the land with all his belongings. These

are the salient facts of the case, and its minor circumstances do not alter their complexion. The motion of appellant for a new trial was based upon the grounds that the verdict was not sustained by the evidence, and that the court had erred in its instructions to the jury. As to the principal question of law arising upon the facts above stated there is no controversy. It seems to be conceded that if a mortgagor places his mortgagee in possession of the mortgaged premises as additional security, the mortgagee thereby acquires the right to retain possession as long as the indebtedness so secured remains unpaid—a right additional to, and independent of, his right to foreclose, and which is not extinguished or affected by the fact that an action to foreclose may be barred by the statute of limitations. *Spect v. Spect*, 88 Cal. 440, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314; *Zellerbach v. Allenberg*, 99 Cal. 69, 33 Pac. 786; *Boyce v. Flak*, 110 Cal. 113, 42 Pac. 473.

We think it clear, as above stated, that appellant was in possession of the mortgaged premises by Shoemaker's tacit, if not by his express, agreement, and for the purpose of additional security. Indeed, we think the evidence of an express agreement to that effect is free from any substantial conflict. There are many cases in which actions speak louder than words, and here is presented a series of acts of the parties of a highly significant character, every one of which consists with the testimony of Robinson and conflicts with the testimony of Shoemaker. It was a most reasonable and moderate condition of remitting one third of the purchase price of the land and all accrued interest, and extending the time of payment of the other third, that the appellant should have the possession of the land as further security, and it was a condition which, while beneficial to the appellant, so far from imposing any hardship upon Shoemaker, entirely comported with his interest and convenience. The omission of appellant to foreclose, not once only, but twice in succession, until the statute had barred that remedy is strong evidence that its officers, including Robinson, considered that they had other sufficient security, and Shoemaker's acquiescence for a period of 10 years in the possession of the appellant is to my mind conclusive that he knew it to be a rightful possession.

But it is contended that the appellant by causing the land to be assessed to it independent of the mortgage, thereby initiating an adverse claim which would ripen into a prescriptive title at the end of five years, forfeited its right of possession as mortgagee, and restored to Shoemaker the right to recover the possession without paying his debt. If this is true it places a mortgagee in possession after the action to foreclose is barred in this position. While he can keep the land forever if he makes no other claim to it than that of mortgagee, he can never sell it be-

cause he can never make an indefeasible title, and he can never put improvements on it which will make it profitable to the mortgagor to redeem. The land is out of the market for all time, and forever condemned to lie idle and unimproved. Such a result is opposed to public policy and to the policy of express law. We think it much more reasonable to hold that the mortgagee in possession has, as he ought to have, some means of quieting his title to the mortgaged premises, and, since he can no longer foreclose, that he should be allowed to set in motion the time which will bar the right of the mortgagor to redeem, by plainly manifesting his intention to claim the land as his own, so that at the end of five years, in default of redemption, he will be invested with a prescriptive title.

If this view is correct, the appellant was in the peaceable and rightful possession of lot 13 on the 20th of October, 1903, when respondent made his attempt to take possession. It is extremely doubtful whether the respondent ever had anything more than a mere scrambling possession of any part of the premises. He had gone inside of appellant's inclosure upon land every foot of which, except 40 acres belonging to a third party, was in the exclusive possession of the appellant, and was attempting to inclose the 40 acres composing lot 13. He had pitched a tent, marked the corners of the lot, and set some posts on one side when, on the 10th of November, he was dispossessed. By these wrongful acts he had gained at most a right to recover in an action of forcible entry. He was himself a trespasser, and by virtue of his 20 days' occupancy had gained no right except that which was secured by a statute whose principal object is to prevent breaches of the peace by punishing the aggressor. He could perhaps have recovered in forcible entry, but he cannot recover damages in trespass against the party rightfully entitled to the possession. *Burnham v. Stone*, 101 Cal. 164, 172, 35 Pac. 627.

It is unnecessary to consider the objection (not raised by respondent, but suggested in one of the opinions transmitted from the district court of appeal) that the errors specified in the instructions of the court cannot be considered because it is not made to appear that they were excepted to before the jury retired. I think it does sufficiently appear that exceptions were taken in time; but, assuming they were not, the instructions appear in the record and serve to explain the erroneous verdict of the jury. They imply that the complete inclosure of the larger tract of which lot 13 was a portion was not evidence of possession of that lot by appellant if there was other land (referring to the 40-acre lot belonging to a third party above mentioned) within the inclosure which appellant did not claim. This instruction probably ac-

counts for the disregard by the jury of the overwhelming evidence of appellant's rightful possession at the date of respondent's wrongful entry. The facts of this case are widely at variance with those of *Walsh v. Hill*, 41 Cal. 571, upon which the instruction referred to seems to be based. The appellant having a large tract of land inclosed conveyed 40 acres within the tract and put its vendee in possession. This did not put an end to appellant's possession of the residue. It only entitled the vendee to a right of way across the residue. There should have been a new trial granted on the evidence.

The judgment and order of the superior court are reversed.

We concur: MCFARLAND, J.; HENSHAW, J.; LORIGAN, J.

SHAW, J. I concur in the judgment and in all of the opinion of the Chief Justice, with two exceptions.

The opinion appears to suggest that there was no substantial conflict in the evidence in regard to the fact of there having been an agreement between Shoemaker and Robinson, as agent of the Santa Ynez Land & Improvement Company, to the effect that that company should, as mortgagee, take and retain possession of the mortgaged land until the mortgage debt was paid, and in regard to there having been any express consent thereto by Mr. Shoemaker. I think there is a substantial conflict on this subject, but Mr. Shoemaker does not dispute the fact that the company was in the exclusive, actual, and peaceful possession of the land continuously, with his knowledge, receiving to its own use the rents and profits thereof, from 1893 to 1903, nor the fact that during that period he made no objection thereto and demanded no accounting, that, in short, he acquiesced in its possession as mortgagee. This being the case, the question whether or not there was an express agreement or a formal consent is immaterial. The company must be deemed to be lawfully in possession as mortgagee by implied agreement and by tacit consent. The fact of such implied agreement arises from the circumstances stated, and neither the circumstances nor the implied agreement arising therefrom is denied. The case comes within the rule laid down in *Burns v. Hiatt*, 149 Cal. 623, 87 Pac. 196, and the company, having lawfully acquired possession, has the same rights as mortgagee in possession as if its possession was under the sanction of an express agreement.

In the statement in the opinion suggesting that the record sufficiently shows the taking of an exception to the instructions, I understand the Chief Justice to be stating his personal opinion, and not that of the court.

We concur: SLOSS, J.; ANGELLOTTI, J.

151 Cal. 785

FOGARTY v. SOUTHERN PAC. CO. et al.
(L. A. 1,712.)

(Supreme Court of California. Aug. 23, 1907.)

1. MASTER AND SERVANT—INJURY TO SERVANT—PROXIMATE CAUSE—QUESTION FOR JURY.

In an action against a railway company for injuries to a car repairer while working under a car in consequence of the car being struck by another car placed on the track, *held*, that the questions whether the proximate cause of the accident was the negligence of the company in failing to inspect the latter car and discover defects in the brake thereof, or whether the accident was due to the negligence of a fellow servant, or disobedience by him of a rule of the company, or in the examination of the brakes thereof, were for the jury.

2. NEGLIGENCE—QUESTION FOR JURY—PROXIMATE CAUSE.

Where the evidence, in an action for personal injuries, does not, as a matter of law, show what the proximate cause of the accident was, the question is for the jury.

3. MASTER AND SERVANT—INJURY TO SERVANT—RULES OF EMPLOYEE—VIOLATIONS—EVIDENCE.

A car repairer was injured while working under a car in a yard in consequence of the car being struck by another car. The brake of the latter car was out of repair and was placed on a track by the use of a flying switch. The company had a rule which provided that flying switches should not be made except where it would cause great delay to do the work in any other manner. *Held* that, if the company relied on a violation of the rule, it should make it appear that the work could have been otherwise done without great delay under the circumstances, and five or ten minutes might constitute such a great delay under certain circumstances.

4. SAME.

Where the inspection of cars and the discovery of defects therein were confided by a railway company to car inspectors, a rule of the company that flying switches should not be made without testing the brakes of the cars did not make employes engaged in switching agents for the inspection of the cars and the discovery of defects, and it was not liable to an employe for the negligence of a fellow employe violating the rule.

5. SAME—EVIDENCE—INSTRUCTIONS.

Where, in an action against a railway company for injuries to a car repairer while working under a car in a yard, in consequence of the car being struck by another car because of a defect in the brake thereof, the evidence did not, as a matter of law, establish negligence of the company in failing to inspect the car and discover the defect, instructions authorizing a recovery if an employe engaged in moving the car negligently omitted to discover the defect, were erroneous, for the employe was not the vice principal of the company for the inspection of the car.

6. TRIAL—ERRORS IN INSTRUCTIONS.

An error in an instruction is not cured by the giving of a correct instruction.

[*Ed. Note.*—For cases in point, see Cent. Dig. vol. 46, Trial, § 718.]

7. MASTER AND SERVANT—INSPECTION OF APPLIANCES—DELEGATION OF DUTY.

A railroad company must inspect its cars, including brakes thereon, and it cannot escape responsibility by any delegation of such duty.

[*Ed. Note.*—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 175.]

In Bank. Appeal from Superior Court, San Luis Obispo County; N. P. Unangst, Judge.

Action by Thomas Fogarty against the

Southern Pacific Company and others. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Judgment modified, order denying a new trial reversed, and cause remanded.

The following is the opinion in department, referred to in opinion:

"ANGELLOTTI, J. This is an action for damages for personal injuries alleged to have been suffered through the negligence of the defendants. Plaintiff was given a verdict against all the defendants for the sum of \$50,000, on which judgment was entered. On motion for a new trial, the trial court required plaintiff to remit \$10,000 thereof, as a condition precedent to the denial of the motion. This plaintiff did, and the motion was denied, and the judgment modified accordingly. Defendants appeal from the judgment, the modified judgment, and from the orders denying the motion for a new trial.

"The defendant Southern Pacific Company, which will hereafter be designated herein as the defendant, is a railroad corporation, owning and operating a railroad in this and other states. Plaintiff was a car repairer in its employ. At the time of the accident he was, as such car repairer, working under a car that was standing on what is known as the 'cripple track' in defendant's yard at San Luis Obispo, about a quarter of a mile thereon from its junction with the main track. This track was so designated because it was the place where cars were kept while waiting or undergoing repairs. It becoming necessary to run another car in the yard a portion of the way down the cripple track from the main line, where it was to be unloaded, a switching crew, including defendants Nelson and Waters, took the car, attached to an engine, up the main line, and then switched it on to the cripple track by means of what is called a 'flying switch.' The car passed to the cripple track, going at the rate of six to eight miles an hour. The cripple track from the main line was sufficiently down grade to require efficient brakes to stop the car before it reached the place where plaintiff was working. Defendant Waters was on the moving car, charged with the management thereof, and at a point about a thousand feet from the car under which plaintiff was working first commenced to apply the brake. He at once discovered that the brake had no effect on the car, and, climbing down, endeavored in other ways to obstruct its movement, but without effect. The car continued to move until it collided with the car under which plaintiff was working, causing that car to run over plaintiff's legs, injuring them to a degree requiring amputation. Examination subsequently made of the car so switched to the cripple track showed that the reason why the brake did not hold the car was that it had not been adjusted for some time and had become too slack in parts; the result be-

ing that as to some of the wheels the brake shoes would not reach and hold. To remedy this defect, all that was essential was to take up the surplus slack, which could be done by shifting a key bolt in a lever from one hole to another. This was a comparatively simple thing to do, requiring the use only of a hammer and chisel, and occupied only 15 minutes in this case. This was apparently the only defect in the brake. Plaintiff's claim is that the injury was caused by this defective brake, and that defendant was negligent in not having discovered and remedied the defect. There was a rule of defendant for the government of its employes which provided that running or flying switches must not be made except where it would cause great delay to do the work in any other manner, and that 'whenever they are made the train must first be stopped and before the engine is again started the switch and also the brakes on the car to be set out must be tested and great care used.' This rule, so far as it required the testing of the brakes, was entirely ignored by Waters and the remainder of the switching crew on the occasion in question. It is undisputed that no test of the brake was made by the crew before throwing the car on to the cripple track, and that the brake was in no way examined or touched until Waters attempted to use it as heretofore described. The evidence was such that we cannot say that it was not sufficient to sustain in conclusion that if the rule had been observed the defect would have been apparent and the accident avoided.

"We may assume, for the purposes of this decision, that the evidence was such that it must be held that it was the personal duty of the employer to use reasonable care to ascertain and remedy such a defect as here existed, and also, that there was evidence which would have sufficiently supported a finding that it failed to use such care, and that this failure was the proximate cause of the accident. But, assuming all this, the question as to whether defendant had so failed to exercise such care in the matter of the inspection of the brake as to make it guilty of negligence was for the jury to determine, under proper instructions, from the circumstances of the case as shown by the evidence. It could not be liable unless it had failed to exercise such reasonable care. It appears very clear to us that, in the determination of this particular question, the violation by Waters of the rule requiring the brakes to be tested before making a flying switch was an immaterial matter. If at a time when an inspection was required of the railroad company in the exercise of reasonable care, by reason of a negligent failure to inspect the brakes at all, or a negligent inspection, the defect remained undiscovered and caused injury, the defendant would be liable for injuries proximately caused thereby, notwithstanding a violation of this rule by Waters, even though had the rule been ob-

served the defect would have been discovered. On the other hand, the rule in no degree added to the liability of the defendant, so as to make it liable to an employé for the negligence of a fellow employé violating its provisions. It did not operate to make those engaged merely in switching its agents for the inspection and discovery of defects in the cars, for whose negligence it would be responsible to other employes. That duty had been confided to regular car inspectors, who represented their principal in that matter, and for whose negligence the defendant would be liable. The rule was simply one relative to the manner in which the switching crew should perform the work of switching, prohibiting the making of a flying switch by them without testing the brakes. The distinction between train hands required by rule of the employer to make some examination of the appliances on the cars operated by them for the ascertainment of defects preventing the proper operation thereof while in their charge, and those specially charged by the employer with the regular duty of full inspection for the discovery and remedying of defects, is noted in several cases cited by plaintiff, especially in the case of *Eaton v. N. Y. C., etc., R. R. Co.*, 163 N. Y. 391, 57 N. E. 609, 79 Am. St. Rep. 600. In that case a recovery was allowed to a brakeman for injuries resulting from a defective brake on a car operated by him, notwithstanding a rule requiring brakemen at all stoppings of the train 'to inspect the wheels, brakes, and trucks of the car and report any defects immediately to the conductor,' where a reasonably careful inspection of the brake by the employé would have disclosed the weakness of the parts of the brake. It was said therein that while the effect of this rule was to impose on the trainmen the obligation of the examination of the appliances which their service compelled them to use, both for their own protection and the protection of the property of their master and the persons of their fellow servants, the examination contemplated was not that of an expert inspector, but only such as the ordinary knowledge of brakemen and the time allowed for the purpose consistent with their other duties would enable them to make. It was held that the train hands upon whom such a duty was devolved by rule were not follow servants of the regular inspectors of the railroad company. We can see no foundation for any contention that it was intended by this rule to make the train operatives engaged in the many and pressing duties of operation the agents of the company for that thorough inspection of the appliances that is required by law of the employer. The rule was merely one as to the manner of operation, and a negligent failure on the part of one of the switching crew to comply therewith could be, as respects other employes, only the negligence of the employé and not that of the defendant.

"As we read various instructions of the trial court, however, the question as to whether defendant had been negligent in the matter of the inspection of the brakes was made to turn upon the violation of this rule by Waters. The jury was told, in instruction No. 15, that if it was the duty of Waters to test the brake before making a flying switch, and he negligently omitted to so do, the negligence of Waters was the negligence of the railroad company. In instruction No. 17, it was substantially said to the jury that if the brake was defective or insufficient by reason of slack, and Waters negligently omitted to inspect said brake, and by reason of such negligence on his part the car was allowed to run on to the cripple track and collide with the car under which plaintiff was working, inflicting the injury upon him, the verdict must be for the plaintiff and against the defendant, if plaintiff himself was free from fault. Instruction 18 was as follows: 'If you believe from the evidence that Waters negligently omitted to test the brakes of the loaded car in his charge on the 16th day of December, 1901, and if you believe that it became or was his duty to test said brakes before or at the time he made a flying switch, if he made such flying switch, then, I charge, that his negligence is the negligence of the defendant corporation, and if by reason of his negligence the car in his charge collided with the car under which Fogarty was working, then your verdict must be in favor of the plaintiff and against the defendant corporation for an amount not exceeding the amount prayed for in plaintiff's complaint, if you further believe from the evidence that the plaintiff himself was free from fault.' The effect of these instructions plainly was to render Waters, solely by reason of this rule, the vice principal or personal agent of the defendant for the inspection of the car, and to make the violation of the rule by him negligence on the part of the defendant. By them the jury was clearly instructed that if Waters had violated the rule, which concededly he had done, his violation thereof was negligence on the part of defendant, and if the injuries to plaintiff were caused by this violation of the rule, the verdict must be for plaintiff. We can conceive of no sound theory upon which these instructions can be upheld. Waters was not the personal representative of the defendant in this matter, and his failure to observe the rule enacted by the defendant for its own protection and the protection of Waters himself and his fellow employes was not negligence on the part of the railroad company. As we have intimated, there may have been sufficient evidence to warrant the jury in finding that the defendant had been negligent in the matter of inspecting this car, and that the accident was caused thereby; but such negligence is not shown as a matter of law, and we cannot say, in the face of these instructions, that the jury so found. They may have concluded simply that the failure of Waters to observe

the rule caused the accident, and that the only negligence on the part of defendant was this violation of the rule by Waters, for so concluding their verdict would have been warranted by the instructions. It does not assist that the trial court in two other instructions charged the jury in direct conflict with the instructions above referred to, and in terms too favorable to defendant. The conflicting statements of the court in this regard were each equally positive and plain, and no one can tell which the jury followed. It follows that a reversal must be had on account of these instructions.

"One or two other matters should be discussed for the purposes of a new trial. Much of the argument of counsel has been devoted to the contention of defendant that the condition of slack in the brake was a mere matter of detail in the operation of the car, not involving any breach of original duty on the part of the employer, and the remedying of which was a part of the proper operation of the car by train hands or switching crew. By this contention, it is sought to bring the case within the doctrine of *Helling v. Schindler*, 145 Cal. 303, 78 Pac. 710, where the rule that the employer is not liable for defects arising in the daily use of an appliance which are not of a permanent character and do not require the help of skillful mechanics to repair, but which may easily be and usually are repaired by the workmen, and to repair which proper and suitable materials are supplied, was applied in the case of an injury to an operative on a planing machine, the knife of which had become dull and the belt slack by use therein by him and others using the machine with him. See, also, *Towne v. Electric Co.*, 146 Cal. 766, 81 Pac. 124, 70 L. R. A. 214; *Leishman v. Union Iron Works*, 83 Pac. 30, 148 Cal. 274, 3 L. R. A. (N. S.) 500. It was there said that this rule is, 'at least so far as those engaged in the common use of an appliance are concerned' sustained by the great weight of authority. This rule is a qualification of the general rule relative to the duty of the employer to furnish an appliance that is reasonably safe, and to use reasonable care to keep the same in proper repair, and, as stated in *Helling v. Schindler*, supra, it 'relates only to such slight defects attendant upon the operation of machinery as from their nature require remedying at the hands of the operators themselves and as a part of the proper operation of the machine.' It was manifestly applicable to such defects as were considered in that case, under the circumstances there appearing. We are unable, however, to see the application of this rule to the case at bar. The management of cars by train hands is a very different matter from the operation of a single piece of machinery that is continually under the direct management of a single employe or a single group of employes, to whom the slight defects attendant upon the daily use of the appliance, such as the dullness of knives, be-

come at once apparent. In the case of a railroad of any considerable extent, any particular car is only very temporarily in the charge of any particular group of train hand employes, and their work in regard thereto has ordinarily to do only with its operation as a completed appliance, and consists simply in moving it as the needs of the railroad company may require. The most that can be said of the evidence relative to the duty of train hands or switching crew as regards the work of remedying such a defect as here existed was that, where the same became apparent in the course of the operation of the car, they should take up the slack. This was simply emergency work. There was nothing to indicate that it was the general duty of such operatives to keep the brakes in proper condition in this regard, and clearly such a requirement would generally be impracticable, considering the other duties and obligations of such employes. It appears to be thoroughly settled by the authorities that it is the primary and nonassignable duty of the employer to use reasonable care to discover and remedy any defect in the car as a completed appliance, and that it is responsible to any employe injured by reason of its failure to so do, except, of course, to an employe whose duty it is to discover the defect, and whose negligent failure to do so contributes to his own injury. The duty of reasonable inspection by the employer for the discovery of any defect that would render the operation of the car dangerous is rigidly insisted on, and we can see no reason why this requirement does not include any defect in the adjustment of the brakes which renders them wholly ineffectual, however arising, just as fully as any other defect. The employer cannot escape responsibility in this matter by any delegation of the duty. See *Bailey v. Rome, etc., Co.*, 139 N. Y. 302, 34 N. E. 918; *Eaton v. N. Y., etc., Co.*, 163 N. Y. 391, 57 N. E. 609, 79 Am. St. Rep. 600; *Chicago, etc., Co. v. Kneirim*, 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259; *Cincinnati, etc., Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67; *Sheedy v. Chicago, etc., Co.*, 55 Minn. 357, 57 N. W. 60; *Bender v. St. Louis, etc., Co.*, 137 Mo. 240, 37 S. W. 132; *Union Stock Yards Co. v. Goodwin*, 57 Neb. 138, 77 N. W. 357; *Galveston, etc., Co. v. Templeton*, 87 Tex. 42, 26 S. W. 1066; *Richmond, etc., Co. v. Burnett*, 88 Va. 538, 14 S. E. 372; *Texas, etc., Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188. The question as to defendant's negligence, as we look at it, in view of the evidence contained in the record, was simply this: Did defendant fail to use reasonable care, that is, such care as was under all the circumstances reasonably consistent with a due regard for the safety of its employes, in inspecting this car for the discovery and remedying of such defects as would render the car an unsafe appliance? If it did not do this, and its failure to do so contributed di-

rectly to plaintiff's injuries, and plaintiff himself was not guilty of contributory negligence, it is liable for such damages as will properly compensate plaintiff for such injuries. In determining the question of fact as to whether reasonable care was used in the matter of inspection, it is, of course, proper to take into consideration with the other circumstances the fact that the car was not then being used for transportation purposes, but was being temporarily kept for unloading in the San Luis Obispo yard of defendant, and also that there was a rule prohibiting the employes from making a flying switch with it without first testing its brakes. There was some evidence tending to show that the difficulty with this brake was of a character that such cursory test by a switchman as may properly be held to be contemplated by this rule would not disclose it. All these are circumstances which may justly be considered in arriving at a conclusion as to whether reasonable care was exercised by defendant in the matter of keeping the car in proper condition; their effect being solely for the jury. If the accident was in no degree caused by the negligence of defendant, but was wholly due to the neglect of employes in a mere matter of detail in the operation of the car, defendant cannot be held liable.

"It cannot be said that the evidence showed plaintiff guilty of contributory negligence as a matter of law. Defendant does not point out specifically wherein the instruction of the court upon this subject was erroneous. If plaintiff was negligent in the matter of not indicating his presence under the car by flags, and his negligence directly contributed to his injuries, there can, of course, be no recovery.

"Other points made by defendant will probably not arise on a new trial, and need not here be considered.

"The judgment, the modified judgment, and the orders denying a new trial are reversed, and the cause remanded.

"We concur: SHAW, J.; SLOSS, J."

Wm. F. Herrin, P. F. Dunne, and W. S. Spencer, for appellants. Sullivan & Sullivan and Theo J. Roche, for respondent.

ANGELLOTTI, J. A rehearing was granted in this case, after decision in department, principally because of the complaint of plaintiff that no reason had been assigned for the reversal as to the defendants Nelson and Waters, employes of the principal defendant and fellow servants of the plaintiff. Upon the reargument, plaintiff's counsel, while urging that the judgments and orders should be affirmed as to the railroad company, stipulated that, in the event of reversal as to it, the judgments and orders should also be reversed as to the other defendants. We are satisfied that this course should be adopted. On further consideration, we see

no reason to modify the views expressed in the department opinion as to certain instructions given to the jury at the request of the plaintiff, and on account of which the reversal was ordered.

Learned counsel for defendant railroad company earnestly urge that the department opinion be modified in certain particulars. Much of what is said by counsel in this behalf is due we cannot but feel to a misconception of the opinion. Certainly, that opinion cannot be construed as declaring that the proximate cause of the accident was the non-adjustment of the brake. The assumption to this effect of which defendant complains was expressly limited in the opinion to the discussion of the question as to the alleged negligence of the defendant in the matter of the inspection of the brake, and the instruction given to the jury in that connection, and on account of which the reversal was ordered. It is declared, in effect, over and over again in the opinion, that the question as to the proximate cause of the accident was, in this case, one for the jury. Unless the jury can find, upon sufficient evidence, that the railroad company was negligent in the matter of the inspection of the brake, and that this negligence contributed directly to plaintiff's injury, there can, of course, be no recovery by plaintiff. If the accident was wholly due to the negligence of a fellow servant of plaintiff, or disobedience by him of a reasonable rule enacted for his guidance in the operation of the car, either as to the making of a flying switch at all, or examining the brakes before making the same, there can be no recovery, even though the defendant had itself been negligent. *Kevern v. Pro.*, etc., Co., 70 Cal. 394, 11 Pac. 740; *Vizelich v. S. P. Co.*, 126 Cal. 587, 59 Pac. 129; *Luman v. Golden*, etc., Co., 140 Cal. 707, 74 Pac. 307. The evidence in the record before us cannot be held, as a matter of law, to show what was the proximate cause, and hence the question is necessarily one for the trial jury. It should also be said, in this connection, that the showing in the record now before us, as to whether the conditions were such as to make the rule prohibiting a flying switch "except where it would cause great delay to do the work in any other manner" applicable, is extremely weak, if, indeed, there can be said to be any showing at all on the subject. It was because of this that the matter was not referred to in the former opinion. If defendant relies on a violation of this portion of the rule, it should make it appear that the work could have been otherwise done without what would have been "great delay" under the existing circumstances. Five or ten minutes might have constituted such a great delay under certain circumstances.

The question as to whether or not the condition of slack in the brake was a mere matter of detail in the operation of the car, the

discovery and remedying of which was a part of the regular operation of the car by train hands or switching crew, was discussed in the former opinion in the light of the evidence contained in the record. We are satisfied with the views expressed in the opinion in regard to that question, as applied to the case shown by such record, and see no occasion to add thereto.

The portion of the former opinion reading as follows: "If at the time when an inspection was required of the railroad company in the exercise of reasonable care, by reason of the negligent failure to inspect the brakes at all, or a negligent inspection, the defect remained undiscovered and caused injury, the defendant would be liable for injuries proximately caused thereby, notwithstanding a violation of this rule by Waters, even though had the rule been observed the defect would have been discovered"—should be stricken out, together with the words "on the other hand," immediately succeeding.

With this exception the department opinion is adopted as the opinion of the court in bank, supplemented by what we have heretofore said.

The judgment, the modified judgment, and the orders denying a new trial are reversed, and the cause remanded.

We concur: SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

6 Cal. App. 108

PEOPLE v. SOLANI. (Cr. 39.)

(Court of Appeal, Third District, California.
July 10, 1907.)

1. CRIMINAL LAW—FORMER JEOPARDY—PLEA—REQUISITES.

A plea of former jeopardy, failing to state where the judgment of conviction was rendered, as required by Pen. Code, § 1017, subd. 3, was fatally defective.

2. SAME—TIME.

A plea of former jeopardy may be interposed at any stage of the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 667.]

3. SAME—PRIOR CONVICTION OF LESSER OFFENSE.

Where a new trial is granted after conviction of manslaughter on an information for murder, it is no violation of defendant's constitutional right to protection against being twice put in jeopardy for the same offense to again place him on trial for murder, unless he pleads former conviction.

4. SAME—HARMLESS ERROR.

A new trial having been granted defendant after conviction of manslaughter on an information charging murder, he was again placed on trial for murder, and the trial proceeded without any plea of former conviction until nearly all the instructions had been given, when an ineffectual plea of former conviction was offered. This was disallowed, and was not corrected until the jury had reached a verdict convicting defendant of manslaughter. *Held*, that defendant, having received the same sentence at both trials, was not prejudiced by the court's denial of the plea.

5. SAME—ADMISSION OF EVIDENCE—CURING ERROR.

In a prosecution for homicide, the court having withdrawn from the jury a statement alleged to have been made by defendant while in jail, and having admonished the jury to disregard the statement, any error in its admission was cured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3141.]

6. SAME—EXPERIMENTS.

Where, in a prosecution for homicide, the evidence was conflicting and unsatisfactory as to there being any powder marks plainly discernible around the wound on deceased's body, it was not error to refuse to permit a witness to testify with reference to experiments made at various distances with a revolver loaded with black powder, as to whether powder marks were left on pieces of white paper; the caliber of the revolver used for the experiments not being shown with certainty to be the same as that used by defendant, and there being no evidence that the cartridge used was similarly loaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 854.]

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

John Solani was convicted of manslaughter, and he appeals. Affirmed.

W. F. Cowan and Jos. P. Berry, for appellant. U. S. Webb, Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was convicted of the crime of manslaughter upon an information charging murder. He appealed from the judgment of conviction to this court and a new trial was ordered. 2 Cal. App. 225, 83 Pac. 281. At his second trial he was tried upon the original information. He was not again arraigned, and the trial proceeded without further plea of the defendant than his original plea of "not guilty." After the cause had been argued to the jury and as the court was about concluding its instructions, counsel for defendant asked leave to interpose a plea of once in jeopardy and former acquittal, and also asked the court to instruct the jury upon the theory of once in jeopardy. The plea offered was defective, in failing to state where the judgment of conviction was rendered, as required by subdivision 3, § 1017, of the Penal Code. The court declined to allow the reading of the instructions to be interrupted and stated that it would later consider the offer of defendant. At the conclusion of the reading the matter was again brought before the court. It appears that at the opening of the trial it was agreed between the district attorney and defendant's counsel that defendant would take 20 peremptory challenges "as long as this information charged murder," and that the case was tried and the instructions framed upon the theory that the charge being investigated was murder. It further appeared that to grant defendant's request would have required the instructions already given to be recast to some extent. Upon this state of facts the court denied defendant's request. The court, thereupon, gave

the jury five forms of verdict which do not appear in the record. The instructions were full and clear as to what constitutes murder in the first and second degree and manslaughter, and it must be presumed that the forms of verdicts embraced manslaughter among other crimes of which defendant might have been found guilty or not guilty. Later, when the jury was about to return with its verdict, but before it had been brought into the courtroom, defendant asked leave to correct his plea of jeopardy so as to state therein at what place the former judgment of conviction had been entered and that the jury "be directed to return a verdict of once in jeopardy." The court directed that the jury be brought in, without giving any further instructions. Thereupon the jury came into court and rendered its verdict of murder in the second degree. Before it was recorded defendant objected to the recording of the verdict on the ground that "the court is without jurisdiction to pronounce the judgment allowed by law, and the verdict is illegal, and the jury without legal authority to find the same." Motion was regularly made in arrest of judgment and for a new trial, which was denied, and defendant appeals from the judgment and order denying his said motion.

1. The principal question presented by the appeal arises out of the refusal of the court to permit the defendant to plead jeopardy. If, as appellant contends, the court was without jurisdiction under any circumstances to try him for the crime of murder, clearly he had the right at any stage of the trial to raise the question by any appropriate step. But in the numerous cases where there has been a new trial granted, after conviction of manslaughter upon an information for murder, thus acquitting the defendant of the crime of murder, the Supreme Court of our state has held that it is no violation of the defendant's constitutional right to protection against being placed twice in jeopardy for the same offense, unless he pleads former conviction. It was said in *People v. Bennett*, 114 Cal. 58, 45 Pac. 1014: "The law's method must be pursued by him who asks the protection of the law." It was also said: "The fact that the first trial was held in the same court, and before the same judge as the second trial, in no way excused the necessity of the plea of once in jeopardy." The question was discussed at some length in *People v. McFarlane*, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245, where the opinion upon the point met the concurrence of the full court by refusing a rehearing. Nothing in *People v. Smith*, 134 Cal. 453, 66 Pac. 669, can be said to be in conflict with the views expressed in *People v. McFarlane*, which is confirmed by the fact that the writer of the opinion in the *Smith* Case inferentially approved the opinion in the *McFarlane* Case. In the recent case of *Huntington v. Superior Court* (Cal. App.) 90 Pac. 141, the

court held that the trial court was without jurisdiction to try the defendant for murder; but as we understand the opinion, written by Presiding Justice Cooper, it was so held because the offense charged did not involve the elements of manslaughter, and, as the defendant could not be convicted of murder, there was no authority to try him on the charge of murder or manslaughter. The question, therefore, was one of discretion with the trial court whether or not to admit the plea under the circumstances, and unless that discretion was abused this court will not interfere. It is not claimed that counsel for defendant were ignorant of his rights or of the decisions upon the very point in question. With this knowledge counsel, we must presume, intentionally chose to go to trial without a plea of jeopardy. They claimed and exercised the right to 20 peremptory challenges, when otherwise but 10 were allowed, tried and argued the case, and stood by until nearly all the instructions of the court had been given the jury, and then offered an ineffectual plea (*State v. Lewis*, 31 Wash. 86, 71 Pac. 778, citing *People v. O'Leary*, 77 Cal. 30, 18 Pac. 856), which was not corrected until the jury had reached a verdict. It seems to us that there was no abuse of discretion in the action of the court. Defendant received the same sentence at both trials, so that, while his counsel may reproach themselves for the risk they took in not pleading jeopardy, both they and defendant may find consolation in the fact that defendant has probably suffered no prejudice thereby.

2. In the course of the trial plaintiff offered in evidence a statement which plaintiff claimed defendant had made in the county jail in the presence and hearing of the district attorney, and which was reduced to longhand by the official court reporter, who was also present and heard defendant make the statement. It was objected to as immaterial, irrelevant, and incompetent. "The Court: I suppose that covers everything. I suppose it includes the accuracy of the transcription, and the accuracy of the interpretation. Mr. Cowan (attorney for defendant): No; we admit the accuracy of what Mr. Lafferty [court reporter] took down; that Mr. Lafferty took down what he heard. The Court: Of course I can't tell whether it is competent or not. I have not seen it or heard it. * * * The objection is overruled to the introduction of the statement." Later during the trial the question of the admissibility of this evidence came before the court, and the court said: "Gentlemen of the jury, I will admonish you that you are to disregard the statement read to you and alleged to have been the statement of Mr. Solani." In *People v. Prather*, 134 Cal. 436, 439, 66 Pac. 589, 590, the court said "Whatever error may have occurred in the admission in evidence of the verdict and judgment in the larceny case was cured by the subse-

quent action of the trial court in taking the evidence away from the jury. At that time the court instructed the jury specially not to consider the evidence so taken from them, and it will be presumed that the jury obeyed the instruction." The court further said that it is only in certain exceptional cases where the action of the court in withdrawing evidence from the jury, which it deems erroneously admitted, may not be held to cure the error committed in its admission. Under ordinary circumstances the court should be allowed to correct an error of this kind, and, we think, it should be done under the present circumstances.

3. The homicide occurred in front of the Roma Hotel in the town of Glen Ellen at about 10 or half-past 10 o'clock at night. The evidence is conflicting as to the relation of the defendant and deceased to each other at the instant the fatal shot was fired. Two witnesses for the prosecution located deceased as standing from five to eight feet distant from the hotel porch, on which, or on the lower step leading up to the porch, the defendant stood. Another witness, a fellow Italian, was near the parties, when some angry words passed between them. He testified to having separated them at one time when defendant had drawn his revolver as though to shoot deceased. His testimony was that deceased was standing in the middle of the road when the shot was fired, and defendant was three or four steps from the porch, and about six or seven steps from the deceased; that deceased fell backwards to the ground when shot, and at the time was standing with his hands on his hips (showing the hands on the hips outside of the coat). Witness testified that he grappled with defendant after the first shot and threw him down, and while in this position defendant fired two more shots; both taking effect on witness. Witness Dr. Cronin, who assisted Dr. Thompson at the autopsy, testified for the prosecution at the first trial that there were powder marks on the skin around the wound. At the second trial he testified that he saw no powder marks and was quite sure there were none, but that he "could not swear to an absolute certainty that there were no powder marks." Dr. Thompson testified for the defense that there was discoloration around the orifice of the wound, which in his opinion "was caused by a powder burn," which did not extend beyond an area greater than two inches in diameter; that his opinion was based upon the appearance of the skin—"something embedded in the skin" which he "took to be particles of charcoal, * * * particles of powder underneath the skin, underneath the cuticle." He further testified that he did not examine these particles to determine what they were; that he was not asked to do so; that his opinion was formed merely from surface indications; that he had no experience in the use of a gun, and in his medical experience he

had not had occasion to examine or study gunshot wounds to any extent. Witness Hardman testified for the defense that he assisted in dressing the corpse for burial; that "there were little black specks, or rather black and blue, that was around that wound, from a distance—well the size of a half dollar or a dollar." Again: "What I have reference to by the grains was the impression. You could not see exactly the grains, but the impression as the corpse was stiff. * * * That is as near as I can explain it. There was congested blood all over the face and forehead. There were little indentations on the skin." The testimony of defendant, in his own behalf, was that he had been thrown down by deceased and a friend of deceased, one Ricci; that Ricci was on top of him as he was lying on the ground, and deceased close by on the ground or on top of him. Defendant was corroborated in some degree as to his being down, and a witness testified that deceased was on top of him when defendant fired. It appeared that the revolver introduced at the first trial was not identified with certainty as the revolver introduced at the second trial as the one used by defendant, and there was some question whether it was a 32 or 38 caliber. Witness Boswell testified for defendant that he had experimentally fired into white paper with a 32-caliber revolver with a cartridge loaded with black powder, at distances of eight and fourteen inches and two and four feet. Defendant's counsel offered to prove by the witness that the revolver discharged at a distance of eight inches from the muzzle of the revolver to the paper produced an effect similar to that described by witness Hardman. The witness was asked whether there were any powder marks shown in the experiments made at the other distances and if so to describe them. Certain four exhibits were shown the witness and offered for identification, which it was claimed tended to prove the result of Boswell's experiments. These exhibits were not offered, except for identification, and do not appear in the record. The district attorney objected to all this offered evidence as immaterial, incompetent, and irrelevant. The court sustained the objection on the grounds that the "experiments do not seem to have been under the same conditions or upon the same substance."

Among the cases which have come before our Supreme Court where this class of evidence has received attention are the following: *People v. Clark*, 84 Cal. 573, 24 Pac. 313; *People v. Levine*, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631, *People v. Woon Tuck Wo*, 120 Cal. 294, 52 Pac. 833, and *People v. Weber*, 86 Pac. 671, 149 Cal. 325. The question is quite fully discussed in *State v. Justus*, 11 Or. 178, 8 Pac. 337, 50 Am. Rep. 470. In *People v. Woon Tuck Wo*, supra, it was held that the admission of such evidence is largely within the discretion of the trial court, and that a case will not be reversed

for an abuse of discretion by the court in rejecting such evidence, unless it comes clearly within the principles by which it is allowed. The principle upon which this class of evidence is held admissible is stated as follows: "Unless the experiments are shown to have been under essentially the same conditions that existed in the case on trial, the tendency is to confuse and mislead, rather than enlighten, the jury"—citing *Lake Erie*, etc., R. R. Co. v. Mugg, 132 Ind. 168, 31 N. E. 564. The court further said: "There must be a possibility of reproducing substantially the same conditions which existed when the original occurrence took place, or the evidence will not be admitted." We should be unwilling to hold that under no circumstances could experiments be made in a case such as we have here, unless made upon a live human being. In *Burg v. Chicago R. R. Co.*, 90 Iowa, 106, 57 N. W. 680, 48 Am. St. Rep. 419, it was held that the rule does not exact more than a substantial or reasonable similarity; and in *Feln v. Cov. Mut. Ben. Ass'n*, 60 Ill. App. 274, it was held that an experiment made upon white paper to test the distance at which powder would burn the human skin presented conditions substantially the same as the occurrence itself. The court said: "The difficulty of obtaining the latter substance for such an experiment is manifest, without argument to show that the substitution of paper was the best that could be done under the circumstances." In the case of *People v. Clark*, supra, the experiment with a Winchester rifle was made upon clothing to show that at a given distance no powder marks were made. In that case the evidence was admitted, but it was also an admitted fact that there were no powder marks upon the clothing of the deceased. In the *Woon Tuck Wo* Case the fact in dispute was whether the homicide could have been witnessed from the point where the witness stood who testified that he saw it committed. It was sought to prove by a witness standing at that point that he could not see and recognize a person standing where the defendant stood. The court said: "We think there could be no substantial reproduction of the same conditions under which the witness for the prosecution testified to having seen the homicide committed by the defendant and to have recognized him immediately afterward. The testimony of the various witnesses who testified for the prosecution and for the defendant, who were at the scene at the time of or immediately after the homicide, was very conflicting as to the condition of the lights at that time; and under these circumstances the proposed testimony of the witness McFarlane would have 'tended to confuse and mislead, rather than enlighten, the jury.'" In the case here the evidence was not only conflicting, but far from satisfactory, as to there being any powder marks plainly discernible around the wound. The caliber of the revolver used

for the experiment was not shown with certainty to be the same as that used by the defendant, nor was there any evidence that the cartridge used for loading was the same in its contents.

It may be further observed that it nowhere appears in the record that the witness Boswell was asked to state the result of any experiment, except the one made at eight inches' distance from the paper. It was not shown what he would testify to as to other distances, or what the exhibits showed. Error must be made affirmatively to appear. Non constat but all his other experiments would have shown no powder marks, and thus have confirmed the theory of the prosecution.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

6 Cal. App. 144

FISHER v. LUDWIG. (Civ. 353.)

(Court of Appeal, Third District, California.
July 30, 1907. Rehearing Denied by
Supreme Court Sept. 26, 1907.)

1. GIFTS—INTER VIVOS—REQUISITES—DELIVERY—EXECUTED GRANT.

Civ. Code, § 1146, defines a gift as a transfer of personal property, which, when made in writing, is by action 1053 designated as a grant, conveyance, or bill of sale, and by section 1083 vests in the transferee all the actual title to the thing transferred which the transferor then had, unless a different intention is expressed or is necessarily implied, and section 1054 declares that the estate transferred is vested in the transferee on the donor's delivery of the grant. *Held*, that manual delivery of personal property is not essential to the validity of a gift thereof, evidenced by a written instrument duly executed and delivered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, § 37.]

2. SAME—EVIDENCE—BANK DEPOSIT—TRANSFER.

Decedent, prior to his death being the owner of a bank deposit, executed a writing by which he authorized the bank to pay to defendant any money standing to his credit as a deposit in the bank, represented by a pass book with a specified number. This order, with the book, he gave to defendant, who filed the same with the bank, by which the order was accepted prior to decedent's death. *Held*, sufficient to establish a valid gift of the bank deposit *inter vivos*, although the account was not formally transferred on the bank's books until after decedent's death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, §§ 52-57.]

Appeal from Superior Court, Placer County; J. W. Bartlett, Judge.

Action by George H. Fisher, as administrator of the estate of George Ludwig, deceased, against Caroline Ludwig. From a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

A. K. Robinson, for appellant. John M. Fulweiler, for respondent.

BURNETT, J. Plaintiff, as administrator, brought the action for the recovery of \$5,170, claiming that it belongs to said estate, and that the defendant unlawfully collected and embezzled said amount after the death of said George Ludwig. The defense is that the money was given to defendant by the said George Ludwig some time previous to his death. The issue is squarely presented by the pleadings, as follows. The complaint alleges: "That thereafter, to wit, January 29th, 1903, the said George Ludwig without any consideration therefor, and for the purpose that the said indebtedness due to him from the Sacramento Bank aforesaid and represented by said pass book 22,603 aforesaid might be drawn and collected therefrom and held in trust by the said defendant for his use and benefit, gave to the said defendant a power of attorney of which the following is a copy: 'Sacramento, Jan. 29, 1903. I hereby authorize the Sacramento Bank to pay to Caroline Ludwig any money standing to my credit as a deposit in said bank, represented by pass book No. 22,603. [Signed] George Ludwig.'" Defendant denies this allegation, and avers "that said George Ludwig, on the 29th day of January, 1903, executed and delivered to Caroline Ludwig, this defendant, for good and valuable consideration, an order, assignment, and transfer to defendant, absolutely and without any reservation, all the sums of money coming to said George Ludwig from, or standing to his credit in said Sacramento Bank as a deposit in said bank in his name and as represented by pass book No. 22,603, in words and figures as follows, to wit." Then follows the order hereinbefore set out. It is also averred in the answer that "the control and possession of said pass book No. 22,603 was also delivered to this defendant by said George Ludwig."

A distinction of importance is recognized in some of the decisions between a gift resting in parol and one made effective by virtue of a written instrument. In Driscoll v. Driscoll, 143 Cal. 535, 77 Pac. 471, Mr. Justice Harrison, who seems to have written most of the cases on this subject while he was a member of the Supreme Court, speaking for the court, says: "There is no statutory requirement in this state that a gift which is effected by an executed grant shall be accompanied by a delivery of the property given, and, as between the parties to the transaction, there is no violation of law or infringement of public policy, if the donor, after he has executed the instrument of gift, shall retain possession of the property. A gift is declared by section 1146 of the Civil Code to be 'a transfer of personal property' which if made in writing is by section 1053 called a 'grant or conveyance or bill of sale,' and by section 1083 'rests in the transferee all the actual title to the thing transferred which the transferor then has unless a different intention is expressed or is necessarily im-

pled.' As under section 1053 of the Civil Code this promise applies to personal as well as real property, the interest intended to be transferred is under section 1054 of the Civil Code vested in the transferee upon the donor's delivery of the grant." The rule as to verbal gifts is provided in section 1147 of the Civil Code as follows: "A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor if it is capable of delivery unless there is an actual or symbolical delivery of the thing to the donee." The delivery of the written instrument to the donee in the one case then vests in him the title, but in the other case the means of obtaining possession must be given, and if capable of delivery the thing given must be actually or symbolically delivered to the donee before he can claim title. A failure to observe this distinction at times has led to some confusion and apparent conflict in some of the decisions. In fact, due consideration to this difference seems to have been given for the first time by our Supreme Court in the Driscoll Case, supra. Another consideration sometimes ignored is the difference between an action brought by an administrator of an estate as such and one brought by a creditor of the donor within the provision of section 3440, Civ. Code. But in the case at bar, whether the transaction be regarded in the light of a verbal gift or one effectuated by a written instrument explained by parol testimony, the evidence is clear and convincing that decedent prior to his death had voluntarily transferred the money in question to the defendant.

The evidence is without substantial conflict, and in its salient features is as follows: A. L. Smith, cashier of the Placer County Bank, testified: "I had something to do with the drawing of that order of July 29, 1902. [This was similar to the said order of January 29, 1903, but related to pass book 136.] I called at the office of the Sacramento Bank and was furnished with the original order that is dated July 29, 1902, by the cashier. I brought the order to Auburn with me and a few days later it was signed by George Ludwig. After it was signed by him it was filed with the Sacramento Bank. Prior to the drawing of that order I had a conversation with George Ludwig regarding moneys that stood in the Sacramento Bank in his name. He stated to me that he desired all his funds to go to Mrs. Caroline Ludwig before he died, in order to save any probating of the estate, and the order was drawn in connection with that particular matter. I had something to do with the drawing of the order of January 29, 1903. It was filed with the Sacramento Bank by me for Mrs. Ludwig. Pass book 136 was the term deposit, and 22,603 was the ordinary deposit. On the morning of March 12th, I received from Mrs. Caroline Ludwig an order requesting the Sacramento

Bank to transfer the amounts due to George Ludwig to a joint account in the name of Caroline Ludwig and George Ludwig. I wrote a letter to the Sacramento Bank requesting them to do that, and I sent the pass books which I had held in my possession for months for Mrs. Ludwig." He testified further that the Sacramento Bank replied suggesting some embarrassment that might arise in case of a joint account, and advising that it be opened with one who could give the other authority to draw. This letter was written March 14th. March 17th Mr. Ludwig died, and on the same day Mr. Smith, by direction of Mrs. Ludwig, wrote the Sacramento Bank to transfer the account to Mrs. Ludwig, which the said bank did on March 18th.

Mrs. Caroline Ludwig testified as follows: "I knew George Ludwig for 39 years. He was my brother-in-law and lived on our ranch nine miles from Auburn. Prior to July 29, 1902, I had a talk with him about the disposition of his money. He wanted to give me the money, and he did give it to me. He gave me the bank book and an order for the money. When he gave it to me he told me to keep it. He told me he give me all the money he has got, and I shall keep it for myself. He said about the money represented by those books—he told me to keep them, and if I wanted some money to go and get it, and any time he wanted money he come to me and get some. He gave me another order afterwards. When he gave that order he said to me, he gave me the order. He give me the books, and he told me to keep the money. I brought the books to the bank, and I gave them to A. L. Smith, and he kept them in the bank. I have drawn money out of the bank on Mr. George Ludwig's account. Whenever he told me he wanted money I drew it. If I had money in my pocket I went out and gave it to him without drawing it. I gave him all the money he wanted and everything he wanted. He simply gave me that money in the bank and wanted me to keep it because we worked together and earned it together, and he said it isn't more than right, because he didn't want to go through court."

J. M. Henderson, cashier of the Sacramento Bank, among other things, said: "The order of July 29, 1902, stands filed among the records of the bank as received on July 30, 1902. It authorized the bank to pay to Caroline Ludwig any money standing to the credit of George Ludwig represented by pass book 136, and the order of January 29, 1903, authorized the bank to pay to Caroline Ludwig, represented by pass book No. 22,603; and it was upon the strength of these orders that we recognized the subsequent orders of Caroline Ludwig dated March 12, 1904."

It is not contested that the whole amount in question is shown as a credit in said pass book 22,603. Of course, it may be that Mrs. Ludwig did not tell the truth; but as there

is nothing inherently improbable in her statements, and as the trial judge accepted them as true and based the findings upon her testimony and that of the other witnesses, we are not at liberty to discredit her testimony, but we must construe all the evidence so as to uphold, rather than overthrow, the judgment of the lower court. The record thus discloses every element of a gift. The deceased expressed clearly and unequivocally his intention that the defendant should have as her own the money immediately, and, since the property was not in his possession, he did all that the statute and decisions require. He gave her the means whereby she could reduce the property to her possession, to wit, the order upon the bank where the money was deposited. The elements necessary to the validity of a gift *inter vivos* have been specifically stated as follows: (1) The donor must be competent to contract. (2) There must be freedom of will. (3) The gift must be complete, with nothing left undone. (4) The property must be delivered by the donor and accepted by the donee. (5) The gift must go into immediate and absolute effect. *Mercantile Safe Deposit Co. v. Huntington*, 89 Hun, 465, 35 N. Y. Supp. 890; *Mathews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054; *Telford v. Patton*, 144 Ill. 611, 33 N. E. 1119. Reduced to simpler form, it is held that a gift must be voluntary, gratuitous, and absolute. *Williamson v. Johnson*, 62 Vt. 378, 20 Atl. 279, 9 L. R. A. 277, 22 Am. St. Rep. 117. The foregoing elements must all be present to constitute a gift in this state, except that delivery is modified, as we have seen, by the provisions of the Civil Code. And the only controversy here is as to whether there was such a delivery as is required by the statute. The said order of January 29, 1903, was delivered to and accepted by the bank, and, if that be regarded in connection with the transfer of the pass book as a written instrument of gift, then the delivery of the money under the decision in the *Driscoll Case*, *supra*, was not required. That the said order was intended as an assignment of the money is shown clearly by the parol testimony, and there is no good reason why it should not be given the effect that was intended by the parties. But in any event, the order constituted the means whereby defendant could secure possession of the money, thereby satisfying the requirement of said section 1147, Civ. Code, since the property was in the hands of the bank and could not be actually delivered by the donor. The only circumstance in this connection urged by appellant entitled to any consideration is that the bank did not actually transfer the money to the account of defendant until the day after the death of the donor. It is difficult to see how the validity of the gift as between the donor and donee could be affected by any action of the bank. And it must be remembered that the plaintiff is in no better position to question the

gift than would the donor be if alive. To protect itself the bank might refuse to recognize the transfer, but the bank is not a party to the action, and, besides, the testimony of Mr. Henderson shows that the bank accepted and acted upon the orders before Mr. Ludwig's death. The fact that the clerical work of transferring the account had not been done is of no consequence, as the gift was complete prior to Mr. Ludwig's death. As stated in *Hart v. Ketchum*, 121 Cal. 423, 53 Pac. 931: "Money deposited in a savings bank may be the subject of a gift *causa mortis* if it appears from the transaction that the donor intended to confer upon the donee a present right to the money and at the same time clothed him with the means of obtaining it." And this applies equally to gifts *inter vivos*, as the only difference between the two relates to the power of revocation. *Pullen v. Placer Co. Bank*, 138 Cal. 170, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19.

It is claimed that the view of the lower court is opposed to certain decisions of the Supreme Court; but it is apparent that the facts in those cases are dissimilar to those before us, as will be disclosed by a brief reference to them. In *Zeller v. Jordan*, 105 Cal. 143, 88 Pac. 640, it was held that "the giving of a check by the wife to the husband in consideration of love and affection, with the understanding that the check is not to be used or presented until after her death, unaccompanied by the delivery of the pass book or of any order accompanying the pass book, as required by the rules of the bank, is invalid." Here the gift was to take effect immediately, and it was accompanied by the delivery of the pass books and an order upon the bank for the payment of the money. In *Hart v. Ketchum*, *supra*, the alleged gift was not absolute, but it was an unsuccessful attempt to make a testamentary disposition of property, as is apparent from what the intestate said: "I want you to draw this money and pay it out as I wish to have it done to different parties." There was nothing in his declarations to show an intent to make a present gift of the money. The case is not at all like the one at bar. In *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267, as stated in the syllabus, it is held that "oral declarations by an invalid woman preceding a written assignment of her personal property in contemplation of death, stating 'I want to give it to you or place all of it in your hands and tell you those I want should have it,' and other such declarations accompanying the transfer of bank books to the effect that she wanted to assign the money under certain conditions that she had given in regard to its disposal, are insufficient to sustain the claim of a gift." It is manifest that it was not the intention of the intestate in that case to vest the title in the defendant, but to constitute him her agent, rather than beneficiary, to carry out a testamentary disposition of her property. This was made clear by writ-

ten instructions as to what should be done with the property in the event of her death. In *Vance v. Smith*, 124 Cal. 219, 56 Pac. 1031, the gift was not to take effect until some time in the future, and hence it was declared invalid. In *Denigan v. Hibernia, etc., Society*, 127 Cal. 138, 50 Pac. 389, it was properly held that "the retention by the wife of the right in herself to withdraw the whole of the money from the bank" is inconsistent with the idea of a gift. This must be so, because it is not a gift unless the donor divests himself of all control and dominion over the property. In *Pulleu v. Placer County Bank*, 138 Cal. 160, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19, John W. Clarke, Sr., for the purpose of making a gift of \$1,000 to his son, John W. Clarke, Jr., drew his check upon the bank for that sum and delivered it to his son, saying that he could get the money from the bank, but after delivering it to him stated that he wished he would not present it until after his death. The son did not present it till the morning after his father's death. It was held that the gift was not complete, since the son did not present the check and secure possession of the money during the father's lifetime. However, the court said: "The check was not a symbolic delivery of the money, but it was a delivery of the means by which the son could obtain possession of the money." This would seem to meet the requirement of section 1147, Civ. Code, where the property is in possession of a third party; but, at any rate, the case is not controlling here, because the order in the case at bar was presented to the bank and accepted by it before the death of Mr. Ludwig. In *Noble v. Garden*, 146 Cal. 225, 79 Pac. 883, it was held that the transaction did not amount to a gift, where the deceased in her lifetime maintained dominion and control over the certificates of stock in controversy, and where she gave her agent oral directions to deliver the assigned shares to certain persons after her death, and the agent complied with the directions. Since the pretended gift was not to take effect until after the death of the transferor, it is clear that it could not be held to be a gift. The decision in *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500, was based upon an alleged gift of money represented by a certificate of deposit evidenced by the following writing on the back of the certificate: "Pay to Martin Basket of Henderson, Ky.; no one else; then not till my death. * * * I may live through this spell. Then I will attend to it myself." It will thus be seen that the foregoing cases are not decisive here. As an illustration of transactions upheld as valid gifts, we may refer to *Vandor v. Roach*, 73 Cal. 614, 15 Pac. 354; *Fleld v. Shorb*, 99 Cal. 661, 34 Pac. 504; *Rulz v. Dow*, 113 Cal. 490, 45 Pac. 867; *Calkins v. Equitable B. & L. Association*, 126 Cal. 531, 59 Pac. 30.

The only other point worthy of notice relates to alleged erroneous rulings of the court upon objections to certain evidence. We do not deem it necessary to refer to them specifically. We have examined them all, and we find no prejudicial error.

The cause appears to have been justly decided, and the order denying the motion for a new trial is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

6 Cal. App. 123

PEOPLE ex rel. McCARTY v. WILSON.

(Civ. 321.)

(Court of Appeal, Third District, California. July 30, 1907.)

1. JUDGMENT — CONCLUSIVENESS — ELECTION CONTEST.

A determination in an election contest, against the contestee's objection that the law authorizing "no nomination" to be printed on ballots, where no nomination had been made, was unconstitutional, and that hence no such ballot should be counted, became *res judicata*, barring the contestee from asserting the unconstitutionality of the statute in *quo warranto* subsequently brought against him by the contestant, in whose favor the contest had been decided.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1231.]

2. SAME.

The final judgment in an election contest in favor of contestant was admissible on subsequent *quo warranto* by the people on the relation of the successful contestant against the contestee; the parties being essentially the same in both actions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1177.]

3. SCHOOLS AND SCHOOL DISTRICTS—SUPERINTENDENT OF SCHOOLS' RESIDENCE.

A successful contestant for the office of county superintendent of schools did not disqualify himself to hold the office because, pending the determination of the contest, he went to an adjoining county to teach a term of school, where he owned a house and personality in the county of the contest, and left a considerable portion of his household goods there, claiming that county as his residence; his name remaining on the great register as a voter, and he returning when the term of school closed.

4. OFFICERS—FILING OATH—TIME FOR CONTEST.

Pol. Code, § 907, prescribing the time within which one elected to an office must take and file his oath of office, does not apply where a contest is pending, and where a contest grew out of an election held November 4, 1902, and remittitur on the affirmation of a judgment for contestant was filed April 4, 1906, and he filed his oath and bond April 14th, he acted within a reasonable time in qualifying.

Appeal from Superior Court, El Dorado County; N. D. Arnot, Judge.

Quo warranto by the people of the state of California, on the relation of T. E. McCarty, against S. B. Wilson. From a judgment for relator adjudging him to be entitled to an office, defendant appeals. Affirmed.

W. F. Bray, for appellant. U. S. Webb, Atty. Gen., Chas. A. Swissler, and Abr. Darlington, for respondent.

HART, J. This is an action in the nature of a quo warranto to determine the right or title to the office of superintendent of schools of El Dorado county. The respondent obtained judgment in the court below, adjudging him to be entitled to the office, and appellant takes this appeal from the judgment, upon a bill of exceptions.

The history of the differences between the parties over the title to the office in question is as follows: On the 4th day of November, 1902, at the general state election held in California on that day, the relator and the defendant were rival candidates for the said office of superintendent of schools of El Dorado county. Thereafter a canvass of the returns of said election by the board of supervisors of that county established, at least prima facie, the election of the defendant, and he was by said board so declared elected, and thereupon a certificate of election issued to him by the county clerk. The relator was the then incumbent of the office, having been elected thereto at the general state election held in the year 1898. After the receipt of the certificate of his election, as declared by the board of supervisors, the defendant duly qualified by taking the oath of office and filing the same and recording his official bond, it having been first approved by the judge of the superior court, and upon the expiration of the previous term took charge of and entered upon the discharge of the duties of the office. Thereafter and within the time limited by the law, the relator instituted a proceeding in the superior court, under the authority of section 1111 of the Code of Civil Procedure, contesting the defendant's right to the office. A trial of the contest resulted in a judgment for the defendant, and thereupon the relator took an appeal from said judgment to the Supreme Court, and said judgment was thereafter reversed and the cause remanded "for further proceedings." *McCarty v. Wilson*, 146 Cal. 324, 82 Pac. 243. The grounds upon which the reversal of that case was founded involved rulings of the trial court overruling appellant's (respondent here) objections to the admission in evidence of a large number of ballots upon which the voters had stamped a cross after or opposite the words "No nomination," printed upon said ballots, and also because of the overruling of the objections to the reception in evidence of seven ballots containing as many votes for respondent in that case (appellant here), on "each of which ballots the voter had written a name in the blank column on the ballot, and had stamped a cross after each written name." Upon a retrial of the case in the court below, the objections to the counting of the said ballots were, in conformity with the ruling of the Supreme Court, sustained, thus eliminating them in the determination of the result of the election. The result of this ruling at the second trial was that the relator here received

the highest number of votes cast for the contested office, and was therefore, on the 12th day of June, 1905, adjudged by the trial court to be entitled to said office. On the 29th day of June, 1905, the county clerk issued, in pursuance of the said judgment, a certificate of election to the relator, who, upon the same day, duly qualified and made a demand upon the defendant to surrender to him the office. The defendant refused to turn over the office to the relator, but served and filed a notice of appeal to this court from the judgment entered in said case. On the 30th day of January, 1906, this court rendered its decision in said cause, affirming the judgment appealed from, and the remittitur certifying the judgment so rendered by this court was transmitted to the county clerk and received by that officer on the 4th day of April, 1906. Thereafter, and on the 14th day of April, 1906, the county clerk again issued to the relator a certificate of election, and, after again duly qualifying for the office, the respondent demanded said office of and from said defendant, who refused to surrender it to the relator, and continued to usurp and unlawfully withhold the same.

Four points are urged in argument by the appellant for a reversal of the judgment: (1) That that portion of section 1197 of the Political Code, as it existed at the time of the general state election held in the year 1902, at which the electors of El Dorado county voted for candidates for the office in dispute, requiring the words "No nomination" to be printed on the ballots, when no nomination had been made by a political party for any office to be filed at the election, etc., was unconstitutional. (2) That the court erred in admitting in evidence the judgment in the case of *McCarty v. Wilson*, entered in favor of the plaintiff therein upon a second trial of that case. (3) That the relator, at the time of his purported qualification for the office after the remittitur from this court in the case of *McCarty v. Wilson*, supra, had been sent down and filed in the court below, was ineligible to hold the office because he was not a citizen of El Dorado county. (4) That the relator failed to qualify for the office within the time prescribed by law.

Counsel complains that, in the variety of forms in which the litigation of the question here has been before the courts of dernier resort, he has in vain vigorously insisted upon the determination of the proposition submitted by him that that portion of section 1197 of the Political Code, referred to here under the head of point No. 1, was violative of certain provisions of the state as well as the federal Constitution. The part of said section toward which hostility is thus directed was repealed by the Legislature of 1903 (St. 1903, p. 147, c. 134), but appellant declares that he is nevertheless entitled to a decision of the question. But, under the record before us, we think we are re-

lieved from that duty, as we perceive nothing in the case at bar which is affected by the question; nor do we appreciate the importance of declaring that the criticised part of the section, having long since been repealed by the Legislature, is dead beyond the power or hope of resurrection. The proposition involves a moot question. It originally arose, however, in the first trial of the contested election case. Counsel for the plaintiff in that case objected to the counting of certain ballots, upon the ground that after the words, "No nomination," printed thereon, the voter had stamped a cross, and that thereby said ballots were wholly invalidated. Thereupon, counsel for defendant in that case raised the point and made the objection that the provision of the law authorizing the printing on the ballots the words "No nomination," in a case where a political party had in fact made no nomination, was unqualifiedly unconstitutional and void, and that consequently no ballot containing those words, whether a cross was stamped opposite them or not, should be counted. The trial court overruled the objection made by the plaintiff, as well as that interposed by the defendant in that case. The Supreme Court, as seen, reversed the cause, principally upon the ground that the court below erred in overruling the objection of plaintiff in said contested election case to the counting of the ballots upon which the words "No nomination" appeared with a cross stamped after them. It is at a glance perceivable that the objection challenging the constitutional validity of that part of section 1197, *supra*, referred to, cannot be raised here. The objection thus made simply meant that such ballots constituted testimony irrelevant to the issue in the election contest, for the reason that the act of printing the words "No nomination" upon the ballots was contrary to some provision of the Constitution. It having been one of the questions tried and conclusively determined upon the objection of appellant in the first litigation of the ultimate proposition in that case, and which is practically the same that is sought to be established by this proceeding, it became thereby *res adjudicata*. It does not matter that the form of the main question in that case was as to which of the rival candidates had been in fact and in law elected to the contested office, and therefore in whom was thereby invested the right and title to that office, while here the question, in form, is as to whether or not the defendant is usurping and unlawfully withholding the office from the relator. The fact is that it is undoubtedly correct to say that the ultimate point or final object sought to be achieved by both proceedings was and is to secure the occupation and control of the office. All the material issues tried and facts proven relevantly bearing upon such issues in the former case were necessarily definitively and con-

clusively determined by the judgment in that case. It follows, by consequence, that the question raised by appellant's objection upon constitutional grounds against the counting of the ballots in all cases where the words "No nomination" appear thereon, whether such words so appearing declared the fact and the truth or otherwise, having been passed upon and decided in the former case, is, as is true of all the other material questions therein adjudicated, merged in the judgment in said case, and upon which he is estopped from making an attack in a collateral proceeding, unless, of course, it appeared that the judgment was void upon its face or the record somewhere disclosed that the court did not have jurisdiction of the subject-matter or of the parties or either of them. No question here is raised that the judgment in that case was void for any reason.

As to the objection that the court erred in allowing in evidence here the judgment obtained by the relator at the second trial of the contest, counsel attempts to maintain that, upon the authority of the case of *People ex rel. Drew v. Rodgers*, 118 Cal. 394, 46 Pac. 740, 50 Pac. 668, the parties to the election contest and the parties to this proceeding are different and distinct from each other. He also claims that different issues were presented in this proceeding from those adjudicated in the former case; that the allegations in the complaint concerning the election contest, and the judgment therein, were not germane to any question here or necessary for a determination of any issues tendered in this cause, and should have been, upon his motion, stricken out. We are unable to agree with the learned counsel in this statement. There are, in the very nature of the proceedings before us, essentially some new issues tendered. For illustration, it is alleged by the relator that the defendant has unlawfully intruded into, usurped, and is unlawfully withholding the office from relator. This is an issue which was not, technically speaking, involved in the former case. It is also true that the defendant himself presents two new questions, numbered 3 and 4 in the order in which we are considering the points. But it does not follow from these considerations that the judgment in the former case was not an issue here. Indeed, it was an exceedingly important one to the relator—in fact, all-important, for without it he would have utterly failed to make a case against the defendant.

In the case of *Drew v. Rodgers*, *supra*, the court below admitted in evidence the judgment roll in the case of *Drew v. Rodgers* (Cal.) 34 Pac. 1081. The plaintiff in the last-mentioned case was Moses M. Drew. The relator in the case subsequently tried was one Warren F. Drew. The object of both actions was to oust the defendant from the office of chief of police of the city of Sacramento. In the case of the *People ex rel. Drew v. Rodgers*, *supra*, the Supreme Court says: "The court

erred in admitting in evidence the judgment roll in the case of *Drew v. Rogers*, supra, and in holding that the defendant was estopped thereby from proving that he had been a citizen of the United States for more than 90 days prior to the election in March, 1892. The judgment was not between the parties to the present action, nor was it between the relator and the defendant." The relator in the case at bar was the contestant in the former case, and merely because in this proceeding the law requires that he must first obtain the consent of the Attorney General before instituting it, and because the people are, eo nomine, made parties to it, renders him none the less the real party in interest. The object of this proceeding is, as is manifest, practically to enforce and carry out the judgment in the election contest. The appellant refused to surrender the office to the party adjudged by the courts upon a trial of the question to be entitled to it. He was therefore an usurper of the office, and the relator was compelled to resort to this proceeding for the purpose of securing what had been judicially determined to be his right. In order to establish that right here, it was not only proper but absolutely necessary for him to present to the courts the evidence of his title. In what other way could he have established the allegations that the defendant was unlawfully withholding the office from him, and that he was himself, under the law, entitled to exercise the duties of the office? The defendant had, as his authority for occupying the office, the certificate of election issued to him, as required by law, by the county clerk, upon the declaration by the board of supervisors, after canvassing the election returns, that he had received the highest number of votes cast at the election for that office, and was consequently elected thereto. The election contest prosecuted by the relator resulted in the annulment of the certificate so received by the defendant, and the judgment of the court so annulling it was the only authority of the clerk for issuing to the relator the certificate evidencing his right to exercise the duties of the office. The ruling of the court upon the point under discussion was, as we have said, not only proper, but necessary. We have thus disposed of the constitutional question presented by counsel, and also the second point, in the order presented by us.

There is no merit in the point that the relator was not qualified to hold the office because of nonresidence in the county at the time he took the oath of office and filed his bond after the remittitur from this court certifying its decision on the appeal from the judgment entered upon the second trial of the contested election case was received and filed in the court below. The evidence upon this point, consisting alone of the testimony of the relator, was to the effect that, pending the final determination by the courts of the election contest, the relator went to Placer

county for the purpose of teaching school. He owned a house and personal property in El Dorado county, and left a considerable portion of his household effects in his house. He testified that his residence in Placer county was only temporary, and because he was compelled to teach in order to earn a livelihood for himself and family. He never had any intention of abandoning El Dorado county as his home, and his name remained on the great register as a voter in that county; that as soon as the term of school he was teaching terminated he intended to and did return to El Dorado county. The court's finding against the contention of appellant upon this point is fully sustained by the evidence.

The contention that the relator failed to qualify within the time required by law finds no support either in principle or the decisions of the courts. It has been held in this state that, where a contest is pending for an office, section 907 of the Political Code, prescribing the time within which a person elected to an office must take and file his oath of office, has no application. *People v. Potter*, 63 Cal. 127. According to the agreed statement of facts here, the remittitur from this court certifying the affirmance of the judgment of the court below was received and filed in the last-mentioned court on the 4th day of April, 1906, and the relator filed his oath and bond on April 14th. The relator acted within a reasonable time in qualifying.

Under all the circumstances of the case, as disclosed by the record, we think the defendant had no conceivable reason for withholding the office from the relator, after the decision of this court affirming the judgment and the order by the Supreme Court denying the petition for a rehearing of the case after judgment here.

There are some other points suggested, but we do not regard them worth noticing.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

6 Cal. App. 117

DRINKWATER v. HOLLAR et al. (Civ. 354.)
(Court of Appeal, Second District, California.
July 25, 1907.)

1. QUIETING TITLE—PLEADING—DELIVERY OF DEED.

In an action to quiet title, an allegation in the answer of the delivery of a deed, under which defendants claimed, is deemed controverted under Code Civ. Proc. § 462, providing that the statement of new matter in the answer in avoidance or constituting a defense, must at the trial be deemed controverted by the opposite party.

2. DEEDS—DELIVERY.

Delivery of a deed is as essential to the passing of title as the execution thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 116.]

3. EVIDENCE—PAROL—NONDELIVERY OF DEED.

While possession of a deed by the grantee is prima facie evidence of its delivery, parol ex-

trinsic evidence is admissible to show that no delivery was ever made by the grantor with intent to pass title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1978.]

4. DEEDS—DELIVERY BY BROKER—AUTHORITY.

Certain brokers, acting for plaintiff and defendant in effecting an exchange of land for certain stock, received a deed from plaintiff, with instructions not to deliver the same until the transaction was completed, and plaintiff should have had time to investigate the value of the stock. Thereafter plaintiff told the brokers he was not satisfied, and was still investigating the stock; but the brokers, contrary to his instructions, delivered the deed to defendant. Held, that neither plaintiff's delivery of the deed to the brokers, nor their delivery thereof to defendant, was effectual to pass title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Deeds, § 124.]

Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by T. P. Drinkwater against X. H. Hollar and others. From a judgment for plaintiff, and from an order denying defendants' motion for a new trial, they appeal. Affirmed.

X. H. Hollar, Flint & Barker and Barker & Bowen, for appellants. G. R. Freeman and E. W. Freeman, for respondent.

SHAW, J. Action to quiet title. The verified complaint is in the usual form, ascribing possession and ownership of the property to plaintiff, and alleging an unfounded adverse claim of defendant thereto. The answer controverts the ownership of plaintiff, and alleges that by deed duly executed on December 28, 1904, and delivered to defendant on January 11, 1905, plaintiff conveyed the land in question to defendant. The deed was recorded on January 12, 1905, and this action instituted on the following day. Judgment went for plaintiff, from which, and an order denying defendant's motion for a new trial made upon a bill of exceptions, he appeals.

On December 28, 1904, the respondent, Drinkwater, executed an "agreement for exchange," which recited that he had placed with Rains & Hunter, who were real estate brokers acting as agents for both parties, the land in question (particularly describing it), which he desired to exchange for property consisting of \$8,500 per value of the stock of the Toledo, Columbus & Cincinnati Railway Company, then owned by appellant, and authorized said Rains & Hunter to act as his agents in negotiating such exchange, and agreed if they should secure an acceptance of the proposition for such exchange to furnish a certificate of title and a deed of bargain and sale conveying a good and sufficient title to the property, and, upon securing the acceptance of the proposition to exchange the real estate for the stock, agreed to pay Rains & Hunter the sum of \$275 as commission for their services. On the same day the appellant Hollar accepted the prop-

osition by a written agreement to that effect, as follows: "This agreement witnesseth: That I, X. H. Hollar, of Lima, Ohio, owner of the second piece of property described within, hereby accept the proposition of exchange made therein, and agree to furnish said stock mentioned in within agreement to T. P. Drinkwater or his assigns or representatives. And I further agree to pay Rains & Hunter commission for said exchange. * * * [Signed] X. H. Hollar." A deed of conveyance, whereby Drinkwater and his wife conveyed to appellant the real estate in question, was duly executed, and on January 4, 1905, said Drinkwater placed the deed, together with his note for the sum of \$275, covering the agreed commission, with Rains & Hunter, who gave him a receipt therefor, as follows: "January 4, 1904. Received from T. P. Drinkwater deed to X. H. Hollar of lot 5 in block 47 of the lands of South Riverside Land & Water Co. in Corona, Calif. Agreement for certificate of title that land is to be free and clear except incumbrances mentioned in deed, and note of \$275 as commission for the exchange of said property. Rains & Hunter. On the above we have \$8,500.00 stock per value of the T. C. & C. Ry. Co., which we agree to deliver to said T. P. Drinkwater on demand. Rains & Hunter." Appellant's claim is based upon the deed executed by Drinkwater, which, it is alleged, was delivered to defendant Hollar on the 11th day of January, 1905.

Under section 462 of the Code of Civil Procedure this allegation of delivery of the deed is deemed to be controverted. Upon the issue thus tendered by the answer, the court found there had been no delivery of any deed conveying the property to the defendant. Assuming the evidence upon which the court based its conclusion to have been admissible, it was sufficient to justify the finding. The evidence tended to prove there was no delivery of the deed; that representations as to the value of the stock had been made to plaintiff; that, while he left the deed with Rains & Hunter, it was so deposited upon an understanding that they should retain possession thereof and hold until the deal was completed, and until he should have time to investigate the value of the stock; that thereafter he told them that he was not satisfied and was still investigating its value, but that, contrary to his instructions, they delivered the deed to appellant—to all of which, and other testimony of similar character, defendant objected, upon the ground that there was no issue under which such testimony was admissible. The action was prosecuted under the provisions of section 738, Code Civ. Proc. The deed upon which defendant bases his claim of title was duly signed, acknowledged, and recorded, and constituted an apparently good record title. But delivery of a deed is equally essential in transferring title as the act

of signing. "Delivery is the force that vitalizes the instrument." *Gould v. Wise*, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323. While possession of the deed was *prima facie* evidence of its delivery, it was not conclusive, but might be controverted by extrinsic evidence showing that it was never delivered. If the deed was not delivered to the grantee, plaintiff was not divested of his title. In a legal sense, there can be no delivery of an instrument without the consent of the grantor. "It may be shown by parol evidence that a deed in the possession of the grantee was not delivered." *Devlin on Deeds*, §§ 294, 295. "And even if the deed is deposited with the grantee, but for a purpose other than delivery, it would not take effect as a deed; nor can a title be derived from a deed which has not been delivered. While, therefore, it is not competent to control a deed by parol evidence where it has taken effect by delivery, it is always competent by such evidence to show that the deed, though in the grantee's hands, has never been delivered." *Washburn on Real Property*, 311. "But whether there has been a valid delivery or not must be decided by determining what was the intention of the grantor and by regarding the particular circumstances of the case." *Devlin on Deeds*, § 269. The intent of the grantor, rather than the mode of executing the intention, is the crucial point. *Corker v. Corker*, 95 Cal. 308, 30 Pac. 541. It may be deposited with a third person merely as custodian for safekeeping, or, as in the case at bar, "to hold until this deal was completed subject to" respondent's "investigation of this stock." It is settled that delivery is not complete until the grantor has voluntarily surrendered all control over it. The sole issue is whether or not the deed in question was delivered—not that its delivery was procured by fraud, or breach of trust. Respondent contends that it was not delivered at all, and the court so found. Neither fraud nor breach of trust enter into the case. Hence the very able argument and cases cited bearing upon the subject of the cancellation of deeds and remedies where delivery thereof has been obtained through fraud do not apply to this case. Plaintiff, as said in the opinion of the Supreme Court in *Cutler v. Fitzgibbons*, 148 Cal. 562, 83 Pac. 1075, decided January 29, 1906, "is not trying to set aside a deed which conveyed the legal title, on the ground that the deed was procured through fraud, mistake, undue influence, conspiracy," etc. Plaintiff had the legal title. It certainly did not pass out of him by a written instrument which was never delivered. Having the legal title to the land, he brings this action to have his title thereto quieted against appellant, who asserts and proclaims an estate in the land based upon a deed which, according to respondent's contention, had never been delivered. The act of *Rains & Hunter* in turning over the deed to

appellant contrary to the expressed wishes of *Drinkwater* was as ineffectual in divesting the latter of title as though it had been forged or stolen. *Denls v. Velati*, 96 Cal. 223, 31 Pac. 1; *Black v. Sharkey*, 104 Cal. 279, 37 Pac. 939; *Gould v. Wise*, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323; *Hibberd v. Smith*, 67 Cal. 547, 4 Pac. 473, 8 Pac. 46, 56 Am. Rep. 726. *Rains & Hunter* were the agents of both parties. The deposit of the deed with them, under the circumstances of this case, conferred no authority to deliver it to the grantee. Plaintiff does not seek a rescission of the contract, but contends that the deed is void for want of delivery; nor is it an action by one having an equitable interest to establish a trust in one holding the legal title. Delivery of an instrument is a question of fact independent of the writing itself, and extrinsic evidence to prove non-delivery is admissible, notwithstanding the fact that the adverse claim of title constituting the cloud is based upon an apparently good record title. *Arrington v. Liscom*, 34 Cal. 365, 94 Am. Dec. 722.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

6 Cal. App. 116

CONTINENTAL BUILDING & LOAN ASS'N
v. BEAVER et al. (Civ. 411.)

(Court of Appeal, Second District, California.
July 24, 1907.)

1. APPEAL—MOTION FOR DISMISSAL—NECESSITY FOR STATING GROUNDS.

That the notice of motion to dismiss an appeal did not specify appellant's failure to file an undertaking within the required time does not affect respondent's right to a dismissal on that ground.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3153.]

2. SAME—UNDERTAKING—TIME FOR FILING.

Under Code Civ. Proc. § 940, making an appeal ineffectual for any purpose unless an undertaking be filed within five days after service of the notice of appeal, the Court of Appeal acquires no jurisdiction where the undertaking is not filed within the required time, and the appeal must be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2065.]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the Continental Building & Loan Association against William J. Beaver and another. Defendants appeal from the judgment, and plaintiff moves to dismiss the appeal. Appeal dismissed.

C. W. Pendleton, for appellants. Frank G. Finlayson, for respondent.

SHAW, J. Respondent asks that the appeal from the judgment herein be dismissed. The ground for the motion, as stated in the notice thereof, is that the transcript of the record to be used on the appeal has not been

filed, and the time for filing the same has expired. In support of the motion, a certificate of the clerk of the court rendering said judgment is presented. Among other facts disclosed by this certificate, it appears that the judgment was entered on January 24, 1907; that on the 10th day of February appellant duly served upon respondent his notice of appeal from said judgment; that on February 27, 1907, eight days after the service of said notice, appellant filed in the office of said clerk an undertaking on appeal. Section 940, Code Civ. Proc., provides that "the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal an undertaking be filed."

The notice of motion does not specify the failure to file the required undertaking within five days from service of the notice of appeal as a ground for dismissal of the appeal. This, however, is not necessary. The filing of the undertaking within the time fixed by the provision of said section 940, Code Civ. Proc., is absolutely essential to give this court jurisdiction. *Rose v. Mesmer*, 134 Cal. 459, 66 Pac. 594; *Hoyt v. Stark*, 134 Cal. 178, 66 Pac. 223, 86 Am. St. Rep. 246. "The matter going to the jurisdiction of this court to entertain the appeal, it would seem to be immaterial in what manner comes the suggestion that the steps necessary to confer jurisdiction have not been taken." *Bullock v. Taylor*, 112 Cal. 147, 44 Pac. 457. When the facts appear showing want of jurisdiction, it is the duty of the court of its own motion to dismiss the attempted appeal. As the undertaking was not filed within five days after service of the notice of appeal, this court has no jurisdiction to entertain the same, and the appeal is therefore dismissed.

This conclusion renders it unnecessary to consider other points made in presenting the motion.

We concur: ALLEN, P. J.; TAGGART, J.

CONTINENTAL BUILDING & LOAN ASS'N v. BEAVER. (Civ. 412.)

(Court of Appeal, Second District, California.
July 24, 1907.)

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the Continental Building & Loan Association against William J. Beaver. Defendant appeals from the judgment, and plaintiff moves to dismiss the appeal. Appeal dismissed.

C. W. Pendleton, for appellant. Frank G. Finlayson, for respondent.

SHAW, J. Motion to dismiss an appeal from judgment.

The facts in this case are identical with those involved in *Continental Building & Loan Association v. William J. Beaver et al.*

(Civ. 411) 91 Pac. 666, the appeal in which was this day dismissed for failure to file the required undertaking within five days after service of notice of appeal.

Upon the authority of that case, the appeal herein is likewise dismissed.

We concur: ALLEN, P. J.; TAGGART, J.

6 Cal. App. 152
STEWART et al. v. SMITH et al. (Civ. 345.)
(Court of Appeal, Third District, California.
July 30, 1907. Rehearing Denied by
Supreme Court Sept. 26, 1907.)

1. SPECIFIC PERFORMANCE—CONTRACT TO WILL—REQUISITES.

Under the express provisions of Civ. Code, § 3391, in order to entitle a party to specific performance of a contract to dispose of property by will, the contract must be based on an adequate consideration, must be just and reasonable as to the party against whom it is sought to be enforced, and certain and definite, not within the statute of frauds, free from fraud or undue influence committed by the enforcing party, and its enforcement must not invoke an invasion of the rights of an innocent third party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 223.]

2. SAME—PARTIES COMPLAINANT—MISJOINDER.

Where complainants were all interested in a suit to compel specific performance of a contract to dispose of real and personal property by will, there was no misjoinder of parties complainant, because they were not all interested to the same extent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 345.]

3. SAME—PARTIES DEFENDANT—EXECUTOR.

Where an executor had no interest in the distribution of an estate, he was not a necessary party to a suit between all the persons claiming an interest in the estate to enforce specific performance of a contract with testatrix for the disposition of her property by will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 347.]

4. WILLS—CONTRACT TO DEVISE—VALIDITY.

A contract by which testatrix agreed to convey property in a particular manner by will was not invalid as a contract providing for the sale of property, some of which had neither actual nor potential existence at the time, within Civ. Code, § 1722, providing that the subject of a sale must be property, the title to which can be immediately transferred.

5. FRAUDS, STATUTE OF—CONTRACT TO WILL—PERFORMANCE WITHIN YEAR.

A contract by which testatrix, in consideration of a transfer of certain property to her by her children, agreed to make a will, leaving at her death the whole of the property or residue thereof and all increase and accumulations to her children, share and share alike, and to execute a will so providing was not within the statute of frauds as an agreement not to be performed within a year.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 81.]

6. SAME—AGREEMENT FOR THE SALE OF REAL PROPERTY—DEMURRER.

A bill for specific performance of an alleged contract to make a will devising and bequeathing all testatrix's property, of which she should die seised, alleging that at the time of her death she left an estate of the value of \$32,547.23, was not demurrable, in that the agreement orally provided for the sale of real property within

the statute of frauds (Code Civ. Proc. § 1973; Civ. Code, § 1624); it not appearing that such estate consisted of realty.

7. SPECIFIC PERFORMANCE—EXECUTED CONTRACT—RIGHT TO PLEAD STATUTE.

Testatrix's husband died seized of real and personal property of the value of \$17,000, with debts not exceeding \$1,000, all of which estate consisted of community property. Testatrix was appointed administratrix, and contracted with complainants, her children, that, if they would convey their interests as heirs at law in their father's estate to her, testatrix would enjoy the property for her support for life, and would invest the surplus income, and bequeath the residue and all increase and accumulations to her children at her death, in equal shares by will. *Held* that, complainants having executed a conveyance of their interests pursuant to such agreement, testatrix's contract to will became executed so far as complainants were concerned, so that the statute of frauds was no defense to a suit by them for specific performance.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Suit by John H. Stewart and others against Mary S. Smith and others, to compel specific performance of a contract to make a testamentary disposition of property. From a decree in favor of complainants, defendants appeal. *Affirmed*.

W. H. Carlin and M. E. Sanborn, for appellants. S. J. Stabler and A. C. McLaughlin, for respondents.

BURNETT, J. The action is in equity to compel specific performance of a contract to make a certain testamentary disposition of property. Two of the plaintiffs are children, and the other two are daughters, of a deceased child of James S. Stewart and Annie Stewart, decedents. All the other heirs, legatees, and devisees of said Annie Stewart, deceased, are made defendants. It appears from the complaint that said James S. Stewart, at the time of his death in 1870, left property, real and personal, of the value of \$17,000. All claims against the estate did not exceed the sum of \$1,000. In the same year Annie Stewart, widow of said James S. Stewart, was appointed administratrix of his estate, and remained such until the administration of the estate was closed, April 8, 1893. All the estate of said James S. Stewart was community property. Some time in the year 1873 the said Annie Stewart "for her better maintenance and support during her life orally solicited and requested her said sons, John H. Stewart and Charles E. Stewart and her said daughter Elizabeth Reilay (née Stewart), deceased, mother of said plaintiffs, Luella M. Reilay and Mabel S. Kellogg (née Reilay), to deed, sell, assign, and deliver to her all their and each of their shares and interests as heirs at law of their said father of, in, and to their said father's estate, upon the oral promise, contract, and agreement, in consideration therefor, that she, the said Annie Stewart, would use and enjoy the said property for her support and maintenance during her life, and would manage said property and

invest the income, rents, issues, and profits thereof, and at her death she would leave the whole of said property, or the residue thereof, and all increase and accumulations thereof, to her said 10 children, share and share alike, and would make, execute, and leave in existence at her death a last will and testament, wherein and by the terms of which she would give, demise, and bequeath to her said 10 children, share and share alike, or to the heirs of any deceased child by right of representation all the property of which she might die seized or possessed." The said John H. Stewart and Charles E. Stewart and Elizabeth Reilay accepted said proposition and agreed to do as requested by their mother upon the terms proposed by her. Thereafter, on or about November 22, 1873, in compliance with their part of the agreement, they transferred to their said mother all their interest in the personal estate of their father, and in conjunction with the other children, and in pursuance of said agreement, they executed and delivered to their said mother a conveyance of their interest in the real property of their father, situated in Sutter county, Cal., and on or about June 5, 1883, in further compliance with said contract, and in full consummation thereof, and in conjunction with their mother, and with all of the other heirs of the said James S. Stewart, they made, executed, and delivered for a valuable consideration to one Charles P. Winzlaw all their and each of their interests in and to all the real property of the estate of said James S. Stewart, situate in the state of Ohio, and all the corresponding proceeds of said sale were given to and accepted by said Annie Stewart in pursuance of said contract and agreement. The said Annie Stewart received the income and profits of said estate and applied a portion of the same and the proceeds of the sales of personal property to her support, and invested the residue in real property in the said county of Sutter. On April 8, 1893, the entire residue of the estate of the said James Stewart was distributed to the said Annie Stewart and was of the value of about \$30,000. Said Annie Stewart died testate August 6, 1904, and left estate in said Sutter county of the value of about \$32,000. Her will was admitted to probate, and letters of administration were issued to defendant William W. Stewart. Said last will and testament provides that neither of the plaintiffs should receive anything by virtue of said will, and the complaint alleges "that said Annie Stewart, deceased, thereby ignored, repudiated, and violated said contract and agreement so entered into as aforesaid and so as aforesaid fully performed on the part of said John H. Stewart, Charles E. Stewart, and Elizabeth Reilay." A demurrer was interposed and overruled, and, defendants declining to answer, judgment was entered as prayed for, establishing the agreement and decreeing distribution to plaintiffs of the proportion of the residue of the estate to which

each is entitled under the terms of the said contract. From this judgment the appeal is taken.

That contracts providing for disposition of property by will are enforceable is clearly established by the authorities. There are, however, certain important conditions and limitations, hereafter to be noticed, under which a court of equity will decree a specific performance of such contracts. In the case of *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 776, it is said by the Court of Chancery of New Jersey that: "The law permits a man to dispose of his own property at his pleasure, and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual, or for a particular purpose as well by will as by a conveyance to be made at some specific future period, or upon the happening of some future event. It may be unwise for a man in this way to embarrass himself as to the final disposition of his property, but he is the disposer by law of his own fortune, and the sole and best judge as to the time and manner of disposing of it. A court of equity will decree the specific performance of such an agreement upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction." The reports contain many cases abounding in interesting and instructive observations upon this subject, but we content ourselves with merely a citation of some of them: *Kofka v. Rosicky*, 41 Neb. 323, 59 N. W. 738, 25 L. R. A. 207, 43 Am. St. Rep. 685; *Lothrop v. Marble*, 12 S. D. 511, 81 N. W. 835, 76 Am. St. Rep. 626; *Svanburg v. Fosseen*, 75 Minn. 350, 78 N. W. 4, 43 L. R. A. 427, 74 Am. St. Rep. 490; *Nowack v. Berger*, 133 Mo. 24, 34 S. W. 489, 31 L. R. A. 810, 54 Am. St. Rep. 663; *Korminsky v. Korminsky*, 21 N. Y. Supp. 611, 2 Misc. Rep. 138; *Townsend v. Vanderwerker*, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383; *Whiton v. Whiton*, 53 N. E. 722, 179 Ill. 32; *Bush v. Whitaker*, 91 N. Y. Supp. 616, 45 Misc. Rep. 74; *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; *McCabe v. Healy*, 138 Cal. 81, 70 Pac. 1008; *Schaadt v. Mutual Life Ins. Co.*, 2 Cal. App. 715, 84 Pac. 249. The same general principles of equity jurisdiction apply to these cases, as stated in *Johnson v. Hubbell*, supra, that must be present in the enforcement of contracts to convey during the lifetime of the parties. In other words: There must be an adequate consideration; the contract must be just and reasonable as to the party against whom it is sought to be enforced; the other party must not have practiced fraud nor undue influence in securing the contract; it must be certain and definite, not within the statute of frauds; and its enforcement must not involve an invasion of the legal or equitable rights of an innocent third party. Section 3391, Civ. Code; *Pomeroy's Equity Juris.* § 1405; *Davison v. Davison*, 13 N. J. Eq.

252; *Shakespeare v. Markham*, 10 Hun (N. Y.) 322; *Rivers v. Rivers*, 3 Desaus. (S. C.) 190, 4 Am. Dec. 609; *Stanton v. Miller*, 58 N. Y. 192; *McClure v. McClure*, 1 Pa. 378; *Wright v. Wright*, 31 Mich. 380.

It is contended by appellants that the contract before us does not satisfy the requirement of these principles of equity, and, besides, that the complaint is objectionable in other respects, and to the consideration of the specific objections made by appellants and raised by their demurrer we direct our attention.

1. There is no misjoinder of parties plaintiff. The contention of appellants in this respect can be answered no better than by a quotation from the case of *Whitehead v. Sweet*, 126 Cal. 70, 58 Pac. 376, where the Supreme Court, speaking through Commissioner Cooper, says: "A court of equity abhors a multiplicity of suits. No fixed rule can be laid down by which to determine whether a given bill in equity is or is not subject to the objection of multifariousness. * * * A bill in equity is said to be multifarious when distinct and independent matters are joined therein. If the subject-matter in the main relates to one transaction around which the others cluster, and each party has an interest in some matters in the suit, and they are connected, even though all the parties do not have an interest in all the matters in the suit, the bill is not multifarious"—citing *Story's Eq. Pleading*, §§ 271, 272a, *Wilson v. Castro* 31 Cal. 429. See, also *Lanigan v. Neely* (Cal. App.) 89 Pac. 441. The purpose of the suit here is to enforce a contract made with decedent in which all the plaintiffs are directly interested. The subject-matter relates to that one transaction, and it is of no consequence that the plaintiffs are not all interested therein to the same extent. It would be a singular rule that would require these plaintiffs to bring separate actions to establish the same contract. If they had done so, defendants would undoubtedly have a right to complain of the inconvenience and unnecessary expense occasioned thereby. The cases cited by appellants, as we view the matter are not in point, and we deem it unnecessary to review them.

2. The executor is not a necessary party to the action. All the devisees, legatees, and persons claiming an interest in the estate are made parties plaintiff and defendant, and, as the executor has no interest as such in the distribution of the estate, he is properly excluded from a contest over the right to a distribution of the whole or a part of it. *Estate of Wright*, 49 Cal. 550; *Jones v. Lamont*, 118 Cal. 499, 50 Pac. 766, 62 Am. St. Rep. 251; *Estate of Healy*, 137 Cal. 474, 70 Pac. 455.

Attention is directed by appellants to several particulars wherein they claim the complaint is open to the objection that it does not state sufficient facts to constitute a cause of action. It is contended that, if

the contract of Annie Stewart is to be treated as a sale of her property to plaintiffs, it must be held to be void for the reason that it included property having neither an actual nor potential existence at the time. Civ. Code, § 1722. But it is too plain for argument that the contract does not purport to constitute a sale by her, but an agreement to convey at a future period. It is manifest that said section has no application. Again, it is urged that the contract is void for two reasons: "(1) By its terms the agreement was not to be performed within a year from the making thereof; and (2) it was an agreement for the sale of real property. Code Civ. Proc. § 1973; Civ. Code, § 1624; Story's Eq. Juris. § 752." In response to the former specification, it is sufficient to say that the contract in question is not "an agreement that by its terms is not to be performed within a year from the making thereof." It is said in *McKeany v. Black*, 117 Cal. 592, 49 Pac. 710: "If the contract by its terms is not to be performed within a year, it is void; but, if it may by its terms be performed within a year, it is not, even though it may not be performed within that time." To the same effect are *Dougherty v. Rosenberg*, 62 Cal. 37, and *Blanding v. Sargent*, 33 N. H. 239, 66 Am. Dec. 721. Again, the agreement on the part of said Annie Stewart was not to give, devise, and bequeath all the real property, but "all the property of which she might die seised or possessed." The complaint does not show the character of the property left by her, but the allegation is she "was at the time of her death a resident of said Sutter county and left estate therein of the value of \$32,547.23." It does not appear, therefore, affirmatively, that the second specification of appellant to which we have above referred is in point. Appellants did not demur to the complaint on the ground of uncertainty as to the character of the property of the said Annie Stewart, and we cannot assume that it was not personal property. But the complete answer to the whole proposition is that the contract was entirely executed on the part of the three children. Relying, as they were justified in doing, upon the solemn promise of their mother to make the said testamentary disposition, they transferred to her all their interest in the father's estate, both personal and real, and the said mother used, enjoyed, and treated as her own said property, and upon well-known principles of equity defendants are estopped from assailing the contract upon the grounds we have been considering. But it is said in this connection that plaintiffs' remedy is at law, and not in equity. Certain cases are cited in support of this position which we shall consider briefly. In doing so the suggestion naturally arises that it is not surprising that there is some apparent conflict in the authorities in view of the fact that the rules of equity are somewhat flexible and in this class of cases con-

siderable latitude is allowed to the discretion of the individual chancellor.

In *Windsor v. Miner*, 124 Cal. 492, 57 Pac. 386, specific performance was denied because the complaint did not state facts from which the court could determine whether the consideration was adequate, and the contract as to the defendant just and reasonable. The scope of *Newman v. Freitas*, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548, is seen in the following quotation from the syllabus: "Under the settled rule of equity, specific performance cannot be decreed unless it affirmatively appears that the contract is fair, just, and equal in all its parts, and reasonable and equal in its operation; and if it is in any respect unfair or oppressive, the plaintiff will be left to his remedy at law." It was justly held in that case that the contract was unreasonable and unjust. *Stiles v. Cain*, 134 Cal. 170, 66 Pac. 231, is to the same effect. Specific performance was denied in *Russell v. Agar*, 121 Cal. 396, 53 Pac. 926, 66 Am. St. Rep. 35, for the reason stated by the court that plaintiff was suing "to enforce a contract whereby he was to be paid some undetermined and undeterminable sum of money." The contract was held to be too uncertain to be enforced in equity or even to be the basis for an action at law for damages. In *Re Hayden's Estate*, 81 Pac. 668, 1 Cal. App. 75, decided by this court, the contract was sought to be enforced against an incompetent. In the opinion written by Mr. Justice McLaughlin, it is very properly said that: "Courts will be more strict in examining into the nature and circumstances of such agreements than any others and would require very satisfactory proofs of the fairness and justness of the transaction." It is pointed out in the course of the opinion that the contract was so lacking in the elements of certainty and fairness as not to commend itself to a court of equity. The same contract was under review in the case of *Hayden v. Collins*, 81 Pac. 1120, 1 Cal. App. 239, and a sufficient reason for a denial of specific performance is found in the following language: "A thorough analysis and study of the evidence convinces us that nothing was said or done to indicate an agreement. There was no meeting of minds on any definite proposition made by any of the parties. Nothing is indicated more than that Mrs. Hayden at one time probably intended to remember appellant in her will or 'do something for him.'" The decision in *Henning v. Miller*, 21 N. Y. Supp. 831, 66 Hun, 588, a case at law, really rests upon the doctrine that parol evidence is not admissible to vary the terms of a written instrument. Some unnecessary language was used apparently in line with appellant's contention here, but it must be limited to the facts of that particular case.

But appellants admit that part performance may take a case out of the statute of frauds, but claim that the facts here are in-

sufficient to meet the requirement of the law in that regard. We proceed to notice some of the authorities upon which they rely to support this contention. Judge Story, in his *Equity Jurisprudence* (section 261), states the rule as follows: "But a more general ground, and that which ought to be the governing rule in cases of this sort, is that nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him, unless the agreement is fully performed." The authorities all agree as to the rule, although it is expressed in varying phraseology. For instance, Professor Pomeroy, in section 1409 of his work on *Equity Jurisprudence*, says: "The ground upon which the remedy in such cases rests is that of equitable fraud. It would be a virtual fraud for the defendant, after permitting the acts of partial performance, to interpose the statute as a bar to the plaintiff's remedial right. * * * The most important acts which constitute a sufficient part performance are actual possession, permanent and valuable improvements, and these two combined." Plaintiffs have brought themselves clearly within the rule as thus announced. If it would not be a fraud upon them to withhold specific performance, then we mistake the meaning of the expression. They have not entered into the actual possession of the real property and made valuable improvements upon it; but, relying on the promise of the mother, they surrendered to her the possession and deprived themselves of the use of the property and the opportunity and means to make valuable improvements thereon. In an action to enforce specific performance of such a contract, the surrender of possession of real property by one party to the other in reliance upon the latter's promise must be considered, in contemplation of equity, a factor as persuasive as though the former had acquired possession by virtue of said contract.

Of the cases cited by appellants in support of their contention, in the following specific performance was decreed: *Nowack v. Berger*, 133 Mo. 24, 34 S. W. 489, 31 L. R. A. 810, 54 Am. St. Rep. 663; *Quinn v. Quinn*, 5 S. D. 328, 58 N. W. 808, 49 Am. St. Rep. 875; *Svanburg v. Fosseen*, 75 Minn. 350, 78 N. W. 4, 43 L. R. A. 427, 74 Am. St. Rep. 490; *Lothrop v. Marble*, 12 S. D. 511, 81 N. W. 885, 76 Am. St. Rep. 626; and *Kofka v. Rosicky*, 41 Neb. 328, 59 N. W. 788, 25 L. R. A. 207, 43 Am. St. Rep. 685. In *Dicken v. McKinley*, 163 Ill. 318, 45 N. E. 134, 54 Am. St. Rep. 471, it was held that the act of statutory adoption is not sufficient to take the case out of the statute of frauds. In *Shahan v. Swan*, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517, specific performance was denied because the acts relied upon were not necessarily referable to the contract, but might have been prompted merely by benevolence and affection. *Grant v. Grant*, 63 Conn. 530, 29 Atl. 15, 38 Am. St.

Cal. Rep. 89-91 P.—59

Rep. 379, is rather in line with the contention of appellants; but since plaintiff had been clothed, maintained, educated, and treated as a daughter by the Grants, it could be held that she had received full consideration for the services rendered by her. The decisive factor in *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369, was the subsequent marriage of McNally. Hence it was held that the enforcement of the contract would wrong an innocent third party. *Forrester v. Flores*, 64 Cal. 24, 28 Pac. 107, and *Salfeld v. Sutter County*, 94 Cal. 546, 29 Pac. 1105, are based upon the familiar doctrine that the payment of money alone is not sufficient to justify specific performance. *Flood v. Templeton*, 148 Cal. 374, 83 Pac. 148, was held to be not a case for specific performance, for the reason that there was no showing as to the value of the land at the time of the contract, or that plaintiff suffered any detriment, or that the promisor gained any advantage by said contract, and also, since plaintiff forebore to press a fixed monetary demand an action at law was the proper remedy.

In most of the cases cited where specific performance was decreed, personal services were the basis for the action, but in some of them the conveyance of property was the consideration. There is no difference, however, in principle, if the elements of equitable cognizance are present. In the case at bar, assuming, as we must, that all the facts alleged in the complaint are true, only one conclusion can be reached in consonance with the principles of equity and justice and in harmony with the best considered cases. No case cited appeals more strongly than this one to the conscience of the chancellor. There is no uncertainty as to the intention of the parties, and as to Mrs. Stewart the contract was eminently fair, just and reasonable. She received property more than 30 years ago from each of the children, of the value of nearly \$1,000, upon the promise that she would leave to the promisee an indefinite amount—it might be much less than she received, and at some uncertain period—as it developed, more than 30 years thereafter. As a cold business proposition, no one would be so liberal as were the children. They deprived themselves of valuable property at a time when they probably could have used it to great advantage and profit for an uncertain amount that they might never live to enjoy. In fact, the mother did survive one of them. The circumstances of the transaction reveal clearly the adequacy of the consideration and cannot be aided by any comment in which we might indulge.

Again, the mother received real property as a part of the consideration, and the peculiar value of such property is a decisive element in actions for specific performance. If the children had parted simply with personal property, under the decisions it might be that application would have to be made

to the law side of the court; but here no such contention can be maintained. If the plaintiffs did not present a case for specific performance, then it is idle to assert that it is ever proper to decree specific performance of an oral agreement to devise property to a particular individual. The decision of the court below upon the admitted facts was just and equitable, and a contrary view is intolerable in contemplation of fair dealing and good conscience.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

6 Cal. App. 189

EWBANK v. MIKEL. (Civ. 338.)

(Court of Appeal, Third District, California.
July 30, 1907.)

1. PUBLIC LANDS—CONTEST—ACTION—LIMITATION.

Under Pol. Code, § 3415, providing that, after an order is made by the surveyor general referring to the court a contest concerning the purchase of public lands, an action may be brought to determine the contest, and that the production of a certified copy of the entry made by the surveyor gives the court complete jurisdiction, and section 3417, providing that, unless the contestant commences his action within 60 days after the order of reference is made, his rights in the premises and under his application to purchase cease, the limitation begins to run from the making and entry of the order, and not from the time contestant is notified thereof, or from the date of the certified copy of the entry.

2. SAME — ATTACKING PATENT — SUIT BY ANOTHER THAN THE STATE.

A contestant of the right to purchase public lands having failed to bring his action to determine the contest within 60 days of the making of an order by the surveyor general, referring the contest to the court, so that under Pol. Code, § 3417, his rights in the premises and under his application to purchase had ceased, and he not having taken any steps to acquire any further or new right, and a patent having been issued to the contestee, he is not in privity with the state by reason alone of his occupation of the land as a settler, with the intention of purchasing it, so as to authorize his maintaining an action attacking the patent, on the ground that it was obtained by fraud, and for a decree, and that the patentee holds the title in trust for plaintiff.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Thomas Ewbank against J. A. Mikel. Judgment for defendant. Plaintiff appeals. Affirmed.

Robert W. Miller, for appellant. H. P. Brown and Chas. G. Lamberson, for respondent.

CHIPMAN, P. J. Action to obtain a decree that the legal title to certain state land, evidenced by a patent from the state to the defendant, is held by defendant in trust for plaintiff. A general demurrer to the complaint was sustained without leave to amend, and plaintiff appeals from the judgment dismissing the action.

The land in question is the east half of

section 33, township 21 south, range 19 east, Mount Diablo base and meridian, being land uncovered by the recession of the waters of Tulare Lake, and which thus became state lands. It is averred in the complaint that said section 35 was surveyed and sectionized and the survey made to conform to the United States surveys, and a plat of the survey, with copy of the field notes, duly filed in the office of the state surveyor general on June 7, 1899, and said land became subject to sale by virtue of the act approved March 24, 1893. St. 1893, p. 341, c. 229. On July 15, 1903, defendant filed in the office of the state surveyor general his application to purchase the whole of said section, which was approved by said surveyor general, and on November 27, 1903, a certificate of purchase of said lands was issued to defendant. It is averred that in certain essential particulars, specifically set forth, the affidavit of defendant accompanying his said application was untrue; that on June 12, 1905, said land was vacant and unoccupied, and on that day plaintiff entered into possession of the east half of said section, with the intention of settling thereon, and pursuant thereto constructed a dwelling thereon; that on said day he filed his application with the said surveyor general to purchase said land, and at the same time made protest against the issuance of further evidence of title to defendant, and made demand that the contest thereby created be referred to the superior court of Kings county for adjudication of the respective rights of the parties to purchase said east half of said section; that on June 30, 1905, the surveyor general made and entered of record an order of that date referring the contest to said court, which said order is fully set forth in the complaint; that thereafter, to wit, on July 11, 1905, the said surveyor general caused the said profert of reference to be certified and plaintiff's attorney notified thereof by letter of the same date; and that said profert was received and filed in the office of the clerk of said court on July 13, 1905. It is then averred that with intention to deceive the surveyor general into believing that "full 60 days had elapsed since the issuance of the said profert and order of reference aforesaid," defendant, on August 30, 1905, caused the county clerk of said county "to certify to the said surveyor general that, up to that date, no action had been commenced in the said superior court" by plaintiff herein, in the matter of said conflicting claims, which said certificate defendant telegraphed to said surveyor general and demanded that a patent issue to defendant; that thereafter the said surveyor general issued to said defendant a patent for said land; that resting in the belief that he had until September 10, 1905, or 60 days after July 11, 1905, in which to commence his action in said court, plaintiff, on September 6, 1905, commenced said action. There is no allegation of intentional

wrongdoing on the part of the surveyor general in the issuing said patent, but only that he was deceived by said certificate of said clerk and by the records in his office into the belief that full 60 days had elapsed since said order of reference and proferet were made. The present suit was commenced September 21, 1905.

Assuming the averments of the complaint to be true, as we must, it may be conceded, as contended by plaintiff, that defendant's application was and is invalid; and that, the contest having been referred to the superior court for determination, the surveyor general was without authority to issue a patent, until the final judgment of the court had been duly certified to him. It must also be conceded that equity will control a patent in the hands of one who has procured its issue to him in fraud of the rights of the rightful owner. It was so held in *McFaul v. Pfankuch*, 98 Cal. 404, 33 Pac. 397, and *Mery v. Brodt*, 121 Cal. 338, 53 Pac. 818. Thus much conceded, still the judgment on the demurrer must be affirmed. Section 3417 of the Political Code is as follows: "Unless the party contestant commences his action within sixty days after the order of reference is made, his rights in the premises and under his application cease." The contest is certified to the court when the order of the surveyor general, as register of the land office, is made and entered in the proper record book. The 60 days mentioned in the statute begin to run when such order is made and entered, and the contestant may at once commence his action. The certified copy of the entry of the order may not be furnished until the trial, as it is but evidentiary of the fact that the order of reference was made. *Sherman v. Wright*, 133 Cal. 539, 65 Pac. 1096, where it was said: "Hence it is plain that the order of reference and the entry thereof constitute the act of certifying the contest to the district court." The contention of appellant that the 60 days began to run from the date of the certified copy of the order of reference sent to plaintiff's attorney finds no support in any proper construction of the statute or in the decisions of our courts. Plaintiff instituted the contest and was bound to take notice of the entry of the order of reference in the surveyor general's office and govern himself accordingly. Plaintiff is in error in his contention that it was the duty of the surveyor general to notify plaintiff of the order of reference, and that until he did so the time prescribed by the statute did not begin to run. It is true that section 3415 provides that complete jurisdiction of the court attaches upon the filing of the copy of the certificate of reference with the clerk, but jurisdiction may also attach by the filing of the complaint before such filing of the certificate. Section 3415 cannot be held to modify or change in any way the plain provisions of section 3417. The running of time under the latter section,

as a statute of limitations, in no wise depends upon the jurisdiction of the court.

We are next to consider the effect upon plaintiff's rights through his failure to commence his action in time. This is very clearly pointed out in *Greenwade v. De Camp*, 72 Cal. 448, 14 Pac. 177: "The effect was to work a forfeiture of all rights of plaintiff, both in the application and in the premises." He could have filed another application, and thus have acquired a right (*Id.*), but he could not, upon an application thus forfeited, successfully pursue his rights under the action commenced by him after the statute had run against his right to commence the action.

Conceding that the averments of defendant's fraud are sufficient in law, it was still incumbent upon plaintiff to connect himself with the paramount source of title to entitle him to bring the action. Defendant's patent may be invalid by reason of the facts averred in the complaint, and yet this fact would be of no avail to plaintiff as a stranger to the title. *Mery v. Brodt*, 121 Cal. 332, 53 Pac. 818. There must be a privity of title between plaintiff and the state. He must possess some right, title, interest, or claim in or to the lands acquired before the final transmission of title and which is recognized by the laws of the state as valid. *Robinson v. Forrest*, 29 Cal. 320. In *Plummer v. Brown*, 70 Cal. 546, 12 Pac. 465, the court said: "To entitle the alleged owner, however, to equitable relief, he must show that he occupies such status as entitles him to control the legal title." But we have seen (*Greenwade v. De Camp*, *supra*) that plaintiff forfeited all right to the land and to his application by his failure to commence his action in time, and it is not shown that he took any steps to acquire any further or any new right. He has therefore failed to state a cause of action.

Appellant contends that he is in privity with the state by reason alone of his occupation of the land as a settler, with the intention, as he alleges, of purchasing it, citing *Perri v. Beaumont*, 91 Cal. 30, 27 Pac. 534; also, *Hinckley v. Fowler*, 43 Cal. 64. In the case of *Perri v. Beaumont*, *supra*, plaintiff by his complaint showed that he was an actual settler upon the land, having made valuable improvements thereon, and being desirous of purchasing the premises, and that he possessed all the requisite qualifications to purchase at the time he filed his application; but he failed to show that the land was surveyed at the date of his application to purchase. He also showed that defendant's application and certificate of purchase were invalid, and that he had no right to a patent. The trial court sustained a general demurrer to the complaint, and, plaintiff failing to amend his complaint, gave judgment for defendant. Upon appeal the court held that plaintiff had the right to institute the contest, and though not himself entitled to judgment, as he failed to allege that the land

was surveyed, he had sufficient interest to entitle him to prevent defendant from obtaining a patent; that by its judgment the trial court placed defendant in position to obtain a patent which would have been conclusive against plaintiff; that the demurrer was improperly sustained; and that plaintiff should have leave to allege by amendment that the land was surveyed when he made his application. If plaintiff here had commenced his action in time, thus preserving his right under his application, the case of *Perri v. Beaumont* would apply. But suffering a forfeiture of all his rights, by his own act, he ceased to be in privity with the state. His status was altogether different from that of *Perri* in *Perri v. Beaumont*, who was a qualified purchaser, and who was in court upon a complaint insufficient in one respect as to his own rights, but sufficient to compel an adjudication of defendant's rights. The right to set aside the patent rests alone with the state. *People v. Stratton*, 25 Cal. 242; *Carder v. Baxter*, 28 Cal. 99; *Peabody v. Prince*, 78 Cal. 511, 21 Pac. 123.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

6 Cal. App. 93

ALBERGER v. KINGSBURY, Surveyor General. (Civ. 356.)

(Court of Appeal, First District, California. July 10, 1907. Rehearing Denied by Supreme Court Sept. 5, 1907.)

1. PUBLIC LANDS—GRANTS TO STATE FOR SCHOOLS—LANDS IN RESERVATION—LIEU LANDS.

Land is within a reservation, within Rev. St. U. S. § 2275 [U. S. Comp. St. 1901, p. 1381], appropriating and granting to and authorizing the state to select other lands where the school sections are within any reservation, provided, however, that the state shall not be prevented from awaiting the extinguishment of the reservation, where it has been withdrawn by the Secretary of the Interior "pending determination as to the advisability of including the same within a forest reservation."

2. MANDAMUS—TO SURVEYOR GENERAL—COMMUNICATING WITH UNITED STATES LAND OFFICE.

The surveyor general being, under Pol. Code, § 3398, the general agent of the state for location in the United States land office of the unsold portions of the land granted to the state for public schools and lands in lieu thereof, and it being made his ministerial duty by such section, when application for purchase of any of said lands is made to him, to communicate with such land office and ask that the land described in the application be accepted in part satisfaction of the grant under which it is sought to be located, mandamus will lie to compel him to receive an application for purchase of such lands and make such communication to and request of such land office.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 184.]

Application by William C. Alberger for writ of mandamus to W. S. Kingsbury, surveyor general. Writ granted.

F. D. Brandon, for petitioner. U. S. Webb, Atty. Gen., for respondent.

COOPER, P. J. This is an original application to this court for a writ of mandate to compel the defendant to receive and file the plaintiff's application to purchase from the state of California section 5 of township 26 N., range 17 E., M. D. M., being in Lassen county, state of California, and to thereupon make selection and location in the proper United States land office, on behalf of plaintiff, as lieu land, of the lands so applied for by plaintiff, and to make such selection and location in lieu of section 16, township 42 N., range 3 E., M. D. M. Plaintiff alleges in his complaint his qualifications to purchase state school land, sets out a copy of his application, and also alleges that he tendered said application to the defendant with the proper fee for filing the same; that the land described in the application has been regularly surveyed and sectionized by the United States, and the township plat, showing that said land had been so regularly surveyed and sectionized, had been more than five years on file in the proper United States land office; that said section 16, township 42 N., range 3 E., for which the lands applied for are desired to be taken as lieu lands, is unsurveyed public land of the United States.

It is stipulated that the following are the facts on which this controversy hinges, to wit: "That the question, and only question, intended by the parties to be presented by this record, is whether the lands or any of the lands described in the letter dated December 12, 1904, hereinafter specifically set forth, are located within a reservation, within the meaning of the act of Congress which is known as section 2275 of the Revised Statutes [U. S. Comp. St. 1901, p. 1381]."

* * * That on the 12th day of December, 1904, James Wilson, the then Secretary of Agriculture, wrote that certain letter which is and was in words and figures as follows, to wit: 'Department of Agriculture, Office of the Secretary, Washington, D. C., Dec. 12, 1904. The Honorable the Secretary of the Interior—Sir: A field examination of the following described lands in the vicinity of Mt. Hoffman in the state of California has recently been made by the Bureau of Forestry, and the region as a whole has been found to be well adapted to forest reserve purposes. The best of the timber lands are rapidly passing into private ownership through lieu selections and timber and stone entries, and, in order that title to the remaining public lands may rest with the government until further action is decided upon, I have the honor to recommend that all the vacant unappropriated public lands in the following described townships and parts thereof be temporarily withdrawn from settlement at the earliest practicable date: * * * T. 42 N., R. 3 E., the entire township, * * * all numbered from the Mt. Diablo base and meridian. Very respectfully, Your obedient servant, James Wilson, Secretary.' It is further admitted that on the 13th day of December,

1904, E. A. Hitchcock, the then Secretary of the Interior, indorsed on said letter that certain indorsement which is and was in words and figures as follows, to wit: 'J. S. P. A. M. Dept. of the Interior, Dec. 13, '04. Respectfully referred to Com. Gen. Land. The public lands in the prescribed areas are hereby temporarily withdrawn from disposition under the public land laws, and the Comr. is directed to instruct the local offices in the premises, immediately, by wire, and report action, with return of letter. E. A. Hitchcock, Secretary.' It is further admitted that on the 13th day of December, 1904, W. A. Richards, the then Commissioner of the General Land Office, wrote that certain letter which is and was in words and figures as follows, to wit: 'Department of the Interior, United States Land Office, Washington, D. C., Dec. 13, 1904. Register and Receiver, Redding, California—Gentlemen: On December 13, 1904, the Secretary of the Interior temporarily withdrew all the public lands in the below described areas from settlement, entry, sale, or other disposal, except under the mineral laws, pending determination as to the advisability of including the same within a forest reservation. The lands so withdrawn are as follows: * * * Township 42 N., range 3 E., M. D. M. Note this withdrawal upon the records of your office. Very respectfully, W. A. Richards, Commissioner.' * * * It is further stipulated and agreed that said letters and indorsements thereon are still in full force and effect, and that the same have never been altered, withdrawn, or modified. It is further stipulated and agreed that at all times mentioned in the complaint and petition of plaintiff the Commissioner of the General Land Office had adopted, and the Secretary of the Interior had approved, and that there were in full force and effect, certain regulations governing selections of indemnity school lands; that, among others, said regulations contained the following provisions and regulations: "The cause of the loss in each case must be specifically stated. If caused by an entry based upon a settlement claim initiated prior to survey, the number of the entry must be given. If occasioned by a reservation of the land, entitling the states to indemnity, the date, name, and purpose of the reservation must be stated. If the loss occurs by reason of the fractional character of the land, it must be set forth."

It is said in the points and authorities that the entire case depends and turns upon the proper construction of section 2275 of the Revised Statutes. Said section, so far as material here, is as follows: "Where settlements with a view to pre-emption or homestead have been or shall hereafter be made before the survey of the land in the field, which are found to have been made on sections 16 or 36, those sections shall be subject to the claims of such settlers, and if such sections or either of them be or shall be granted,

reserved or pledged for the use of schools or colleges in the state or territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said state or territory in lieu of such as may be thus taken by pre-emption or homestead settlers. *And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said state or territory where sections 16 or 36 are mineral lands, or are included within any Indian, military or other reservation, or are otherwise disposed of by the United States.*" (The italics are ours.) The question is as to whether or not the said section 16, township 42 N., range 3 E., has been included within a reservation within the meaning of the italicized clause of the above section. The said section 16 has not been included in any Indian or military reservation, but it has been kept back or reserved "pending determination as to the advisability of including the same within a forest reservation."

The words "other reservations" are evidently used in a broad sense in the statute. The word "reservation" is defined in the Standard Dictionary as "that which is reserved, kept back, withheld." The said sixteenth section, to which the state would be otherwise entitled, has been by the proper authorities of the United States—the Land Department—kept back, withheld, and reserved. It has been reserved with a view to including it in a permanent forest reserve. The state is not now entitled to it, because the United States has seen fit to reserve it for its own uses. It is no answer to this to say that the reservation may not be made permanent, and that the state may yet be entitled to the land. That might be said as to any other kind of reservation—for military purposes, for Indians, or any other purpose. A reservation is a reservation, no matter what may be the purpose, nor for how long a time the reservation may continue. The statute does not fix a time during which it shall continue, and we are not at liberty to do so. In our opinion the question as to time refers only to the time when the state desires to take the land. Can the state take the section in place now? Evidently not, because it has been reserved and withheld from sale. This view is made clear by the concluding portion of the section, which is as follows: "Provided, however, that nothing herein contained shall prevent any state or territory from awaiting the extinguishment of any such military, Indian or other reservation, and the restoration of the lands therein embraced to the public domain, and then taking the sections 16 and 36 in place therein; but nothing in this proviso shall be construed as conferring any right not now existing." The above-quoted proviso gives the state the right to await the extinguishment of any reservation which includes a sixteenth or thirty-sixth section, and then to take the section in place; but that is a matter solely for the state. It

need not wait for years or forever. It may at once take lieu lands and sell them to its citizens or to the persons authorized by statute to receive them. It makes no difference to the state as to whether it sells the sixteenth and thirty-sixth sections or lands in lieu thereof, because the price is the same in either case. When the reservation exists—no matter how long it may continue—and the state is deprived of the lands in place, it immediately has the right to select and take other lands in lieu of the lands withheld from it. This right continues as long as the withdrawal or reservation continues. We know of no decision or rule of law that requires the state to try the question as to the time the United States may desire to keep the land in reserve. The view we have taken seems to us to be the view of common sense and justice. Under it the state will get no more land than it is entitled to, and the United States will be deprived of no more of its public domain than if the state had waited and taken the section in place. The statute is to be given a liberal construction, so as to do justice and promote its objects and purposes.

While there are few decisions bearing upon the question that are directly in point, there are decisions which tend to sustain the view we have taken. In a decision rendered by Secretary Smith April 13, 1895 (20 Land. Dec. Dep. Int. 327), it appeared that the state of California had made a lieu selection in lieu of an unsurveyed sixteenth section included within a withdrawal. The Commissioner of the General Land Office had rejected the selection, holding that the law granting the lieu right must be held to apply only to reservations created by an act of Congress or by proclamation of the President, and not to a mere temporary withdrawal of lands pending an investigation as to the character of the trees growing thereon. From this decision the state appealed, so that the matter came up before the Secretary squarely upon the question of law. The Secretary in his opinion held that the state might take other lands, and said: "It is not necessary that the reservation of said section 16 be of a permanent character to justify indemnity selection made by the state." In *Wolsey v. Chapman*, 11 Otto (U. S.) 755, 25 L. Ed. 915, a construction was given to section 8 of an act to appropriate the proceeds of the sales of public lands and to grant pre-emption rights. 5 Stat. p. 455, c. 16. The section contained the proviso "that to each of the said states which has already received grants for said purposes there is hereby granted no more than the quantity of land which shall, together with the amount such state has already received as aforesaid, make 500,000 acres; the selections in all the states to be made within their limits respectively in such a manner as the Legislature thereof shall direct, and located in parcels conformable to sectional

divisions and subdivisions of not less than 320 acres in one location on public land, except such as is or may be reserved from sale by any law of Congress or proclamation of the President of the United States." The Supreme Court of the United States, in discussing the clause, said: "There seems to be no good reason why the selections of the pre-emptioner should be restricted within narrower limits than those of the state, and we cannot believe it was the intention of Congress to give a state the power to take lands under section 8 which had actually been reserved by the United States for any purpose whatever." In *Wolcott v. Des Moines Nav. Co.*, 5 Wall. (U. S.) 681, 18 L. Ed. 689, the question was as to whether or not certain lands, which were within the limits of a grant made while they were withdrawn under authority of the Land Department of the United States, passed by the grant to the railroad company. The granting act contained a proviso that "any and all lands heretofore reserved by competent authority should not pass by the grant," and the court held that the temporary withdrawal of them by the order of the Commissioner was such a reservation as excluded them from the grant. In *Northern Pacific Railroad Company v. Musser Sauntry Land, etc., Co.*, 168 U. S. 604, 18 Sup. Ct. 205, 42 L. Ed. 596, the question was whether a departmental withdrawal of certain lands within the indemnity limits of a railroad grant until it should be seen if they should be needed to satisfy that grant was a reservation, and the court held that it was. In the opinion it is said: "The withdrawal by the Secretary in aid of the grant to the state of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the government under the general land laws. The act of the Secretary was in effect a reservation." The following cases have more or less bearing upon the question: *Riley v. Welles*, 14 Sup. Ct. 1166, 154 U. S. 578, 19 L. Ed. 648; *Dubuque Co. v. Des Moines R. R. Co.*, 109 U. S. 329, 3 Sup. Ct. 188, 27 L. Ed. 952; *Bullard v. Des Moines Co.*, 122 U. S. 167; *Wilcox v. Jackson*, 13 Pet. (U. S.) 498, 16 L. Ed. 264.

Under section 3398 of the Political Code, the surveyor general is the general agent of the state for the location in the United States land office of the unsold portions of the 500,000 acres of land granted to the state for school purposes, and the sixteenth and thirty-sixth sections granted for the use of public schools, and lands in lieu thereof. When any person desires to purchase any portion of these lands, and makes the proper affidavit as prescribed in the Code, it is the duty of the surveyor general to file such application. Section 3406 of the Political Code provides as follows: "Duty of Surveyor General on Application for Purchase. The surveyor general must, whenever application is made to

him for any portion of the lands mentioned in section 3398, communicate with the United States land office, and ask that the lands described in the application be accepted in part satisfaction of the grant under which it is sought to be located." It is thus made by the section the ministerial duty of the surveyor general by reason of his office to communicate with the United States land office, and ask that the lands described in the application be accepted in part satisfaction of the said grant to the state. It is not our business to anticipate the rulings of the United States Land Department upon the question herein decided, nor as to whether or not they will receive the application and grant the lieu land in place of the said sixteenth section. We must presume that the officers of the Land Department will obey the law, and we cannot in this decision anticipate any of its rulings.

It follows from what has been said that a writ of mandate should issue, directing and commanding the defendant, as surveyor general and ex officio registrar of the state land office, and as locating agent of the state of California, to receive and file the plaintiff's application on payment of the lawful filing fee therefor, and thereupon to communicate with the United States land office, and ask that the lands described in plaintiff's application be accepted in part satisfaction of the grant under which said lands are sought to be located; and it is so ordered.

We concur: HALL, J.; KERRIGAN, J.

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KEATING v. MORRISSEY. (Civ. 340.)

(Court of Appeal, Third District, California, July 31, 1907. On Rehearing, Aug. 29, 1907. Rehearing Denied by Supreme Court Sept. 26, 1907.)

1. BILLS AND NOTES—ACTION ON NOTE—PRIMA FACIE CASE—BURDEN OF PROOF.

Offer and receipt in evidence of a note sued on constituted prima facie proof that the note was given for a sufficient consideration, as provided by Code Civ. Proc. § 1963, subd. 21, and Civ. Code, § 1614.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1816.]

2. SAME—WANT OF CONSIDERATION—BURDEN OF PROOF.

Where a note sued on is offered in evidence, the burden of proving want of consideration is on the defendant, as provided by Civ. Code, § 1615.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1654.]

3. CONTRACTS—CONSIDERATION—FORBEARANCE OF PROSECUTION OF ANOTHER FOR FELONY.

A note executed in consideration of a promise of the payee to refrain from prosecuting another for felony is void as opposed to public morals and public policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 633.]

4. SAME—FORBEARANCE OF CIVIL ACTION—EVIDENCE.

Defendant's son, while acting as plaintiff's agent for the loaning of her money, executed a

note in his own name to plaintiff for part of the money loaned, and then executed in the names of fictitious persons other notes to plaintiff for the balance. After he had absconded, plaintiff discovered the fraud, and went to defendant, who executed the note sued on for the entire amount. *Held*, that such facts were sufficient to support a finding that defendant's note was made in consideration of plaintiff's forbearance to sue the son on his own note, and was not therefore void as a contract to refrain from prosecuting the son for forgery.

On Rehearing.

5. BILLS AND NOTES—CONSIDERATION—PRESUMPTION.

Where a note sued on is proved and offered in evidence, it raises a presumption that it is based on a sufficient consideration, in the absence of evidence to the contrary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1653.]

6. APPEAL—EVIDENCE—REVIEW.

Where there was evidence justifying a finding that the consideration for a note sued on was plaintiff's forbearance to sue the maker's son in a civil action on certain other indebtedness, and such finding by a jury was sustained by the trial judge, it could not be set aside on appeal, because there was other evidence that the note was given to save defendant's son from prosecution for forgery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3949-3950.]

Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by Mary L. Keating against Mary J. Morrissey. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, she appeals. *Affirmed*.

Arthur L. Levinsky, for appellant. Ashley & Neumiller, for respondent.

HART, J. This is an action upon a promissory note for the sum of \$5,041, with interest at the rate of 5 per cent. per annum. Said note was made and delivered by the defendant to the plaintiff in the county of San Joaquin on the 16th day of July, 1902, payable one year after date. The case was tried by jury, a verdict returned in favor of plaintiff for the sum of \$5,631.33, representing the principal and interest on said note, and a judgment entered accordingly. The answer sets out with minute particularity the circumstances which, it is alleged, attended the transaction resulting in the execution of the note, the substance of all which is that said note was secured from the defendant by the plaintiff by means of threats or duress, and that therefore there was no valid consideration for the same. The defendant prosecutes this appeal from the order denying her motion for a new trial, upon a bill of exceptions.

The defense relied upon for the defeat of the action, as must be inferred from the allegations of the answer, as we have briefly stated them, was that the note which forms the basis of the suit was without sufficient or any consideration. We will proceed to an examination of the record for the purpose of determining this question. The undisputed

facts of the case, as developed by the proofs, are: Several years prior to the execution of the note which is the subject of this suit, the plaintiff made Walter Morrissey, a son of the defendant, her agent, with full power to negotiate loans of money for her. While so acting in that capacity for plaintiff, said Morrissey loaned, or pretended to have loaned, certain sums of money to different parties, taking in the name of plaintiff what purported to be their promissory notes therefor. These notes, 14 in number, were delivered to the plaintiff by Morrissey. All of these notes, with the exception of one which was made so as to mature one year after the date of its execution, were made payable "one day after date," and represented amounts varying from \$150 to \$800; the sum total of the money so claimed to have been loaned being \$5,041. Some of these notes were made in the year 1899, others in the year 1900, and one in the year 1901. Three of these notes bear upon the backs thereof an indorsement, signed by the plaintiff, acknowledging the receipt of the interest which had accrued thereon. The plaintiff did not, at the several times at which she received said notes from Morrissey, either personally or by reputation, know persons bearing the names represented by the signatures subscribed to the notes. A short time before the making and delivery of the note by the defendant to the plaintiff, Morrissey, without previously apprising the plaintiff or any of his other acquaintances of his intention to do so, departed from San Joaquin county, or at least could not be found at his home or in that county. The plaintiff was desirous of securing the payment of the interest which was due upon the notes, and, not being able to find her agent, and, as stated, not knowing anything of or about the parties who were represented to have made the notes, proceeded to make an investigation into the matter. She sought the aid and advice of a Mr. Crane, of Stockton, and, as he was not acquainted with any persons of the names attached to the notes as representing the makers thereof, the great register and the tax roll of the county were carefully examined, with the result that neither contained the names attached to the notes. Thereupon the plaintiff called at the residence of the defendant and obtained from her the note, to secure the payment of which this action was instituted.

At the trial, the plaintiff offered, and the same was received in evidence, the note in dispute, and then rested her case. This constituted, of course, prima facie proof of all that the note purported to be. The presumption is that the note was given for a sufficient consideration. Section 1963, subd. 21, Code Civ. Proc.; section 1614, Civ. Code. The burden of proving want of consideration sufficient to support the note was upon the defendant. Section 1615, Civ. Code. The defendant, having been sworn as a witness, gave testimony directed to the support of the

allegations of her answer, stating that on both occasions of the visit of the plaintiff at her residence the latter declared that she had investigated the great register and tax roll of the county, and that neither contained names corresponding with those attached to the notes delivered to her by Walter Morrissey; that she submitted to the defendant for inspection the 14 notes, said they were forgeries, and Walter was guilty of forgery, and, unless she was reimbursed or indemnified against the loss which it was probable she would sustain through the criminal acts of said Walter, she would cause him to be arrested and prosecuted for a felony and punished therefor by imprisonment in the state penitentiary. The defendant further testified that when the conversations occurred she was and had been for some time prior thereto in ill health, and, keenly realizing the humiliation and chagrin which the disgrace occasioned by the prosecution of her son upon a felony charge would entail upon herself and her family, and influenced by no other motive or consideration, readily agreed, on the occasion of the first interview between plaintiff and herself, to adjust the matter. On the following day, so defendant testified, the plaintiff returned to the residence of the former, and, presenting to her a printed blank form of a promissory note, requested her to fill it out and sign it, at the same time repeating her threat to prosecute Walter unless the note was given by defendant. The defendant thereupon filled out the note for the sum of \$5,041, with interest at the rate of 5 per cent., and attached her signature thereto. Upon the suggestion of the plaintiff, the note was executed for the sum of \$5,041, although the interest due on the 14 notes turned over to plaintiff by Walter Morrissey amounted to the sum of \$600. Plaintiff waived her right to said interest, saying to the defendant that she would be satisfied with a note for the principal sum so obtained from her by Walter. A majority of these 14 notes called for interest at the rate of 8 per cent. per annum; the remainder provided for interest at the rate of 9 and 10 per cent. One of the 14 notes, so delivered to plaintiff by said Walter, purported to have been executed by "W. A. Morrissey" and one "Geo. L. Brown," and the defendant, while under cross-examination as a witness, admitted that her son's name was "W. A. Morrissey," and that the signature to the note of which we are speaking appeared to be in the handwriting of her son. The defendant's version of the transaction was corroborated to some extent by her daughter, who testified that, being in a room adjoining the one in which occurred the conversation between the parties on the day upon which the note was made, she overheard the plaintiff say "that, if a paper was not signed, she would have my brother Walter arrested." At the conclusion of the testimony thus given on behalf of the defendant, the defense rested.

The plaintiff was sworn as a witness in rebuttal, and not only denied making the threats to which the defendant and her daughter testified or using any language from which it might be inferred that she threatened to prosecute Walter for or even accused him of committing forgery, but also gave, in full and in detail, what she claimed to have been said by both herself and the defendant during the course of the only conversations held between the parties involving the transaction resulting in the execution of the note. She was exhaustively cross-examined, but nothing was thus brought out showing affirmatively or otherwise that there was not a valid consideration for the note. In other words, there was nothing stated by her as a witness which tended affirmatively to overcome the presumption of a consideration. Among other things, she declared that the defendant, in the first conversation, said that she had previously made efforts to secure for Walter the necessary money with which to reimburse the plaintiff, thus showing, at least, that the defendant knew of the financial transactions between her son and the plaintiff, and that she had before the conversations formed an intention to aid Walter in discharging his obligation to plaintiff. This part of the conversation was not disputed.

It is only elementary to say that the jury, or court trying an issue of fact, as the exclusive judge of the weight of all evidence submitted upon such issue and of the credibility of the witnesses, has the right to discredit the witnesses or disregard altogether evidence offered in support of a material issue in the case. And in the case at bar it was within the exclusive province of the jury to declare whether the evidence offered to overcome the presumption of consideration for the note was of sufficient strength to do so or not. Having determined that it was not, the verdict so returned is, as to the facts, unimpeachable, so far as this court is concerned. A court or jury is not bound to believe an interested witness as against a presumption, if the latter satisfies its mind. Code Civ. Proc. § 2061, subd. 2; *Adams v. Hopkins*, 144 Cal. 36, 77 Pac. 712; *People v. Milner*, 122 Cal. 179, 54 Pac. 833. In the last-mentioned case, the court, through Mr. Justice Henshaw, thus states the rule: "By section 2061, subd. 2, of the Code of Civil Procedure, jurors are to be instructed 'that they are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds.' In this is a distinct recognition of the facts: (1) That a presumption is evidence; and (2) that it is evidence which may outweigh the positive testimony of witnesses against it. It has been said that disputable presumptions are allowed to stand, not against the facts they represent,

but in lieu of proof of the facts, and that, when the fact is proven contrary to the presumption, no conflict arises, but the presumption is simply overcome and dispelled, citing *Savings, etc., Soc. v. Burnett*, 106 Cal. 514, 39 Pac. 922. This is true. Against a proved fact, or a fact admitted, a disputable presumption has no weight; but, where it is undertaken to prove the fact against the presumption, it still remains with the jury to say whether or not the fact has been proven, and, if they are not satisfied with the proof offered in its support, they are at liberty to accept the evidence of the presumption."

It is, of course, at once to be conceded that a note executed in consideration of a promise to refrain from prosecuting a person for a felony would be absolutely void, for such a contract would be opposed to public morals, as well as public policy. In fact, such a consideration in this case, if a forgery had been committed by Walter, would itself constitute or involve the commission of a crime. But, as we have indicated, the jury found against the contention of the defendant as to the circumstances under which the note was given, and we are bound by that finding. It is also to be admitted that, if there is shown by the evidence, either by presumptive or positive proof, any valid consideration whatever for the note—if for instance, the note was signed upon an agreement or promise upon the part of the payee that she would refrain from instituting suit on the one note of the fourteen bearing the signature of Walter Morrissey—there would then be in law a sufficient consideration for the support of the note, for "the law will not attempt to measure the amount or weigh the quantum of the consideration." *Whelan v. Swain*, 132 Cal. 391, 64 Pac. 560; *Pillans v. Mierop*, Lang. S. C. L. Cont., p. 177. We think the evidence, both circumstantial and direct, fairly warrants the inference that Mrs. Morrissey, in executing the note, was influenced by the consideration that, for so doing, the plaintiff would forbear bringing a civil action against her son for the recovery of the money due plaintiff from him. If the facts of the transactions between plaintiff and Walter were such as the record seems to indicate them to have been, it is just as logical to infer that Mrs. Morrissey was almost as much in dread of the consequences of a civil as a criminal action, for it is only a response to the natural sentiment and love of a mother that she should spare no efforts to save her son from the disgrace and loss of confidence of the public generally which would follow the exposure through a lawsuit of bad faith and dishonesty in him in his business dealings with another party. Besides, the desire to save herself and family and family name from being linked with transactions of a shady nature or involving fraud or the elements of a public crime would serve as a strong incentive or induce-

ment in a mother to prevent the institution of a civil action which would expose to the public the questionable circumstances giving rise to the suit. But, as we have declared, we are not called upon to hunt for the specific reasons which moved the defendant in signing the note. It is enough to know that, after all the evidence was introduced and considered, the jurors, guided presumably by all the criteria by which the law says they must be governed in weighing evidence, decided that the presumption of a sufficient consideration for the support of the instrument was not dispelled, or that such presumption satisfied their minds as against the other evidence which failed to possess such persuasive power.

We have consulted with painstaking care all the authorities cited by counsel representing both sides of this controversy. There is no conflict between the views here and those expressed in the cases to which our attention has been called. There is a large number of specifications of alleged error, involving rulings of the court in the reception and rejection of evidence and in the giving and refusal of instructions. It would require unnecessary labor to give all the assignments of error special notice. We may say, however, that we have given much time to an examination of the record and to a consideration of all the points urged, and we may state, generally, that we think the court carefully, fully, and correctly declared to the jury the law applicable to the issues and the facts, and that in the rulings upon the reception and rejection of evidence we find nothing which in any degree prejudiced the rights of appellant. It is noticeable that in all instances where questions were propounded to a witness and to which objections were sustained, the same questions to the same witness were at some other time during her examination allowed. The rulings of the court were therefore not erroneous. We think the case was fairly tried, and that the appellant therefore suffered no prejudice either from the rulings of the court upon the admission and rejection of testimony, or from the giving and refusing of instructions.

The order is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Rehearing.

HART, J. In his petition for a rehearing, counsel for appellant insists that this court was justified in declaring that the evidence introduced both upon the part of the defendant and the plaintiff, after the proof of the note upon which the action was brought, was sufficient to and did overcome the presumption of a consideration for said note. He calls our attention to certain language used in the case of *Adams v. Hopkins*, 144 Cal. 36, 77 Pac. 712, which, he claims, sustains his contention that upon the evidence

as shown by the record the case should be reversed, because said presumption was, in truth, overcome. The language referred to reads: "It will be presumed that there was a good consideration for the written release, in the absence of evidence to the contrary." The rule as thus stated is undoubtedly sound and applicable to all disputable presumptions of fact. In truth, their very characterization by the Code provision as "disputable presumptions" carries with it necessarily the right to controvert them by other evidence and the complete exhaustion of their force when evidence has been introduced sufficient to destroy the verity of the facts for which, until then, the law, for reasons of expediency, makes them responsible vouchers. The presumption of a consideration is, indeed, enough to support the note, in the absence of evidence to the contrary. But in whom is vested, under our system, the exclusive province of determining when there is evidence to the contrary? There must be, as counsel will concede, a determination by somebody that there is in fact evidence to the contrary. The fact that the record here seems to show "evidence to the contrary" is not enough, so far as our power over the verdict and findings is concerned. It must have been "evidence to the contrary" to which the proper tribunal has given such weight as to enable it to say that such "evidence to the contrary" has overcome and dispelled the presumption. The learned counsel's argument would be valid and might be sound addressed to a jury or court trying the facts, but, when addressed to this court, it overlooks the constitutional provision limiting the power of the appellate courts of this state to the determination of questions of law alone, and that, therefore, the Supreme and this court would clearly transcend their appellate jurisdiction, as outlined by the Constitution, were they to engage in the business of indiscriminately setting aside verdicts of juries and findings and judgments of trial courts upon the ground of the insufficiency of the evidence to sustain them, except, of course, in such cases only in which it can truly be said that, as a matter of law, the evidence is not strong enough to uphold such verdicts, findings, or judgments. However differently the record evidence may strike different minds, it is evident that the jury trying the issues of fact did not think the evidence was strong enough to overcome the presumption, and it is equally evident that the trial judge, who presided at the hearing of the cause, and who heard the evidence, was of the same opinion when he made the order denying appellant's motion for a new trial. The weight of the evidence and the credibility of the witnesses were matters peculiarly within the duty of the jury to determine, and, having decided the facts against the appellant, and having, it is clearly apparent, in reaching their conclusion, disregarded or discredited the testimony of-

ferred by the defendant, we see nothing in the record which would warrant this court in declaring that, as a question of law, their finding is against the evidence.

As we stated in the main opinion, the Supreme Court, in the case from which we have here quoted the language upon which the appellant so implicitly relies, also uses the following language immediately following that quoted: "Indeed, the court is not bound to believe an interested witness against such a presumption if the latter satisfies his mind"—citing section 2061, subd. 4, Code Civ. Proc. The jury and the court appear to have not been satisfied that the evidence overcame the presumption. On the contrary, their minds seem to have been satisfied by the presumption as against the declarations of the witnesses directed against such presumption.

But the learned counsel seems to have formed a total misconception of certain language employed in the main opinion, when he says that "it means that it is conceded by reason of the testimony that Walter Morrissey was about to be arrested on a felony charge, and she (the defendant) desired to prevent it," etc. We were discussing the probable specific reasons which might have induced Mrs. Morrissey to sign the note in consideration of forbearance on the part of the plaintiff to institute a civil action against Walter. This discussion was only in reply to the elaborate argument of counsel to the effect that the evidence on the part of the defendant showed threats by the plaintiff of a prosecution of Walter for forgery, for which reason alone, he argued, the defendant signed the note. We stated that in our opinion the evidence fairly warranted the inference that she signed the note upon an understanding that the plaintiff would refrain from suing Walter in a civil action; that (if that were true), while it was not necessary to search for specific reasons which thus influenced her, yet it was equally as reasonable as any other deduction from the evidence that she was almost as much in fear of the consequences of a civil as of a criminal action; and that that fact might have been the cause moving her to execute the note in consideration of forbearance upon the part of the plaintiff to sue Walter in the civil courts. It appeared from the uncontradicted evidence in the record that the plaintiff, at the first interview with the defendant, exhibited the 14 notes to the latter, said to her that she did not know persons bearing the names ostensibly subscribed to the notes, and that such names could be found neither on the great register nor the tax roll of the county. While this did not involve upon the part of plaintiff the specific charge of a crime against young Morrissey, the inference was that the transactions represented by the notes were not altogether devoid of fraud of some sort, and we ventured the opinion, therefore, that Mrs. Morrissey, if receiving such an impression,

might be nearly as anxious, under such circumstances, to avoid a civil suit as a criminal proceeding, realizing that in the former the facts would be brought before the public as readily as in the latter proceeding. The plaintiff had a perfect right to sue Walter in a civil action, not alone upon the note executed by him to her, but also the right to sue him for money had and received as to the sums represented by all the other notes, if said notes were in fact fictitious, subject, of course, to the defense of a bar under the statute, or to any other legal defense. If the defendant desired that her son should not be sued in a civil action, and signed the note in dispute in consideration of such an agreement on the part of the plaintiff, we cannot see that it would be particularly material to ascertain what the specific reason was that prompted her desire to prevent the institution of a civil suit against Walter. The defendant might have believed, from her inspection of the notes, or from any other circumstance brought to her notice, that said notes were forgeries, the result of the criminal acts of her son; yet, if the evidence, presumptive and otherwise, fairly warrants the inference that she was moved to sign the note solely because of an agreement upon the part of the plaintiff that she would not bring a civil suit against Walter, the mere fact of her belief that her son had committed a criminal offense would be, it seems to us, immaterial. All that Mrs. Morrissey said about her son having been accused by the plaintiff of committing forgery, and that the latter would prosecute him for the crime, was denied by Miss Keating. The jury, as stated in the main opinion, seem to have paid no attention to the testimony of the defendant. But it is enough for us to be satisfied that the evidence, both direct and circumstantial, fairly justifies the conclusion that the consideration for which the note was signed was based upon an understanding that the plaintiff would forbear suing Walter in a civil action; or that the evidence, in the minds of the jury and the judge trying the case, was not sufficient to overcome the presumption of a valid consideration; and that the record before us is not such as would sustain a conclusion by this court that, as a matter of law, the evidence is too weak to support the verdict of the jury and the findings of the court.

The petition for a rehearing is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

(77 Kan. 342)

MEEK v. METROPOLITAN ST. RY. CO.

(Supreme Court of Kansas. July 5, 1907.

Rehearing Denied Sept. 21, 1907.)

CARRIERS—CARRIAGE OF PASSENGERS—ACTIONS—EVIDENCE—ADMISSIBILITY.

In an action for injuries to a street car passenger, a question to plaintiff whether the conductor asked him to write his name on a slip of paper was properly excluded.

Error to District Court, Wyandotte County; J. McCabe Moore, Judge.

Action by John G. Meek against the Metropolitan Street Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Rush L. Fissette and Bird & Pope, for plaintiff in error. Miller, Buchan & Miller, for defendant in error.

PER CURIAM. Action brought by John G. Meek to recover damages from the Metropolitan Street Railway Company for personal injuries alleged to have been sustained by him while riding in a street car of defendant. The car, running at a speed of about three miles an hour, ran into one just ahead of it going in the same direction, and he claims that the resulting jar injured his back and kidneys. Under the testimony there was a fair question of fact as to whether he was really hurt by the collision, and it was settled by a verdict in favor of the defendant.

The inquiry as to the plaintiff's ability to give bond for costs, about which complaint is made, could not have been prejudicial, especially after the full examination on the same subject which had been previously made by both parties. The hypothetical questions objected to were properly allowed. *United Commercial Travelers of America v. Barnes* (decided May 11, 1907) 91 Pac. —. No error was committed in excluding the question propounded to plaintiff whether the conductor asked him to write his name on a slip of paper, nor do we find any good reason to complain of the rulings of the court in instructing the jury.

Judgment affirmed.

(76 Kan. 301)

DENDY et al. v. FIRST NAT. BANK OF COBLESKILL, N. Y.

(Supreme Court of Kansas. July 5, 1907.
Rehearing Denied Sept. 21, 1907.)

1. CHATTEL MORTGAGES—VALIDITY—REPLEVIN OF ASSIGNEE.

Where the owner of personal property takes a mortgage thereon from one having no interest therein, securing an accommodation note between the same parties, and assigns the note and mortgage, the fact that the mortgagor never had any real interest in the property constitutes no defense to an action brought by the assignee to replevin the property under the mortgage, whether the defendant be a stranger to the transaction or a claimant under a party to it.

2. SAME—INACCURATE DESCRIPTION.

In an action to recover the possession of personal property under a chattel mortgage in which it is inaccurately described, where the plaintiff relies upon the record as imparting constructive notice, such erroneous description is not fatal to a recovery, if in spite thereof the instrument gives upon its face sufficient information from which, by the aid of reasonable inquiry, the property intended can be identified; and whether that is the case is ordinarily a

question of fact, to be determined from all the circumstances of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9. Chattel Mortgages, § 87.]

(Syllabus by the Court.)

Error from District Court, Reno County; P. J. Galle, Judge.

Action by the First National Bank of Cobleskill, N. Y., against W. F. Dendy and H. O. Peck. Judgment for plaintiff. Defendants bring error. Affirmed.

A. M. Harvey and John V. Abrahams, for plaintiffs in error. John D. Milliken and Whiteside & Malloy, for defendant in error.

MASON, J. The First National Bank of Cobleskill, N. Y., recovered judgment upon a verdict in a replevin action brought by it against Dendy & Peck for the possession of a number of cattle, and the defendants prosecute error.

The plaintiff claimed as assignee of a chattel mortgage executed by L. M. Hyre to Zeb F. Crider Commission Company. Three defenses were interposed: (1) That the mortgage was void; (2) that the cattle replevied were not in fact those referred to in the mortgage; and (3) that, even if they were, the description was so defective that the record did not impart constructive notice of the fact—it being admitted that the defendants purchased them without actual notice of the mortgage. The attack upon the validity of the mortgage is based upon the circumstance that Hyre, the nominal mortgagor, never had any real interest in the cattle. They were owned by the commission company, of which Hyre was an employé. He signed the note and mortgage at the request of the company, and for its purposes. The defendants argue that, as Hyre had no title, a mortgage executed by him could create no lien. There was an effort on the part of the plaintiff to show that as a part of the transaction the company gave Hyre a bill of sale of the cattle, thereby vesting in him the legal title as a basis for his making the mortgage. Probably the execution of this bill of sale was not established; the reference to it in the evidence falling short of technical proof of that fact. But the omission is not important. The company was the actual owner of the cattle. In accepting and assigning the mortgage, it recognized Hyre as their formal owner—as the holder of the legal title. The execution of a bill of sale could add nothing to the force of such recognition. By the purchase of the note the bank acquired a valid lien on the cattle. That the mortgage secured accommodation paper was not a matter of any concern to the parties to this litigation.

The question of the identity of the cattle replevied with those mortgaged was fairly submitted to the jury and their verdict is conclusive. It is true that a representative of the commission company was permitted

to testify to matters in this connection of which he had no personal knowledge, and technical error may have been committed in this respect. But the sources of his information were fully brought out, and upon consideration of the entire record we see no reason to believe that any substantial prejudice to the defendants could have resulted. The description which the mortgage gave of the cattle was defective. They were described as kept at a particular ranch; whereas, they were in fact in another part of the county. Whether, notwithstanding this partial misdescription, the mortgage still gave sufficient information by which the cattle could with reasonable inquiry have been identified, was a question for the determination of the jury. 6 Cyc. 1037.

Although complaint is made of the instructions, we think they fairly presented this and the other questions involved, and that no ground is shown for disturbing the verdict.

The judgment is affirmed. All the Justices concurring.

RICHARDS v. SMITH.

(Supreme Court of Utah. Aug. 24, 1907. On Rehearing, Sept. 20, 1907.)

1. ARBITRATION AND AWARD—ARBITRATION AGREEMENT—CONSTRUCTION.

An agreement, submitting to arbitration a "controversy existing between the parties," wherein plaintiff claimed that defendant was indebted to him in the sum of \$55,500, as damages for not carrying out a certain agreement made between plaintiff and H., deceased, which damages defendant denied, constituted a submission of the question of the existence of the contract and the cause of action between the parties as well as the amount of damages plaintiff was entitled to recover, if any.

2. SAME—AWARD—FILING—DUTY OF ARBITRATORS—STATUTES.

Rev. St. 1898, § 3223, provides that, when a submission is made an order of court, the arbitrators may be compelled to make an award which may be enforced as a judgment, and section 3227 declares that the award must be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties; that, when the submission is made an order of court, the award must be filed with the clerk, and a note thereof made on the register. *Held*, that it is no part of the duty of arbitrators to file their award with the clerk; such filing being required by the parties only when the party filing the award desires it to have the effect of a judgment.

3. SAME—JUDGMENT—ENTRY—AWARD—DELAY IN FILING.

No time being specified by a submission to arbitrators, nor by Rev. St. 1898, § 3227, for the filing of the award, mere delay in filing it did not deprive the court of jurisdiction to enter judgment on the award.

On Rehearing.

4. SAME—FILING SUBMISSION—HEARING—TIME.

Rev. St. 1898, § 3223, provides that it may be stipulated in a submission that it be entered as an order of the district court, and when so entered the stipulation cannot be revoked without the consent of both parties; that the arbitrators may be compelled by the court to make an award, which may be enforced as a judgment,

but, if the submission is not made an order of the court, it may be revoked at any time before award. *Held*, that the effect of a failure to file a submission in court before the hearing was only to permit the parties to revoke the submission, and prevent the court from acquiring jurisdiction until filed, and did not affect the right of the arbitrators to proceed to a hearing.

Appeal from District Court, Third District; before Justice T. D. Lewis.

Action by Joseph S. Richards against Joseph F. Smith. From the judgment entered on an award of arbitrators, plaintiff appeals. Affirmed.

This is an appeal taken on the judgment roll, and is from a judgment entered on an award. The written submission of arbitration upon which the award is based, omitting the title of the court, is as follows: "Pursuant to chapter 40, tit. 73, entitled 'Arbitration,' Rev. St. Utah, 1898, the above-named parties have agreed to submit, and by these presents do submit, a certain controversy existing between them, wherein said Joseph S. Richards, plaintiff, claims that said defendant is indebted to him in a sum of money, to wit, \$55,500.00, as damages for not carrying out a certain agreement made between him and the late Bishop Edward Hunter, in regard to the purchase and sale of a certain piece of land, and which said damages said defendant denies; and they each of them have agreed to submit the question to arbitration to four disinterested persons, with privilege in said four persons to select a fifth at any time in the course of said proceedings that they may elect to do so. The four arbitrators selected and chosen are as follows: L. S. Hills and James Sharp, on the part of plaintiff, and W. W. Riter and John R. Barnes, on the part of defendant, and they four, with a fifth one above provided for, in their election, are to hear the evidence and determine the cause; and the judgment of the majority of them, whether of the four or the five, shall be binding and final upon the parties hereto. It is hereby agreed by the parties hereto that the four parties above named as aforesaid may select a fifth, either after they have heard the testimony, and find that the majority cannot agree, or they may select a fifth before they go into the testimony, and he may sit with them, and the decision of the majority shall be binding. It is hereby stipulated and agreed that this agreement be entered as an order of the district court. This arbitration shall take place on the 30th day of September, 1902, and shall be concluded on or before the 1st day of December, 1902. The arbitrators may have all the powers given in said chapter aforesaid to them, and they shall act in accordance therewith. In witness whereof the parties have hereunto set their hands and seals this 6th day of August, A. D. 1902. Jos. S. Richards. Jos. F. Smith."

The submission was duly acknowledged, and, on October 2, 1902, filed with the clerk

of the Third judicial district court for Salt Lake county. The arbitrators were sworn before a notary public and subscribed to an oath in writing, which was annexed to the submission and filed therewith. On October 14, 1902, the arbitrators made their award in writing, which, omitting title of court and cause, recited as follows: "Decision by Arbitrators. On the 6th day of August, 1902, the above-named parties entered into an agreement, pursuant to chapter 40, tit. 73, entitled 'Arbitration,' of the Revised Statutes of Utah of 1898, by which the above-named parties agreed to submit to arbitration a certain controversy existing between them, wherein said Joseph S. Richards, plaintiff, claimed that Joseph F. Smith, trustee in trust, defendant, was and is indebted to him in the sum of \$55,500.00 as damages for not carrying out a certain agreement made between him, the said Joseph S. Richards, and the late Bishop Edward Hunter in regard to the purchase and sale of a certain piece of land, which said damages the said defendant denied. At the same time each of said parties agreed to submit the question to arbitration before four disinterested persons, with the privilege in said four persons to select a fifth at any time in the course of said proceedings as they might elect to do. That said four persons selected for arbitrators were L. S. Hills and James Sharp, on the part of the plaintiff, and W. W. Riter and John R. Barnes, on the part of defendant. That those four persons, on the 30th day of September, 1902, held their first meeting, and agreed then and there not to then select a fifth person, but to hear the evidence themselves, and, if thereafter they could not agree, then to make a selection of a fifth arbitrator. That on the said date plaintiff, Joseph S. Richards, introduced his case and made a statement thereof to said arbitrators. Adjournment was then taken until the 13th day of October, 1902, when they all met again, and, the witnesses being sworn, testimony was given on both sides. The parties having submitted their testimony, and the case being closed, the undersigned arbitrators took the same under advisement, and on this 14th day of October, 1902, make, conclude, and decide in favor of the defendant that there is no cause of action. [Signed] L. S. Hills. James Sharp. W. W. Riter. John R. Barnes."

On April 18, 1904, the award was filed with the clerk of said court, and on the same day notice thereof served upon the appellant, plaintiff below. On April 22, 1904, on motion of appellant, the court made an order extending the time 20 days in which to file objections to the award and to the entry of judgment thereon. Extensions were granted from time to time for the purposes aforesaid until August 15, 1904. On August 12, 1904, appellant filed a motion to vacate the award. This motion was denied by the court April 9, 1906, and on the 29th day of September,

1906, judgment was, by order of the court, duly entered on the award.

P. T. Farnsworth, Jr., and C. S. Varian, for appellant. O. W. Moyle, for respondent.

McCARTY, C. J., after making the foregoing statement of the case, delivered the opinion of the court.

Appellant contends that "the award is void because beyond the terms of submission, in this, the arbitrators undertook to determine the right of action as matter of law, which was not submitted but conceded or reserved by the parties." That is, it is urged by appellant that the submission on its face shows that the parties conceded that the contract with respect to the sale of land existed between them, and that there was a breach of the contract, and therefore the only question for determination submitted to the arbitrators was the amount of damages. From these premises it is argued that the appellant, on the face of the submission, was entitled to at least nominal damages, and that, when the arbitrators undertook to determine whether or not a cause of action existed in favor of appellant, they exceeded their authority. As stated by counsel for appellant in their brief, the submission takes the place of a complaint and answer and contains the admissions as well as the allegations of the parties. The "admissions" and "allegations" presenting the questions and issues submitted to the arbitrators were that the "parties have agreed to submit a certain controversy existing between them, wherein said Joseph S. Richards, plaintiff, claims that said defendant is indebted to him in a sum of money, to wit, \$55,500.00, as damages for not carrying out a certain agreement made between him and the late Bishop Hunter, in regard to the purchase and sale of a certain piece of land, and which damages said defendant denies." The foregoing recital in the submission shows that a certain controversy was submitted. The general rule, of course, is that submissions to arbitration are to be liberally construed, and that "courts do not travel out of their way for the purpose of overturning awards, but, on the other hand, will refrain from exact and technical interpretation, and will indulge every reasonable presumption, whenever there is any room for such indulgence, in favor of the finality and validity of the award." 3 Cyc. 673. So construing the language contained in the written submission, we are of the opinion that it includes the questions of the existence of a contract and breach thereof, as well as the question of damages and the amount, if any, sustained; and that therefore it was within the authority of the arbitrators to determine the question whether or not a cause of action existed. It is quite true that, if the language is to be construed technically, and is to be interpreted under the rules of pleadings, there is some force to

the argument that the denial portion of the written submission is simply a denial that the plaintiff was entitled to \$55,500 damages. Giving it such a construction, the denial would, in effect, amount to an admission that the defendant was indebted to the plaintiff in a sum less than \$55,500. But upon what theory is the submission to be construed most strongly against the defendant? It was plaintiff's document or pleading as much as it was the defendant's. Whatever was uncertain or incomplete about it was plaintiff's uncertainty as much as the defendant's. However, we do not see anything in the writing to warrant the conclusion that the parties intended to stipulate that the contract existed, or that there was a breach thereof on the part of the defendant or the late Bishop Hunter, or that either of them was indebted to the plaintiff in any sum on account thereof. Such was not the evident intention of the parties as expressed by the obvious and natural meaning of the language used by them. The writing recites that "plaintiff claims" the defendant is indebted to him in the sum named for not carrying out a certain contract. No words are contained in the writing from which it could be fairly implied that the defendant admitted or conceded any part of the claim. Respondent by his general denial clearly negatives any present liability, and this denial is also a denial of any liability on the part of Bishop Hunter. Such is what the parties evidently intended it for and meant by it. In ascertaining the meaning and intention of the parties as expressed by the writing, we must not separate portions of it and construe parts most strongly against one or the other of the parties, but must consider and construe the writing as a whole. When so considered, we have no doubt that the finding of the arbitrators is within the issues submitted. 3 Cyc. 604.

Appellant's next contention is that the arbitration was not completed until the award was filed with the clerk, and therefore was not concluded within the time specified in the submission. The arbitrators were not required, under the statutes, to file their award with the clerk. Section 3223 of the Revised Statutes of the state of Utah, 1898, provides that, when the submission is made an order of the court, "the arbitrators may be compelled by the court to make an award, and the award may be enforced by the court in the same manner as a judgment." And section 3227, Rev. St. 1898, provides that "the award must be in writing, signed by the arbitrators or a majority of them, and delivered to the parties." An award is defined as "the judgment or decision of arbitrators or referees in a matter submitted to them." 1 Bouv. Law Dict. 205; 1 Words & Phrases, 656. In 2 A. & E. Ency. Law (2d Ed.) 719, it is said: "The judgment of the arbitrator and also the paper on which it is written are called an 'award.'" Therefore,

it is manifest, from the very nature of an award, that it must be made and concluded before it can be filed. Section 3227, supra, provides that "when the submission is made an order of the court, the award must be filed with the clerk and a note thereof made on his register." No time is fixed by the statute when this must be done. It is evident, however, as we have suggested, that it cannot be done before the award is made and concluded by the arbitrators, because before it is so made and concluded there is no award to file. The purpose of making a submission to arbitration an order of the court is to give the award, when filed with the clerk and entered in the judgment book, as provided in section 3227, Rev. St. 1898, the force and effect of a judgment. When the arbitrators signed the award and delivered it to the parties, they did all they were authorized or empowered to do under the statute. It then devolved upon the parties themselves, if they, or either of them, desired the award to have the force and effect of a judgment, to file it with the clerk and proceed in the manner pointed out in section 3227. As neither the statute nor the terms of the submission required the parties to file the award with the clerk within a specified time, the mere delay in filing, which either of the parties could have obviated, did not deprive the court of jurisdiction to enter the judgment appealed from.

And furthermore, section 3228, Rev. St. 1898, provides upon what grounds a court may vacate an award, and delay in filing an award is not one of the grounds therein specified. *Boone v. Reynolds*, 1 Sug. & R. (Pa.) 231; *Patrick v. Batten*, 123 Mich. 203, 81 N. W. 1081.

The judgment is affirmed, with costs.

STRAUP, and FRICK, JJ., concur.

On Rehearing.

FRICK, J. A rehearing is requested in this case upon the ground that we failed to specially consider and pass upon the assignment that the district court was without jurisdiction, for the reason that the arbitrators held a session and heard the statement of appellant's case before the agreement of submission was filed in court and before the clerk made the entries required in a statutory arbitration by section 3223, Rev. St. 1898. In view that we sustained the judgment, and, further, directly held that the court had jurisdiction, we deemed the point now made by counsel as necessarily included within our decision. In deference to counsel's request, however, we have concluded to briefly state our reasons for holding that the court had jurisdiction notwithstanding the fact that the hearing may have been entered upon before the submission agreement was actually filed in court. This we have concluded to do without the formality of a rehearing.

It appears from the opinion that the agreement of submission was duly entered into and acknowledged on August 6, 1902, and that on the 14th of said month the arbitrators duly qualified by taking the statutory oath. In the agreement of submission it is stipulated that the "arbitration shall take place" (begin) on September 30, 1902, and "shall be concluded on or before the 1st day of December, 1902." In the agreement the arbitrators were given all the powers provided for by the statutes of this state. One of the powers conferred is the right to adjourn from time to time pending the hearing. The award was reduced to writing and signed on October 14, 1902, within the time fixed by the agreement of submission. On the day fixed by the agreement of submission for the arbitration to begin, the arbitrators met, and on that day, as the record shows, the appellant "introduced his case and made a statement thereof to said arbitrators." Following this, to wit, on October 2, 1902, the agreement of submission was filed, and the clerk duly made the entries as required by law. After hearing appellant's statement of his case on September 30th, the day fixed for the arbitration to begin, the arbitrators adjourned the hearing to October 13, 1902, at which time, the record shows, they all met, "and, the witnesses being sworn, testimony was given on both sides." On the following day the award was duly made in writing, signed by all the arbitrators, as required by the statute. It will thus be seen that every requirement of chapter 40, under which the arbitration was had, was substantially complied with.

Was it necessary to file the agreement for submission before the hearing was actually entered upon? We think not. Section 3223, so far as material here, provides: "It may be stipulated in the submission that it be entered as an order of the district court. * * * When so entered the stipulation cannot be revoked without the consent of both parties. The arbitrators may be compelled by the court to make an award, and the award may be enforced by the court in the same manner as a judgment. If the submission is not made an order of the court, it may be revoked at any time before the award is made." When the submission is made an order of the court, then, as provided by section 3227, the award must be filed with the clerk. In neither of these sections is the time of filing mentioned or made of the essence. By section 3223 the object of filing the submission with the clerk is clearly intended for the purpose of conferring power upon the court to compel an award by the arbitrators, and to enforce it when made, and to compel the attendance of witnesses. The only effect the filing has upon the parties is that, after the submission is filed, neither party may revoke it. The object, therefore, is not for the purpose of conferring power

upon the arbitrators to hear the matters submitted to them, but to bring them and the parties within the jurisdiction of the court. Therefore, from the time the submission is filed, if filed within the time fixed by the agreement for concluding the arbitration, or, if no time is fixed, before an award is made, we think the court acquires jurisdiction. But up to the time it is so filed a party may revoke the submission, and the court can neither compel the arbitrators to make an award, nor enforce it if made. If a time be specified in the submission, as in the case at bar, when the arbitration must be concluded, then it must be concluded within this time limit, or the arbitrators will lose jurisdiction to act further without the express consent of the parties. But the mere fact that the arbitrators comply with the agreement of submission in entering upon the hearing of the matters submitted to them before the submission is filed in no way affects their jurisdiction, nor does it affect the jurisdiction of the court, provided the submission be actually filed and the proper entries made at any time within which the agreement itself is in full force and effect; that is, before the time has expired within which the arbitrators may, by the terms of the submission, make an award.

As we construe section 3223, the effect of a failure to file the submission in court is that it permits the parties to revoke it, and the court acquires no jurisdiction until it is filed. If, however, the submission is filed and the entries required by the statute are made at any time before the award is made by the arbitrators, or, in case a time is specified within which an award must be made, before such time expires, then the court acquires power to act. From the time the submission is filed, as aforesaid, the district court acquires jurisdiction of the arbitration, and the proceeding is then pending in court. After the award is rendered, either party may, at any time, as pointed out in the original opinion, file it and have judgment entered; or may attack the award upon the grounds named in the statute, and may appeal from the action of the district court to this court. By this means every right contemplated by the statute is preserved to either party, and the very purpose of the submission agreement is effectuated; while, if appellant's contention were granted, any irregularity would defeat the arbitration, and thus destroy the very purpose of the statute.

We have carefully read all the cases cited by counsel upon this question, and, as we read them, nothing is contained in any of them that is contrary to the conclusions reached by us.

It follows, therefore, that the application should be, and accordingly is, denied.

MCCARTY, C. J., and STRAUP, J., concur.

KIMMELL v. POWERS et al.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. PRINCIPAL AND AGENT—RELATIONSHIP—EVIDENCE.

A contract, whereby the owner of an addition to a town gives to another the management and exclusive sale of the same for a period of 10 years, and agrees to pay to such person 25 per cent. of the proceeds of sales, after deducting the current expense, and also agrees that, if any part of the addition remains unsold at the end of that time, it shall be appraised and the owner to have three-fourths thereof, and the other party one-fourth, constitutes the relation of principal and agent, and does not vest the agent with any interest in the real estate itself.

2. SAME—TERMINATION—DEATH OF PARTY

Where the relation of principal and agency exists, the death of either party terminates the agency, except where the agent has a pecuniary interest of his own in the execution of the agency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 67-71, 74, 75.]

3. PLEADING—DEMURRER.

Where a petition neither states a cause of action in equity or at law, a demurrer thereto should be sustained.

(Syllabus by the Court.)

Error from District Court, Comanche County; before Justice Frank E. Gillette.

Action by Cyrus Kimmell against Oliver Powers, executor, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Black & Trosper, for plaintiff in error. Stevens & Myers and Hudson & Keys, for defendants in error.

BURWELL, J. James R. Woods was the owner of a valuable claim adjoining the city of Lawton, which was afterwards platted and known as Woods' Addition to that city. on March 5, 1902, Mr. Woods died, and the legal title to this land became vested in his wife, who was a daughter of the plaintiff. After the death of James R. Woods, the plaintiff, on October 17, 1902, entered into a written contract with his daughter, Alta M. Woods, whereby it was agreed that the plaintiff should have charge of the selling and management of this addition, as well as the management of investments to be made with Mrs. Woods' money. The contract is as follows: "This contract made and entered into this 17th day of October, 1902, by and between Alta M. Woods, of Lawton, Oklahoma, or Norton, Kansas, party of the first part, and Cyrus Kimmell, of El Reno, party of the second part, witnesseth: That said party of the second part does hereby covenant with the party of the first part, her heirs, executors, and assigns, to take charge of all the business interests of the party of the first part in Lawton, Oklahoma, and elsewhere, consisting of the sale of lots, blocks, adjusting legal difficulties, railway right of way case, and all matters pertaining to the Woods' Addition whatsoever. That the party of the second part shall have control of the

sale of the Woods' Addition in Lawton, Oklahoma, for a period of ten years hereof, and shall receive for such services twenty-five (25) per cent. of the proceeds of such sales, after deducting current expenses of the same, such division to be made on or about the first day of January of each year during the term of this contract, and before investing the proceeds of the sales and other income for the previous year, provided, however, that the party of the second part shall not receive a per cent. of the settlement for the right of way through said addition which may be granted to the Oklahoma City & Western Railway Company, and that the party of the second part shall have full control of each investment for a period of ten years from date of each investment, but in all matters of investment, whenever practical, before investing said money, is to counsel with the party of the first part regarding such investment. That he shall seek, according to his best judgment, safe and conservative investments for all moneys received from the above-described real estate and belonging to the party of the first part after deducting all current expenses for the year. That such investment shall be made in the name of Alta M. Woods, party of the first part. That he is to receive all money derived from the sale of the Woods' Addition and deposit the same in the banks of El Reno and Lawton, in the name of the party of the first part. That the party of the second part shall receive for the management of such investments belonging to the party of the first part thirty-seven and one-half per cent. of the net profits of all such investments, after deducting all expenses of said business. That on or about the first day of January of each year during the term of this contract the books of the business for the previous year shall be closed, and dividends declared and divided between the parties according to this contract. That, if the profits upon said investment belonging to the party of the first part are reinvested, such money reinvested is to be managed on the same terms as the original investment. And it is agreed further that if at the expiration of ten years from this date either party may wish to sever their business relations, and terminate this contract, that all the property of the Woods' Addition remaining unsold shall be appraised by three competent, disinterested parties, and that such value shall be a fair cash valuation, and it shall be divided between the parties hereto, the first party receiving seventy-five per cent., and the second party twenty-five per cent., of all such unsold property either in lots, stock, notes, mortgages, or cash, as they may agree, provided, however, that should the parties hereto arrive at a valuation of such unsold property without the intervention of outside parties, a settlement may be made and the appraisement waived. It is provided that, in the event of the death

of the party of the first part, this contract is to remain and be in full force and effect, with and against the heirs, executors, and legal assigns of the first party. That, in the event of the death of the party of the second part, there shall be due his estate that portion of twenty-five per cent. of the unsold property which shall correspond to the per cent. of years of this contract which shall have then elapsed." Subsequently, Mrs. Woods married one Oliver Powers, and on September 26, 1903, Mrs. Powers (formerly Mrs. Woods, but to whom we shall hereafter refer as Mrs. Powers) died. The plaintiff commenced this action to compel specific performance of the contract by the executor and the heirs of Mrs. Powers. A demurrer was filed to the first count of the petition and sustained thereto, and this ruling is the only matter involved in this appeal.

The petition is quite long, and it would subserve no useful purpose to copy it in full. We shall only refer to those parts that are vital to a determination of the question involved. In the first place, what is the effect of the contract between the plaintiff and Mrs. Woods? Counsel for the appellants insists that the contract operated as a conveyance of an interest in the land to the plaintiff. With this contention we cannot agree. It is simply a contract appointing the plaintiff as the agent of Mrs. Powers, which agency was to continue, so far as the land is concerned, for a period of 10 years. It is true that the contract also constitutes the plaintiff the agent of Mrs. Powers for the investment of her moneys; but, although the petition contains a count based upon the profits derived from such investments, counsel have waived those matters, and are seeking to enforce only that part that relates to the land. The contract itself plainly shows the intention of the parties. It says that the party of the second part (Kimmell) shall have control of the sale of Woods' Addition in Lawton, Okl., for a period of 10 years from the date thereof, and that he shall receive for such services 25 per cent. of the proceeds of such sales, after deducting current expenses of the same, and that such division shall be made on or about the 1st day of January of each year during the term of the contract. Kimmell was to sell the land, and he was to receive 25 per cent. therefor. This, it seems to us, was a very liberal commission for such services, and, taking into account the allegation of the petition that the plaintiff is a man of age and business experience, and was familiar with his daughter's business affairs, the contract savors of the elements of unconscionableness.

But it is alleged that there were considerations other than those named in the contract, which influenced its execution. What were they? Let us briefly notice. The petition alleges that the appellant (Kimmell) loaned his daughter and James R. Woods, her

former husband, money with which to prove up on his claim and with which to live on. These allegations only show acts of kindness from a father to his child, as it is not pretended that these loans were not paid back to Kimmell. There is, however, one allegation in the petition, as follows: "The facts of plaintiff's relationship, his superior age, business experience, intimate knowledge of her affairs, and previous protective acts and services, furnished in part the motive and consideration on the part of said Alta M. Woods for said written contract." It is quite likely that these acts of kindness on the part of Kimmell to his daughter and his superior business experience, etc., influenced in part the making of the contract, and these same considerations would have had an important bearing in giving a similar contract to one who was not a near relative. But these considerations cannot operate to confer upon Kimmell rights which the language of the contract itself does not import. The relation being that of principal and agent, the death of Mrs. Powers terminated the agency. In Bishop on Contracts, § 340, it is said: "The death of either party terminates the agency—that of the agent, because a dead man can perform no act; that of the principal, because his earthly existence has ceased, and in the nature of things there can be no agent without a principal. Even though the death of the principal is unknown to the agent, so that the latter executes in good faith what he believes to be a continuing agency, such execution is void." And see Am. & Eng. Enc. of Law (2d Ed.) p. 1022: "It is a well-established rule of the common law that the death of the principal puts an end to the agency, when the authority is not coupled with an interest, and no act of agency subsequent thereto is binding upon the estate of the principal, for no one can do an act in the name of one who is dead"—citing authorities.

What interest could Kimmell possibly have in the land itself? The petition alleges "that on October 17th, 1902, Alta M. Woods (Powers) was the owner in fee simple, and in possession of the unsold portion of the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of section 31, in township 2 N., of range 11 W., I. M., in Comanche county, Okl., which land was platted and generally known and described as the Woods' Addition to Lawton, Okl., which property was then of the value of about \$73,305, and she continued to be such owner and in possession of the same up to the time of her death hereinafter mentioned." The plaintiff here states that, on the date the contract in question was entered into, the land was platted, and also that Mrs. Powers continued to be the owner of all of the land referred to in the contract until the time of her death. Hence the plaintiff in this case did not sell a single lot or foot of ground under the contract, and, as he did not claim that he paid any money or other valuable consideration for

the contract, we cannot perceive how he has an interest in the land which should be recognized. He does not even allege that he expended money in preparing the addition for sale or in attempting to make sales. His allegation as to what he did under the contract is "that he has duly performed all the conditions on his part required by said contract; that immediately upon the execution and delivery of said contract he entered upon the performance of his duties and obligations thereunder; that he gave his entire time and attention to the management and control of said business," etc. The plaintiff may have given his time and attention, but he sold no lots. Under the contention of appellant, he could have done nothing for 10 years, and then exacted a one-fourth interest in the entire addition. The contract will not be so interpreted. There was a remote contingency that there might be some lots unsold at the end of 10 years, and, if so, the appellant would be entitled to a one-fourth interest in them, or the proceeds therefrom; but that feature of the contract contemplated an honest effort to sell the addition. The appellant could not sit quietly by for months, and then, upon the death of the principal, claim this clause as giving an interest in the lots unsold. Equity will only give him that which, in justice, he is entitled to. The appellant may have expended his time in making investments for Mrs. Powers and in looking after the same, but, as to such services, the contract provides a different compensation, and the presumption is that he has received it.

Nor can the clause in the contract to the effect that, in the event of the death of Mrs. Powers, the contract is to remain and be in full force and effect, be interpreted as continuing the contract of agency after the death of Mrs. Powers. When she died, the interests of the plaintiff, on the one hand, and the heirs of Mrs. Powers, on the other, became fixed. Kimmell could recover that which was due him, if anything, under it, but he could not authoritatively act longer as agent for his principal who was dead.

The petition presents no ground for equitable relief, nor does it state an action at law for damages.

The judgment of the lower court is hereby affirmed, at the cost of the appellant.

All the Justices concurring, except GILLETTE, J., who presided at the trial below, not sitting, and IRWIN, J., absent.

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In re McQUOWN.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. COURTS — RECORDS — AMENDMENT — ENTRIES NUNC PRO TUNC.

On proper application and notice a court may by nunc pro tunc order cause its records to speak the truth and be amended, so as to record any part of the proceedings had in a

cause which by inadvertence or mistake the clerk has omitted to record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 368.]

2. JURY—RIGHT TO JURY TRIAL—WAIVER—HABEAS CORPUS.

One who is charged with a crime triable by a jury at common law is required by our statute to be tried by a jury, and cannot waive such right. A judgment of conviction, pronounced by a court upon a plea of not guilty, without the intervention of a jury, is void; and a person imprisoned upon such judgment is entitled to his discharge upon habeas corpus.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 198.]

(Syllabus by the Court.)

Application by C. W. McQuown for a writ of habeas corpus. Petitioner discharged.

Geo. T. Webster, for plaintiff. M. L. Holcombe, Co. Atty., for respondent.

BURFORD, C. J. The petitioner was convicted in the probate court of Custer county for a violation of the law for the protection of game, and was sentenced to pay a fine of \$100 and costs, and to stand committed to the county jail in default of payment. He appealed to the district court, but there dismissed his appeal before trial, and the cause was remanded to the probate court to be executed. The defendant upon arraignment pleaded not guilty, waived a jury, and tried the case to the court.

The original record of the judgment omitted to state that the defendant was ordered committed to jail in default of payment of the fine adjudged against him, or that he waived a jury trial. Subsequently the court, on motion of the county attorney, found that the defendant did, on arraignment, waive a jury, and that in rendering the judgment and pronouncing judgment the court did in fact adjudge that upon failure to pay the fine and costs that the defendant be committed to the county jail of Custer county until the fine and costs should be paid, or until he had served one day for each \$2 of said fine and costs, and the court ordered nunc pro tunc that the record be made to speak the truth, which was accordingly done. The petitioner contends that that judgment so entered and recorded is void and of no effect, for the reason that the record was amended after the expiration of the term of court at which the judgment was rendered, and a number of authorities are cited sustaining the proposition that the clerk cannot amend his records after the term at which the proceedings were had. We find no fault with the rule as here contended for, but it has no application to the facts in this case. The orders, judgments, and proceedings of a court of general jurisdiction are required to be recorded by the clerk of the court. The failure of the clerk or recording officer to make such record does not vitiate the proceedings. The clerk may, at any time during the term at which the proceedings are had, correct,

amend, or supply omissions to make the record speak the truth; and the court may at any time, upon proper application, from the memory of the presiding judge or upon proper showing, by appropriate order nunc pro tunc cause its records to recite the truth, and may supply any omission from its records; and this may be done in a criminal as well as in a civil cause. Such record, when so supplied, relates to the time when the proceedings were in fact had, and may make valid that which was apparently defective. *Wight v. Nicholson*, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. Ed. 865; *Gonzales v. Cunningham*, 164 U. S. 612, 17 Sup. Ct. 182, 41 L. Ed. 572; *Hyde v. Curling*, 10 Mo. 359; *State v. Clark*, 18 Mo. 432; *Nelson v. Barker*, 3 McLean (U. S.) 379, Fed. Cas. No. 10,101; *State v. Bilansky* 3 Minn. 246 (Gil. 169); *Bishop's New Crim. Proc.* § 1345. The proceedings had before the probate court for the purpose of determining what judgment was in fact rendered, and its finding and order for a nunc pro tunc order perfecting the record, are strictly in accord with recognized practice, and conform to what is required by due process of law. We are not permitted in this kind of a proceeding on habeas corpus to review or correct errors, and we need not decide whether the proceedings were in every respect free from error. The court had power to make its records speak the truth, it had jurisdiction of the parties and of the subject-matter, and it proceeded in the manner recognized by law. The proceedings are not void and may be enforced.

The next contention is that the judgment is void for the reason that the petitioner was entitled to a jury trial, and that he could not lawfully waive such right, and that a judgment rendered by the court upon a plea of not guilty, without the intervention of a jury, is void. The statutory provisions involved are as follows: Section 5142, *Wilson's Rev. & Ann. St.* 1903: "No person can be punished for a public offense except upon legal conviction in a court having jurisdiction thereof." Section 5151: "The procedure, practice and pleadings in the district courts of this territory in criminal actions or in matters of a criminal nature, not specifically provided for in this chapter, shall be in accordance with the procedure, practice and pleadings of the common law, and assimilated as near as may be with the procedure, practice and pleadings of the United States or federal side of said court." Section 5158: "No person can be convicted of a public offense unless by the verdict of a jury accepted and recorded by the court, or upon a plea of guilty, or upon final judgment for or against him upon a demurrer to the indictment, or upon a judgment of a police or justice's court in cases in which such judgment may be lawfully given without the intervention of a jury or grand jury." Section 5434: "An issue of fact arises, first, upon a plea of not guilty; or, second, upon a plea of a former

conviction or acquittal of the same offense." Section 5435: "Issues of fact must be tried by a jury." Section 5436: "If the indictment is for a felony, the defendant must be personally present at the trial, but if for a misdemeanor not punishable by imprisonment, the trial may be had in the absence of the defendant. If, however, his presence is necessary for the purpose of identification, the court may, upon the application of the district attorney, by an order or warrant, require the personal attendance of the defendant at the trial."

This brings us to the question: Can a defendant, charged with a crime and entitled to a jury, waive the jury and try the case to the court? Upon this question a casual examination of the decisions would lead to the impression that there is considerable conflict. But a careful and discriminating review discloses the fact that the decisions holding that the accused may waive a jury are based upon statutory or constitutional provisions. A great many of the states of the Union have constitutional or statutory provisions to the effect that a defendant in a criminal cause shall be tried by a jury, unless he waive the jury and consent to trial by the court. We believe the authorities are practically unanimous in holding that a jury cannot be waived, unless such waiver is authorized by statute. In *Hughes on Criminal Procedure*, § 2979, the author says: "A jury cannot be waived in a felony case, even by agreement or consent of the defendant. It is jurisdictional, and consent can never confer jurisdiction. The defendant may waive his right to a jury trial in a prosecution for a misdemeanor, and be tried by the court instead of a jury, where such waiver has been authorized by statute, and the courts have upheld the constitutionality of statutes providing for such waiver in misdemeanor cases." In *Bishop's New Criminal Procedure*, § 893, it is said: "One form of waiver is where, authorized by statute and the Constitution not withholding any needful jurisdiction from the tribunal, the defendant consents to be tried by the court without a jury. He cannot afterward complain."

Rapalje, in his *Criminal Procedure* (section 150), goes more fully into the question, saying: "There are few questions of law upon which the courts are more evenly divided in opinion than the problem whether it is legally competent for a defendant in a prosecution for felony to waive a trial by jury and consent to be tried by the court, unless, as in the case in some of the states, the Constitution allows a jury to be waived in such cases as the Legislature may direct. Where the Constitution so provides, the Legislature alone has the power to determine in what classes of cases a jury trial may be waived. The words 'prescribed by law,' in the Constitution, are held to look to actual legislation upon the subject, and, in the ab-

sence of a statute, to impliedly prohibit the granting of a permission by the court to the defendant to dispense with a jury. And, a statute having provided a certain way of waiving a jury, that way must be pursued. A waiver can be had in no other. But, where the Constitution is silent on this matter, the decisions are at variance as to whether a legislative authorization is effectual to enable the accused to waive a jury. Upon the affirmative side of this question it is held in Alabama and Indiana that the failure to demand the privilege of a jury trial is a waiver of it. In Arkansas, in a trial for assault or other misdemeanor, by agreement of the parties, the defendant may be tried by a jury of less than 12, or by the court alone; but mere waiver of the requisite number by failing to object to less will not authorize a trial by less than 12. In Connecticut, a statute providing that in all prosecutions the party accused, if he should so elect, might be tried by the court, instead of by the jury, and that in such cases the court should have full power to try the case and to render judgment, was held not to conflict with the Constitution. In Georgia, a defendant may waive the jury altogether, or the full number. In Illinois, a party under indictment for a felony, after pleading not guilty, may waive his constitutional right to a trial by jury, and a trial and conviction by the court alone is valid; but in a capital case the accused will not be presumed to have waived any of his rights, although he has power to waive them all. So, also, in misdemeanor cases, the jury may be waived by consent. In Iowa, if the defendant consents, 11 jurors may try the case; but he cannot waive a jury altogether and submit to a trial by the court. In Kansas, the defendant may waive or insist on trial by jury at his option. In Michigan, a waiver of jury trial in a prosecution for assault and battery before a justice of the peace is binding. So, also, in Kentucky, Missouri, and Nevada, in misdemeanor cases the defendant may consent to be tried by less than a full jury. And, in New York, an infant accused of petit larceny may waive his right to trial by jury and elect to be tried by a court of special sessions. In Ohio, where the offense is a petty one triable in the police court, a failure to demand a jury is a waiver. In Texas, a waiver may be effected by the entry of a plea of guilty. In Wisconsin, the defendant was held to have waived his right of jury trial by obtaining a change of venue." In section 151 the author reviews the opposite holdings, and says: "Notwithstanding the many ably reasoned opinions to be found in the cases collated in the preceding section, an examination of the decisions holding the contrary doctrine has led the writer to the conclusion that the weight of authority, as well as the better opinion, is that, in prosecution for crime other than minor misdemeanors and petty offenses, the

defendant cannot waive his right to trial by jury or consent to a trial by a less number than 12. A trial without a jury is a trial without jurisdiction. The state and the defendant cannot agree upon the facts and submit them to the judge for his decision. Some of the cases merely decide that the waiver is ineffectual in cases of felony; but it is difficult to see why the same rule should not obtain in cases of grave misdemeanors entailing heavy punishment in the event of conviction. Even the issue on a plea of former trial must be decided by a jury, and defendant's consent will not dispense with such trial. In Michigan, a conviction for murder was had, one of the jurors being an alien, which was unknown to the defendant until after verdict, and, his motion for a new trial being refused, it was held that the verdict was void; that the defendant could neither expressly nor impliedly waive his right to a jury of 12 men such as is meant by the state Constitution—a jury of his countrymen. The error into which those who hold the opposite view fall seems to be twofold: First. They ignore the distinction between civil suits, involving property rights, and criminal prosecutions, involving the right of life or liberty. Second. They treat the mode of trial by jury as though its sole purpose and effect was to protect the particular sutor or the individual defendant—as if its use or disuse were a matter of purely personal right and concerned only the litigants themselves. For, as Blackstone says, 'the king has an interest in the preservation of all his subjects.' The life and liberty of the citizen is a matter of supreme importance to the state, and it should not allow him to throw either away by failure, intentional or unintentional, to take advantage of the constitutional safeguards in a criminal trial."

In Wharton's Criminal Pleading and Practice (8th Ed.) § 733, discussing consent and waiver, the author says: "But such consent does not, it has been held, operate to legalize a trial by 11 instead of 12 jurors; nor can a defendant, without an express statutory authority, waive his right to a trial by jury on a plea of not guilty." In the law of Crimes and Criminal Procedure, by Hochheimer, it is stated: "Statutes authorizing the submission of a case to the determination of the court are valid; but, in the absence of statutory provision, the parties cannot by consent confer upon the court power to determine the facts." Mr. Clark, in his Criminal Procedure, says (page 434): "The right of every person charged with crime to a trial by jury has from the earliest period existed at common law. It was recognized and secured to the English people by the Magna Charta and with us it is guaranteed by our federal and state Constitutions. The language of the different provisions varies to some extent; but their object and effect is the same, namely, to secure to every person charged with

a crime the same right to a jury trial, and only the same right, as had always existed at common law. No new right is conferred; but the common-law right is guaranteed, so that the Legislature cannot take it away nor impair it. The Legislature may regulate the mode of trial by jury, provided it does not deprive the accused of his substantial common-law rights; but it cannot take away a single one of these rights. At common law a person accused of petty offenses, such as vagrancy, disorderly conduct, violation of municipal ordinances, and trivial breaches of the peace, of which justices of the peace and police magistrates had jurisdiction, had no right to demand a trial by jury, and by the weight of authority he has no such right under the constitutional guaranty; for, as we have seen, it was only intended to guarantee the same right as had always existed at common-law. Whether or not the right of trial is a right which the defendant can waive is a question upon which the authorities are conflicting. Some of the courts have held that a jury may be waived in all cases, provided there is a statute authorizing the court to try the case without a jury; that the constitutional right to a trial by jury is not infringed when the accused may have it or not at his election. Many of the cases so holding were cases of felony, but most of them were cases of misdemeanor, and it is probable that the court in some of the latter cases did not intend to lay down any such rule for cases of felony. Many of the cases hold that trial by jury cannot be waived in prosecutions for felony. It is difficult to understand how there can be any distinction in this respect between a prosecution for a felony and a prosecution for such a misdemeanor as at common law entitled the defendant to a jury trial. It would seem in reason that if a jury cannot be waived in one it cannot be waived in the other, and that if it can be waived in one it can be waived in the other. The grade of the crime should be immaterial, provided it is such a crime as entitled the defendant to a jury trial at common law; for, as we have seen, the Constitutions guarantee the same right as existed at common law. If, therefore, a jury trial cannot be waived in one case in which it was necessary at common law, it cannot in reason be waived in another. Where the Constitution or a statute expressly requires a jury trial, and does not merely give the accused the right to such a trial, a jury can in no case be waived; for it is intended to protect the state as well as the defendant. Where the right to a jury trial is given by statute in cases which could be tried without a jury at common law, as in prosecutions for petty misdemeanors before inferior tribunals, the right may, of course, be waived."

It is clear from the foregoing authorities that, if one charged with a crime would have been triable by jury at common law, then

his right to a jury trial is guaranteed under the Constitution of the United States. Our statute contains the same guaranty. Section 5434: "An issue of fact arises, first, upon a plea of not guilty. * * * Issues of fact must be tried by a jury." Section 5153: "No person can be convicted of a public offense unless by verdict of a jury, accepted and recorded by the court, or upon a plea of guilty, or upon final judgment for or against him upon a demurrer to the indictment, or upon a judgment of a police or justice's court in cases in which such judgment may be lawfully given without the intervention of a jury or grand jury." The last clause of this section evidently refers to the class of petty misdemeanors and violations of municipal ordinances which were triable at common law without a jury; so that our statute prescribes the same rule which is found in the authorities cited, and, there being no statute in this territory which authorizes a defendant in a criminal case to waive a jury trial, it follows that such a case cannot be tried upon a plea of not guilty without a jury, unless it comes within the class of cases in which no jury was required at common law, and which, in our statute, are designated as cases triable in a justice or police court, in which judgment may be lawfully given without the intervention of a jury.

Does the charge against the petitioner come within these classes? He was charged by information before the probate court with a violation of the game law, in shipping 3,000 quail during the closed season, in violation of law. He pleaded not guilty. The court found him guilty, and assessed against him a fine of \$100 and \$88.60 costs of prosecution, and ordered him committed until the fine and costs were paid, or until he should serve one day for each \$2 of such fine and costs. This prosecution was under section 3079, Wilson's Rev. & Ann. St. 1903, which provides a penalty for its violation by a fine of not less than \$50 nor more than \$500 and costs of the prosecution. Section 5578, Wilson's Rev. & Ann. St. 1903, further provides: "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every \$2 of the fine." This is a general statute and applicable to all criminal prosecutions where a fine may be imposed as a penalty for a crime. Petty misdemeanors at common law were unimportant, trifling offenses, such as vagrancy, disturbing the peace, desecrating the Sabbath, profanity, and kindred offenses. We think the offense charged against the petitioner here rises above the dignity of a petty misdemeanor and entitled him to a trial by jury, and, not having had a trial by jury, the judgment cannot be enforced, and that his imprisonment thereunder was illegal.

The petitioner is ordered discharged from the commitment, and, as he is now on bail

to respond to such order as this court may make, that he appear at such time as shall be designated by the probate court to answer the charge in said information, and for such further proceedings in said cause as may be in conformity to law. All the Justices concur, except IRWIN, J., absent.

ST. LOUIS & S. F. R. CO. v. MCGIVNEY.
(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. CARRIERS—INJURY TO FREIGHT—PRESUMPTIONS.

Where goods shipped over several connecting lines are found to be injured when they reach their destination, there is no presumption that the injury occurred while the goods were in the hands of the first carrier.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 841.]

2. SAME—DELIVERY TO CONNECTING CARRIER.

If a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier carrying to the place of address, or connected with those who thus carry, and his liability ceases upon his making such delivery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 751.]

3. SAME—LIABILITY OF FIRST CARRIER.

If freight addressed to a place beyond the usual route of the common carrier who first received it is lost or injured, the shipper may demand satisfactory information from the first carrier that the injury or loss did not occur on its line, and if such carrier fails to furnish within a reasonable time the proof, in its possession or under its control, tending to show that it was not responsible for the injury or loss, it will be held liable therefor, regardless of whether or not it was in fact responsible for such injury or loss.

4. SAME—ACTION AGAINST FIRST CARRIER.

The right of a shipper under section 511 of the Statutes of Oklahoma of 1893 to demand of a first carrier proof that loss of or injury to freight addressed to a point beyond its usual route, where it has been delivered to a connecting carrier, to the effect that the loss or injury did not occur on its line, does not prohibit a shipper in the first instance, without such demand, from bringing an action for damages for an alleged loss or injury.

5. SAME.

The purpose of the statute is to put the shipper in possession of the information which is in the possession or under the control of the first carrier, so that he may determine what carrier caused the injury, and obtain satisfaction therefor without being compelled to bring a multiplicity of actions.

6. APPEAL—DETERMINATION—REMAND FOR NEW TRIAL.

Where a plaintiff fails to offer any evidence in support of an allegation of a petition which, if proven, would authorize a recovery, and the case is appealed to this court, such allegation, for the purposes of the appeal, will be deemed to have been waived; and while, in case of a reversal and remanding for a new trial, evidence might, on such second trial, be offered in support thereof, this court will not order a new trial for the purpose of affording such opportunity, as it is the duty of a litigant to offer all of his evidence at the first trial at which the law permits him to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4609.]

(Syllabus by the Court.)

Error from District Court, Grant County; before Justice James K. Beauchamp.

Action by L. W. McGivney against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed. Action dismissed.

Flynn & Ames and R. A. Kleinschmidt, for plaintiff in error. Mackey & Mackey, for defendant in error.

BURWELL, J. The appellee, L. W. McGivney, shipped a car of corn from Salt Fork, Okla., to Henrietta, Tex., according to the bill of lading as follows: "From Salt Fork, Oklahoma, to Sherman, Texas, over the St. Louis & San Francisco Railroad Company; from Sherman, Texas, to Ft. Worth, Texas, over the Houston & Texas Central Railroad Company; and from Ft. Worth, Texas, to Henrietta, Texas, over the Ft. Worth & Denver City Railroad Company." There was a delay in delivery, and, when the car finally reached Henrietta, over the Ft. Worth & Denver Railroad, it was so damaged that the consignee refused to receive it. The appellee made a claim to the Ft. Worth & Denver Company, which was by that company referred to the appellant company and investigated by it, and finally the appellee brought suit for the value of the corn.

There is absolutely no evidence in the record that in the slightest degree indicates the corn was damaged while in transit over the appellant's road, and the fact that the car was received by a connecting line carries with it the presumption that it was in good condition when delivered by the appellant to such connecting road. The appellee has proceeded upon the theory that, because the appellant company received his corn for shipment and loss occurred, it is primarily liable to him, without regard to negligence on the part of appellant. Such is a mistaken theory of the law. Where a common carrier receives freight for transportation to a point beyond its line, under a contract that it will deliver it to a connecting carrier and will not be liable for damages not occurring on its own line, and the goods are received by the connecting carrier without objection, the presumption of law is that the freight was in the same condition when delivered to the connecting carrier as it was when received by the initial carrier; and if the freight is damaged when it reaches its destination, in the absence of proof, the presumption is that the damages occurred while the property was in the possession of the last carrier. This identical question was decided by the Supreme Judicial Court of Massachusetts in the case of Farmington Mercantile Co. v. Chicago, B. & Q. R. Co., 166 Mass. 154, 44 N. E. 131. Mr. Justice Holmes, the present member of the Supreme Court of the United States, participated in the opinion, although it was written by Mr. Justice Allen. The court said: "When goods shipped over several connecting lines are found to be injured when they reach

their destination, there is no presumption that the injury occurred while the goods were in the hands of the first carrier." The Supreme Court of Alabama, in the case of *Louisville & N. R. Co. v. Jones*, 100 Ala. 263, 14 South, 114, said: "Where goods are delivered to a carrier for transportation to a point beyond its own line under a through bill of lading, which stipulates against liability for injury beyond its own line, and the goods are in a damaged condition when delivered by the connecting carrier to the consignee, the presumption is that the receiving carrier delivered them to the connecting carrier in good condition, and the presumption must be overcome before the consignor can recover for such damage from the receiving carrier."

In 6 Cyc. p. 490, § 7, the law is declared as follows: "Under the American rule that, in the absence of partnership relations or contract for through transportation, each of the carriers is alone liable for loss or damage occurring during his part of the transportation, the action may be brought directly against the carrier on whose line the loss or injury occurred. To render the first carrier liable, it must appear that he failed to deliver the goods to the connecting carrier, or delivered them in damaged condition. The second or subsequent carrier is not to be held liable in an action against him until it appears that he received the goods in sound condition and that loss or injury happened to them while in his possession. But on proof of delivery to the first carrier in good condition and receipt by the second carrier without objection, it will be presumed, in an action against the second carrier, that the goods were still in the condition in which they were received by the first carrier. Indeed, the weight of authority seems to be in support of the general proposition that, if the goods are delivered by the last carrier in damaged condition, the presumption arises, without further evidence, that the damage occurred while in the possession of the last carrier, and that the burden is upon him to prove that they were in the damaged condition when received by him; the double presumption being entertained that they were accepted in good condition by the first carrier and that such good condition continued until their receipt by the last carrier, notwithstanding transportation over intermediate lines."

Under the law a common carrier is not bound to receive goods from a connecting carrier for transportation which are damaged, or, if it receives them, it is entitled to have the receipt given therefor, or the records of shipment show the real condition of the goods when it received them; and the presumption is that a second carrier, or any carrier, will not receipt a former carrier for goods as being in good condition when they are already damaged. It is because of the right of a subsequent carrier to have the record speak the truth that the law, in the absence of a record or proof to the contrary,

presumes that goods or freight were in good condition when received from a connecting carrier. The Legislature of this territory has recognized the rule stated above, as will be seen from the following sections of the Statutes of Oklahoma of 1893:

"Sec. 510. If a common carrier accepts freights for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier, carrying to the place of address, or connected with those who thus carry, and his liability ceases upon his making such delivery.

"Sec. 511. If freight, addressed to a place beyond the usual route of the common carrier who first received it, is injured or lost, he must, within a reasonable time after demand, give satisfactory proof to the consignor that the loss or injury did not occur while it was in his charge, or he will be himself liable therefor."

From section 510 it will be seen that the liability of the first carrier ceases when it delivers freight to a competent connecting carrier carrying freight in the direction of the destination thereof. And section 511 provides that where freight is received by a common carrier, and its destination is beyond the usual route of the carrier first receiving it, and such freight is lost or injured, the first carrier must, within a reasonable time after demand, give satisfactory proof to the consignor that the loss or injury did not occur while it was in its charge, and if it fails to furnish such proof it will itself be liable therefor.

It is insisted that the word "demand" meant by the statute is a demand for payment for the loss. We do not think so. The statute, recognizing that the first carrier can easily furnish proof as to whether or not the loss occurred on its line, has provided that it must furnish the shipper with satisfactory proof within a reasonable time that it was not responsible for such loss. The shipper, under the statute, may go to the first carrier and request it to furnish proof that the injury did not occur on its line, so that it may be able to locate the carrier responsible for the injury and sue it, if necessary; but if the first carrier fails to furnish the proof within a reasonable time, showing that the loss did not occur on its line, then it will be held liable therefor, regardless of whether or not it was, in fact, responsible for the injury to the freight. And under this section the shipper is entitled to full and complete information regarding the shipment so far as known to the first carrier, which could be used by such carrier in defending an action for damages therefor; that is, to all of the proof in its possession or under its control at the time that would tend to show that the first carrier was not responsible for the loss. The penalty for failing to furnish such proof is absolute liability on its own part to pay the damages sustained. It must, however, be observed that this statute is not intended to

prohibit one who has sustained loss by reason of injury to freight from suing the first carrier without such demand; but, when he does so, the burden is on the shipper to show by a preponderance of the evidence that the injury was the result of the negligence of such first carrier. The statute was enacted primarily for the benefit of the shipper; but when he fails to avail himself of its conditions in the first instance, and sues the first carrier without such demand, he cannot then take advantage of its provisions, after the first carrier has been put to the trouble and expense of defending an action against it. The statute is intended to require the first carrier to furnish to the shipper on demand that information which, in the absence of the statute, the shipper could only compel in an action against it or some other connecting carrier.

The appellant has made other assignments of error, such as the barring of the cause of action by reason of the statute of limitation, and misdirecting the jury on questions of law; but it is not necessary to discuss them, as under the record presented the plaintiff must fail to recover. There are some allegations of the petition which, if proven, would make the appellant liable in damages; but, as there was absolutely no evidence offered as to them so far as this appeal is concerned, they are deemed to have been waived. If the case were reversed and remanded by reason of error committed in the trial below on those issues which were litigated, the appellee would not be precluded from offering evidence on another trial, under any proper allegation of his petition. But, when, on the trial of a case in the lower court, a party omits to offer evidence on an issue formed by the pleadings, and this court finds that he must fail under the evidence offered, and that he cannot recover on any of the issues tried, this court will not remand the case for a second trial under the theory that he might possibly make out a case or defense under allegations of his petition or answer which he did not support by evidence on the former trial. It is the duty of a party on a trial to litigate his whole case and each and every part thereof at the first opportunity, and if he fails to do so he cannot complain if the appellate court deems those issues not litigated as waived.

The judgment of the lower court is hereby reversed, at the cost of appellee, and the cause dismissed, with prejudice. All of the Justices concurring, except IRWIN, J., absent.

BANK OF INDIAN TERRITORY v. ECKLES, County Treasurer.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

COUNTIES—POWERS—INCURRING DEBTS.

By the provisions of the act of Congress approved March 3, 1901 (31 Stat. 1093, c. 846), the board of county commissioners of Comanche

county, Okl., had no power or authority to allow any claim against the county revenues and issue a warrant prior to December 15, 1903, unless the contracting or incurring of such indebtedness was first authorized by the Secretary of the Interior.

(Syllabus by the Court.)

Error from District Court, Comanche County; before Justice F. E. Gillette.

Application by the Bank of Indian Territory for a writ of mandamus to James R. Eckles, county treasurer of Comanche county. Judgment for defendant. Plaintiff brings error. Affirmed.

Stevens & Myers, for plaintiff in error.
S. M. Cunningham, for defendant in error.

BURFORD, C. J. The Kiowa, Comanche, and Apache Indian country was opened to settlement on August 6, 1901, and Comanche county is composed of territory which originally was a portion of said Indian reservations. The county government was organized immediately after the opening of said reservation to white settlement, and W. W. Painter was by the Governor appointed and qualified as sheriff of said county, and proceeded to discharge the duties of said office until his successor was elected and qualified in January, 1903. This proceeding is for a peremptory writ of mandamus to compel the treasurer of said county to pay four several warrants issued by the board of county commissioners to Painter, and by him assigned to the plaintiff. The petition for an alternative writ avers that on January 5, 1903, the board of county commissioners of Comanche county, Okl., issued to W. W. Painter warrant No. 64 for \$10.40, warrant No. 65 for \$1.15, warrant No. 46 for \$985.80, and warrant No. 47 for \$1,087.90; that there was at the time ample funds in each of the funds upon which said warrants were issued to pay all indebtedness against said funds, including these warrants; that the county treasurer refused to pay them; that the Bank of Indian Territory was the owner of each said warrants by assignment from Painter for a valuable consideration; and it was asked that an alternative writ issue, directing the treasurer to pay said warrants from the funds in his hands or show cause why he refused. The county treasurer, by way of return to the alternative writ, admitted all the averments contained in the petition, but alleged that each of said warrants were issued by the board of county commissioners without authority of law and in payment of claims for which Comanche county was not liable; that all of said warrants were for indebtedness incurred prior to the time for collecting county taxes in the calendar year next succeeding the opening, and that the incurring of said indebtedness had never been authorized by the Secretary of the Interior; that warrant No. 65, for \$1.15, was issued to Painter for repairs on the county jail, furnished on October 24, 1902; that warrant No. 64, for

\$10.40, was issued for stamps bought and paid for by Painter as sheriff between October 3, 1902, and October 31, 1902; that warrant No. 46, for \$985.80, was issued to Painter for criminal work done by him as sheriff of said county from January 1, 1902, to March 31, 1902; that warrant No. 47, for \$1,687.90, was issued to Painter for criminal work done by him as sheriff of said county during the quarter ending June 30, 1902; that said funds in the hands of the county treasurer were not liable for any of said indebtedness, but that the said indebtedness was payable, if at all, out of the funds derived from the sale of lots in the town of Lawton, which fund was in the hands of the Secretary of the Interior, and had never been in the hands of the county treasurer or subject to the order of the board of county commissioners; that there was at that time in the hands of the Secretary of the Interior a sufficient balance of said town lot sale fund to pay all charges against the same, and to more than pay plaintiff's claims. To this return to the alternative writ the plaintiff filed a general denial. The alternative writ and the return constitute the pleadings in the case, and the reply should be treated as a demurrer to the return. The facts are admitted in the argument to be as alleged in the writ and return, and the court so found.

The facts presented call for the application and interpretation of the act of Congress of March 3, 1901, 31 Stat. 1093, 1094, c. 846. This act provides for the reservation of lands in each county for a county seat, the manner of disposal of the town lots, and the disposition to be made of the funds arising from such sale. It may be stated generally that the power of Congress to dispose of the public lands, as well as to legislate directly for the territories, is unquestioned. In any case, when Congress legislates upon any subject over which it has jurisdiction, its laws supersede all laws upon the same subject and serving the same purposes enacted by any of its subordinate dependencies. The territory of Oklahoma possessed the legislative power to create county offices, to fix their compensation, and provide the manner of their payment. Congress possessed the same powers. Yet there could be no conflict of authority or of laws. The superior includes the inferior. Its laws are paramount, and when the superior legislates, and makes specific provision for the payment of county officers, and provides the fund from which they are to be paid, the laws of the territory upon the same subject are suspended and inoperative, and the laws of Congress must prevail. The portion of the act in question is as follows: "The receipts from the sale of these lots in the respective county seats shall, after deducting the expenses incident to the surveying, subdividing, platting and selling of the same, be disposed of under the direction of the Secretary of the Interior in

the following manner: A courthouse shall be erected therewith at such county seat at cost of not exceeding ten thousand dollars, and the residue shall be applied to the construction of bridges, roads and such other public improvements as the Secretary of the Interior shall deem appropriate, including the payment of all expenses actually necessary to the maintenance of the county government until the time for collecting county taxes in the calendar year next succeeding the time of the opening. No indebtedness of any character shall be contracted or incurred by any of said counties prior to the time for collecting county taxes in the calendar year next succeeding the opening, excepting where the same shall have been authorized by the Secretary of the Interior." In the interpretation of statutes, courts must find the meaning and intent in the language of the act itself, where there is no repugnancy or uncertainty. This statute seems clear. Congress knew what it wanted to accomplish, and said so; and we have no right to attempt to read into it some other purpose or meaning. Congress recognized the fact that under the laws of Oklahoma, which were then operative in these Indian reservations, county governments would be put in operation as soon as the country was opened to settlement; and by section 2 of the act it was provided: "The Governor of the territory shall appoint and commission for each county all county and township officers made necessary by the laws of the territory of Oklahoma, who shall hold their respective offices until the officers elected by the people at the general election next following the opening shall have qualified." Congress knew that these officers so appointed would have to be paid, and the funds for the maintenance of a county government would have to be provided. By the laws of Oklahoma no taxes would be available for the payment of current expenses until December of the next year following the opening. The country was opened in August, after the time for the assessment of property for that year had elapsed. The first assessment that could be made under our laws would be in the spring of the following year, and the first installment of taxes from this assessment would be payable December 15, 1902, and until this date Congress made provision for maintaining county governments and provided the funds and manner of their disbursement. In addition to providing a fund for the payment of all the necessary expenses incident to the maintenance and support of the county government during a given period, a prohibition was also imposed upon the counties. It was provided: "No indebtedness of any character shall be contracted or incurred by any of said counties prior to the time for collecting county taxes in the calendar year next succeeding the opening, excepting where the same shall have been authorized by the Secretary of the

Interior." This was a wise and commendable act.

It has been suggested in the argument that this inhibition relates only to contractual obligations and does not affect imposed obligations or liabilities; that the salary of the sheriff was fixed by the laws of Oklahoma, and the law required him to be paid certain fees by the county; and that it was not the intention of Congress to take from the counties the authority to pay this class of obligations. The language used by Congress will not admit of this contention. The law says "contracted or incurred." The word "contracted" includes all of one class, and the word "incurred," to be given any meaning whatever, must be held to include another class. There are only two classes of county obligations, contractual and imposed, and evidently Congress meant to include both classes. The word "incurred" is defined by Webster as "to become liable or subject to; to render liable or subject to." Black says: "Men contract debts. They incur liabilities. In the one case, they act affirmatively; in the other, the liability is incurred or cast upon them by operation of law. 'Incur' means something beyond contracts, something not embraced in the word 'debt.'" In *Scott v. Tyler*, 14 Barb. (N. Y.) 202, "incur" is held to mean "to become liable for." *Flanagan v. Baltimore & O. R. Co.*, 83 Iowa, 639, 50 N. W. 60: "To become liable for." In *Beekman v. Van Dolsen*, 24 N. Y. Supp. 414, 70 Hun, 288: "To become liable for." In *Deyo v. Stewart*, 4 Denio (N. Y.) 101: "Brought on himself." In *Ashe v. Young*, 68 Tex. 123, 3 S. W. 454: "Brought on, occasioned, or caused." Hence it is apparent that the word "incurred" means more and embraces a different class of liabilities or obligations from these contracted. It means the indebtedness imposed upon the county by salaries of county officers and other required and necessary expenses, all of which, to be a charge against the lot sale fund, must be authorized or approved by the Secretary of the Interior. To use a phrase somewhat familiar in these days, Congress imposed "departmental government" upon these new counties until such time as the revenues from the taxes levied upon their own property were available for their expenses, and until that time no indebtedness could be created by the county officers or imposed by the laws of Oklahoma until such time as the prohibition in the act of Congress expired by limitation, when the laws of Oklahoma become operative and the "embryo quarantine" was raised.

The services for which Painter filed his claim should have been presented to the Secretary of the Interior, and his authority obtained to incur the liability against the funds in his hands, and payment enforced against the special fund set apart for this special purpose. It was a part of the expense of maintaining the county government which is charged with the enforcement of the crim-

inal laws and the prosecution of criminals. The return set up a complete defense to the allegations of the writ, and, being found true, the peremptory writ was properly refused.

The judgment of the district court is affirmed, at the costs of the plaintiff in error. All the Justices concur, except GILLETTE, J., who tried the case below, not sitting, and IRWIN, J., absent.

LONG-BELL LUMBER CO. v. NEWELL et al.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

APPEAL—DISMISSAL—SCURRILIOUS BRIEF.

Where the plaintiff in error files what is designated as a brief in support of his assignment of error, and in such written argument makes an abusive, wanton, insulting, and scurrilous assault upon the judgment appealed from, and which is an inexcusable and unwarranted reflection upon the trial judge, the so-called brief will be stricken from the files, the case treated as if no brief had been filed, and the appeal dismissed for failure to comply with the rules of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3102.]

(Syllabus by the Court.)

Error from District Court, Garfield County; before Justice F. E. Gillette.

Action by Albert F. Newell and Frank M. Ross against the Long-Bell Lumber Company. Judgment for plaintiffs. Defendant brings error. Dismissed.

W. R. Cowley, L. L. Cowley, and E. E. Chesney, for plaintiff in error. Robberts & Curran and W. S. Denton, for defendants in error.

PER CURIAM. This cause was tried in the district court of Garfield county before an associate justice of this court sitting as a district judge. During an active service of over five years upon the Supreme and district bench the distinguished justice has established a record for integrity, fairness, and impartiality which is unassailable, and which will endure to his credit long after his detractors will have passed into oblivion. The plaintiff in error is the Long-Bell Lumber Company, a foreign corporation, which comes into this jurisdiction by comity and sufferance, and, while seeking at the hands of this court relief from an alleged erroneous judgment, overlooks the common courtesy and amenities due from a guest in the house of his host, and makes an unwarranted, wanton, and vicious attack upon a member of his host's family. The brief filed by plaintiff in error, after citing a principle contended for, contains this statement: "If this is the law, and, indeed, it, beyond even cavil, is the law, then the judgment in the case at bar simply cannot remain, is everywhere unsupported, is vicious, virulent with venom, through and through, infected and infectious, fit for that antidote for that bane spoken of by Justice

Swayne in *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 808." Such insolent, discourteous, and uncalled-for denunciations of a judgment of a court of high standing, and necessarily reflecting upon the judge who rendered it, can have no place in the records of a court of justice, and not only calls for severe rebuke, but exemplary punishment. And this stranger, a guest in the house of a friend, guilty of such wanton disregard of decency, must submit to the customary treatment usual in such cases—that of being unceremoniously ejected from the household whose hospitality and generosity it has for so long enjoyed and preyed upon, but at last outraged.

The case is one where the defendants in error obtained a judgment against the plaintiff in error for a fraud alleged to have been committed through its attorney and agent. The trial court found that the corporation had a judgment against one Payne, which was a lien upon a lot in the city of Enid. The lot was worth considerably more than the judgment. It was sold at sheriff's sale, and bid in by the corporation, and its bid assigned to the M. E. Church South, and the church paid the amount of the bid. While proceedings were pending for confirmation of the sale, the agent sold the property to the defendants in error, who paid off the judgment held by the company against Payne, paid Payne the balance of the purchase money, and obtained a deed for the property. The agent represented that the church had paid nothing and had no interest in the property. They relied on his representations, and paid \$800 on the strength of them. In the meantime the corporation was resisting the claim of the church, but was defeated, and the sale was ordered confirmed, and the sheriff directed to convey the property to the church. The defendants in error got nothing. The court found that the corporation received and accepted the money paid by the defendants in error to their agent, thereby ratifying his acts and binding itself by his representations made in order to induce the payment to him of said money. The judgment in this case is to reimburse the defendants in error for the amount of money paid by them to the company for this property.

The company was charged with fraud and bad faith. The court found it guilty. It denied the authority of its agent, while holding onto the fruits of his deceit. It is in no position to make wanton and vicious assaults upon our courts. It is entitled to and will receive all the rights and privileges of a citizen of our territory in the courts of our territory; but it must submit to the same rules and observe the same respect for our courts and laws as is due from our own citizens. A foreign corporation dealing in lumber and building materials and occupying one of the most fruitful and profitable fields ever opened to commerce, enjoying an extensive trade with our builders and consumers,

and diligent in its efforts to extend its field of operations, should be the last person to make unprovoked assaults upon the courts. In these days of the aggressions of combined wealth and the importunities of organized labor, the courts are the powerful civic regulators, which stand between the two great antagonistic forces in our social and political organization, and, uninfluenced by the one and unawed by the other, compel obedience to law and deal out justice evenly and justly, and are entitled to the respect and support of all well-disposed citizens. An examination of this entire record discloses absolutely nothing to inspire, provoke, or excuse any criticism of the trial court in the proceedings had before it. There is nothing in the judgment to condemn.

This foreign corporation also comes into our court by foreign counsel, who has been permitted to appear by courtesy, and, forgetting his duty, is guilty of discourteous and unprofessional conduct in placing such a brief on file. The matter set out in the brief of plaintiff in error is improper, unwarranted, inexcusable, and reprehensible. This court cannot recognize a document containing such matters as a brief, or the filing of such a compliance with the rule requiring a brief.

The so-called brief is stricken from the record and ordered removed from the files; and, for the reason that the plaintiff in error has failed to file a brief as required by the rules of this court, the appeal is dismissed, at the costs of the plaintiff in error.

(19 Okl. 419)

RICE et al. v. HAMMONDS, Sheriff.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

TAXATION — PROPERTY SUBJECT — MILITARY RESERVATIONS.

The taxing officers of Comanche county, Okl., have the lawful right to levy and collect taxes on personal property belonging to private individuals and located on the Ft. Sill military reservation, which is wholly within such county and constitutes a part thereof. The legislative power of the territory extends to all rightful subjects of legislation, and the only property which Congress has prohibited the territory from taxing is the property of the United States.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 54.]

(Syllabus by the Court.)

Error from District Court, Comanche County; before Justice Frank E. Gillette.

Action by T. R. Rice and W. H. Quinette against C. C. Hammonds, sheriff. Judgment for defendant, and plaintiffs bring error. Affirmed.

Parmenter & Myers, for plaintiffs in error. S. M. Cunningham and Frank P. Cease, for defendant in error.

BURWELL, J. F. R. Rice and W. H. Quinette were partners in the cattle business; the firm name being Rice & Quinette. They owned quite a lot of cattle, which were lo-

cated on the Ft. Sill military reservation, in Comanche county, Okl. The taxing officers assessed these cattle for territorial, county, township and school district purposes. The owners of the cattle commenced this action against the sheriff of Comanche county (a tax warrant having been placed in his hands), praying that he be enjoined from levying such tax warrant upon the property of the plaintiffs. On a hearing for a temporary injunction the court enjoined the collection of the district school tax on the ground that none of the plaintiffs' property had been located within such district, and denied the injunction as to the other taxes.

The sole contention of the plaintiffs is that, inasmuch as these cattle were located on a military reservation of the United States, even though such reservation is within an organized county of Oklahoma, they cannot be taxed under the territorial laws, asserting that a military reservation is under the sole legislative control of the United States. We have read counsel's brief, and while it is true that, as long as Oklahoma remains a territory, Congress may legislate as to all matters pertaining to this reservation and exclude the territorial authorities from exercising any control thereof, it has not done so. By section 6 of the organic act of the territory of Oklahoma, it is provided: "That the legislative power of the territory shall extend to all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil, no tax shall be imposed on the property of the United States, nor shall the lands and other property of nonresidents be taxed higher than the lands or other property of residents, nor shall any law be passed impairing the right of private property, nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value." Under this express grant of power from Congress, the territory may subject all property within the territory to taxation except the property of the United States. It is immaterial where the property is located. If it is not the property of the United States, the Legislature may require it to bear its just proportion of the burdens of government. A military reservation in a territory is no more under the legislative control of Congress than is an Indian reservation; and it has been expressly held by the Supreme Court of the United States that the territory may tax property on an Indian reservation, even though it is not located within an organized county, but only attached to an organized county for judicial purposes. *Thomas v. Guy*, 169 U. S. 264, 18 Sup. Ct. 340, 42 L. Ed. 740; *Polson v. Purcell*, 4 Okl. 93, 46 Pac. 578; *Wagoner v. Evans*, 170 U. S. 568, 18 Sup. Ct. 730, 42 L. Ed. 1154; *Stell v. Territory*, 4 Okl. 497, 46 Pac. 1117; *Truscott, Co. Treas., v. Hurlbut Land*

& Cattle Company, 73 Fed. 60, 19 C. C. A. 374; *Foster v. Pryor*, 189 U. S. 325, 23 Sup. Ct. 540, 47 L. Ed. 835; *Atchison, T. & S. F. R. Co. v. Bryan*, 11 Okl. 357, 66 Pac. 348. See, also, *Ft. Leavenworth R. Co. v. Rowe*, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264.

Under the laws of the territory of Oklahoma the property in question is subject to taxation in Comanche county. The property of the United States located on this reservation or anywhere else in the territory cannot be taxed. The territory is expressly prohibited as to such taxation by the organic act. But should Congress exclude the territory from taxing the property of the plaintiff simply because it is located on this reservation? It did not intend to do so, nor has it done so. Counsel have overlooked the fact that Congress has not only exclusive legislative control over military reservations in the territories, but it has legislative control of the territories themselves. The Ft. Sill military reservation is within the organized county of Comanche and constitutes a part thereof. The persons and property within such reservation have the protection of the laws of the territory, and it is only equitable that the property therein not belonging to the United States should pay a part of the expenses of the same. If Congress had intended that the property on this or other reservations in the territory should not be taxed, it would have so declared, as it did with reference to property of the United States and property belonging to certain Indians. As the property in question was within an organized township of an organized county of the territory, the power exists to exact taxes for all three purposes, to wit, territorial, county, and township.

The judgment of the lower court is affirmed. All of the Justices concurring, except GILLETTE, J., who presided at the trial below, not sitting, and IRWIN, J., absent. Costs taxed to appellant.

BOARD OF COM'RS OF DAY COUNTY v. STATE OF KANSAS.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. EVIDENCE—JUDICIAL NOTICE.

Courts of record in any county will take judicial notice of the county seat of such county, and, if the seat of public business in any county is the county seat de facto, such courts will take notice thereof, and the validity of the proceedings of such court transacted at the county seat de facto cannot thereafter be questioned in a collateral proceeding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 31.]

2. COURTS—CORRECTIONS OF RECORD—NUNC PRO TUNC ORDER.

A person interested in the proceedings of a court of record may appear before the court at any time and ask to have the journal of the court made correct and complete as of the date such record should have been made, and the court should entertain and hear such motion upon notice given to those adversely interested.

Where the default was that of the court or its officers, it is the duty of the court to make its record complete at any subsequent date when the default is called to its attention without the formality of a motion.

3. JUDGMENT—RES JUDICATA—BONDS—VALID ISSUE.

Where a court of competent jurisdiction has determined the validity of the bonds involved in a proceeding provided by the statute, and has decreed that the bonds were valid obligations and issued in strict conformity with the laws of the territory, and no objection or exception was taken therefrom, the decree and judgment of the court is final and conclusive upon all matters put directly in issue, tried, and determined in that proceeding. Following *Territory v. Hopkins*, 9 Okl. 133, 59 Pac. 976.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1251.]

(Syllabus by the Court.)

Error from District Court, Day County; before Justice J. L. Pancoast.

Action by the state of Kansas against the board of county commissioners of Day county. Judgment for plaintiff, and defendant brings error. Affirmed.

This action was originally commenced in the district court of Day county, Okl., by the defendant in error filing therein its petition, which, with exhibits attached and referred to in the petition, is as follows:

"The state of Kansas, the plaintiff herein, complains of the board of county commissioners of Day county, the defendant herein, and for its causes of action against said defendant says: That the state of Kansas is one of the states of the United States of America, and was admitted into the Union on January 29, 1861. That the defendant, the board of county commissioners of Day county, is the lawful executive and administrative body of Day county, Okl., and that said Day county was organized on or about ———, 1902, and is now, and at all times hereinafter mentioned was, one of the duly organized counties of the territory of Oklahoma. That by various acts of Congress the state of Kansas, plaintiff herein, was granted large tracts of land out of the public domain for the purpose of creating a fund, to be known as the agricultural college endowment fund of the state of Kansas, and providing that the said fund realized from the sale of said lands should never be diminished, but should be perpetual, and the principal sum of the said fund should be invested, and the interest money derived from such investments should be for the support of the Kansas State Agricultural College. That, in pursuance of said acts of Congress, the state of Kansas has accumulated a large fund, to wit, five hundred thousand dollars, which is invested from time to time in municipal bonds, and interest thereon is devoted to the support of said college. That the defendant, the board of county commissioners of Day county, on July 10, 1900, in open court in the district court of said Day county, Okl., at the lawful sitting of said court, ordered by the Supreme Court

of the territory of Oklahoma to be held at Grand, Day county, Okl., for the issue of county bonds, July 10, 1900, before the judge of said court, executed certain judgment funding bonds of said county, as more fully hereinafter appears, and the said bonds were then and there signed by the duly qualified and acting chairman of the board of county commissioners of said county, and the said bonds were then and there attested and signed by the duly qualified and acting county clerk of said court, and the said bonds were then and there signed by the duly qualified and acting judge of the district court of said county, and were then and there duly attested and signed by the duly qualified and acting deputy clerk of the district court of said county.

"Thereafter the bonds so executed as aforesaid were duly registered by the auditor of the territory of Oklahoma, and said auditor certified on the back of each bond aforesaid, under the seal of his office, that the said bonds were legal and regularly issued according to law. True copies of the said auditor's certificate of registration and of the legality and regularity of the issue of the bonds aforesaid are hereinafter set out in Exhibits B and C, attached hereto and made a part hereof. That the defendant issued the said judgment funding bonds as aforesaid, and said bonds were made payable to bearer, and thereafter divers and certain of said bonds of said judgment issue of July 10, 1900, aforesaid, more fully hereinafter set forth, were bought in good faith in the open market by the loan commissioner of the State Agricultural College of the state of Kansas as an investment for the endowment fund of said college, for a valuable consideration; and out of an abundance of prudence and caution on the part of the said loan commissioner, before purchasing said bonds, the said loan commissioner required to be furnished to him a certified copy of all the papers on file in the office of the auditor of the territory of Oklahoma containing the history of the issue of said judgment funding bonds, and particularly showing the journal entry of the judgment upon which this issue of bonds was based, and particularly showing the amount of said issue, and particularly showing the total outstanding indebtedness of said Day county, and particularly showing the assessed valuation of said Day county, which copy of all the papers on file as aforesaid, in the office of the auditor aforesaid, was duly certified by the auditor of Oklahoma under the seal of his office, a true copy of which is hereto attached, marked Exhibit A, and made a part of this petition. That the bonds of this judgment funding issue so purchased as aforesaid by the loan commissioner as aforesaid are bonds numbered 11, 12, 13, 14, 15, and 16, for \$1,000.00 each, and bond numbered 18 for \$100.00, and all of said bonds so purchased as aforesaid are issued as of the date of July 10, 1900, and due July 10, 1910. A true copy of bond

ness to be the sum of \$3,000.00, and the amount of outstanding legal judgment indebtedness to be the sum of \$16,738.23. The court further finds that the aforesaid bonded indebtedness and the above void judgment indebtedness does not exceed four per cent. of the assessed valuation of the taxable property of said Day county according to the last assessment valuation of the assessors for said county, and the bonds being presented, form and amount duly signed by the chairman of the board of county commissioners of Day county and by the county clerk of said county, the court is satisfied that they are of the class and character authorized by statute, and said bonds are approved in form, classes and amounts, and therefore said bonds are signed by the judge of said court to the amount as evidenced by the face thereof (\$16,738.23) sixteen thousand seven hundred thirty-eight and twenty-three one-hundredths dollars, and said bonds being signed are delivered to the county treasurer of said county in open court, and the same are receipted for to the judge of said court.

"John L. McAtee, Judge.

"Attest:

"J. P. Renshaw, Clerk District Court,

"By O. H. Richards, Deputy."

"Territory of Oklahoma, Day County—ss.:

"I, J. P. Renshaw, clerk district court of the Fifth judicial district of the territory of Oklahoma, do hereby certify that the within and foregoing to be a full, true and complete copy of the original journal entry in the matter of issuing bonds in said county on the 10th day of July, 1900, as the same now appears on file and record in my office, in the town of Grand, county of Day, and territory of Oklahoma. Witness my hand and official seal, at my office at Grand, in the county of Day and territory of Oklahoma.

"J. P. Renshaw, Clerk District Court,

"[Seal.] O. H. Richards, Deputy."

"Office of Edson L. Mead, County Clerk,
Day County.

"Territory of Oklahoma, Day County—ss.:

"I, Edson L. Mead, county clerk in and for Day county, Oklahoma, do hereby certify that the assessed valuation of the taxable property in and for said county as shown by the last assessment of said county amounts to the sum of (\$501,156.00) five hundred and one thousand one hundred and fifty-six dollars; and that the total amount of outstanding indebtedness of said county of Day, from all sources, amounts to (\$19,800.00) nineteen thousand eight hundred dollars. Given under my hand, whereunto I have affixed the seal of my office, this 10th day of July, A. D. 1900.

"Edson L. Mead,

"[Seal.] County Clerk of Day County."

"Territory of Oklahoma, County of Logan—ss.:

"I, S. M. Hopkins, auditor in and for the territory of Oklahoma, do hereby certify that

the hereto attached and foregoing papers are a true and correct copy of all the papers on file in my office in the matter of the issuance of judgment funding bonds in the amount of \$16,738.23, by Day county, Oklahoma, and, further, that the sworn statement, as made by the county clerk to this office, shows the total outstanding indebtedness of said county amounts to \$19,800 and the assessed valuation to \$501,156. I further certify that the omission of the judge's signature to the copy of the findings hereto attached was a mistake. In testimony whereof, I have this day set my hand and affixed the official seal of my office, at Guthrie, Okla., this 31st day of July, 1900.

"[Seal.] S. N. Hopkins, Auditor,

By E. P. McCabe, Deputy Auditor."

Exhibit B.

"United States of America. Territory of
Oklahoma.

"No. 11. 1,000 Dollars.
"Day County Judgment Funding Bond.

"Know all men by these presents: That the county of Day, in the territory of Oklahoma, acknowledges itself to be indebted, and for value received hereby promises to pay to the bearer the sum of one thousand dollars (\$1,000), lawful money of the United States of America, on the tenth day of July, A. D. 1910. However, this bond is subject to call and payment at any time at the option of said county, together with interest on said sum from date hereof, until paid at the rate of six per centum per annum, payable semi-annually on the tenth days of January and July, respectively, in each year, upon presentation and surrender of the interest coupons hereto attached, as they severally become due, both principal and interest payable at the Western National Bank, in the city of New York and state of New York, and for the prompt payment of this bond, with interest as aforesaid, at maturity, the full faith and credit of said county of Day, in the territory of Oklahoma, is hereby irrevocably pledged.

"This bond is issued by the said county of Day, aforesaid, for the purpose of funding and paying valid and existing outstanding judgments recovered against said county, in the courts of competent jurisdiction within the said territory of Oklahoma, and having jurisdiction both of the person of said county and of the subject-matter of the actions prosecuted against said county, resulting in the rendition of said judgments, and is issued by virtue of the authority conferred by article 11, chapter 5, of the Session Laws of the territory of Oklahoma for the year 1897, being an act of the territorial assembly of said territory, entitled 'An act providing for the issuance of bonds in payment of judgments against counties and other municipal corporations,' approved on the 12th day of March, 1897, and subject to its provisions. And it is hereby recited, certified and warranted that all acts, conditions and things re-

quired to be done precedent to and in the issuing of this bond have been properly done and performed in regular and due form required by law; and that said county has duly proved to the satisfaction of the district court of the county of Day and territory of Oklahoma, the existence, validity, force and legality of said judgment indebtedness; and that the said judgment indebtedness remains unpaid at the date of the issuance of this bond; and that an agreement has been made for the settlement of such judgments by the issuance of this bond; and that all other requirements of the said act aforesaid, together with all other requirements of law in the premises, have been duly complied with in the issuance of this bond; and that no congressional or statutory limitation of the amount of the indebtedness of said municipality is exceeded by this issue.

"In witness whereof, the said county of Day and territory of Oklahoma has caused this bond to be signed by the chairman of its board of county commissioners and its county clerk, under the seal of said county, this tenth day of July, A. D. 1900, and the Honorable John L. McAtee, the judge of the district court of said county in open court, as the act of said court, has also signed these presents on the said day and date.

"Cosmo Falconer,

"Chairman of the Board of County Commissioners.

"Attest: Edson L. Mead,
" [Seal.] County Clerk.

"Signed in open court by the district court of the county of Day, Oklahoma Territory, this tenth day of July, A. D. 1900.

"Jno. L. McAtee,

"Judge of the District Court of Day County.

"Attest: J. P. Renshaw,

"Clerk of the District Court of Day County.

" [Seal.] By O. H. Richards, Deputy."

Indorsed on the back thus:

"Territory of Oklahoma,

"Office of the Territorial Auditor.

"I, S. N. Hopkins, auditor of the territory of Oklahoma, do hereby certify the within bond to be legally and regularly issued, and has been registered in my office this day, pursuant to an act of the legislative assembly of the territory of Oklahoma, entitled, 'An act providing for the issuance of bonds in payment of judgments against counties and other municipal corporations,' approved March 12, 1897. Witness my hand and official seal, done at my office in the city of Guthrie, Oklahoma Territory, this 12th day of July.

"S. N. Hopkins, Territorial Auditor,

" [Seal.] By E. P. McCabe, Deputy."

Also indorsed on back thus:

"No. 11, Day county, Oklahoma Territory, judgment funding bond 1,000 dollars. Dated July 10, 1900, due July 10, 1910. Interest 6 per cent. per annum, payable semi-annually on the tenth days of January and July of

each year, at the Western National Bank, in the city of New York and state of New York."

Exhibit C.

"United States of America, Territory of Oklahoma.

"No. 18.

100 Dollars.

"Day County Judgment Funding Bond.

"Know all men by these presents: That the county of Day, in the territory of Oklahoma, acknowledges itself to be indebted, and for value received promises to pay to the bearer, the sum of one hundred dollars (\$100), lawful money of the United States of America, on the tenth day of July, A. D. 1910. However, this bond is subject to call and payment at any time at the option of said county, together with interest on said sum from the date thereof, until paid, at the rate of six per centum per annum, payable semi-annually on the tenth days of January and July, respectively, of each year, upon presentation and surrender of the interest coupons hereto attached, as they severally become due, both principal and interest payable at the Western National Bank, in the city of New York and state of New York, and for the prompt payment of this bond, with interest as aforesaid, at maturity, the full faith and credit of said county of Day, of the territory of Oklahoma, is hereby irrevocably pledged.

"This bond is issued by the said county of Day, aforesaid, for the purpose of funding and paying valid and existing outstanding judgments recovered against said county, in the courts of competent jurisdiction within the said territory of Oklahoma, and having jurisdiction both of the person of the said county and of the subject-matter of the action prosecuted against said county, resulting in the rendition of said judgments, and is issued by virtue of the authority conferred by article 2, chapter 5, of the Session Laws of the territory of Oklahoma, for the year 1897, being an act of the territorial assembly of said territory, entitled 'An act providing for the issuance of bonds in payment of judgments against counties and other municipal corporations,' approved on the 12th day of March, 1897, and subject to its provisions. And it is hereby recited, certified and warranted that all acts, conditions and things required to be done precedent to and in the issuing of this bond have been properly done and performed in regular and due form required by law; and that the said county has duly proved to the satisfaction of the district court of the county of Day and territory of Oklahoma, the existence, validity, force and legality of said judgment indebtedness; and that the said judgment indebtedness remains unpaid at the date of the issuance of this bond; and that an agreement has been made for the settlement of such judgments by the issuance of this bond; and that all other requirements of the said act aforesaid, together with all other requirements of law in the premises, have been fully complied with in

the issuance of this bond; and that no congressional or statutory limitation of the amount of the indebtedness of said municipality is exceeded by this issue.

"In witness whereof, the said county of Day and territory of Oklahoma has caused this bond to be signed by the chairman of its board of county commissioners and its county clerk, under the seal of said county, this tenth day of July, A. D. 1900, and the Honorable John L. McAtee, the judge of the district court of said county, in open court, as the act of said court, has also signed these presents on the said day and date.

"Cosmo Falconer,

"Chairman of the Board of County Commissioners.

"Attest: Edson L. Mead,
County Clerk.

"Signed in open court by the district court of the county of Day, Oklahoma Territory, this tenth day of July, A. D. 1900.

"Jno. L. McAtee,

"Judge of the District Court of Day County.

"Attest: J. P. Renshaw,

"Clerk of the District Court of Day County,
By O. H. Richards, Deputy."

Indorsed on back thus:

"Territory of Oklahoma, Office of the Territorial Auditor.

"I, S. N. Hopkins, auditor of the territory of Oklahoma, do hereby certify the within bond to be legal and regularly issued, and has been registered in my office this day, pursuant to an act of the legislative assembly of the territory of Oklahoma, entitled 'An act providing for the issuance of bonds in payment of judgments against counties and other municipal corporations,' approved March 12, 1897. Witness my hand and official seal, done at my office in the city of Guthrie, Oklahoma Territory, this 12th day of July.

"S. N. Hopkins, Territorial Auditor.

"[Seal.] By E. P. McCabe, Deputy."

Also indorsed on back thus:

"No. 18. Day county, Oklahoma territory, judgment funding bond. One hundred dollars. Dated July 10, 1900, due July 10, 1910. Interest 6 per cent per annum, payable semi-annually on the tenth days of January and July of each year, at the Western National Bank, in the city of New York, and state of New York."

To which petition the defendant answered as follows:

"The defendant comes, and for his answer to the plaintiff's petition filed herein denies each and every allegation therein contained, and not hereinafter admitted.

"For a second and further defense to plaintiff's petition, the defendant alleges that the bonds numbered 11, 12, 13, 14, 15, and 16, and 18, and the interest coupons thereto, at the time attached, and of which the plaintiff at the time of bringing of this action

claimed to be the owner, were not issued pursuant to any law or authority of the territory of Oklahoma, and were at all times and now are illegal and void and are not a binding obligation against this defendant. The defendant alleges that on the 10th day of July, 1900, the district court of the territory of Oklahoma was not in session, open or otherwise, and there was no sitting of the said court in said county in the month of July, 1900, and that no judgment indebtedness of said Day county, and particularly the indebtedness mentioned in Exhibit A to plaintiff's petition were proved by the defendant before the district court of said Day county, nor did the judge of said court thereof, in open session or otherwise, on the 10th day of July, 1900, or at any other time, find any amount of judgment indebtedness of said county to exist, and have effect and be in force against the said county; and that said district court nor the judge thereof did not, on the said day, to wit, July 10, 1900, nor at any other time, in open session of said court, nor at all cause to be made on the record of said court, a statement and findings of the evidence of any judgment or judgments, and the said county by and through its board of county commissioners in which the holders of said judgments agreed to accept, and the said county agreed to have issued, the bonds in question in payment of said judgments or any of them in settlement of said judgments or any of them before the signing of said bonds by the judge of the said district court, nor at any other time, and that the said judge of the district court of said county was at the time of the signing of said bonds, and at all times prior and subsequent thereto, without authority or jurisdiction to sign the same.

"For a third and further defense defendant says that at all times mentioned in plaintiff's petition the county seat of Day county, Oklahoma Territory, was legally at Ioland, where the same had been established by the Congress and the Secretary of the Interior of the United States, and that the district court of said county could only be legally held at said county seat, and that all notices and proceedings had about the issue of the bonds in question or other bonds should have been given from and referred to the said Ioland, the county seat of said county. That there was no term of the district court in the year 1900 held at said Ioland, the county seat of said county, nor was any notice given of any bonding proceedings nor the funding of any judgment indebtedness of said county into bonds to be had at said county seat. That no proof was made before the judge of the district court, in open court or otherwise, in said Ioland, the county seat of the said Day county, of any judgment indebtedness against said county, nor were any bonds issued or signed by the

chairman of the board of county commissioners of said county at Ioland, in the county of Day, on the 10th day of July, 1900, or at any other time. That no finding was made by the district court of said county nor the judge thereof, in open session or otherwise, of any judgment indebtedness against said county of Day, and which he caused to be entered upon the record of said court at Ioland, the county seat of said county, or other place therein, and that all said bonds are void, and were at all times since their pretended issue. That the coupons sued upon herein are for interest accrued upon the principal bonds claimed to be held and owing by the plaintiff. That they derived their validity, if any, from the validity of the parent bond from which they were clipped.

"For a fourth and further defense, the defendant says that in the month of July, 1900, the last-assessed valuation of the property of said county for taxes was \$469,289.77. That four per cent. of said amount is \$18,771.54, and said last-named sum was the limit for which said county could become indebted in said year. That at the time of the pretended issue of said bonds in question, there were outstanding bonds of said county in the sum of \$7,500.00, exclusive of interest, and warrant indebtedness in the sum of \$5,700.00. That said bonds and warrants were legal and valid issue of said county and part of its indebtedness. That at the time of the issue of the bonds in question, \$16,800.00 were issued legally or illegally, and upon the coupons for interest of six of said bonds plaintiff seeks to recover in this action. That of moneys in the treasury of said county and belonging thereto, taxes levied and uncollected and all other property, money and resources belonging to said county at the time of the issuance of said bonds on July 10, 1900, was the sum of \$5,700.00, and deducting said amount from the bond and warrant indebtedness of said county as aforesaid, the said county could only have issued on said date, to wit, July 10, 1900, bonds to the amount of \$11,200.00, whereas the said county issued \$16,800.00 in bonds, which amount exceeded the amount the county might have issued, \$5,600.00, and that \$5,600.00 of said bonds are illegal and void. Defendant further says that because of the facts aforesaid the said county could not, at the time of the issue of the bonds in question, legally issue to exceed \$11,200.00 of the bonds of said county and that the excess of said amount, to wit, \$5,600.00, was and is illegal and void for being in excess of four per centum of the last-assessed valuation of the property of said county for taxation preceding the issue of said bonds, and that said amount of illegal issue affects and enters into each of the bonds of said issue, and should be apportioned to and among each and all said bonds. That defendant makes the second count of this answer a part of this count.

"For a fifth and further defense, and by way of cross-petition against the plaintiff, the defendant says that it has paid, and the plaintiff has received, interest paid on the seven bonds it holds and which are described in its petition, the sum of \$122.00; that said interest payments were made under the mistaken belief of the defendant that the bonds on which it was paid were legal and binding obligations of the said county of Day for their face value; and that, since the discovery by the defendant that said bonds were illegal in whole or in part, the defendant has not paid any interest upon the same. The defendant says that it makes the second and fourth counts of this answer a part of this count.

"Wherefore, the defendant prays judgment against the defendant that the interest coupons sued on be decreed and adjudged illegal and void, and the petition of plaintiff be dismissed, and that the defendant recover the interest heretofore paid on said bonds in amount \$122.00, and that, if said bonds be found in part legal and part illegal, the defendant have judgment that the interest paid on the amount of said bonds found to be illegal be credited on the interest due and owing thereon, for costs, and all other proper relief.

"E. S. Sharp, County Attorney,

"Cowgill & Dunn,

"Attorneys for Defendant.

To which answer plaintiff replied as follows:

"Comes now the plaintiff, and, after leave of court first had and obtained, filed its amended reply to the defendant's answer in this cause. First, plaintiff denies each and every allegation in defendant's answer so far as the same are inconsistent with the allegations of plaintiff's petition. Second, replying further to defendant's answer, plaintiff says that it relied implicitly and absolutely upon the recitals in the bond to which the coupons in controversy pertain, and relied implicitly and absolutely on the recitals on the back of the bond as certified by the auditor of Oklahoma Territory."

After the issues in the cause were joined as heretofore shown, the cause coming on to be heard, the plaintiff filed the following motion for judgment upon the pleadings: "Comes now the said plaintiff, the state of Kansas, and exhibits to the court the petition of the said plaintiff, the answer of the said defendant, and the reply of the plaintiff thereto, and shows to the court that the said petition of the plaintiff alleges and sets forth a good and valid cause of action against said defendants; and that all the allegations, averments and statements of the said answer are not sufficient to constitute any defense against the said cause of action of the plaintiff; that it appears from the said petition and answer that the said defendant has no good, valid and sufficient defense to the

said cause of action alleged in plaintiff's petition; and that it appears from all the pleadings in said cause that the said plaintiff is entitled to judgment as prayed for in its petition. Now, therefore, said plaintiff moves the court for judgment in this cause upon the pleadings as prayed for in plaintiff's petition."

The cause came on to be heard before the court upon said motion for judgment upon the pleadings, and the court overruled the motion for reasons expressed in the argument, which, as stated by the court, was the fact "that the journal entry and the matter of funding the judgment indebtedness of the county is not on file, never has been filed, there is no filing marks, and has never been recorded, and the entire absence of any record as to a term of court at that time or any entry concerning the entry of judgment in that case." While said cause was still pending and not finally disposed of, the court adjourned to the next day, and upon the reconvening of the court Mr. Darrow, attorney for defendant in error, read and presented to the court a motion asking that the journal entry in the matter of funding the judgment indebtedness of the county be entered upon the journal of the court nunc pro tunc, which motion was as follows:

"In the District Court of Day County, Oklahoma. In the Matter of the Funding of the Judgment Indebtedness of the County of Day and Territory of Oklahoma. Motion to Enter of Record the Journal Entry of Judgment Relating to the Issue of Day County Funding Bonds of July 10, 1900. Comes now the state of Kansas, by C. C. Coleman, its duly qualified and acting Attorney General, and John S. Dawson, its duly qualified and acting Assistant Attorney General, and shows to the court that the state of Kansas is the owner of certain judgment funding bonds of Day county, Oklahoma, issued July 10, 1900, in the district court of Day county, Oklahoma, under and by virtue of a judgment pronounced by said court on said date, in pursuance to a proceeding in said court invoked by the board of county commissioners in accordance with the laws of Oklahoma Territory, at a special sitting of said court at Grand, Day county, Oklahoma, designated and ordered by the Supreme Court of Oklahoma Territory and by the Honorable Chief Justice of said Supreme Court, and held in accordance therewith. And the state of Kansas is the bona fide holder in good faith of bonds 11, 12, 13, 14, 15, 16, and 18 of said issue, and is vitally and materially interested, both in law and in equity, in the matters involved in the proceeding whereby the judgment and other indebtedness of Day county was determined on said July 10, 1900, as aforesaid, and where the assessed valuation of the taxable property of said Day county and the statutory limit of indebtedness which might be and was funded into judgment funding

bonds of said county were determined and adjudicated. And the state of Kansas further shows the court that the journal entry of judgment and findings of the district court of Day county, Oklahoma, is in the custody of the clerk of said district court of Day county, but for some reason unknown the said journal entry does not appear of record. Wherefore, the state of Kansas prays the court that the court now order the journal entry aforesaid to be entered of record in the records of the district court of Day county, and for such other precautions as may be necessary to preserve intact the proceedings of said court in the matter of the funding of the judgment indebtedness of Day county, Oklahoma, had and done at the sitting of said court at Grand, Day county, Oklahoma, on July 10, 1900, as aforesaid. And the state of Kansas, your orator herein, as in duty bound, will ever pray, etc. The State of Kansas, by C. C. Coleman, Atty. Gen. of Kansas, and John S. Dawson, Asst. Atty. Gen. of Kansas, Attorneys and Solicitors for the State of Kansas.

"Territory of Oklahoma, Day County—ss.:

"John S. Dawson, being duly sworn, on his oath says that he is Assistant Attorney General of the state of Kansas; that he is familiar with the matters set forth in the above motion; that all of the allegations and statements therein are true, so far as he knows positively, and, as to all other matters therein set forth, he believes them to be true, and that your orator, the state of Kansas, is well entitled at law and in equity to the relief prayed for therein.

"John S. Dawson.

"Subscribed and sworn to before me, a notary public of Day county, Oklahoma, this 27th day of March.

"[Seal.] C. B. Leedy, Notary Public.

"My commission expires August 15, 1906."

Notice of a purpose to file such motion was on the day before the filing of the same served upon E. S. Sharp, county attorney, and W. H. Monser, county clerk of Day county. Upon the filing of such motion counsel for the plaintiff in error objected to the consideration of it, for the reason that sufficient facts were not shown to justify the relief asked for. The court thereupon announced that he would hear the evidence, which offer was objected to by counsel for plaintiff in error and the objection overruled. The court thereupon entered its judgment directing the recording of the journal entry of judgment of July 10, 1900, authorizing the issuance of funding bonds, the coupons of which bonds issued pursuant to and in compliance with the judgment of the court of July 10, 1900, are in issue in this case, which judgment of the court so entered was in words and figures as follows:

"And now, to wit, on March 28, 1906, at a regular sitting of the above-named court, the state of Kansas appeared by John S.

Dawson, its attorney, and moved the court to enter of record the journal entry of judgment relating to the issue of Day county funding bonds of July 10, 1900, and the bond notice and publisher's affidavit thereto appertaining; and the said state of Kansas showed the court that the state aforesaid was the owner of certain of the bonds of Day county of the judgment funding issue of July 10, 1900, issued by the board of county commissioners of Day county, Oklahoma Territory, under and by virtue of a proceeding had before the above-named court at the sitting of said Day county district court on said July 10, 1900, and that the said state of Kansas is vitally and materially interested and affected thereby. And it appearing that the said journal entry of the findings and proceedings had in said court on July 10, 1900, pertaining to the issue of Day county judgment funding bonds of said July 10, 1900, has been reduced to writing and is in the custody of the clerk of the district court of Day county, but the said journal entry has not been entered of record, and the court having been fully advised and informed in the premises and of all matters material and pertaining thereto, it is therefore decreed, adjudged and ordered that the clerk of the district court do now and here record the said journal entry and bond notice aforesaid, pertaining to the issue of the Day county judgment funding bonds of July 10, 1900, in the matter as entitled above. J. L. Pancoast, Judge Day County District Court."

This journal entry of the judgment of July 10, 1900, entered of record, is set out as Exhibit A of the plaintiff's petition. After hearing the motion to make the journal entry of July 10, 1900, this cause was further called for hearing upon the motion for judgment on the pleadings, and the court thereupon set aside its former order overruling the motion for judgment on the pleadings, and, upon reconsideration of the same, sustained said motion and rendered judgment in favor of the plaintiff in the sum prayed for in the petition herein. Motion for new trial having been made and overruled, which prayed for a new trial upon the ground that the judgment was not sustained by sufficient evidence and for error of law occurring at the trial and excepted to at the time, the plaintiff in error, defendant below, brings the cause to this court praying a reversal for the errors complained of.

E. S. Sharp, Co. Atty., and Cowgill & Dunn, for plaintiff in error. C. C. Coleman, Atty. Gen., and John S. Dawson, Asst. Atty. Gen., for defendant in error.

GILLETTE, J. (after stating the facts as above). This action having been determined in the court below upon a motion for judgment on the pleadings, and owing to the importance of the subject-matter, we have set out at length, in the statement of facts,

the pleadings and proceedings had and considered upon the trial of the cause. It will be observed that, while the action is founded upon written instruments, the answer setting up such defense as the county of Day, plaintiff in error, had to the allegations of plaintiff's petition, was not verified, by reason whereof the allegations of the petition, touching the execution of the instrument sued on, under the provisions of section 4312, Wilson's Rev. & Ann. St. 1903, are taken as true. Such statute provides: "In all actions, allegations of the execution of written instruments and endorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney." By the pleadings in the case therefore, when the same was submitted to the trial court for consideration upon the motion for judgment on the pleadings, it was admitted: First, that Day county was a duly organized and existing municipal corporation of the territory of Oklahoma as in the petition alleged; second, that on July 10, 1900, at a lawful sitting of said court, the board of county commissioners, by authority of the court, executed the bonds, the coupons of which are herein sued on, and said bonds were signed by the chairman of the board of county commissioners of said county and attested and signed by the duly qualified and acting county clerk, and were thereafter signed by the duly qualified and acting judge of the district court of said county, whose acts were duly attested by the duly qualified and acting deputy clerk of said district court; third, that the coupons sued on herein were and are the coupons of the bonds so as aforesaid executed, and were signed by the chairman of the board of county commissioners of said county and attested by the county clerk. There was therefore such admission in the pleadings as to support a judgment based thereon, and the same must stand, unless the allegations of the answer present some fact touching the validity of the bonds and coupons presented by the petition which entitled the defendant to a hearing thereon. We will, therefore, notice and consider the allegations of the answer in connection with the admitted facts in the case.

The first allegation, that the bonds Nos. 11 to 18, inclusive, and interest coupons thereto attached, a portion of which coupons were not issued pursuant to any law or authority, and are therefore not a binding obligation, is not discussed in the brief of plaintiff in error or insisted upon as a material ground of defense; nor can we see how such a defense can be made. The bonds recite that they are issued pursuant

to the authority conferred by article 2, c. 5, p. 76, of the Session Laws of Oklahoma for 1897, and the trial court, at the time of the rendition of its judgment in this case, took judicial notice of the provisions of such statute, which authorizes the issuance of municipal bonds of the character of the bonds and coupons in question. The next material allegation of the answer was that no court was held in Day county on July 10, 1900, the day on which the instruments sued on were by the district court authorized to be issued, and a judgment indebtedness found to exist which, under the authority of the statute, was authorized by the court to be funded into judgment funding bonds. By this plea, we take it that it was intended by the plaintiff in error to plead what is commonly termed *nul tiel* record, which is ordinarily proved by inspection of the record. The bonds, from which the coupons sued on were taken, as shown by the petition, recited the holding of the court July 10, 1900, and the authority of the court of that date to execute the same; and Exhibit A to the petition sets out the journal entry of that date fully authorizing the execution of the bonds, to which journal entry was attached the certificate of the clerk of the court that such journal entry was correct. There was, however, no record upon the journal of the court of a session of the court held on that date, and the journal entry attached to plaintiff's petition and certified as correct nowhere appeared on the records of the court. When, under this plea, the conditions of this record were called to the attention of the court, the motion for judgment upon the pleadings was overruled, and further proceedings in the case temporarily suspended, during which time a motion was made and filed in the court by the defendant in error, asking to have entered upon the records of the court *nunc pro tunc* journal entry of the judgment of July 10, 1900, authorizing the issuance of the bonds. Notice was served upon the county attorney and county clerk of the pendency of such motion, at that time, and a hearing was had thereon the next day. The plaintiff in error appeared as to said motion, upon which hearing it was made to appear that the journal entry of July 10, 1900, was among the files of the court, but had never been entered of record, and testimony was offered showing a session of the court on that day, to wit, July 10, 1900, at which time a hearing was by the court had upon the question of the issuance of the bonds of the county to fund the judgment indebtedness against the county. As a conclusion of the hearing, and by reason of the facts shown to exist, the court ordered the journal of the session of July 10, 1900, to be made of record then. Upon such record being made, the motion in this case for judgment upon the pleadings was renewed, and such motion sustained.

It is urged by the plaintiff in error that it was error to order the journal entry of July 10, 1900, to be made of record at that time *nunc pro tunc*. But we are unable to see or understand how such question can be considered in this case. No such order was made in this case, nor was the motion to enter the journal entry of July 10, 1900, filed in this case. Such motion was entitled, "In the matter of the funding of the judgment indebtedness of the county of Day and territory of Oklahoma," which was followed by the words "Motion to enter of record the journal entry of judgment relating to the issue of Day county funding bonds of July 10, 1900." The motion thereafter sets forth that it is made by the Attorney General of the state of Kansas, who appeared on behalf of the state as owner of the funding bonds of Day county issued July 10, 1900, by authority of the honorable district court of that county, and asks that an order *nunc pro tunc* be entered of the journal of July 10, 1900, showing the authority of the court to issue the judgment funding bonds which were issued of that date. The motion was verified as to its allegations. An appearance was entered in the matter of such pending motion by counsel for Day county, and it was then heard by the court, resulting in the order, as above stated, directing the record of the proceedings of July 10, 1900, to be then made. If there was any error committed in the matter of such proceedings, such error can be reviewed only by an appeal of the cause to which they relate. Such proceeding was no part of this case, and, as no appeal was taken from the order of the court directing an entry of the journal of July 10, 1900, such journal must stand of record with the same force as if recorded the date on which the judgment was found. We may say, however, touching such procedure, that we know of no reason why a person interested in a judgment of a court of record should not appear before the court at any time and ask to have the journal of the court made correct and complete as of the date such record should have been made; and, we think, the court should entertain and hear and determine such motion upon due notice to those adversely interested, and where, as in this case, the default originally was that of the court and its officials, and not of the party, we think it the duty of the court to make its records complete at any subsequent date when the default is called to the court's attention, and that this may and should be done when justice demands, without the formality of a motion, as the court upon its own motion may and should make its record complete. *Mitchell v. Overman*, 103 U. S. 65, 28 L. Ed. 369; *Borer v. Chapman*, 119 U. S. 596, 7 Sup. Ct. 342, 30 L. Ed. 532. It will be noticed that this procedure by which the journals of the court of July 10, 1900, were by order of the court made of record, took place while the action under consideration

was pending, and, we think, that if the making of such record changed the defense of the plaintiff in error, or was a matter of such surprise as that further procedure in the case could not then be reasonably had, the plaintiff in error would have been entitled to a continuance or any necessary delay of the proceedings, but none was asked, and no appeal was taken from the nunc pro tunc order. The record made pursuant to such order must stand as the record of the court of July 10, 1900, and was a record of the court when the plea of nul tiel record was overruled, and judgment was entered upon the motion for judgment on the pleadings. The plaintiff's petition sets forth the journal entry of July 10, 1900, and, as the plea of nul tiel record is ordinarily determined by the record, such record having been made complete, the court had before it upon the pleadings and the record all the facts necessary to a final determination of that plea.

The third defense presented by the answer of the plaintiff in error is that the county seat of Day county was established by an act of Congress at Ioland, and that the district court of said county could only be legally held at such county seat, and that no court was held at Ioland on July 10, 1900, and no proceedings were there had in the district court of Day county touching the finding of the county's indebtedness. It appears from the record that on July 10, 1900, the session of the district court of Day county was held at Grand, instead of at Ioland, and was being held at Grand at the time this case was heard. Under the provisions of the organic act of the territory of Oklahoma, it is made the duty of the Supreme Court to define the judicial districts of said territory, and to fix the time and place of each county seat in each district, where the district court shall be held, and designate the judge who shall preside therein. An order of the Supreme Court therefore, fixing a term of court, is made pursuant to the requirements of the organic act. A term of court in any county is only held pursuant to an order of the Supreme Court fixing such terms. From the record before us it appears that the Supreme Court of the territory had, prior to July 10, 1900, fixed a term of court for Day county for that date, and had fixed the place at Grand, and specified that such term was for the issue of county bonds. As the courts of this territory are organized, we think that judicial notice of such an order may be taken, for it is equivalent to a statute fixing a term of court, and the journal entry of a proceeding had in the court on that date is sufficient to establish the fact that the court was held pursuant to such order. All this was before the court when it finally considered the motion for judgment on the pleadings as fully as though the same had been established by testimony introduced for that purpose, and was probably so established as

that it could not be disputed by oral testimony admissible under the pleadings, for courts will take judicial notice of their own sessions. That the term of court was held at Grand, instead of at Ioland, may therefore be regarded as settled. That Grand was the place where all the public business of Day county was and is transacted was and is a matter of such public notoriety that the court and all persons interested would take notice of, and would not and could not question or ignore, it. That Ioland was the originally established county seat is also a fact beyond controversy. That Ioland has been abandoned as a townsite for many years, and was so abandoned prior to the year 1900, is a matter of such general knowledge as that it would seem to be trifling with justice to presume that there was any controversy over the question as to where the actual seat of justice for the transaction of public business for that county was located. There remains, therefore, only the question as to whether or not the determination of the court sitting at Grand, in the county of Day, was a binding and conclusive determination as against parties litigant, appearing in the court and without objecting at the time, and submitting to the court their controversies to be determined by it. If Ioland was the county seat de jure, Grand was the county seat de facto, and this the district court of Day county, being a court of general jurisdiction, would take judicial notice of, and the validity of the proceedings had could not be questioned in a collateral proceeding.

In a case almost identical with this case, the Supreme Court of Colorado used the following language (*In re Chas. Allison*, 13 Colo. 525, 22 Pac. 820, 10 L. R. A. 790, 16 Am. St. Rep. 224): "No issue made with the definition usually given, that a 'court' consists of 'persons officially assembled under authority of law, at the appropriate time and place, for the administration of justice'; nor it is denied that the place of meeting is an important element in the definition. We shall maintain the proposition that, under the admitted facts before us, there was a de facto location of the county seat at the town of Conejos, and that therefore the judgment under consideration is not vulnerable in the present proceeding. For more than 12 years Conejos has been regarded as the lawful county seat. During this period, unquestionably it has been the county seat in fact; that is, the county buildings, offices, and records have, without exception, been at that place, and the county business, including that of the district and county courts, has all been transacted there. The people of the state and the different departments of the state government have recognized Conejos as the place where the county seat was lawfully established. No direct judicial proceeding has ever been instituted for the purpose of determining the legality of such location in fact, or for the purpose of restoring the county seat to Gau-

daloupe. On the contrary, the inhabitants of the county, so far as we are advised, have universally acquiesced in this disposition of the county seat. During these 12 years property has been bought and sold, and public moneys have been expended in permanent improvements at the town of Conejos, upon the strength of its being the county seat. Estates of deceased persons have been there administered upon, and the interests of minor heirs have been there adjudicated. At that place property rights of all kinds have been litigated and determined, and criminals have been tried, convicted, sentenced, and executed, or sent to the penitentiary. In this state, the power to locate and remove the county seat is lodged by the Constitution exclusively with the inhabitants of the county. They may, by a popular vote, establish or change the county seat at will, save that removals cannot be made oftener than once in four years. Their absolute power over the subject is restricted only by the limitation mentioned and the statutory regulations prescribing the manner of calling and conducting the election. The knowledge of the inhabitants of Conejos county that the county seat had in fact been removed from Gaudaloupe, and established at the town of Conejos, cannot be questioned; nor can we presume that, while acquiescing during 12 years in the change, they have been ignorant of the manner in which it took place; and, since the entire control of the subject has always been in their hands, we are inclined to the view that their conduct in the premises should be treated as such a confirmation of the unauthorized transfer, or at least such a waiver of objection thereto, as justifies an application of the *de facto* doctrine, so far as judicial proceedings that have taken place under all the forms of law at the town of Conejos are concerned. This conclusion is reinforced by the facts above narrated, showing a universal outside recognition of Conejos as the *de jure* county seat during the long period mentioned. We are aware of no principle of law that compels us to hold all such proceedings void, and thus entail the appalling consequences that would inevitably follow. We do not hold that there may be a *de facto* court, although this view has been vigorously and ably maintained. *Burt v. Winona & St. P. R. Co.*, 31 Minn. 472, 18 N. W. 285, 289, 4 Am. & Eng. Corp. Cas. 426, and note. When a court or office is created by statute, and when the statute creating it is unconstitutional, there is no *de jure* court or office, as the case may be (*Ex parte Stout*, 5 Colo. 509), and under such circumstances we have the highest authority for the view that there can be no *de facto* court or office (*Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178). But we are here dealing with a court unquestionably *de jure* so far as its establishment and organization are concerned—a court presided over by a judge, the legality of whose title and office is

not challenged—and our position is simply that, though a county seat may have been originally unlawfully removed, but subsequent circumstances may supervene which authorize the view that the proceedings of such a tribunal at the place of relocation are valid, and forbid litigating collaterally, by habeas corpus, the regularity of the removal. The foregoing views do not conflict with those expressed by *Coulter v. Routt County Com'rs*, 9 Colo. 258, 11 Pac. 199. A general law exists, as already suggested, providing that the district court shall be held at the county seat of the various counties. The special act considered in the *Coulter* Case applied to the county of Routt alone. It provided for holding the terms of the district court at the town of Yampa, which was not and never had been a county seat. This court held that the act conflicted, in this respect, with the constitutional provision inhibiting special legislation "regulating county and township affairs." Thus it will be seen that the decision is not in conflict with the view that, when the county seat itself is removed, though the removal be *de facto* merely, the place of holding the court may, under circumstances like those here presented, also be changed." See, also, *Watts v. State*, 22 Tex. App. 572, 3 S. W. 769; *Robinson v. Moors*, 25 Ill. 135; 11 Cyc. p. 368 (4); 7 Am. & Eng. Cyc. of Law, p. 1045.

If there is any controversy concerning the county seat of Day county, and the power of officials to transact public business at Grand, instead of at Ioland, such controversy can be settled only in a direct proceeding for that purpose. Questions of this character have often been before the courts, and it has been the universal holding that the judgment and conclusions of courts of record cannot be collaterally attacked upon the ground that the court at the time of the transaction of the business was not held at the county seat or place designated for the holding of such court, unless the question is presented in the case and at the time of the hearing complained of. In this case, which is an action to recover upon the coupons of bonds of Day county, the execution of which was authorized by the judgment of the district court of said county, it is sought to question their validity because of the fact, as alleged, that the district court when it authorized the execution of such bonds was sitting at Grand, instead of at Ioland. The recitations of the bonds, as well as the allegations of the journal entry authorizing their execution, show that the proceedings in the court, as a conclusion of which such bonds were authorized, were begun and had upon the application of the board of county commissioners of said county, and it appears that, pursuant to such proceeding and judgment, certain judgments of record were funded into the bonds, the validity of which is here brought in question. It would be a proceeding at right angles with equity and justice to say that the

county might institute a proceeding of this kind and carry it through the courts at Grand, and, after the statute of limitations had run against the judgments funded, defeat liability upon the bonds because the proceeding in court, which the county, through its board of commissioners, was a party to, was not held at Ioland. Such consideration seems to illustrate the soundness and justice in the rule of the courts that the judgment of a court of record cannot be collaterally attacked, and can only be questioned by a proceeding in error or by some authorized direct proceeding for that purpose. From these considerations we are of the opinion that the district court did not err in refusing to consider the defendant's third ground of defense and in rendering judgment for the plaintiff notwithstanding the grounds of defense therein stated.

One other ground of defense, the fourth, as set forth in defendant's answer, remains for consideration, which, in substance, is that the bonds issued were in excess of 4 per cent. of the last-assessed valuation of the taxable property in the county. The answer alleges that such valuation was \$469,289.77, and that, considering the outstanding indebtedness of the county not funded, together with taxes levied and uncollected, and all other property, money, and resources belonging to said county July 10, 1900, not more than \$11,200 of the bonds of said county could, at that time, have been lawfully issued, and that therefore \$5,600 of such bond issue was illegal and void. By this defense the defendant seeks to try over again a question that was of paramount importance and before the court for consideration when it authorized the issuance of the bonds July 10, 1900. The record shows that at the time the court authorized the issuance of said bonds it found that the amount including outstanding indebtedness did not exceed 4 per cent. of the assessed valuation of the taxable property of Day county, according to the last assessment valuation of the assessor of said county, and the question here presented is whether or not that question may be retried in this action for the purpose of defeating a part of the bond issue of July 10, 1900. Touching this question, this court, in the case of *Territory v. Hopkins*, 9 Okl. 149, 59 Pac. 980, said: "The court having determined the validity of the bonds involved in this proceeding, and having decreed that they are valid obligations and issued in strict conformity with the laws of this territory and no objections or exceptions having been made to the issuance thereof, and no appeal having been taken therefrom, the decree and judgment of the court is therefore final and conclusive upon all matters put directly in issue, tried, and determined in that proceeding. This doctrine has been clearly enunciated and uniformly upheld by the decisions of the Supreme Court of the United States." The soundness of

this determination by this court is questioned by counsel for plaintiff in error, who base their conclusions upon the proposition that the district court, when hearing a question touching the issuance of funding bonds, does not reach a conclusion which in effect amounts to a judgment. If this is a correct conclusion, we can see no purpose in having the question of the issue of bonds brought before the court at all. Under the statute the court must hear and determine the question as to whether or not the issuance of such bonds is authorized under the law, and it would seem that, when a court of competent jurisdiction has before it a legal question to determine, and has heard and determined that question, such determination, unappealed from, is thereafter res adjudicata.

It is urged that the judgment of the court of July 10, 1900, authorizing the issuing of the funding bonds in question, was not a judgment in the sense in which that expression is used, and that there was no judgment until it was entered upon the order made nunc pro tunc. The finding of the court July 10, 1900, was embodied in a journal entry of that date and was signed by the judge hearing the case and recited the things that were found and determined. It was a judgment as to all the intents and purposes and upon all the questions submitted to and necessary of determination by the court in order to authorize the further action had, to wit, the issuance of the bonds. It is true it was not that character of judgment which authorized or required an execution to issue for its enforcement, but it was nevertheless a judicial determination of the existence of facts necessary to the execution of the bonds, and which facts when determined were conclusively and finally determined, unless appealed from. Such determination cannot thereafter be attacked except for fraud or want of jurisdiction. Such judgment or conclusion was executed when the bonds were signed. The entry of the judgment upon the journal of the court at a subsequent date probably served no purpose other than to make the record of the court complete in that respect.

With these questions settled, was there such evidence before the court as to justify the rendition of a judgment upon the pleadings? That the plaintiff was an innocent purchaser of the bonds is not questioned. Such bonds and coupons were negotiable instruments and passed by delivery. They were past due when the action was brought, and liability thereon was denied, and payment refused. The petition of the plaintiff set forth the particular bonds the coupons sued on belonged to. The recitals in the bonds from which the coupons were taken were that they were issued pursuant to the laws of Oklahoma. They bore the unquestioned signature of the officials of Day county, together with that of the judge of the

district court of that county, attested by the clerk and seal of the court; also, the indorsement on the back, by the territorial auditor who certified such bonds to be legally and regularly issued in accordance with an act of the Legislature of March 12, 1897. It has been the universal holding of the courts that, where negotiable bonds or securities on their face import by recital a compliance with the law under which they were issued, the purchaser is not bound to look further for evidence of compliance with the law authorizing their execution. In this case they were not only issued as the act of the officials of Day county, but, in addition, the bonds recite that they are issued as the act of the district court and therefore go upon the market as instruments, the authority to issue which has been judicially determined. As to the effect of such recitals, and the fact that the plaintiff in error is bound thereby, see 62 U. S. 539, 16 L. Ed. 208, *Knox v. Aspinwell*; 99 U. S. 86, 25 L. Ed. 363, *Hackett v. Ottawa*; 105 U. S. 342, 26 L. Ed. 1127, *Ottawa v. National Bk.*; 103 U. S. 683, 26 L. Ed. 526, *Walnut v. Wade*; *Walte v. Santa Cruz* (C. C.) 89 Fed. 619; 65 U. S. 287, 16 L. Ed. 664, *Bissell v. Jeffersonville*.

From the record before us it is apparent that the bonds to which the coupons in question belong were regularly issued for the purpose of funding the judgment indebtedness of Day county, that when issued they were authorized by the determination of the district court of Day county, that they have passed to the plaintiff, an innocent purchaser, and that the county is liable for the full face value thereof; and we conclude that the district court did not err in the rendition of the judgment complained of.

The judgment of the district court will therefore, be affirmed. All the Justices concurring, except *PANCOAST, J.*, who presided in the court below, not sitting, and *IRWIN* and *GARBER, JJ.*, absent.

FLOHR et al. v. TERRITORY.

(Supreme Court of Oklahoma, Sept. 5, 1907.)

CRIMINAL LAW — NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

A motion for a new trial upon the ground of newly discovered evidence, made after the term at which the defendant was convicted and sentenced, which motion sets forth the evidence relied on, is not sufficient to justify a new trial of the cause, unless from a consideration of it the court can determine that the result of the trial would probably have been different, had such new evidence been heard upon the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2336.]

(Syllabus by the Court.)

Error from District Court, Woods County; before Justice J. L. Pancoast.

Charles Flohr and Emma Flohr were convicted of crime, and bring error. Affirmed.

W. S. Denton and Roberts & Curran, for plaintiffs in error. P. C. Simons, Atty. Gen., for the Territory.

GILLETTE, J. In order to a consideration of this case, which is an appeal from an order overruling a motion for a new trial, made after the term when judgment was entered and sentence pronounced, upon the ground of newly discovered evidence, and in considering such motion and the ground laid therefor, it is necessary first to notice the defendants' ground of defense on the trial of the cause. They were charged with larceny by stealth and fraud, in the felonious taking of merchandise, the property of C. H. and Luella Richards, at Rusk, in Woods county, Okl.; the indictment setting out the time and place and the property alleged to have been stolen. When the case came on for trial the defense interposed and relied upon by the defendants was set out in a statement to the jury by one of defendants' counsel, as shown by the record in the case, and was in substance that, while defendants were absent from their home in the state of Kansas as witnesses in a cause pending against the complaining witnesses at Wichita, Kan., a scheme was devised, planned, and executed for the purpose of having a continuance of the case then and there pending against Richards, and that during that time and for that purpose Richards slipped down to Flohr's place, in Woods county, Okl., near Rusk, and in the nighttime secreted his (Richards') property upon Flohr's place, and the next morning sent an officer there and had him find the property so secreted. The property alleged to have been stolen was set out in the indictment, and a description of it required 14 pages of closely typewritten matter, a large portion of which was recovered by a writ of replevin. Such a defense to an indictment charging the larceny of such property by fraud and stealth precludes the theory that Flohr and his wife had the possession of the property at his home at all, but substantially avers that, when the same was found there, it was by reason of the fraudulent and vicious act of Richards in secreting it there without his (Flohr's) knowledge or consent, and during his and his wife's absence from home.

The evidence upon the trial of the case showed that the property, when found at his place, was secreted in different portions of the house, some of it in the back part of and inside an organ, and some in the attic of the building; that, when Dr. Richards and his wife left Rusk, they left the key to their place of business with one Chamberlain, and that Flohr obtained possession of it from him by writing Richards, who was then in Illinois, that Chamberlain was disposing of the property and was not caring for it, and that if he (Flohr) had possession of it he would take good care of the same. Thereupon Richards telegraphed to Chamberlain to turn

the key over to Flohr. Chamberlain testified that upon receipt of such telegram he did turn the key over to Flohr. The testimony of Flohr himself upon the trial of the case upon cross-examination showed that he procured the key and possession of the store from Chamberlain; that he lived some ten miles from Rusk, and had no opportunity to know what Chamberlain's acts were; and that such statements written to Richards were made in the consciousness that he did not know the facts. In this way the evidence for the prosecution upon the trial of the cause accounted for the ability of Flohr to have gotten possession of the property charged to have been fraudulently stolen. From this it will appear that Flohr's possession of the property was, upon the trial, accounted for by each side upon theories that were directly antagonistic—upon the part of the territory by proof tending to establish a fraudulent larceny of the same, and by the defendant's attempting to show that the property was fraudulently taken to his premises by Richards with a view of accusing him of the larceny thereof. These conflicting theories were settled by the verdict of the jury against the Flohrs.

Upon this motion for a new trial on the ground of newly discovered evidence it is proposed to show as a matter of defense to the charge of larceny in the indictment that the property charged to have been stolen, and which was found secreted at Flohr's house, was there by the mutual consent of the parties, through an alleged credit statement made by Dr. Richards to a business house in Wichita, Kansas, to which credit statement there was attached a written exhibit, and in which exhibit appears the following:

"I instructed Mr. Flohr, who had the keys to the store while I was away, to take all the jewelry and silverware in the store to his place, and I kept the most expensive jewelry and silverware, including. * * * I also gave him or sent him keys to my trunk, where good gold watches and rings, etc. * * * and told him to take it out and put in security somewhere, in case of fire or robbery or burglary. He took all this, including the musical instruments, silver-mounted ebony brushes, and silver-mounted combs, the best of the fancy china ware, perfumes, and some other things up to his house for safe-keeping. I should think he has about \$1,000 or \$1,200 worth of goods in this line at his place." This written statement is attached to the credit statement, without any reference in the credit statement to the same; the person making it averring that, when Richards made it, he (Richards) said he would make a more complete property statement, which he afterwards did, and handed him the statement containing the language above quoted. The execution and delivery of this statement is positively denied by Richards and his wife, who also deny that the same is in the handwriting of either of them. The

authenticity of this newly discovered evidence is therefore placed in much doubt, judging the same from the basis of the motion for a new trial alone; and it seems to us, when considered in connection with the defense made by Flohr upon the trial of the cause, it is so fully discredited as to justify the trial court in refusing to grant a new trial based thereon.

The defense now proposed, that Flohr received these goods under the direction of Richards and took them from the store to his dwelling house, 11 miles distant, is at direct variance with the defense stated at the beginning of the trial, to wit, that Dr. Richards had, while he (Flohr) was absent from home in Wichita, slipped down there and secreted them in the house for the purpose of accusing him of the larceny of them. The motion for a new trial, if granted for such a reason, would be equivalent to authorizing a new trial upon such separate and distinct grounds as to permit the defendant to confess that he had originally defended the case upon false and malicious grounds, wherein he sought to charge Dr. Richards with an offense more heinous than the one charged in the indictment against himself, and, having been defeated in such falsehood, he now seeks to present the truth. Courts will not permit litigants to aver a given statement of facts to be true, and, when defeated in such averment, to have another trial upon a theory which confesses the first to have been falsely presented.

There is one other matter presented by the record deserving of notice. In the credit statement made at Wichita, Richards in the enumeration of his business obligations set forth an item of indebtedness to Charles Flohr in the sum of \$200, and also the fact that there was certain property at Flohr's place belonging to him, which Flohr claimed he held in satisfaction of \$200 indebtedness from Richards to him. Touching this indebtedness and this property, it appears from the record that there was a cattle deal between them wherein Flohr received some 23 head of cattle from Richards which had a mortgage on them, which Richards testified he considered paid in the transfer of the cattle. This transaction was made the subject of investigation on the trial of the cause. Flohr claimed that he held certain property, such as mill fixtures and a buggy and harness, found in his possession, as security for this indebtedness; Richards denying that he had any right to the possession of the same for such purpose. The testimony pro and con upon this subject shows that there was an unsettled difference between them with regard to this \$200 item, and the fact that Richards should make mention of it in listing his obligations in a statement of liabilities to a mercantile concern we do not think would be such a confession of fact as to justify the granting of a motion for a new trial. The important question upon the trial

was not so much the matter of indebtedness of Richards to Flohr as it was the question as to whether or not the property of Richards found at Flohr's place had been by Richards hypothecated to Flohr as a matter of security or in discharge of such obligation. This Richards denied, while Flohr attempted to account for his possession by claiming that that particular property was at his place by authority of Richards in the settlement of such \$200 item of claimed indebtedness. Such indebtedness may be admitted, and Flohr still be guilty as charged. The mercantile statement of Richards, if known at the time of the trial, would have been competent as an item of evidence for the consideration of the jury, but we think not of such importance as that the verdict of the jury would have probably been changed in consideration of it.

The judgment of the court below is therefore affirmed. All the Justices concurring, except PANCOAST, J., who presided in the trial court, not sitting, and IRWIN and GARBNER, JJ., absent.

BLOCK v. PEARSON et al.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. MECHANICS' LIENS—PROPERTY SUBJECT.

By the provisions of section 4817, Wilson's Rev. & Ann. St. 1903, one who, under contract with the husband of the owner of land, furnishes material for the erection of a building upon said land, is entitled to a lien upon such land and the improvements thereon for the amount due for such material.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 85.]

2. SAME—PROPERTY OF LESSEE.

A lessee, who holds under a lease from the school land leasing board, is an "owner" of land as contemplated in the mechanic's lien law, and such a lien may attach to such a leasehold estate subject to the paramount interest of the United States, the lessor, or the holder of the fee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 21.]

3. BILL OF EXCEPTIONS—NECESSITY—EVIDENCE BEFORE REFEREE.

Where a referee for the trial of a cause in the district court is not ordered to report the evidence, but is ordered to hear the evidence and report his findings of fact and conclusions of law, the evidence so taken can only be made a part of the record and subject to review by the trial or Supreme Court by having the referee allow and sign a bill of exceptions containing the evidence taken by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, § 41.]

4. SAME—FINDINGS OF REFEREE.

Where the evidence taken upon a trial before a referee is not made part of the record, the findings of such referee are conclusive upon the parties, as well as the court, and cannot be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2910.]

5. SAME—REVIEW OF PROCEEDINGS.

Where a party desires to have the proceedings before a referee reviewed, he should file a motion for new trial before the referee, and have the same ruled upon before the report of the referee is filed in court; and, in order to preserve a record before a referee, a bill of ex-

ceptions should be prepared and presented to the referee for his allowance and signature, to be filed in court with his report.

(Syllabus by the Court.)

Error from District Court, Comanche County; before Justice Frank E. Gillette.

Action by G. H. Block against W. J. Pearson and others. Judgment for defendants, and plaintiff brings error. Reversed, with directions.

Stevens & Myers, for plaintiff in error.
W. E. Hudson, for defendants in error.

BURFORD, C. J. Prior to the year 1903, one O. P. M. Butler leased from the school land leasing board section 36, township 2 north, range 12 west, reserved for school purposes, and adjacent to the city of Lawton, in Comanche county, Okla. The lessee was permitted to plat a portion of the section for town site purposes as an addition to the city of Lawton, and to sublease the lots embraced in said addition. The lots in controversy in this case were leased to E. T. Pearson, a married woman and the wife of W. J. Pearson. L. H. Robinson entered into a contract with W. J. Pearson to furnish the material and construct a dwelling house on the lots leased to Mrs. Pearson. G. H. Block furnished the material which was used in the construction of the house and received no compensation therefor. He filed a lien upon the property, alleging that W. J. Pearson was the owner of the property, and that he furnished the material under a contract with the contractor, Robinson. On April 25, 1903, the plaintiff in error, G. H. Block, commenced his action in the district court of Comanche county against the defendants in error, W. J. Pearson, E. T. Pearson, L. H. Robinson, and O. P. M. Butler, in which he sought to recover personal judgment against W. J. Pearson for the amount of his claim for material used in the construction of said house, and the enforcement of a lien against the property. Robinson and Butler made no defense. The Pearsons answered setting up that the title to the land was yet in the United States; that Mrs. Pearson occupied the same by virtue of a lease from Butler, who was the lessee of the school land leasing board, and she did not purchase the material or enter into the contract for the construction of said house; that W. J. Pearson had no interest in the property; that he had contracted with Robinson to build the house upon his wife's lease, but that he had not made any contract with Block for the material used in the construction of said house. A reply was filed setting up the authority of Butler from the school land leasing board to subdivide the land and sublease the lots for town site purposes. The cause was ordered to a referee for trial, with directions to hear the evidence and report his findings of fact and conclusions of law. This was done; the referee recommending a judgment for the defendants for their costs.

The court approved the report of the referee and rendered judgment that the plaintiff take nothing by his action, and that he pay the costs of suit. From this judgment the plaintiff below has appealed, and the case is before us for review.

There are some questions argued in the brief of plaintiff in error that we cannot consider on the record presented. The case contains the evidence taken before the referee, but there was no bill of exceptions allowed and signed by the referee preserving the evidence, nor was there any order of the court directing the referee to report the evidence. There is no order of court making the evidence taken before the referee a part of the record. Hence the evidence is no part of the record, and was not properly before the district court for consideration, nor is it before this court for its consideration. This question was before this court in the case of *Howe v. City of Hobart*, 90 Pac. 431, wherein we held that: "The evidence taken before a referee in a cause where the referee is directed to try the cause, make findings of fact and conclusions of law and report the same to the court, can only be preserved and made available for review in the district or Supreme Court by incorporating the same into a bill of exceptions, and having the referee to allow and sign the same." This rule might probably be avoided by having the court order the referee in the first instance to report the evidence taken, together with his findings of fact and conclusions of law thereon; but neither of these steps were followed in the case at bar, and consequently we cannot review any question which, for its determination, depends upon a consideration of the evidence. Upon this state of the record, the findings of fact stated by the referee and adopted by the court are absolutely conclusive upon all parties, as well as upon the court.

The only question we are authorized to inquire into is whether or not there was error in the conclusions of law applied to the facts found. The referee found that Mrs. E. T. Pearson was the lessee of the lots upon which the lien was claimed; that she held as the sublessee of Butler, who was the lessee of the school land leasing board; that her husband, W. J. Pearson, had no interest in the land; that he procured the building to be erected upon her lots for her use and largely at her expense, although he procured some of the means upon his own credit; that W. J. Pearson contracted with Robinson to construct the house; and that W. J. Pearson was about the premises a great deal of the time and acting as agent for his wife. In relation to the claim of plaintiff, he found as follows: "December 28, 1902, Robinson and W. J. Pearson entered into a contract whereby for the sum of \$1,000 Robinson was to build on said lot a dwelling; the material and workmanship to be first-class. Plaintiff furnished materials which went into the con-

struction of the house. The materials furnished were for the prices agreed upon between plaintiff and Robinson. Pearson had full knowledge that Robinson was getting the materials from plaintiff, and knew when he paid Robinson that plaintiff had furnished materials for the house. Pearson paid the full contract price to Robinson and to others for work and material; the amount of cash paid to Robinson being \$508.40, February 28, 1903. Pearson directed plaintiff to charge the materials to him and promised to pay for them. That materials which plaintiff furnished and which went into the construction of the house amounted to \$863.70, no part of which has been paid plaintiff. Pearson moved into the house in February, 1903. Pearson accepted the house as completed according to contract. At the time of the execution of the lease by Butler, E. T. Pearson was a married woman, and W. J. Pearson was her husband." Other findings show that Mrs. Pearson was the lessee; that Block filed his lien statement in proper time; and that Butler, the lessor of Mrs. Pearson, was the lessee from the school land leasing board of section 36, township 2 north, range 12 west, which embraces the lots in controversy. Upon these facts the referee stated as conclusions of law that the plaintiff was not entitled to a lien, for the reason that he had given no notice to Mrs. Pearson of the filing of such lien, as required by the provisions of section 4819, Wilson's Rev. & Ann. St. 1903, and that having proceeded against a subcontractor, and alleged a sale to a subcontractor, he was not entitled to a personal judgment against Pearson. Before the cause proceeded to judgment, the plaintiff applied for and obtained leave to amend his lien statement to conform to the facts as found by the referee, so as to show that the contract was made with W. J. Pearson, the husband of the owner of the property, and to amend the petition by appropriate allegations, changing the facts to conform to the amended lien. These amendments must be treated as made, and they changed the entire theory of the pleadings. The case was tried as one against W. J. Pearson, as owner, and in which Block had furnished material to Pearson's contractor. The facts having shown that Mrs. Pearson was the owner, that W. J. Pearson was her husband, and that Block had sold the material to him to go into the construction of her house, the law as stated by the referee became inapplicable to the issues. There seems to have been no objection made to the request to amend the lien statement and petition or to the allowance of such request. The trial court followed the recommendations of the referee and rendered judgment in favor of the defendants. It seems that either the amendments of the lien statement and petition were overlooked, or the statute on the subject was misapplied. Section 4817, Wilson's Rev. & Ann. St. 1903, governing the amended lien statement

and petition, is as follows: "Any person who shall under contract with the owner of any tract or piece of land or with the * * * husband * * * of such owner, furnish material for the erection * * * of any building * * * thereon * * * shall have a lien upon the whole of said piece or tract of land, the building and appurtenances, in the manner herein provided, for the amount due him for such * * * materials. * * *"

The mode of procedure to acquire the lien and to enforce same is set forth in section 4818. No other notice than that of filing the lien is, in such cases, required. The rule is obviously different from that required where the person seeking the lien has sold the material to a contractor or subcontractor.

The facts found and appearing from the pleadings and exhibits, we think, bring this case within the terms of the foregoing statutes. We think the facts and exhibits show that the plaintiff, Block, sold the material under a contract with W. J. Pearson, the husband of E. T. Pearson, the owner of the leasehold upon the land upon which the house was built; that the material was furnished for the erection of a building upon said real estate. If this position is correct, then the statute gives Block a lien upon Mrs. Pearson's interest in the real estate by complying with the requirements of the statute necessary to effectuate such lien. It is contended that the fee of the land is in the United States, and that the primary disposal of the soil cannot be interfered with. These contentions may be conceded, and yet they are not fatal to this case. Our statute was adopted from the state of Kansas, where it has been in force many years and has frequently been the subject of judicial interpretation. It is there held that the term "owner" embraces a leasehold, and that the lien of the statute will attach to whatever of interest, legal or equitable, the occupant may have, subject to the paramount right of the holder of the fee, and we think this sound in principle. *Seltz et al. v. U. P. Ry. Co.*, 16 Kan. 133; *Hathaway et al. v. Davis et al.*, 32 Kan. 693, 5 Pac. 20; *Chicago Lumber Co. v. Osborn et al.*, 40 Kan. 168, 19 Pac. 656; *Meyer Bros. Drug Co. v. Brown et al.*, 46 Kan. 543, 26 Pac. 1019; *Chicago Lumber Co. v. Fretz et al.*, 51 Kan. 134, 32 Pac. 908; *Mulvane v. Chicago Lumber Co.*, 56 Kan. 675, 44 Pac. 613. While it is true the referee states as a conclusion that Pearson made no contract with Block for the material, we think this conclusion unsound. We can only look to the findings and exhibits, but from these it is obvious that Pearson was erecting a house upon his wife's land for her use, and was looking after the affairs pertaining to the same. He directed Block to charge the material to him and agreed to pay for it. He knew Block delivered the material. The statement shows that it was charged to Pearson, per Robinson. Pearson knew it was received and used, and he knew it was not

paid for at the time he paid Robinson. An order for property, and a promise to pay for it, its delivery and acceptance, constitute a valid and binding contract. It is suggested that this was an oral promise to answer for the debt of another, and not binding because not in writing. We think this a misstatement of the case. Pearson was not offering to pay the debt of another. He ordered the material for his own use. He was building the house for his wife. He was making a promise to pay his own debt, and was bound by his promise. *Trulock v. Blair*, 8 Okl. 345, 58 Pac. 1097; *Kessler et al. v. Cheadle*, 12 Okl. 489, 72 Pac. 367. We think there was manifest error upon the facts stated in holding that the lien was void.

The next contention is that the court erred in not giving the plaintiff personal judgment against W. J. Pearson for the amount of his demand. The law, as stated by the referee, and as applied by the court, was correct as to the original lien statement and pleadings, but was erroneous as applied to the amended lien statement and petition. We think the plaintiff should have been allowed judgment against Pearson for the balance due on his account, with interest and costs.

The judgment of the district court of Comanche county is reversed, with directions to the district court to set aside the conclusions of law and to restate the same in accordance herewith, or grant a new trial, as seems most consistent with justice and right. All the Justices concur, except GILLETTE, J., who tried the case below, not sitting, and IRWIN, J., absent.

(14 N.M. 282)

BROWN & MANZANARES CO. v. GUISE.
(Supreme Court of New Mexico. Aug. 28, 1907.)

1. ACCOUNT STATED—BALANCE—CURRENT ACCOUNT.

The balance of a stated account may become an item of a succeeding current account.

2. LIMITATION OF ACTIONS—ACCRUAL OF RIGHT OF ACTION—ACCOUNTS.

Where the balances of accounts stated were each year carried forward into the next year's current account as a part thereof, with the consent of the debtor, who assented to the balances each year, none of the balances ever became more than one year old before they were supported by a new promise, when the account was stated at the end of the next year, and the balances did not stand as a distinct cause of action within the statute of limitations.

3. ACCOUNT STATED—CONCLUSIVENESS.

The items composing an account stated cannot be questioned in the absence of fraud or mistake.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Account Stated, §§ 50-56.]

4. SAME—INTEREST.

Comp. Laws 1897, § 2550, fixing the legal rate of interest at 6 per cent., in the absence of a written contract fixing a different rate, does not prevent a debtor from paying more than 6 per cent., if he elects, and a debtor who knows that an account stated contains items of interest on average monthly balances agrees to pay interest on the monthly balances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Account Stated, § 59.]

5. PLEADING—AMENDMENTS—ALLOWANCE.

Under Code Civ. Proc. § 94, providing that defects in pleadings not against the justice of the matter of the action and not altering the issue shall be amended, a complaint in an action on an account stated may be amended by striking out allegations with respect to credits claimed by defendant.

Appeal from District Court, San Miguel County; before Chief Justice William J. Mills.

Action by the Brown & Manzanares Company against Cassius O. Guise. From a judgment for plaintiff, defendant appeals. Affirmed.

T. B. Catron, for appellant. Jones & Rogers, for appellee.

PARKER, J. It appears that the appellant was employed by appellee from 1893 to 1902 in the capacity of bookkeeper and cashier, and was also a director of the plaintiff corporation. During this time an account was carried in the books of appellee with appellant, in which were charged goods and money as received by appellant, and in which was credited monthly salary and extra allowance at the end of each month. At the end of each fiscal year of appellee, the account was balanced, and the balance brought down as the first item of the next year's account. Interest at 6 per cent. per annum was charged or credited at the end of each fiscal year on average monthly balances for or against appellee, as the case might be, and brought down as a part of the balance and first item of the account for the next year. The appellant admits in the second paragraph of his answer that the account was a stated account at the end of each fiscal year, but insists that the balance of such annual stated account cannot be included in the succeeding annual current account.

1. The first question therefore is as to whether a balance of a previous stated account can be included as one of the items of a succeeding current account, and whether the statute of limitations does not apply to such balance, notwithstanding its inclusion in the succeeding current account. Upon authority there is no fundamental objection to a balance of a stated account becoming an item of a succeeding current account. 1 Cyc. 367; *Dows v. Durfee*, 10 Barb. (N. Y.) 213; *Fleischner v. Kubli*, 20 Or. 328, 25 Pac. 1086; *Gibson v. Sumner*, 6 Vt. 163; *Auzerais v. Naglee*, 15 Pac. 371, 74 Cal. 60; *Union Bank v. Knapp*, 3 Pick. (Mass.) 96, 15 Am. Dec. 181. This is not seriously controverted by appellant, but he insists that the balances continue to stand alone as a distinct cause of action, and the statute of limitations once set in motion continues to run, regardless of the fact that such balances became a first item in the succeeding current account. This position is untenable both on principle and authority. In this case a fair result, we think, of the defendant's testimony, is that

the balance of the account stated each year was carried forward into the next year's current account as a part thereof without objection on his part and with his full knowledge and consent, and the lower court so found. He also testifies that the amount of this balance each year was assented to by him as correct. It is difficult to understand how a defendant, in charge of plaintiff's books of account in which his account was kept and in which annual balances were correctly stated and brought down as the first item of the next annual account, and all this done by himself or under his direction, could be heard to say that such balances did not become a part of the succeeding year's current account. We have then in this case an annual stated account between the parties. If it is true, as we have decided, that the balances of a stated account may, and in this case did, become an item of the succeeding current account, then none of these balances ever became more than one year old before they were supported by a new promise, when the account was again stated at the end of the next year. Under such circumstances, the statute of limitations had no application. *Gibson v. Sumner*, 6 Vt. 163; *Auzerais v. Naglee*, 15 Pac. 371, 74 Cal. 60; *Union Bank v. Knapp*, 3 Pick. (Mass.) 96, 15 Am. Dec. 181. We have examined the cases cited by counsel for appellant and find them not opposed to this conclusion. *Chace v. Trafford*, 116 Mass. 529, 17 Am. Rep. 171, is a case holding that the stating of an account more than six years after the last item in a current account did not revive the debt as to such item and take it out of the statute because the account was not stated in writing. *Belchertown v. Bridgman*, 118 Mass. 486, was a case where an attempt was made to question the correctness of a balance more than six years old, and it was held that the same could not be done. *Porter v. Railway Co.*, 99 Iowa, 351, 68 N. W. 724, was a case where the balance of a stated account was not carried forward into the succeeding current account, and it was held that the statute of limitations had run against such balance.

2. As before stated, we have a stated account between these parties from which flow certain important consequences. The account being stated, neither party, in the absence of fraud or mistake, can question the correctness of any item composing the same. This is attempted to be done by appellant as to the items of interest charged on average monthly balances, upon the theory that a contract in writing is a prerequisite to such a charge under section 2550, Comp. Laws 1897. It is true that, in order to collect more than 6 per cent. interest, a contract in writing is necessary; but there is nothing in the law which prevents the debtor from paying more if he so elects. The stating of an account containing such items is the same thing in effect. *Auzerais v. Naglee*, 15 Pac. 371, 74 Cal. 60; *Por-*

ter v. Price, 80 Fed. 655, 26 O. C. A. 70; Allen v. Nettles, 2 South. 602, 39 La. Ann. 788. The same doctrine applies to the claim of appellant for additional salary of \$50 per month over and above the amount with which he was credited. There is no claim of fraud or mistake, in the absence of which the account cannot be impeached. 1 Cyc. 454; Oil Co. v. Van Etten, 107 U. S. 325, 1 Sup. Ct. 178, 27 L. Ed. 319. And even if it were an open question of fact as to the \$50 per month additional salary, we think the trial court correctly found against the appellant on that issue.

3. Some doubt is expressed by counsel for plaintiff as to whether an account stated was properly pleaded, and they asked to amend by striking out a portion of the complaint on page 6 of the printed record, which is as follows: "Except that said defendant at said time claimed he was entitled to certain credits on the credit side of said account which he claims has not been allowed; in this, that he claimed that he was entitled to credits for salary at the rate of two thousand (\$2,000) per annum, instead of at the rate of twelve hundred (\$1,200) per annum as credited on said account, but that no objection was made to the debit side of said account, and the same was admitted to be correct." The amendment is allowed under section 94 of the Code of Civil Procedure.

We find no error in the record, and the judgment of the lower court is affirmed, and it is so ordered.

McFIE, POPE, ABBOTT, and MANN, JJ., concur. MILLS, C. J., having tried the case below, did not participate in this decision.

(14 N.M. 271)

EAGLE MINING & IMPROVEMENT CO. v. HAMILTON et al.

HAMILTON et al. v. EAGLE MINING & IMPROVEMENT CO.

(Supreme Court of New Mexico. Aug. 28, 1907.)

1. TRUSTS—EXPRESS TRUSTS.

A trust arising from agreement of parties, whether written or oral, is express, and must be manifested or proved, although it need not be created, by some writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 15.]

2. SAME—EVIDENCE.

The findings of the trial court on the nature and terms of the trust in question in this cause are warranted by the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 66-68.]

3. EVIDENCE—ADMISSIONS—ACQUIESCENCE.

The correspondence between the president and the secretary and treasurer of a corporation and a person having contemporaneous business transactions with it, in relation to such transactions, is admissible on the question of acquiescence on the part of the corporation in the statement of the nature and terms of the transactions which are the subject of the correspondence

made by the other party to them in his letters to such officers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 779.]

4. APPEAL—TRIAL BY COURT—REVIEW OF FINDINGS.

In the trial of a cause by a judge without a jury, he must determine the weight and credibility of the evidence adduced, and this court will not ordinarily disturb a conclusion which, so far as appears, may have resulted from such determination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3972.]

5. SAME—FAILURE TO MAKE FINDINGS.

The remedy for the failure of the judge trying the cause without a jury to make a finding on a material issue is not by appeal, but by a motion for further findings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1322.]

(Syllabus by the Court.)

Appeal from District Court, Lincoln County; before Justice Edward A. Mann.

Action by the Eagle Mining & Improvement Company against Mary R. Hamilton and others and by H. B. Hamilton, administrator, and others against the Eagle Mining & Improvement Company. The cases were consolidated, and from the judgments the Eagle Mining & Improvement Company appeals. Affirmed.

These cases, originally numbered 1,444 and 1,539 in the district court for Lincoln county, were consolidated and tried together by Mann, J., without a jury, and were so heard in this court. The appellees are the administrator, the widow, and the heirs of Humphrey B. Hamilton, to whom by two deeds, Exhibits A and B in the record, were conveyed certain interests in the Hopeful lode mining claim and mill site in the county of Lincoln, N. M. The first deed bears date April 15, 1901; the other March 4, 1902. They were delivered to Hamilton June 30, 1902. The parties are agreed that the said Hamilton held the property conveyed by those deeds in trust for the Eagle Mining & Improvement Company, the appellant; but they differ as to whether the trust was express, and out of that difference arise the principal questions now before us. The appellees claimed that the appellant was indebted to the said Hamilton in the sum of \$10,500 in connection with the transaction to which the two deeds above named relate, with interest from the day of delivery, June 30, 1902, and the further amount of \$10,000 for services as the general attorney of said company for about two years, and that he had a lien on the property so conveyed to him for the total amount of such indebtedness. The appellant admits that it owed Hamilton \$9,500, less certain payments, but claims it was for all services, including what he did in obtaining said deeds; denies that he had a lien as claimed, or was entitled to interest. The appellant also alleged in its answer to the complaint of the appellees, in case No. 1,539, that it was the owner of the premises conveyed by said deeds under certain tax

deeds, and that was denied by the appellees, the plaintiffs in said cause, in their replication. In the first cause the plaintiff, here the appellant, prayed for conveyance to itself of the property conveyed to Hamilton by said deeds. In the second, the plaintiffs, here the appellees, pray that an account be taken, and that, in default of payment by the defendant of the amount found to have been due from it to the said Hamilton at his decease, the said property be sold to pay such indebtedness.

Geo. W. Prichard, for appellant. James G. Fitch, for appellees.

ABBOTT, J. (after stating the facts as above). That there was between the Eagle Mining & Improvement Company and Humphrey B. Hamilton a parol agreement, under which he purchased the property conveyed to him by the two deeds above named, is not practically in dispute between the parties, and as to most of its details they do not differ. Hamilton was to have the property deeded to himself. He was to receive from the company \$15,000 for the purchase of it, and was to have and retain for himself the excess of that amount above what he might have to expend to obtain the property. He was, besides, to waive his claim, under an agreement with one E. S. Parsons for a commission on the sale of the interest of the latter in certain property which he conveyed to the Eagle Mining & Improvement Company direct. As to other particulars of the agreement between them the parties differ. We think, however, that the undisputed evidence proves an express, rather than a resulting, trust. The difference between an express and a resulting trust is that the latter results or arises from circumstances which may be proved by any legal evidence, verbal or written; while the former is created by agreement not necessarily made in writing, but which must be manifested or proved by writing. *Perry on Trusts*, §§ 26, 79; *Kronhelm v. Johnson*, 7 Ch. D. 60. *Anstice v. Brown*, 6 Paige (N. Y.) 448, 453.

The judge who heard the cause found that the letters from Hamilton to the appellant, or its officers, in relation to the subject-matter, which were apparently not questioned by them at the time, established an express trust. That such writings are legally sufficient for that purpose is well settled. *Perry on Trusts*, § 82; *Urann v. Coats*, 109 Mass. 581; *Steers v. Steers*, 5 Johns. Ch. 1, 9 Am. Dec. 256. That being the case, it was for him to decide what were the terms of the agreement from the evidence. He found that the appellant agreed to furnish to Hamilton \$15,000, which was to include the purchase price of the interests in land conveyed by the two deeds first above referred to, his pay for making the purchase and compensation for giving up the claim against E. S.

Parsons above named, but not for other services rendered by him. In fact, there remained an amount, after deducting the purchase price, which would seem to be more than a liberal compensation for the services probably performed by Hamilton, but that is judging after the event. It might have proved to be necessary to pay the entire \$15,000 for the interest acquired, and in that case Hamilton would have been entitled to nothing for his services to the appellant in that matter, and nothing on account of his claim against E. S. Parsons. The trial judge found, too, that Hamilton was not bound to give up the title to the property in question until he received the amount to which he was entitled from the appellant for services rendered in the purchase of it; in effect, that he had a lien on it for that sum. That was in accordance with repeated statements in writing made by Hamilton to officers of the appellant corporation and not questioned by them. But the terms of the agreement were to be determined in the trial court, and were so determined, on evidence which seems to us amply sufficient to sustain the findings there made. The same is true of the findings that Hamilton was employed as the general counsel of the appellant, was entitled to compensation for services rendered in that capacity, and that the amount claimed therefor was reasonable. It is true that the evidence on some or all of these points was conflicting, but the weight and credibility of the evidence adduced were for the trial judge to determine, and if, in the course of the trial, he came to the conclusion that any witness had testified falsely in a certain particular, he had the right to disregard all his testimony. That this court will presume a finding of fact was properly made, unless the contrary plainly appears, is too well established to require discussion.

The appellant alleges error in the admission of the correspondence between Hamilton and Tilden, its president, and Sturgeon, its secretary and treasurer, on the ground that the statements in Hamilton's letter were self-serving, and that it did not appear that the officers named had any authority from the board of directors, or otherwise, to bind the corporation in the matter in question, especially since, as the appellant claims, it was a past transaction. The correspondence related to cotemporary transactions, to the trust which had not been terminated by performance of its conditions, and to the services of Hamilton which were then being rendered. As we have seen it was found by the trial court that the letters of Hamilton proved the existence and contained the terms of the express trust between the parties. They also contained statements relating to Hamilton's services as general attorney for the appellant. The only effect given to the letters from the appellant's officers was that

of acquiescence in the correctness of the statements in Hamilton's letters. It was not claimed that liability was created in that way but that liabilities to and by the corporation which had been created in another way were not disavowed but recognized as existing. It does not appear that the findings of the court depended on this correspondence, since there was other evidence, including letters between Hamilton and Rice, the appellant's general manager, who it was claimed in its behalf was the only one who could bind it in such matters; but it is clear, we think, that the evidence was admissible on the question of acquiescence. *Union Gold Mining Co. v. Rocky Mountain National Bank*, 96 U. S. 640, 24 L. Ed. 648; 4 Thompson on Corporations, 5228.

The eleventh assignment of error relates to the tax title set up by the appellant, and alleges a refusal by the court to rule on that question. We find no such refusal in the record. If the appellant considered that a material issue had been raised by its claim of title under tax deeds and the denial of the appellees, its remedy for the omission of the court to find specifically on that point was not by a motion for a new trial, but by an application for further findings. *Warner v. Foote*, 40 Minn. 176, 41 N. W. 935; *Eakin v. McCraith*, 2 Wash. T. 112, 3 Pac. 838; *Bahnsen v. Gilbert*, 55 Minn. 334, 56 N. W. 1117. No such application was made by the appellant, although the court had made the same omission in a memorandum opinion filed in the cause during its progress, to which the appellant had filed numerous specific objections without mentioning the failure to refer to the tax title, which could hardly have escaped notice.

The appellant claims that there was error in allowing interest on the sum found to be due the defendant under the terms of the trust, on the ground especially that "he can make no profit of his office." The claim of Hamilton was for services in obtaining deeds of the property to himself, and not for anything done after he became trustee. The trial court found that at a certain date he had done all that he had agreed to do for the appellant in relation to the property he held in trust, except to convey that property to it, and that he was ready and offered to make conveyance on the compliance by it with the terms of the trust, and on that state of facts found, we think correctly, that he was entitled to interest on the compensation he was to receive from the time it became due. *Armijo v. Abeytia*, 5 N. M. 533, 25 Pac. 777; 22 Cyc. 1495.

Judgment sustained.

MILLS, C. J., and PARKER, POPE, and McFIE, JJ., concur. MANN, J., having tried the case below, did not participate in this decision.

(14 N.M. 226)

CHURCH v TERRITORY.

(Supreme Court of New Mexico. Aug. 28, 1907.)

1. CRIMINAL LAW—MOTION IN ARREST—DEFECTS IN INDICTMENT.

An indictment, alleging that accused, the proprietor of a saloon, "where gambling is carried on, * * * unlawfully * * * allow" a minor to gamble, though defective for failing to use the word "did" before the word "unlawfully," states a violation of Laws 1901, p. 19, c. 3, § 3, making a proprietor of a saloon, where gambling is carried on, who permits minors to gamble, guilty of a misdemeanor, as against a motion in arrest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2445-2462.]

2. GAMING—OFFENSES—STATUTES—DEFENSES.

That the proprietor of a saloon, where gambling is permitted, instructed his employees not to allow minors to gamble in the saloon, is no defense, on his trial for violating Laws 1901, p. 19, c. 3, § 3, punishing the proprietor of a saloon, where gambling is carried on, for permitting a minor to gamble therein.

3. SAME—INTENT.

Laws 1901, p. 19, c. 3, § 3, punishing the proprietor of a saloon, where gambling is permitted, for permitting a minor to gamble therein, neither makes the intent an element of the offense, nor provides that it shall be knowingly done.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, § 124.]

4. INDICTMENT—SURPLUSAGE.

The word "knowingly," in an indictment charging the proprietor of a saloon with unlawfully and knowingly permitting a minor to gamble therein, in violation of Laws 1901, p. 19, c. 3, § 3, punishing the proprietor of a saloon where gambling is carried on, who permits a minor to gamble therein, is surplusage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 259.]

5. GAMING—OFFENSES—LIABILITY OF EMPLOYEES FOR ACTS OF EMPLOYÉS.

Under Laws 1901, p. 19, c. 3, § 3, punishing the proprietor of a saloon, where gambling is permitted, for permitting any minor to gamble therein, and the statute providing that the act of the employé shall be the act of the proprietor, the proprietor of a saloon, where gambling is permitted, is liable for the act of his employé, though he has no knowledge thereof, and though the employé acts contrary to instructions.

6. SAME—EVIDENCE—SUFFICIENCY.

Where, on the trial of the proprietor of a saloon for permitting a minor to gamble therein, the evidence showed that a roulette wheel was in the saloon, that a third person was operating it, that a minor played thereon, and a witness testified that he believed he saw a barkeeper there, and accused failed to testify that the third person was not his employé, the jury were warranted in finding that the employés of the proprietor permitted the minor to gamble.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, §§ 291-298.]

7. SAME.

Where, on the trial of the proprietor of a saloon for permitting minors to gamble therein, in violation of Laws 1901, p. 19, c. 3, § 3, the evidence showed that a roulette wheel was in the saloon, that it was operated by a third person, and that a minor played thereon, and the court charged that there could be no conviction unless the jury believed that the offense was committed by the proprietor or one of his employés, and submitted the question as to whether the offense was committed by employés, an instruction based on the view that the third person was not an employé was properly refused.

8. CRIMINAL LAW — REVIEW — INDICTMENT — SUFFICIENCY—OBJECTIONS.

The sufficiency of an indictment will not be considered, where the objection was not raised by demurrer or by motions to quash or in arrest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2627.]

9. SAME—DENIAL OF NEW TRIAL—ASSIGNMENT OF ERROR.

The overruling of a motion for a new trial in a criminal case, not assigned as error on appeal, is not before the court on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2954.]

Appeal from District Court, Chavez County; before Justice W. H. Pope.

Joshua P. Church was convicted of permitting a minor to gamble in his saloon, and he appeals. Affirmed.

On the 12th day of November, 1903, the defendant was indicted, and the body of the indictment is as follows: "That Joshua P. Church, late of the county of Chavez, in the territory of New Mexico, on the 25th day of October, in the year of our Lord one thousand nine hundred and three, at the county of Chavez, aforesaid, in said territory of New Mexico, being then and there proprietor, keeper and manager of a certain saloon there situate where intoxicating liquor is kept and offered for sale and where gambling is carried on and permitted, unlawfully and knowingly allow and permit one Guy C. Clements, a minor under the age of twenty-one years and a pupil of a school and educational institution, to wit, The New Mexico Military Institute, to be and loiter upon and frequent the premises belonging to said saloon and engage in games and amusements thereon, contrary to the form of the statute in such case made and provided and against the peace and dignity of the territory of New Mexico."

The record in this case discloses very few facts, but those disclosed, together with the admission of the defendant, seem sufficient for a proper understanding and disposition of the case. The substance of the proof was that Guy C. Clements, Clarence Clements, Reid Curtis, and one McCracken were in the Oriental Saloon, at Roswell, some time during September, October, or November, 1903, and while there Guy C. Clements engaged in playing the roulette wheel, while the others watched the play; that Guy C. Clements and his brother Clarence were in that saloon more than once; that all of these boys were minors and students of the New Mexico Military Institute; that they were not molested or put out of the saloon at any time; that a man by the name of O'Conner was operating the roulette wheel in the saloon, and, so far as the testimony shows, the defendant was not in the saloon at the time these boys were there. The defendant, however, admits upon the record that he was the owner and manager of the Oriental Saloon in the fall of 1903. Upon a trial before a jury, the defendant was found guilty as charged in the indictment. Motion for a new trial having

been overruled, judgment was rendered on the verdict, and the defendant was sentenced to pay to the territory a fine of \$50 and costs, and to stand committed until fine and costs were paid. A motion in arrest of judgment was filed and overruled, and the defendant has brought the cause to this court by appeal.

Gatewood & Dunn, for appellant. W. C. Reid, Atty. Gen., for the Territory.

McFIE, J. (after stating the facts as above). The indictment is based upon the violation of section 3, c. 3, p. 19, Laws 1901, which is as follows: "Section 3. It shall be unlawful for the proprietor, keeper or manager of any saloon where intoxicating liquor is kept or offered for sale, or where gambling in any form is carried on or permitted, to permit any minor under the age of twenty-one years or any pupil in any school or educational institution, to loiter upon or frequent the premises belonging to such saloon, or to engage in games or amusements of any kind thereon." Section 7 of the same chapter is also pertinent, and provides that: "The word 'person' as used in this act, shall be deemed to mean firm or corporation, as well as natural person, and the person managing the business of such firm or corporation shall be liable to the penalties prescribed by this act. And the proprietor or owner of any of the establishments mentioned in this act shall be liable to the penalties prescribed by this act for any violation of its provisions within or at their establishments, whether committed by themselves or by persons in their employ."

Numerous assignments of error appear in the record; but, inasmuch as more than one of them raise the same question in a different form, it will not be necessary for us to consider each of them separately. The first assignment of error is that the court erred in overruling the defendant's motion in arrest of judgment. The indictment in this case omitted to insert the word "did" in the charging part before the words "unlawfully and knowingly allow and permit one Guy C. Clements, a minor and student of the New Mexico Military Institute, to be and loiter upon and frequent the premises belonging to such saloon, and to engage in games and amusements thereon," etc. No demurrer or motion to quash was filed attacking the sufficiency of the indictment; but, after trial and judgment, a motion in arrest of judgment was interposed, based upon this omission, as a fatal defect in the indictment. The court below overruled the motion, and, as counsel for the defendant contends, committed error in so doing. The omission of the word "did," in the charging part of an indictment for a felony, has been held fatal in the state of Texas, and in some other jurisdictions; but in misdemeanors, where a more liberal rule of pleading prevails, such an omission, appearing to be purely clerical, is not deemed fatal, and, if desirable for

completeness of statement, will be supplied by intendment. In *State v. Edwards*, 19 Mo. 675, the court said: "The omission in this indictment consists of the neglect to insert the word 'did' before the words 'assault, beat and maltreat one Stephen L. Page, in the peace then and there being, and other wrongs,' etc., so as to make the sentence read thus: 'With force and violence, in a turbulent and violent manner, "did" assault, beat and maltreat,' etc. We are inclined to think that this word 'did' may, in this indictment, be supplied by intendment. In indictments for misdemeanors merely, such intendment is often resorted to. The strictness and rigor in construction of indictments for felonies are not applied uniformly to indictments for mere misdemeanors. In the case of *State v. Halder*, 2 McCord (S. C.) 377, 13 Am. Dec. 738, the omission to insert the word 'did' before the words 'feloniously utter and publish, dispose and pass' was held fatal, and the judgment was arrested. This indictment was for a felony. In the case of the *State v. Whitney*, 15 Vt. 208, which was an indictment for a misdemeanor, selling liquor by the small measure, without license, the word 'did' was omitted, which should have been joined with the words 'sell and dispose of.' This omission was held not to be fatal on motion in arrest of judgment. *Bennet, J.*, in delivering the opinion of the court, said: 'In this indictment, it is alleged that the respondent, on the 1st day of August, A. D. 1842, at, etc., sell and dispose of, etc. It is evident that the omission is purely a clerical one. The auxiliary verb may be supplied by intendment.'" *People v. Duford*, 66 Mich. 91, 33 N. W. 28; *Shay v. People*, 22 N. Y. 317.

The omission from the indictment in the present case is so obviously clerical that it cannot reasonably be said that the defendant was misled or prejudiced in pleading to the indictment and going to trial, and it is too late, in a case of misdemeanor, for the defendant to raise this question for the first time by motion in arrest of judgment. In the case of *People v. Duford*, 66 Mich. 90, 33 N. W. 28, the court said: "If the word 'did' had been used in the place of 'was,' after the word 'situate,' and before 'willfully,' it would have charged the offense positively upon the respondent. This mistake, we think, should be regarded as clerical and formal, and one which did not mislead, or result to the respondent's prejudice. Especially should this be so held in view of the fact that the complaint upon which he was arrested contained the charge correctly stated. If the respondent desired to take advantage of the defect relied upon, he should have demurred or moved to quash." As to whether the omission of the word "did," as in the indictment in this case, would be fatal or not, we do not decide; but, as the charge is a misdemeanor only, and the punishment assessed a fine of \$50 and costs, we are of opinion

that the court did not err in overruling the motion in arrest of judgment.

In the second, third, fourth, and fifth assignments, it is charged that the court committed error in excluding testimony offered in behalf of the defendant to the effect that the defendant had forbidden minors to loiter in his saloon premises; that he had instructed his employes not to allow minors to loiter about his saloon, and has so instructed O'Conner, who was in charge of the roulette wheel at the time Guy C. Clements was in the saloon. The contention of the defendant is that his good faith evidenced by such instructions to minors and employes constitutes a good defense. The court below excluded this testimony as immaterial, on the ground that the same would not constitute a defense. In *Carroll v. State*, 63 Md. 551, 3 Atl. 29, the court said: "The fact that he (saloon-keeper) has given orders not to sell to minors only shows a bona fide intent to obey the law, which all the authorities say is immaterial in determining guilt." In *McCutcheon v. People*, 69 Ill. 601, the court said: "Where, in the absence of a saloonkeeper, a sale of liquor is made by his bartender, the directions of the former not to sell to minors will not exempt him from liability for the sale." *Mogler v. State*, 47 Ark. 110, 14 S. W. 473; *Waller v. State*, 38 Ark. 656; *Loeb v. Georgia*, 75 Ga. 258; *Riley v. State*, 43 Miss. 397; *Dudley v. Sautbine*, 49 Iowa, 650, 31 Am. Rep. 165; *Mugler v. Kansas*, 128 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. The instructions of the defendant, tending to show his good faith, did not constitute a defense, and the court properly excluded this testimony.

The second, third, fourth, fifth, and sixth assignments of error are made the basis of contention by defendant's counsel, as stated in his brief, that "the principal is not liable under the statute for the act of his employé, unless he had knowledge of such act; nor is he liable if the act is committed by the employé against the order of the principal and without his knowledge." This would doubtless be a correct statement of the law under a statute which made the intention to commit an essential ingredient of the crime. Our statute provides that "the proprietor or owner of any of the establishments mentioned in this act shall be liable to the penalties prescribed by this act for any violation of its provisions within or at their establishments, whether committed by themselves or by persons in their employ." It is clear from this provision of the statute that intent to commit is not made an essential element of the crime, nor is it provided that it shall be knowingly done. The indictment in this case uses the word "knowingly," but, as the statute does not require it, it must be treated as surplusage. In the case of *Carroll v. State*, supra, the Supreme Court of Maryland said: "If intent is not an ingredient in the offense, it logically follows

that it must be immaterial whether such orders are given or not, for he who does by another that which he cannot lawfully do in person must be responsible for the agent's acts. In fact, it is his act. It cannot be that by setting another to do his work, and occupying himself elsewhere or otherwise, he can reap the benefit of his agent's sales, and escape the consequences of his agent's conduct. It would be impossible effectually to enforce a statute of this kind if that were allowed, and it would speedily become a dead letter." This language was used by the court in a case where the charge was selling liquor to minors, but we see no difference in the principle involved. Our statute specifically provides that the act of the employé shall be the act of the proprietor or owner of saloons where liquors are sold or gambling is permitted, and it is the proprietor or owner who is declared liable both for his own and his employé's acts and negligence. The evidence showed that Guy C. Clements, a minor, was in the saloon of the defendant for about 30 minutes on one occasion, and while there he participated in gambling which was being carried on in the saloon; and the evidence shows, also, that this minor was in the saloon of the defendant on more than one occasion, and other minors and students were also in the saloon at the same times. There is no evidence in the record disclosing any effort to prevent these minors from entering the place, nor to prevent them from remaining there after they had entered. It was proven, therefore, that Guy C. Clements, both a minor and a student of the New Mexico Military Institute, did frequent and loiter in the saloon of the defendant, which was also proven to be a place where intoxicating liquors were kept and offered for sale, and where gambling was carried on.

When this defendant procured a license to conduct that saloon, he obligated himself to conduct it in obedience to law, and one of the existing requirements of law was that minors and students should not be permitted to loiter upon or frequent the defendant's saloon premises. The defendant was under obligation to see that this law was obeyed, and, if he chose to leave others in charge of his saloon, he is liable for their failure to do what the law requires. This question is fully considered and a long line of authorities examined by the court in the case of *State v. Kittelle*, 110 N. C. 590, 15 S. E. 103, 15 L. R. A. 604, 28 Am. St. Rep. 698, and, among other things, the court, in considering a statute quite similar to ours, but in relation to the sale of liquors to minors, said: "When regulations are imposed, as in this case, the licensee is criminally liable for their nonobservance. The defendant was found by the county commissioners 'qualified,' and a license was issued to him upon the personal trust that he would conduct the business according to the regulations. The sale here made to a minor was a violation of that trust,

and a violation of law. It is no defense that the defendant had no intention to violate the law. 'Good intentions' are said by the proverb to be the pavement of another place, but they are not a sound one for a barroom. The law has been violated. It looks to the man it intrusted with the management of this business, and holds him liable. It is immaterial whether his liability is based upon his negligence in permitting the sale, or upon the principle of agency, or upon both, for the defendant is liable for a negligent sale from insufficient supervision of an agent, as much as if he had ordered the sale. If the clerk, as Judge Cooley says, *supra*, being in possession of the keys, opened the saloon on Sunday for traffic, the licensee could not excuse himself from liability by his absence or ignorance; nor can he do so in the present case of a sale to the minor by being temporarily absent from the room. The defendant chose to seek for and assume the liabilities of the calling of a saloonkeeper that he might enjoy its profits. He cannot be allowed to enjoy its profits and assign its duties and liabilities to another." In the case of *People v. Roby*, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270, the conviction of the owner was sustained where his clerk, in cleaning out his saloon on Sunday, sold a drink of liquor without the knowledge or consent of the owner. In deciding that case, Chief Justice Cooley said: "As a rule, there can be no crime without a criminal intent, but this is by no means a universal rule. One may be guilty of the high crime of manslaughter, when his only fault is gross negligence, and there are many other cases where mere neglect may be highly criminal. Many statutes which are in the nature of police regulations, as is this, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible." These observations are deemed equally applicable to the present case, as our statute may be properly designated a police regulation also. In *State v. Privett*, 49 N. C. 100, the court instructed the jury to the effect "that, if the principal instructed his clerk not to sell, he would not be liable for the sale by the clerk, unless such instruction had been abrogated expressly or by a course of conduct which would tacitly amount to the same." When this case was before the Supreme Court, speaking of this instruction, the court said that the defendant could not complain of it, because it was in his favor; but the court took occasion to express its disapproval of the instruction by saying "that if they are to have the effect given them by the charge in this case, and in the argument of defendant's counsel, the act under which this prosecution is had will be very easily evaded." This language indicates that the court would have reversed the case if it could have done so. Bearing upon this general proposition, see

also, *Noecker v. People*, 91 Ill. 494; *McCutcheon v. People*, 69 Ill. 606; *Mogler v. State*, 47 Ark. 110, 14 S. W. 473; *Loeb v. Georgia*, 75 Ga. 258; *Snider v. State*, 81 Ga. 753, 7 S. W. 631, 12 Am. St. Rep. 350; *Riley v. State*, 43 Miss. 397; *Dudley v. Sautbine*, 49 Iowa, 650, 31 Am. Rep. 165; *People v. Blake*, 52 Mich. 566, 18 N. W. 360.

It is suggested by counsel for defendant that Mr. O'Conner, who was in charge of the roulette wheel, was not shown to have been an employé of the defendant at the time Clements was in the saloon, and, the defendant being absent, there could be no conviction. It having appeared in evidence that this gambling device was in the defendant's saloon, and that O'Conner was operating it, and at least one witness testified that he believed he saw a barkeeper there when he came in, and as the defendant, who was possessed of the knowledge as to whether these parties were employés of his or not, failed to testify that they were not employés, although he gave evidence in the case, the jury were warranted in concluding that employés of the defendant were present, and granted permission, by failing to exclude these minors from the place, as was their duty to do.

The rulings as to evidence and the tenth and eleventh paragraphs of the court's instructions, authorizing conviction for acts of employés without knowledge or consent of the defendant, and notwithstanding his instructions to them, seem to be fully sustained by the weight of authority.

The eighth assignment of error challenges the refusal of the court to give instructions 1, 2, and 3, requested on behalf of the defendant. As to these instructions, counsel in his brief says that, "if given to the jury, would have enabled it to have passed on the good faith of the defendant in seeking to obey the law, and the jury would have been compelled to find the defendant not guilty under the testimony." As has been stated in another part of this opinion, good faith of the defendant does not constitute a legal defense, and while the court, in a case where it has discretion, may consider good faith in assessing the punishment, evidence tending to show good faith does not enter into the question of whether the defendant is guilty or not guilty, the sole question which the jury are authorized to determine. These instructions were therefore properly refused.

The ninth and tenth assignments cannot be sustained for reasons heretofore stated. They are based upon the view that O'Conner was not an employé of the defendant. The court submitted the question to the jury as to whether the offense was committed by employés or not, and, in the eleventh and twelfth instructions given by the court of its own motion, the court plainly informed the jury that there could be no conviction unless the jury believed from the evidence and beyond a reasonable doubt that the of-

fense charged was committed by the defendant or one of his employés. The instructions requested by the defendant were not broad enough, in that they limited the issue to Mr. O'Conner, who was in charge of the roulette game authorized to be conducted in the defendant's saloon.

The assignment that the indictment was not sufficiently specific is not well taken, because this objection was not raised by demurrer, motion to quash, or by motion in arrest of judgment. The overruling of the motion for a new trial was not assigned as error in this court, and is therefore not before us.

There being no error in the record, the judgment of the court below is affirmed, with costs. It is so ordered.

MILLS, C. J., and PARKER, ABBOTT, and MANN, JJ., concur. POPE, J., having tried the case below, did not participate in this decision.

(14 N.M. 245)

MOGOLLON GOLD & COPPER CO. v
STOUT.

(Supreme Court of New Mexico. Aug. 28, 1907.)

1. JURY—RIGHT TO JURY TRIAL—ASSESSMENT OF DAMAGES.

In a suit for damages, where an injunction is also asked, if the suit is primarily for the injunction, and the right to damages is merely incidental to and dependent upon plaintiff's right to the injunction, the court may, without the intervention of a jury, assess the damages already sustained; but, if the action is brought primarily for the recovery of a money judgment, it is triable by a jury, notwithstanding that the plaintiff also asks for an injunction against the further violation of his rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 35-83.]

2. CONTINUANCE—DISCRETION OF COURT.

In the case at bar the court committed no error in overruling defendant's motion for a continuance, as the granting or refusing of a continuance in any case rests in the sound discretion of the court; and as in this cause the case was first set for trial for the month of June, 1905, and on July 6, 1905, was reset in open court for trial for December, 1905, there was no abuse of discretion in the refusal of the court to grant a further continuance, and to begin the trial of the case December 13, 1905.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Continuance, §§ 6, 7.]

3. APPEAL—ASSIGNMENTS OF ERROR.

Assignments of error as to the admissibility or nonadmissibility of evidence, which are in general terms and do not point out the particular question and answers objected to, will not be considered by this court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3010.]

4. DAMAGES—ATTEMPT TO ARREST LOSS.

When the injured party finds that a wrong is being done him, he should use all reasonable means to arrest the loss, and when a reasonable and bona fide attempt is made to reduce the damage, even if by such attempts the loss is increased, it does not relieve the wrongdoer from a suit for the full recovery of the damages claimed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 119-132.]

5. SAME—INJURY TO GROWING TREES—EVIDENCE.

In a suit for damages for the destruction of growing fruit trees and grapevines, it is competent to prove the damages such as are here claimed, by showing the value of the trees and vines destroyed, or by showing the value of the real estate with the trees and vines growing upon it and its depreciation by reason of their loss, or in both ways.

(Syllabus by the Court.)

Error to District Court, Socorro County; before Justice Frank W. Parker.

Action by the Mogollon Gold & Copper Company against John W. Stout. Judgment for defendant, and plaintiff brings error. Amended and affirmed.

The complaint in this case discloses that in the year 1883 the defendant in error settled on, and has since resided upon, a certain tract of land situated in the county of Socorro, in this territory, containing a trifle over 100 acres, and that in April, 1894, the United States patented the same to him; that immediately upon his settlement upon the land in 1883 defendant in error took and appropriated one cubic foot of water per second from Mineral creek, when that amount of water was flowing in said creek, by building a certain irrigation ditch about 1,800 feet long and 20 inches in width, extending from a point on Mineral creek above lands of defendant in error down to and across his lands; that the water so appropriated was used for irrigating his lands, vineyard, fruit trees, plants, and vegetables, and for watering his live stock, and for domestic purposes; that his lands were irrigated from five or six times during each season; that at the time of his appropriation the water of Mineral creek was pure, and suitable for the purposes for which it was appropriated; that in the year 1893, plaintiff in error erected a large quartz or stamp mill, with a crushing capacity of over 100 tons for every 24 hours, some distance above the head of the irrigation ditch, and so near Mineral creek that the tailings from the mill ran into Mineral creek and polluted the waters of that stream with mineral poison and other substances highly injurious to vegetable and animal life; that the tailings and other deleterious substances were carried by the waters of the creek into the irrigation ditch of defendant in error and upon and over his lands; that by reason of the pollution of the water the same was rendered unfit for the uses and purposes for which it had been appropriated, and that by reason of the tailings running into the irrigation ditch it has filled up, and the lands thereunder have been permanently injured by the deposit thereon of the tailings and the mineral poisons; that the alfalfa, a vineyard, trees, plants, and vegetables of defendant in error have ceased to grow and be productive; and that he has wholly lost his crops, and the alfalfa, vineyard, trees, plants, and vegetables have been poisoned, dried up, and wholly destroyed,

and defendant in error has been deprived of the use of said water for his stock and for domestic purposes. Damages were asked in the sum of \$2,000. Defendant in error also asked for an injunction, and that he be decreed to have prior right to the use of the waters of Mineral creek, to the full extent of his prior appropriation, and for general relief. Issues were finally joined, and the cause was set for trial, at the next term of court. Motion was made to strike the cause from the trial docket, which was denied. Motion for a continuance was made, and was likewise denied, and the case was finally heard by a jury, which returned a verdict in favor of plaintiff below, defendant in error herein, for the sum of \$2,000 damages. At the suggestion of the court \$650 of the verdict was remitted, and judgment was entered for the sum of \$1,350. Motion for new trial was argued and overruled, and a writ of error was sued out.

McMillen & Reynolds and Dougherty & Griffith, for plaintiff in error. James G. Fitch and W. H. Winter, for defendant in error.

MILLS, C. J. (after stating the facts as above). On the several assignments of error we will consider those that we deem pertinent to the proper disposition of this case. It will not be necessary to take them up severally, as those which relate to the measure of damages can properly be considered together.

1. The first alleged error to be considered is that the court below erred in overruling the motion of defendant to strike the cause from the jury trial docket and in submitting the cause to trial by jury. The claim of plaintiff in error is based upon the well-known principle that, if jurisdiction attaches, a court of equity will go on and do complete justice, although in its progress it may decree on matter which was cognizable at law, and that, as the complaint in this case set up facts which called for both legal and equitable relief, when the court took jurisdiction for the purpose of administering equitable relief—that is, issuing the injunction prayed for—it took jurisdiction of the case for all purposes, and would itself decide the question of fact involved in the case, without the intervention of a jury. Our Code of Civil Procedure authorizes the uniting of both legal and equitable causes of action in the same complaint, where they arise out of the same transaction or transactions, connected with the same subject of action. Subsection 33, § 2685, Comp. Laws 1897. Even a cursory examination of the statement of facts which precedes this opinion will show that the legal and equitable causes of action stated in the complaint arise out of the same transaction. Indeed, it is nowhere contended that the complaint improperly joined causes of action. The

complaint sets up what under the common-law rules would have been a good declaration in trespass on the case, and also asks for two remedies, to wit: (1) A judgment for the sum of \$2,000; and (2) that the plaintiff be decreed to have a prior right to the use of the waters of Mineral creek, and that the copper company be enjoined from polluting the waters of said creek. The record also discloses that a verdict was returned by the jury which tried the cause in December, 1905, while nothing was done about securing the restraining order until March, 1906, more than two months after the jury had passed upon the cause. Indeed, the record does not show that a permanent injunction has ever been granted in the case.

By section 1868 of the Revised Statutes of the United States the district courts of this and other territories possess chancery as well as common-law jurisdiction, and at one time it was a serious question as to whether a territorial Legislature had the right to adopt a Code of Civil Procedure; but on April 7, 1874, this right was given by act of Congress, but attached to it is the proviso that by the enactment of a Code no person should be deprived of the right of trial by jury in cases cognizable at common law. There is no doubt, as stated above, but that the complaint in this case, down to the prayer for relief, sets up a state of facts which was "cognizable at common law," and which entitled the plaintiff to the right of a trial by jury; and under the acts of Congress just above referred to the Legislature could not, even if it had been so disposed, which we do not even for a moment intimate, have taken away the right. The mere fact that the defendant in error united in one complaint the necessary allegations and prayers for legal and equitable relief does not deprive him of his right to a jury trial on the legal issues; and this has been the holding, and we think properly, in nearly all of the Code states. *Pomeroy's Code Remedies*, §§ 59, 86; *Hill v. Smith*, 27 Cal. 476; *Potter v. Froment*, 47 Cal. 165; *Hudson v. Caryl*, 44 N. Y. 553; *Sternberger v. McGovern*, 56 N. Y. 12; *McPherson v. Featherstone*, 37 Wis. 632; *Hughes v. Dunlap*, 91 Cal. 385, 27 Pac. 642. And the highest federal court has held likewise in a case very similar to this which came up from Montana, when it was still a territory, and its courts were organized under a law about the same as ours. The syllabus in the case of *Basey et al. v. Gallagher*, 20 Wall. (U. S.) 670, 22 L. Ed. 452, which was decided in 1874, says: "Although by the organic act of the territory of Montana common-law and chancery jurisdiction is exercised by the same court, and by legislation of the territory the distinctions between the pleadings and modes of procedure in common-law actions and those in equity suits are abolished, the essential dis-

inction between law and equity is not changed. The relief which the law affords must be administered through the intervention of a jury, unless a jury be waived. The relief which equity affords must be applied by the court itself." And the same rule has been held to be the law in *Hornbuckle v. Toombs*, 18 Wall. (U. S.) 648, 21 L. Ed. 966, *Hershfield v. Griffith*, 18 Wall. (U. S.) 657, 21 L. Ed. 968, and *Davis v. Billsland*, 18 Wall. (U. S.) 659, 21 L. Ed. 969.

It will be observed that all of these federal cases were decided before the passage by Congress of the act of April 7, 1874, which expressly saves to a litigant the right of trial by jury. It is true that the plaintiff in error quotes in support of his contention the case of *Lynch v. Metropolitan Ry. Co.*, 129 N. Y. 274, 29 N. E. 315, 15 L. R. A. 287, 26 Am. St. Rep. 523, and several federal cases; but the *Lynch Case* seems to stand alone, and is, we think, overwhelmed by the number of cases which hold to the contrary, while all of the federal cases cited, except the first, refer to damages as to infringements of patents, which class of cases is governed by statute—sections 4919 and 4921, Rev. St. U. S. [U. S. Comp. St. 1901, pp. 3394, 3395], providing that damages for infringement may be adjudged either in law or equity. The first case cited by counsel for plaintiff in error is that of *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 672; and, as we understand that case, all that the court holds is that a receiver of an insolvent railroad, where the decree appointing him provides that he has authority to defend all actions brought against him by leave of the court, cannot be sued as such receiver in another jurisdiction, unless the order of the court by which he was appointed receiver for leave to bring the suit be first obtained. The true rule seems to us to be that in a suit for damages, where an injunction is also asked, if the suit is primarily for the injunction and the right to damages is merely incident to and dependent upon plaintiff's right to the injunction, the court may without the intervention of a jury assess the damages already sustained; but, if the action is brought primarily for the recovery of a money judgment, it is triable by a jury, notwithstanding the plaintiff also asks for an injunction against the further violation of his rights, or an injunction *pendente lite*. 24 Cyc. 122.

2. The next error assigned which we need to consider is that the court below erred in overruling defendant's motion for a continuance. The record shows that the complaint in this case was filed on July 13, 1904. On August 13, 1904, a special answer, in the nature of a plea in abatement, was filed, stating that the name in which defendant was sued was not its true name. On September 9, 1904, answer was filed, and on September 12, 1904, leave was given to

amend the complaint by correcting the name of the defendant by interlineation. The case appears to have been set for trial on the jury trial list for the June, 1905, term of court, for a motion was made to strike the cause from the jury trial docket, which motion on June 30, 1905, was overruled, and on July 6, 1905, the case was again set in open court for trial for the second Monday of the next ensuing term of court—i. e., the December, 1905, term. On December 6, 1905, motion for security for costs was filed, and on the 10th of the same month such security was filed, and three days later a motion and affidavit for continuance was filed, which motion was presumably overruled, as the cause was tried; the trial commencing on December 13, 1905. This court has repeatedly held that the granting or refusing of a continuance in any case rests in the sound discretion of the court, and will not be ground for error unless the court grossly abuses such discretion. *Reall v. Territory*, 1 N. M. 507; *Territory v. Padilla*, 12 N. M. 1, 71 Pac. 1084.

We can see no abuse of discretion on the part of the court in the case at bar in refusing the motion for continuance. The case was first set on the jury trial docket for the June term, A. D. 1905, and on July 6, 1905, in open court, was reset for the second Monday of the following December term of court. We know of no greater publicity that can be given as to when a case will be tried than to set it in open court. It is true that the affidavit for continuance sets out that the attorneys for the defendant below had no notice of such setting until November 22, 1905; but it seems to us that they should have had such notice long before that day, for an attorney who has cases on the docket should be in attendance at court while it is in session, or at least should have some one there who will advise of the action of the court in any matters in which he may be interested. We will also take judicial notice of the fact that the December term, 1905, of the district court, sitting within and for Socorro county, began on December 4, 1905, and that the second Monday of said term was December 11th. Consequently from November 22d, when the attorneys for the defendant below admit that they had notice of the setting of the case to December 11th, was nearly three weeks—ample time, it seems to us, to prepare for trial. The first affidavit for continuance was not filed until December 13, 1905, two days after the case was set for trial. We see no error in the refusal of the court to grant the continuance asked for.

3. Five of the alleged errors relate to the admission of evidence objected to by plaintiff in error. Each of these objections, as shown in the motion for a new trial and assigned as error, is in the most general terms, and does not point out the particular question and answer objected to. In order to ascertain

what they are, we would have to search the entire evidence and the rulings of the court most carefully, and endeavor to ascertain which questions and answers the plaintiff in error objected to, and even then we might not select all of those which were regarded as harmful by its counsel. It is a well-settled rule of this court that we will not review alleged erroneous rulings of the trial court upon the admissibility or nonadmissibility of evidence, unless they are specifically pointed out. In the case of *Anderson v. Territory*, 4 N. M. 213, 13 Pac. 21, this court lays this down as the rule, and quotes approvingly the law as laid down in *Grant v. Westfall*, 57 Ind. 128, as follows: "It has been repeatedly held by this court that when a party complains of an alleged erroneous decision of the court trying the cause, either in the exclusion or admission of evidence, he must point out in his motion for a new trial with reasonable certainty the particular evidence admitted or excluded; otherwise, the court below need not, and this court will not, consider such alleged erroneous decision." And we have held the same as late as the case of *Territory v. Cordova*, 11 N. M. 367, 68 Pac. 919, in which case authorities are cited. We see no good reason for departing from the law as heretofore announced by this court, and we will not consider the objections to the introduction of the testimony, except in so far as we are obliged to do so in passing on the giving and refusing of instructions by the court to the jury.

4. The other alleged errors relate to the measure of damages. These alleged errors are based upon the admission of certain evidence by the court, the refusal of the court to give to the jury certain instructions asked by plaintiff in error, and the giving of certain instructions asked by the defendant in error, to all of which objections were duly made and exceptions saved. One of the exceptions is that it was error to permit evidence to go to the jury as to the damages caused by the tailings remaining on the lands, because the water which contained the tailings was turned upon such lands by the defendant in error. The evidence discloses that the spring of the year 1904 was very dry, and that much vegetation was destroyed by reason of the prevailing drought; that defendant in error knew that tailings from the mill of plaintiff in error was in the water which ran down Mineral creek and into his irrigation ditch, but that he thought that much loss would be prevented by irrigating his alfalfa, trees, vines, and vegetables with such water, even if polluted, as without such irrigation they would be completely destroyed.

The instruction given by the court in regard to this point is numbered 7, and is as follows, to wit: "(7) You are instructed that if you believe from the preponderance of the evidence the plaintiff has acquired the right to use the water of Mineral creek for the irrigation of his farm prior to the pollu-

tion of the same by defendant corporation by allowing the tailings from its quartz mill to flow therein, then you are instructed that it devolved upon the plaintiff, before using the said water for irrigation, to use ordinary care in determining whether said water, so polluted, would injure the vegetation on his farm or would injure the soil thereof, and, failing to exercise said ordinary care, he cannot recover in this case, unless you further find from a preponderance of the evidence that he was compelled to use said water for irrigation, and in the exercise of ordinary care and prudence he elected to use said water in its polluted condition, as calculated to result in less injury to him than to fail to irrigate his said land at all, in which event you will not refuse to award plaintiff such damages as he has suffered, notwithstanding he may have known, or with ordinary care should have known, the damaging results of such use of such water in such polluted condition; but in no event would the plaintiff be entitled to greater damages than would have accrued by not using the water so polluted." This instruction covers the law as we understand it. It is the duty of a person to prevent an injury to his property, if he can do so, and, if he cannot prevent such injury entirely, to take such reasonable steps as are in his power to reduce the damages. This rule is admirably stated in 13 Cyc. 71, 72, and is supported by citations of many cases in notes 43 to 46, inclusive, on those pages. The rule is: "Where an injured party finds that a wrong has been perpetrated on him, he should use all reasonable means to arrest the loss. He cannot stand idly by and permit the loss to increase, and then hold the wrongdoer liable for the loss which he might have prevented. It is only incumbent upon him, however, to use reasonable exertion, and the question in such cases is always whether the act was a reasonable one, having regard to all the circumstances of the particular case. The application of this rule sometimes has the effect of enhancing the damages, rather than reducing them; but, where a reasonable and bona fide attempt has been made on the part of the plaintiff to reduce the damages, * * * it does not relieve the defendant from a full recovery of the damages claimed." Plaintiff in error asked the court to instruct the jury that, if the defendant voluntarily turned the water carrying the tailings into his land, he was bound to know the effect of so turning the water containing the tailings into his land, and therefore could recover no damages on account of the injury done by the tailings to his land. The court very properly, we think, declined to give this instruction, as the question was: Was he justified in turning the water on his land, with the view of trying to prevent the greater damage which would occur if he did not so irrigate it?

Another claim of the plaintiff in error is that the court committed error in allowing

testimony to go to the jury as to the amount of money and also to the percentage of damage occasioned by the deposit of the tailings on the land, and as to the value of the fruit trees in the orchard and grapevines growing in the vineyard, and destroyed by the tailings; the plaintiffs in error claiming that they had no value except as a part of the inheritance, and that the true measure of damages was the difference in the value of the land prior to the death of the trees and vines and its value subsequent to that time. The authorities on this point are somewhat in conflict. Some of the states have admitted evidence both ways on the question, and the rule contended for by the plaintiff in error is not the only or universal one. We believe that the damages may be proven in either way. What the law really requires "is that such damages be allowed as, in the judgment of fair men, directly and naturally resulted from the injury for which the suit is brought. This is the rule which obtains in civil actions for damages. They have their foundation in the idea of just compensation for wrongs done." *Hetzl v. B. & O. R. Co.*, 169 U. S. 37, 18 Sup. Ct. 250, 42 L. Ed. 648. The damages to vines and fruit trees "is to be estimated with reference to what they are worth on the premises in their growing state, and not as taken up and removed from the place." *Montgomery v. Locke*, 72 Cal. 75, 13 Pac. 401.

The instruction given by the trial court in regard to the damages seems to us to be eminently fair. It reads as follows: "(6) Now, if you find from the preponderance of the evidence in this case, if any, that the plaintiff operated and used the waters of said Mineral creek for the purpose of irrigating his farm, and the crops, trees, and vines thereon, prior to the bringing of this suit, and prior to the time the defendant began depositing the tailings from their mill there, if they so did, that the depositing of such tailings in said creek by said defendant company, if you so find, polluted the water of said stream, and that such tailings were washed down by plaintiff's land and in his irrigating ditches during the year A. D. 1904, and that thereby the plaintiff's trees, vines, crops, and land were injured, then and in such event you shall find for plaintiff in such sum or sums as will compensate him for the damages sustained by him, if any, during the said year 1904, prior to the bringing of this suit, and claimed by him in his complaint therein, in no event to exceed the amount of damages claimed by plaintiff in his complaint, namely, two thousand dollars." In a well-considered case in Kansas involving the destruction of fruit trees, the court said: "It is contended that the question should have been confined to the value of the farm as a whole before and after the injury, leaving the jury to compute the damages by deducting one from the other. While this is undoubtedly the regular and proper method

of arriving at such damages as cannot be itemized and definitely measured in detail, it does not preclude the use of the best evidence which the nature of the case affords. Where a thing, whether it be a building, a tree, or shrub, is destroyed by a wrongdoer, the most natural and best measure of damage is the value of the thing destroyed as an appurtenant to or part of the realty, and ordinarily the value of the thing destroyed would be the measure of the injury to the freehold." *M., K. & T. Ry. Co. v. Lycan*, 57 Kan. 635, 47 Pac. 526. And in another case the Supreme Court of Kansas also say: "A further claim is made that at most only nominal damages could be awarded under the evidence. The plaintiff showed that some 150 apple trees had been destroyed and that they were of the value of from \$5 to \$10 each. The defendants' witnesses testified that the farm on which the orchard was growing was as valuable after the fire as it was before. It is competent to prove damages such as were here claimed by showing the value of the trees destroyed (*M., K. & T. Ry. Co. v. Lycan*, 57 Kan. 635, 47 Pac. 526; *M. C., Ft. S. & M. R. R. Co. v. Perry*, 65 Kan. 792, 70 Pac. 876), or by showing the depreciation of the value of the real estate." *A., T. & S. F. Ry. Co. v. Gelsner*, 68 Kan. 281, 75 Pac. 68. We are of the opinion that this is the proper rule, and that the damages can be proved in either or both ways, and that this is the rule which is sustained both by reason and by the weight of authority.

We have carefully examined the instructions given by the court in this case, and we see no error in them, and we have also examined the instructions asked by plaintiff in error, and which virtually ask the court to instruct the jury to return a verdict in favor of the defendant below, and we see no error in the refusal of the court to give them.

An examination of the record discloses that the verdict as returned by the jury, and the judgment entered in the lower court against the defendant, was in the wrong name, to wit, the Mogollon Gold & Copper Mining Company, and not against the Mogollon Gold & Copper Company, as is shown by the special answer on page 12 of the transcript of record to be the true name of the defendant company; and according to the authority vested in this court to make such amendments as may be necessary to do justice between parties to the suit, it is ordered that the judgment of the lower court in the name of the Mogollon Gold & Copper Mining Company be affirmed in the name of the Mogollon Gold & Copper Company, and the cause is remanded to the lower court, with directions to execute the judgment as amended; and it is so ordered.

POPE, MANN, ABBOTT, and McFIE, JJ., concur. PARKER, J., having tried this case below, took no part in this decision.

(14 N.M. 283)

UNITED STATES v. TALLMADGE et al.

(Supreme Court of New Mexico. Aug. 30, 1907.)

INDICTMENT—FINDING BY GRAND JURY—IMPEACHMENT.

Members of the grand jury, under our statute, will not be permitted to impeach an indictment duly found, returned in open court, and filed as such, by testifying as to what was said by the prosecuting officer, while advising with them in his official capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 53.]

(Syllabus by the Court.)

Appeal from Fifth Judicial District Court; before Justice Wm. H. Pope.

Benjamin H. Tallmadge and others were indicted for conspiracy. Judgment vacating the indictments, and the United States appeals. Reversed.

W. H. H. Llewellyn, E. L. Medler, and U. S. Bateman, for the United States. Catron & Gortner and J. M. Hervey (A. M. Stevenson and Daniel Prescott, of counsel), for appellees.

MANN, J. At the November, 1905, term of the district court of the Fifth judicial district, sitting for the trial of causes arising under the Constitution and laws of the United States, the defendants were indicted upon various charges concerning the public lands of the United States, charging conspiracy to defraud the government, perjuries, subornation of perjury, and other offenses of like nature; the indictments being numerous, but all relating to like transactions referring to certain land entries and proofs under the laws of the United States. To some or all of the indictments appellees filed pleas in abatement, setting up the specific grounds, to some of which grounds demurrers were interposed and sustained by the trial court, and upon the remaining issues appellant made answer, and the issues thus formed were submitted to a jury. The issue thus tried consists of alleged misconduct of the United States district attorney: (1) In urging to and upon the grand jury that the interests of the government of the United States required and demanded that said grand jury should find an indictment against said defendants; (2) that he stated to said grand jury that the evidence theretofore considered by them was amply sufficient upon which to find indictments against said defendants; (3) that he stated to said grand jury that, if they did not find and return a true bill or true bills against said defendants, upon the evidence theretofore given before them, that he, the said Llewellyn, would have the grand jury dismissed. Upon the trial of these issues the court permitted members of the grand jury to testify as to what was said by the United States district attorney in the grand jury room; in fact the sole evidence upon the issues raised by the

plea was the evidence given by the grand jury and by the United States district attorney. This evidence was admitted over the objection and protest of the United States, and exceptions to the court's rulings upon the admission of such evidence were duly taken at the time. The jury found for the appellees as to all the indictments. A motion for a new trial was heard and sustained as to certain indictments and overruled as to others, and final judgment rendered against the United States abating the indictments, from which judgment the United States appeals.

We do not deem it necessary to discuss but one of the questions of law raised by the assignment of error and discussed by counsel in their briefs, as we think it controlling under the circumstances of this case. If the members of the grand jury and the district attorney are competent witnesses to the transactions and occurrences concerning which they testified in this case, then the verdict of the jury on the issues joined could not be disturbed. Section 986 of the Compiled Laws provides: The grand jury may, at all reasonable times, ask the advice of the court, the Attorney General or the district attorney of the county, and whenever required by the grand jury it shall be the duty of the district attorney of the county to attend them for the purpose of framing indictments, or of examining witnesses in their presence but no district attorney, sheriff or other person shall be permitted to be present during the expression of opinions, or giving of their votes upon any matters before them. Section 987 provides that every member of the grand jury must keep secret whatever he himself, or any other grand juror, may have said, or in what manner he or any other grand juror may have voted, on a matter before them, and provides a penalty for a violation of such provisions. Section 988 provides that a grand juror may, however, be required by the court to disclose the testimony of any witnesses examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given before them, by any other person, upon a charge against him for perjury, or in giving his testimony, or upon his trial thereof. The foreman and each member of the grand jury, before entering upon their duties as such, are required by law to take an oath that they will diligently inquire and true presentment make of all public offenses against the people of the United States or this territory, committed, or triable in this county, of which they shall have or obtain legal evidence; that they shall present no person through malice, hatred, or ill will; not have any unrepresented through fear, favor, or affection, or for any reward or promise or hope thereof; but that in all their presentments or indictments they shall present the truth, the whole truth, and noth-

ing but the truth, according to the best of their skill and understanding. The law also makes it imperative upon the court to instruct the grand jury as to the nature of their duties as such, and provides that their indictments, when found, must be returned by them in open court, and the indictments must be filed with the clerk of the court and remain in his office as a public record.

It is a serious question, then, whether indictments so found, presented, and filed may be impeached by members of the grand jury, for such impeachment would involve the testimony under oath of a grand juror that he and his fellow jurors had violated another oath, solemnly administered, by voting a true bill upon other considerations beside legal evidence, and that the indictment which had been solemnly presented and filed as a public record did not present the truth, the whole truth, and nothing but the truth, according to their skill and understanding. It is a principle well established by eminent authorities that, where there are statutory provisions (such as ours above quoted) prescribing the instances in which grand jurors may testify as to what occurred before them, such statutes are exclusive, and grand jurors may testify in no other than the prescribed cases. 17 Am. & Eng. Ency. of Law, 1295; *People v. Thompson*, 122 Mich. 413, 81 N. W. 344; *People v. Lauder*, 82 Mich. 109, 46 N. W. 956; *State v. Johnson*, 115 Mo. 480, 22 S. W. 463; *Tindle v. Nichols*, 20 Mo. 326; *State v. Baker*, 20 Mo. 339; *State v. Hamilton*, 13 Nev. 387; *Hall v. State*, 134 Ala. 91, 32 South. 750. "At common law a grand juror could not ordinarily become a witness as to facts occurring or testified to in the session of the grand jury, but by modern statutes this disability has been removed to some extent." 1 Elliott on Evidence, § 641, citing numerous authorities. The only exceptions to the common-law rules made by our statutes are those contained in section 988, and the evidence offered in the trial of the plea in abatement did not come within these exceptions. That the common law prevails in this jurisdiction, where it is applicable to conditions, except where it has been abrogated by statutes, has been well settled by this court. In *Hall v. State*, 134 Ala. 90, 32 South. 750, a case very similar to the case at bar, where the district attorney was accused of using language to about the same effect as is alleged was used by the United States district attorney in this case, the court says, at page 113 of 134 Ala., at page 757 of 32 South.: "Certainly to permit a grand juror to testify that one or more of the jury did not vote for the finding of the bill of indictment or matters influencing the action of members of the grand jury would be not only a violation of his oath as a grand juror, but would be destructive and subversive of the grand jury as an institution of our judicial system, and destructive of that

security of freedom of thought and action, and therefore of that independence so absolutely essential to the faithful discharge of the duties imposed upon that body, which if impaired or destroyed would be fatal to a vigorous administration of the criminal law. Proffatt on Jury Trial, 89; 17 Am. & Eng. Ency. of Law (2d Ed.) 1295; State v. Johnson, 115 Mo. 480, 22 S. W. 463; Elbin v. Wilson, 33 Md. 135; People v. Thompson, 122 Mich. 411, 81 N. W. 344; Ex parte Sontag, 64 Cal. 525, 2 Pac. 402."

The judgment of the court below is reversed, and the cause remanded for a new trial on the issues raised by the plea in abatement.

MILLS, C. J., and McFIE, PARKER, and ABBOTT, JJ., concur. POPE, J., having heard the case below, took no part in this decision.

(14 N.M. 288)

TERRITORY v. MEREDITH.

(Supreme Court of New Mexico. Aug. 28, 1907.)

1. ANIMALS—BRANDS—EVIDENCE OF OWNERSHIP.

The statute providing that unrecorded stock brands shall not be recognized "as any evidence of ownership" does not prevent the recognition of a duly recorded brand as evidence bearing on the question of ownership prior to the record of the brand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Animals, § 9.]

2. LARCENY — CATTLE THEFT — EVIDENCE — BRAND.

In the trial of one charged with the larceny of a calf bearing a certain brand, which the owner did not have recorded until after the time of the alleged larceny, evidence is admissible that the owner began to use the brand 10 years before in Utah, and since then had been using it at the range where it was claimed the larceny occurred, as bearing on his good faith in claiming the brand and having it recorded as his own, and on the felonious intent of the appellant in taking the calf.

3. WITNESSES—EXAMINATION—LEADING QUESTIONS.

Leading questions may be put to witnesses at the discretion of the trial judge, and no abuse of that discretion is shown by the record in this cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 795.]

4. CRIMINAL LAW—INSTRUCTIONS.

The trial judge was not bound on the evidence in the case to give special instructions on the law of accomplices.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1859, 1860.]

5. SAME.

When a specification of the material allegations of an indictment would be practically no more than a repetition of the language of the indictment itself, it is not necessary, and ordinarily would not be helpful to the jury, for the court to include such a specification in its instructions.

(Syllabus by the Court.)

Appeal from District Court, Union County; before Justice William J. Mills.

L. A. Meredith was convicted of larceny, and appeals. Affirmed.

Toombs & Pace, for appellant. W. C. Reid, Atty. Gen., for the Territory.

ABBOTT, J. The defendant, here the appellant, was found guilty by a jury at the March term, 1906, of the Fourth district court for Union county, Mills, C. J., presiding, of the larceny of one head of neat cattle, a bull calf, the property of Joseph Davis. The calf was nearly a year old, was branded, and had, besides, certain flesh and skin markings described in the evidence. The errors assigned relate to the admission of certain evidence, to certain instructions given to the jury, and others refused.

The first error alleged is that the court improperly admitted in evidence a certified copy of the brand of Joseph Davis, who claimed to be the owner of the calf; it appearing that it was not recorded until about 35 days after the date of the larceny charged. The statute (section 107, Comp. Laws 1897), which provides that no brands except such as are duly recorded shall be recognized in law as evidence of ownership, does not limit the time to which such proof shall relate. It must have been the case, when that law was enacted, that many cattle in the territory bore brands which had not been recorded. One object of the law was to have them recorded. On the contention of the appellant, the ownership of cattle branded before the passage of the law could not have been proved by brand, although record was made at the earliest possible moment after the law went into effect; and it must often happen that cattle come into the territory which were branded elsewhere by their owners. Can it be that such an owner, who uses due diligence to record his brand after his arrival here, is forbidden to prove his ownership against a thief who takes his cattle in the time which must elapse before his brand could arrive at the place of record? That certainly is not a reasonable view to take of the legislative intent. 2 Cyc. 325-364; Chesnut v. People, 21 Colo. 512, 42 Pac. 656; Turner v. State, 39 Tex. Cr. R. 322, 45 S. W. 1020.

The appellant next contends that it was error to admit evidence that Davis had used the same brand 10 years before in Utah. It was charged that the appellant, who lived in the vicinity, had taken away the calf in question from the range where it was kept by the owner, converted it to his own use, and had it killed, and that he did so with the knowledge and intent essential to make his acts larceny. Evidence of the extent and length of time of Davis' use of the brand was material and relevant on the question of the appellant's probable knowledge of it as Davis' brand. Besides, the fact that the brand was not recorded until after the alleged larceny, as it was urged in behalf of

the appellant, may have detracted from its probative force and put in doubt the good faith of Davis in claiming it as his brand. Evidence that he had long used it was relevant on that point.

The third error alleged by the appellant is that the trial judge asked a witness for the territory a leading question. It is well established that the court may, in its discretion, permit leading questions, and that only an abuse of that discretion will warrant an appellate court in declaring it reversible error. *Jones on Evidence*, § 819; *Greenleaf on Evidence* (Redf. Ed.) § 435. It is equally well established that a trial judge can himself propound questions to witnesses (*Jones on Ev.* § 814), and it would follow beyond doubt that they might be leading questions. The question asked by the court in the trial of the case at bar was obviously intended to clear up a misunderstanding between counsel for the appellant and a witness for the territory as to certain testimony given on cross-examination which was susceptible of two meanings. The witness had already in effect given the explanation which it is claimed the question of the court suggested, and the answer to that question did no more than make clear what might otherwise have remained somewhat obscure.

The ninth assignment of error is that the court failed to instruct the jury in relation to the law of accomplices. As the basis of that contention, it is asserted that one of the principal witnesses against the appellant was an accomplice on his own testimony. The evidence does not, we think, sustain that claim, and the court was not bound to give

instructions on that point, beyond the general one that they (the jury) were the sole judges of the weight of the evidence and the credibility of the witnesses, and that, in passing on the credibility of any witness or the weight to be given to his testimony, they should consider the relationship of the parties, if any, and the interest which he may have in the result of the case.

It is claimed that the court should have given the jury a definition of larceny, and, while that might well have been done, it cannot be said that it would have added anything essential to the obvious meaning of the charge in the indictment that the defendant "did steal, take, and knowingly kill one head of neat cattle, the property of Joseph Davis." Of the truth of that charge the court instructed the jury they must be satisfied beyond a reasonable doubt in order to find the defendant guilty. The material allegations were all embraced in it, and were contained in so few words that it would have tended to confusion, rather than clearness, to restate them in another form.

The remaining assignments of error are not of a nature to call for specific examination. There was abundant evidence, if believed, to warrant, if not to require, a verdict of guilty, and this court cannot say the jury should not have believed the witnesses for the territory in preference to those of the defendant.

Judgment affirmed.

PARKER, MANN, McFIE, and POPE, JJ., concur. MILLS, C. J., having tried the case in the district court, did not take part in this decision.

(14 N.M. 262)

TERRITORY v. PRICE.

(Supreme Court of New Mexico. Aug. 28, 1907.)

1. CRIMINAL LAW—CONTINUANCE.

There was no abuse of discretion by the trial court in refusing the continuance prayed for by the defendant, but rather, under the circumstances, was its course in requiring trial without delay commendable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1315.]

2. SAME—EVIDENCE.

A diagram, offered in evidence in connection with and to illustrate the testimony of the witness for the territory who made it, was properly admitted, although there was other evidence for the territory tending to show that the diagram was incorrect in some particulars.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1024.]

3. HOMICIDE—EVIDENCE.

Evidence that the defendant was intoxicated at the time of the homicide with which he was charged, and that shortly before he, being a news agent on the train on which the man he killed was conductor, had done certain things which were reported to the conductor and were the subject of the altercation between them which terminated in the shooting of the conductor, embodied circumstances forming a part of the res gestæ, and was properly admitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 341.]

4. CRIMINAL LAW—REASONABLE DOUBT.

A reasonable doubt is not a mere possibility of innocence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1267.]

5. SAME—INSTRUCTIONS.

A proper instruction to the jury on the subject of reasonable doubt, when once given and made applicable to every material allegation against the defendant, need not ordinarily be repeated as a part of other separate instructions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1991.]

6. HOMICIDE—EVIDENCE.

Evidence was properly admitted that the defendant had in his possession materials with which he could have produced effects on his clothing which he testified were caused by one or more of the shots he fired.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 364.]

7. SAME—SELF-DEFENSE.

An instruction that one cannot invoke the law of self-defense, who arms himself with a loaded pistol and seeks, brings on, or voluntarily enters into a difficulty with another for the purpose and with the felonious intent of killing him, attacks such other person, his force is met with force in return, and as a part of the same transaction he does shoot and kill his opponent, was sufficiently favorable to the defendant.

8. CRIMINAL LAW—INSTRUCTIONS.

It is not error to refuse to give an instruction, even when it is a correct and appropriate statement of the law, if proper instruction is otherwise given on the question to which it relates.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2011.]

(Syllabus by the Court.)

Error to District Court, Roosevelt County; before Justice William H. Pope.

Elmer L. Price was convicted of murder, and brings error. Affirmed.

The appellant, Elmer L. Price, was indicted by a grand jury of Roosevelt county, April 4, 1906, for the murder of Frank B. Curtis on March 30, 1906. Curtis on that day was the conductor, and Price the news agent, on the passenger train from Amarillo to Roswell, N. M., which was a few hours late, and so running at night, instead of by day, as usual. It appeared from undisputed evidence that it was reported to Curtis by passengers that the defendant was drunk, had sent a negro porter to passengers to sell his wares, and had been annoying a lady passenger in a Pullman car on the train; that Curtis remonstrated with him about it, charged him with being drunk, and threatened to put him off the train if he did not behave; and that a few minutes later, while on his way through the car where Price was standing between two ordinary car seats on which he had his wares and some other articles, he stopped, grasped Price by or near the throat, and, being much the larger and stronger man, shoved him toward or against the wall of the car, when Price fired three shots from a revolver he had, all of which struck Curtis, who died almost immediately. There was evidence in behalf of the territory that as Curtis was passing Price, as above stated, the latter took hold of his arm and partly drew a revolver; that as Curtis immediately turned he put the revolver out of sight; that Curtis was about to pass on, when the defendant again took hold of him by the lapel of his coat, when Curtis turned again, something was said between them, he grasped the defendant, and a shot was almost instantly fired; that Curtis staggered back and wheeled toward the door of the car; that as he did so another shot was fired; that Curtis passed, staggering, out of the door, which was no more than five or six feet distant, and had his hand on the knob of the door of the next car, toward which he was stooping or falling, when the defendant, who had stepped from between the car seats into the aisle behind Curtis, fired a shot into his back, which passed upward, probably through the heart, whereupon Curtis fell forward through the door, the knob of which he still held, into the next car, uttered two sharp exclamations, and was dead before any one could reach him. The defendant in his testimony denied that he touched Curtis or did anything as he was passing to attract his attention, and claimed that Curtis without any provocation stopped, again charged him with intoxication and misconduct, and, when he denied it, seized him by the throat, began choking him, jammed him against the side of the car, and threatened to smash his brain out. He said he fired three shots, but denied that he fired any shot into Curtis' back, or any shot after Curtis had released his hold and turned away from him. It happened that W. H. Cox, a deputy sheriff of Roosevelt county, was a passenger on the

train, and was in the car into which Curtis fell forward after he was shot. He took the defendant into custody immediately, and at Roswell, where the train stopped, detained as witnesses those whose testimony it was thought important to have, including, so far as appeared, all who saw or heard the shooting. A regular term of the district court for said county began two days later, and the defendant was indicted April 4th, put on trial April 7th, and on April 13th found guilty by a jury of murder in the second degree. A motion for a new trial was denied, and he was sentenced to imprisonment in the penitentiary for life.

Frank Willis, Sam J. Nixon, and Clifton J. Pratt, for appellant. Wm. C. Reid, Atty. Gen., for the Territory.

ABBOTT, J. (after stating the facts as above). The first three assignments of error are based on the claim that the defendant was forced to go to trial without time for preparation by counsel and the procurement of witnesses. Counsel for the defendant concede that the applications for continuance were addressed to the discretion of the court, and that only an abuse of that discretion would warrant this court in reversing the trial court for its denial of the applications. The case, although of the highest moment, was simple. There was no denial that the defendant killed Curtis, but it was claimed that the homicide was justifiable on the ground of self-defense. The law of that defense is not complicated or unfamiliar. More time could have been needed only to obtain witnesses, but it clearly appeared that, as a result of the prompt action of the authorities, all who were on the train and present when the homicide occurred, and, indeed, all the passengers who could by any reasonable probability have thrown any light on the matter, were present and testified. Delay in all probability would have resulted in less evidence, rather than more, unless the witnesses, most of whom were not residents of New Mexico, had been detained an unreasonable length of time. Surely they who were, doubtless, were much incommoded by their detention as it was, and had some rights which the court was bound to consider. It did not appear, and is not here claimed, that there actually was any evidence in existence which would naturally have led to a result more favorable to the defendant if it had been produced; but it is urged that there may have been such evidence. In view of the course of procedure in criminal cases prevailing in some parts of the United States, it is not very surprising to find that promptness in bringing on and carrying through a trial in a criminal cause should take on the aspect of abuse of discretion by the judge responsible for it to those who have become accustomed to regard delay, instead of the

speedy trial guaranteed by the Constitution, as one of the valued and inalienable rights of the accused. It seems clear, however, that if the object of the trial in the case at bar was not to afford the defendant every chance to escape conviction, but to give to the jury all the circumstances of the homicide that were known to human beings, the best possible time for it was chosen, and the trial judge should be commended, rather than censured, for his course. *Territory v. Kinney*, 3 N. M. 97, 2 Pac. 357; *Territory v. Yee Dan*, 7 N. M. 439, 37 Pac. 1101; 9 Cyc. 167.

The fourth assignment of error relates to the admission in evidence of a diagram made by one of the witnesses, a physician who had examined the body of Curtis, and which it is claimed was shown to have been incorrect, if certain other evidence offered by the territory was true. This diagram was used to illustrate the testimony of the witness and to enable the jury to better understand it. It was not claimed to be absolutely accurate. Its incorrectness, if established, would affect the weight, and not the admissibility, of the evidence. The entire testimony of that or any other witness might have been incorrect, or absolutely false, tested by other evidence in the case, without affecting its admissibility. It is for the jury to decide which of two conflicting statements in evidence they will credit. *Jones on Ev.* § 414.

The fifth, sixth, and seventh assignments of error rest on exceptions taken to the admission of evidence relating to the acts, words, and the condition of the defendant shortly before the homicide, and which were made known to Curtis before the altercation between him and the defendant began, and were, in part at least, the subject of that altercation. All those circumstances leading up to and preceding the homicide, within not exceeding an hour, as the evidence indicated, must have been fresh in the minds, and presumably influencing the conduct, of Curtis and the defendant, one or both, in the collision between them. Indeed, it was that evidence which disclosed the motive of the reprimand Curtis addressed to the defendant, and for the attack he says Curtis made on him, which forced him to shoot in self-defense. To that extent the evidence was favorable to the defendant, as without it Curtis' alleged angry aggressiveness toward the defendant would have been inexplicable, and perhaps incredible to the jury. That the evidence was admitted on other grounds and was in part withdrawn was not reversible error, if it was properly admissible on any ground. *Jones on Ev.* §§ 138, 353; *Hemingway v. Chicago, etc., Ry.*, 72 Wis. 42, 37 N. W. 804, 7 Am. St. Rep. 823.

The admission of evidence that after the arrest of the defendant a knife and matches were found on his person or in his possession is made the basis of the ninth assignment of error. It was admitted for the pur-

pose of accounting for marks on his clothing which he testified were caused by a shot he fired at Curtis. Its admission for that purpose was, we think, proper.

The instruction that a reasonable doubt is not a mere possibility of innocence, which is claimed to have been error, is well grounded in reason and authority. *State v. Garrison*, 147 Mo. 548, 49 S. W. 508; *State v. Darrah*, 152 Mo. 522; *Earl v. People*, 73 Ill. 329; *Smith v. People*, 74 Ill. 144; *Blashfield, Inst. to Juries*, 847, 852.

The assignments of error from the twelfth to the twenty-fifth, inclusive, omitting the nineteenth, which was waived, relate to the right of self-defense and to justifiable homicide, and are based on instructions given and instructions refused. But for the testimony of the defendant that all the shots were fired before Curtis desisted from his assault on him, those questions would hardly have had a place in the case, since the evidence, aside from his, was to the effect that Curtis was killed by a shot fired by the defendant when they were some distance apart, when he was retreating from the defendant with his back toward him, unarmed, and already twice badly wounded. Nevertheless, the instructions on self-defense and justifiable homicide gave the defendant the full benefit of his testimony, and, besides, covered in his favor every point discussed in the brief here submitted in his behalf, with a single exception. On those subjects they were full and complete. So far as the statutes of the territory deal with them, they were followed; and so far as general principles were applied, they were well founded. We do not think it necessary to consider separately more than the single objection to which we have referred. The instruction which is to the effect that the right of self-defense does not exist for one who purposely induces an attack upon himself in order to be able to kill his assailant under the shield of self-defense is in substance what *Blashfield & Hughes* recommend in their work on Instructions to Juries, and had the distinct sanction of this court so recently as 1902 in *Territory v. Gonzales*, 11 N. M. 301, 323, 68 Pac. 925. *State v. Thomas*, 78 Mo. 327; *State v. Hopper*, 142 Mo. 478, 44 S. W. 272.

As to the instructions which were refused, it is too well settled to require discussion or citation of authorities that, even when such instructions are correct statements of the law applicable in the case, it is not incumbent on the court to give them, if the points involved are otherwise covered by appropriate instructions.

The judgment of the trial court is affirmed.

MILLS, C. J., and PARKER, MANN, and McFIE, JJ., concur. POPE, J., having tried the case in the district court, took no part in this decision.

(14 N.M. 239)

HANCOCK v. BEASLEY et al.

(Supreme Court of New Mexico. Aug. 28, 1907.)

1. APPEAL—REVIEW—FINDINGS OF FACT.

Findings of fact of the trial court will not be disturbed by this court, where they are based upon substantial evidence to sustain such findings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3979.]

2. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

A motion for a new trial upon the ground of newly discovered evidence is properly overruled, where such motion is not accompanied by affidavit showing that the evidence claimed to have been discovered would probably change the result of the trial, and failing to show that such evidence could not have been produced at the trial with due diligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 307-309.]

3. APPEAL—OBJECTIONS—WAIVER.

Evidence admitted without objection cannot be complained of as error, where no motion is made to strike it, even though it might have been rejected if objection had been made at the time.

(Syllabus by the Court.)

Appeal from District Court, Dona Ana County; before Justice Frank W. Parker.

Action by James F. Hancock against George R. Beasley and Austin Beasley. Judgment for plaintiff, and defendants appeal. Affirmed.

Morre & Paxton, for appellants. E. A. Chaffee, for appellee.

MANN, J. This cause was tried before Hon. Frank W. Parker, of the Third judicial district, in the district court of Dona Ana county; a jury having been waived by both parties, as is shown by an order appearing on page 7 of the record. So that the first, third, and fourth assignments of error, which question only the findings of fact of the trial court, may be disposed of under one general head, viz., whether there was any substantial evidence to support such findings; it being well settled by this court that, when there is any substantial evidence to support findings of fact made by the trial court, this court will not disturb such findings. The numerous cases in which this rule has been adhered to by this court are cited by Mr. Justice Parker in the opinion of the court in *Candelaria v. Miera* (N. M.) 84 Pac. 1020. These assignments complain of the findings of the trial court that the defendant George R. Beasley converted to his own use 125 head of Angora goats, branded, some with a cross and some with a bar C, of the property of appellee, and in rendering judgment accordingly. Counsel on either side quote at great length in their briefs from the evidence of the various witnesses, which is quite voluminous and need not be set out here; but, while there is a conflict in the testimony (that offered on behalf of

appellant tending to contradict that offered by the appellee), yet we cannot say that the trial court erred in finding for the appellee, in fact we think he was fully justified in so doing, even from the bare record of the transcript of the evidence, and how much stronger such evidence may appear to one who sees the living witnesses, notes their manner of testifying, their apparent candor while upon the witness stand, and the numerous other elements entering into the question of their credibility, we cannot ascertain. Burden of proof cannot be measured accurately from a transcript of questions and answers. Experience teaches us that demeanor of witnesses, their known credibility or otherwise, may have great bearing upon the words employed by them in testifying.

The second assignment of error by appellant is "that the court erred in not granting a new trial on the ground of newly discovered evidence of James M. McDugal, for the reasons set forth in defendant's motion for a new trial and affidavits in support thereof." "Applications for new trials because of newly discovered evidence are looked upon by the courts with distrust. In the absence of statute, or when a statute expressly provides for what causes a new trial will be granted, and newly discovered evidence is not one of them, no new trial will be granted on this ground." 12 Cyc. 734, and cases cited. This court has laid down rules under which a new trial may be granted on the grounds of newly discovered evidence in *Territory v. Claypool and Lueras*, 11 N. M. 568, 71 Pac. 463, as follows: "The rule of law is that a new trial will not be granted on a mere showing that new evidence has been discovered. Newly discovered evidence, in order to be sufficient, must fulfill all the following requirements, to wit: (1) It must be such as will probably change the result if a new trial is granted. (2) It must have been discovered since the trial. (3) It must be such as could not have been discovered before the trial by the exercise of due diligence. (4) It must be material to the issue. (5) It must not be merely cumulative to the former evidence. (6) It must not be merely impeaching or contradictory of the former evidence." See, also, 12 Cyc. 734; *Berry v. State*, 10 Ga. 511; *Howard v. State*, 36 Fla. 21, 17 South. 84; 14 Enc. Pl. & Pr. 791, 792. Compared by these rules, which have been adopted almost universally by the courts of this country as the true measure of an application for a new trial on the ground of newly discovered evidence, it will readily appear that the trial court was not in error in overruling the motion for a new trial. The affidavits of McDugal and Graham attached to the motion only

tend to contradict the testimony of Hancock as to the number of goats counted in McDugal's herd in the pitchfork brand, and it does not appear that the evidence alleged to have been discovered would change the result of the trial. In point of fact, the trial court, sitting as a jury upon the questions of fact involved, heard the affidavits, and by overruling the motion held, in effect, that no such result would ensue, even though the witnesses appeared before him and gave oral testimony to the same effect. Nor does the bare statement that appellant could not with due diligence have discovered and produced the evidence at the trial suffice. He should state that such facts were not within his knowledge or that of his counsel at the time of the trial, and that he did not know and could not apprehend that these witnesses might be material witnesses in his behalf. On the contrary, it appears from the testimony of both appellants that they knew of the purchase of a part of Phillip's goats by McDugal, at least by hearsay. Pages 81 and 101, Record.

It is urged in the fifth and sixth assignments of error that the court erred in admitting parol evidence of the ownership of the goats in evidence, by allowing the proof of appellee's brands by parol instead of requiring the certificate of record of the brands. In *Territory v. Smith*, 78 Pac. 42, this court held that where title to animals, the subject of larceny, is sought to be established by brand, a certificate of the recorded brand must be shown, under section 67 of the Compiled Laws of 1897, and that under the peculiar circumstances of that case defendant did not waive the omission of offering such certificate by failing to object to the questions calling for the oral testimony at the time they were propounded; but in that case, at the close of the evidence offered by the territory, the defense moved to strike the oral testimony offered as to the brands, and it was then held that such motion was not too late to save the right. In the case at bar, it is conceded by appellant's counsel that no objection was made to the introduction of the oral evidence of Hancock's ownership, by reason of the brands to which he testified; nor does any motion to strike it appear in the record. The statutory method of proving ownership by the brand certificate was therefore waived by appellant. 3 Jones on Evidence, § 898; 4 Elliott on Evidence, § 3217.

We see no error in the record, and the judgment of the court below is affirmed.

MILLS, C. J., and ABBOTT, POPE, and McFIE, JJ., concur. PARKER, J., having tried the case in the court below, did not participate in this opinion.

STATE ex rel. BOTSFORD v. LANGAN, District Judge. (No. 1,737.)

(Supreme Court of Nevada. Sept. 26, 1907.)

1. MANDAMUS—OTHER ADEQUATE REMEDY.

Mandamus will not lie where there is a plain, speedy, and adequate remedy, by motion to dismiss an appeal, for determination of the same matter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 8.]

2. APPEAL—APPEALABLE ORDER.

An appeal from an order setting aside a default entered by the clerk is not within the cases in which Civ. Prac. Act, § 330, provides that an appeal may be taken, and therefore will not lie.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 766.]

Mandamus by the state, on the relation of Charles H. Botsford, against Frank P. Langan, district judge of the First judicial district. Application dismissed.

Hall Thayer & Steele and C. L. Harwood, for relator. Detch, Carney & Stevens, for respondent.

SWEENEY, J. This is an application for a writ of mandamus against Frank P. Langan, district judge of the First judicial district of the state of Nevada, for the purpose of compelling him to hear a motion to dissolve or modify an injunction or increase the injunction bond in the case now pending in the district court of the First judicial district of the state of Nevada in and for the county of Esmeralda, entitled "L. C. Van Riper and Joseph H. Hutchinson, Plaintiffs, v. Charles H. Botsford, James Davis, J. P. Loftus, and James Davis, Doing Business under the Firm Name and Style of Loftus & Davis, Goldfield Mohawk Mining Company, Goldfield Consolidated Mines Company, Combination Mines Company, George S. Nixon, and George Wingfield, Defendants."

It appears from the record in this case that the plaintiffs filed a complaint against the above-named defendants for the purpose of recovering from said defendants a two-thirds interest in 100,000 shares of the capital stock of the Goldfield Consolidated Mines Company of Nevada of the approximate value of half a million dollars. Upon filing of the complaint, an injunction was secured from the district court on a bond in the sum of \$15,000, enjoining the defendants from delivering to their codefendant Botsford the said stock in question until the determination of this suit. Upon the petition of the defendant Botsford for the removal of said cause to the Circuit Court of the United States in and for the Ninth District of Nevada, the district court of Esmeralda county remanded said case to said United States Circuit Court on or about the 1st day of February, 1907, and thereafter, to wit, on the 12th day of June, 1907, the said United States Circuit Court remanded said cause back to the said district court in and for Esmeralda county for trial. Subsequent to

February 1, 1907, when said order of renewal was made from the said state court to the United States Circuit Court and prior to June 12, 1907, when the order remanding said cause from said United States Circuit Court back to said district court was entered, to wit, on the 6th day of March, 1907, and while said cause was pending on removal in said United States Circuit Court, the plaintiffs caused to be issued an alias summons out of the said state court, and caused said alias summons to be served by the sheriff of Esmeralda county upon said Chas. H. Botsford, the relator herein, on or about the 7th day of March, 1907, and on the 12th day of June, 1907, the plaintiffs, through their attorneys, caused the default of said Charles H. Botsford and others of the defendants to be entered by the clerk of the said district court of Esmeralda county. On or about the 7th day of June, 1907, said Charles H. Botsford filed in said cause in said state district court a motion to vacate and set aside said default, and on the 29th day of June, 1907, after hearing arguments upon said motion, Judge Langan, district judge of said state court, entered an order vacating and setting aside the said default, and thereafter, to wit, on the 6th day of August, 1907, plaintiffs perfected an appeal to this court from said order setting aside said default. Upon the 2d day of August, 1907, the relator herein, through his attorneys, served upon the attorneys for said plaintiffs Van Riper and Hutchinson a notice that on Monday, the 12th day of August, at the county courthouse of Lyon county, Nev., at the town of Dayton, in said county, they would apply to the Honorable F. P. Langan, the respondent herein, judge of the First judicial district court aforesaid, to hear a motion to dissolve or modify the injunction theretofore granted in said cause, or to increase the bond of the injunction theretofore issued, and on said date attorneys for said plaintiffs appeared and entered a protest against proceeding, with the motion to dissolve or modify the injunction or to increase the bond for the injunction, and the said district court, after considering the said protest, declined to proceed, and refused to have the said hearing or entertain the same in any way, and announced that, during the pendency of the appeal from the order vacating and setting aside the default, he would not proceed with said motion or any motion of like character. Upon the hearing of the application for a writ of mandamus in this court, counsel for the plaintiffs appeared and demurred to the sufficiency of the petition, and further moved to dismiss the application of relator for a writ of mandamus upon the ground that the defendants had a plain, speedy, and adequate remedy at law. Upon the overruling of the demurrer as to the sufficiency of the petition, counsel for relator moved that the appeal of plaintiffs in the case entitled "L. C. Van Riper and Joseph H. Hutchinson v. Charles

H. Botsford et al." be dismissed because of want of jurisdiction in this court to determine an appeal from an order vacating or setting aside a default entered by the clerk, and moved that said case on appeal herein be placed on the calendar, and they then and there served notices upon counsel for the plaintiffs Van Riper and Hutchinson, and asked a continuance of the case for eight days, and moved that time for service of notice of said application to have said case placed on the docket and notice of motion to dismiss said appeal on the ground aforesaid be shortened to eight days from then, at which time both parties agreed to argue said motions to dismiss the application for a writ of mandamus and the appeal.

Stripping the application for a writ of mandamus and the motion to dismiss said appeal of their immaterial points raised, the real decisive question involved in the merits of this application for a writ of mandamus and motion to dismiss said appeal is whether or not an appeal lies to this tribunal from an order setting aside or vacating a default entered by the clerk. As the motion to dismiss the appeal raises the same point, to wit, as to whether or not an appeal which is granted at this time in the case of Van Riper et al. v. Botsford et al., *infra*, lies from an order setting aside or vacating a default entered by the clerk, as is desired and attempted to be accomplished through the means of the extraordinary writ of mandamus, applied for by relator, it is plain that relator has a plain, speedy, and adequate remedy at law which is now effective in his favor, and for this reason the application for a writ of mandamus is hereby ordered dismissed.

The sole question to be determined now before the court is whether or not an appeal lies to this court from an order setting aside or vacating a default entered by the clerk. Section 3425 of our Compiled Laws, being section 330 of our civil practice act, relating to appeals in civil actions, reads as follows: "An appeal may be taken: First. From a final judgment in an action, or special proceedings commenced in the court in which the judgment is rendered, within one year after the rendition of judgment. Second. From a judgment rendered on an appeal from an inferior court, within ninety days after the rendition of the judgment. Third. From an order granting or refusing a new trial, from an order granting or dissolving an injunction, and from an order refusing to grant or dissolve an attachment, and from any special order made after the final judgment, within sixty days after the order is made and entered in the minutes of the court. Fourth. From an interlocutory judgment or order in cases of partition which determines the right of the several parties, and directs partition sale, or division to be made, within sixty days after the rendition of the same. An

appeal to this tribunal is a matter purely of statutory right, and, unless authorized by statute, any attempted appeal taken from an order not appealable is void, and therefore could not confer any jurisdiction upon this court to act. It is clear that, where an order is nonappealable, no jurisdiction can be conferred on or entertained by this court by the perfecting of an attempted appeal. Under our construction of the statute above quoted regarding appeals, we are of the opinion that the order in question from which the appeal in the present case is attempted is nonappealable. *Rauer's Law & Collection Co., Inc., v. Standley* (Cal. App.) 84 Pac. 214; *Jordan v. Hutchinson*, 39 Wash. 373, 81 Pac. 867; *Bowen v. Webb*, 34 Mont. 61, 85 Pac. 739; *Thornburg v. Gutridge*, 46 Or. 286, 80 Pac. 100; *Burbank v. Rivers*, 20 Nev. 81, 16 Pac. 430.

TALBOT, C. J., and NORCROSS, J., concur.

(29 Nev. 465)

VAN RIPER et al. v. BOTSFORD et al.
(No. 1,735.)

(Supreme Court of Nevada. Sept. 26, 1907.)

Appeal from District Court, Esmeralda County.

Action by L. C. Van Riper and another against Charles H. Botsford and others. From an order setting aside a default, plaintiffs appeal. Dismissed.

Detch, Carney & Stevens, for appellants. Hall, Thayer & Steele and O. L. Harwood, for respondents.

SWEENEY, J. Upon the authority of, and for the reasons stated in, the opinion rendered in the case entitled *Charles H. Botsford, Relator, v. Frank P. Langan*, District Judge of the First Judicial District, State of Nevada, Respondent, 91 Pac. 737, the motion to dismiss the appeal in the present case is hereby granted.

TALBOT, C. J., and NORCROSS, J., concur.

(35 Colo. 154)

Ex parte MOYER.

(Supreme Court of Colorado. September, 1905.)

1. COURTS—SUPREME COURT—HABEAS CORPUS—JURISDICTION.

The authority of the Supreme Court to issue the writ of habeas corpus is derived from the Constitution, and not from the statute.

2. SAME—PROCEEDINGS—PRACTICE.

Where the Supreme Court in the exercise of its original jurisdiction issues the writ of habeas corpus, the practice is governed not by the statute, but by the rules of the court.

3. HABEAS CORPUS—EFFECT OF WRIT—CUSTODY OF PRISONER PENDING HEARING.

On return of a writ of habeas corpus, the original custody of petitioner is superseded, and

he is then in the custody of the court, and pending the hearing the court may in its discretion admit him to bail, remand him, or make such order as shall be deemed proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 63.]

4. SAME.

Where, on return of a writ of habeas corpus to the Supreme Court, the Governor of the state objects to the further exercise of jurisdiction by the court, and resists application for bail, pending the final hearing, on the ground that, as in his judgment the detention of petitioner is a military necessity, the court is without authority in the premises, and states that he holds petitioner by virtue of his authority under the Constitution as Commander in Chief of the National Guard, and that peace cannot be restored in a county in insurrection unless petitioner remains in custody of the military authority, and the Adjutant General of the state declares that he detains petitioner as a military necessity, and that he has been commanded by the Governor not to surrender petitioner either on writ of habeas corpus or otherwise, such application for bail will be denied.

5. COURTS—SUPREME COURT—HABEAS CORPUS—PRACTICE.

Though the chapter of the statutes on the subject of habeas corpus is not applicable to original proceedings in the Supreme Court, yet the same is usually adopted by that court for guidance on questions of practice.

Application for a writ of habeas corpus by Charles H. Moyer. On return of the writ, petitioner applied to be admitted to bail, unless the date for the hearing on the merits be fixed within five days from the return day, in accordance with Mills' Ann. St. § 2108. Application for bail denied.

See 85 Pac. 190.

Richardson & Hawkins, for petitioner. N. C. Miller, Atty. Gen., I. B. Melville and H. J. Hersey, Asst. Attys. Gen., and John M. Waldron, for respondents.

STEELE, J. Upon the return day of the writ, and pursuant to its commands, the respondents named in the writ produced the body of the petitioner. Upon the same day Sherman M. Bell, as Brigadier General and Adjutant General of the state, made return to the writ, and therewith filed objections to the further exercise of jurisdiction by the court. From the return it appears that on the 23d day of March, 1904, the Governor of the state, by his proclamation, proclaimed and declared the county of San Miguel to be in a state of insurrection and rebellion; that immediately after the issuance of the proclamation the Governor commanded the respondent to forthwith proceed to the county of San Miguel with such portion of the National Guard of the state as might be deemed essential, and to use such means as might be deemed necessary for the restoration of peace in said county and for the effectual suppression of the insurrection and rebellion; that, pursuant to the command of the Governor, he proceeded to the county of San Miguel with a portion of the National Guard of the state; that after his arrival at the county of San Miguel he became satis-

fied and convinced that the said Moyer was a prominent leader of bands of lawless men engaged in acts of insurrection and rebellion, and that, so believing, he caused the arrest and detention of said Moyer; that in his judgment, in order to prevent the said Moyer from lending aid, comfort, and direction to the lawless persons now engaged in rebellion in said county, and in order to restore public tranquillity, it is absolutely necessary to detain said Moyer and restrain him of his liberty; that as the officer in command of the National Guard, now on duty, he detains the said Moyer, and that he has been commanded by the Governor of the state not to surrender or release the said Moyer during the existing and continuing condition of affairs in said county, either upon writ of habeas corpus or otherwise, until further orders. Attached to the return is a certificate of the Governor, in which he states that the facts contained in the return are true, and that the arrest and detention of said Moyer were effected under his direction as Governor and Commander in Chief of the National Guard of the state, and that in his judgment the continued retention of the person of said Moyer is a necessary and essential step in the restoration of public peace and order and the suppression of the existing state of insurrection and rebellion in said county. When the return was presented, the attorney for the petitioner requested that the date for the hearing upon the merits be fixed by the court within five days from the return day of the writ, in accordance with section 2108, Mills' Ann. St., and stated that, unless the cause should be set within five days, the petitioner desired to be admitted to bail. The application for bail is resisted by the Governor upon the ground that as, in his judgment, the detention of the petitioner is a military necessity, the court is without authority in the premises.

Our authority to issue the writ is derived from the Constitution, and not from the statute; and, when this court, in the exercise of its original jurisdiction, issues the writ, the practice is governed, not by the statute, but by the rules of the court. By the adjudicated cases, it is held that upon the return of the writ the original custody terminates, and that the prisoner is then in the custody of the court, and that pending the hearing the court may, in its discretion, admit him to bail or remand him to the officer who had him in charge, or make such order in the case as shall be deemed proper. Mr. Justice Swayne, speaking for the Supreme Court of the United States, in the case *Barth v. Clise*, reported in 12 Wall. 400, 20 L. Ed. page 393, said: "By the common law, upon the return of a writ of habeas corpus, and the production of the body of the party suing it out, the authority under which the original commitment took place is superseded. After that time and until the case is finally disposed of, the safe-

keeping of the prisoner is entirely under the control and direction of the court to which the return is made. The prisoner is detained, not under the original commitment, but under the authority of the writ of habeas corpus. Pending the hearing, he may be bailed de die in diem, or be remanded to the jail whence he came, or be committed to any other suitable place of confinement under the control of the court. He may be brought before the court from time to time by its order until it is determined whether he shall be discharged or absolutely remanded."

The rules announced in the cases cited are probably not applicable to cases like the present, where the executive head of the government, at the time of the return, questions the jurisdiction of the court, and states that he holds the petitioner by virtue of his authority under the Constitution as the Commander in Chief of the National Guard. And we are required at this time to assume further jurisdiction or to hold the question of jurisdiction in abeyance by remanding the petitioner to the custody of the respondents. We have undoubted authority to issue the writ in the first instance; but whether our jurisdiction continues depends upon circumstances. In the case at bar the respondent declares that he detains the petitioner as a military necessity, and that he has been commanded by the Governor to not surrender the petitioner, either upon writ of habeas corpus or otherwise. The question, then, as presented by the return, is: Can the Governor, under the Constitution, and under the conditions shown to exist, declare martial law, and as incident thereto suspend the privilege of the writ of habeas corpus? If the Constitution authorizes the Governor so to do, then we have no further jurisdiction. If the power to declare martial law and to suspend the privilege of the writ of habeas corpus is confided by the Constitution to the Legislature, the Governor is without authority to detain the petitioner, and we have jurisdiction to discharge him. At the time of the issuance of the writ, it was stated that we reserved the right to pass upon the question of our jurisdiction when final disposition was made of the case; and, if we were now to admit the prisoner to bail, we should, in effect, determine that we have jurisdiction, and should, pending the hearing, grant all the relief that the petitioner demands. If the liberty of the petitioner alone were involved, we should probably resolve the doubt in his favor, admit him to bail, and determine the question of jurisdiction afterward; but the head of the executive department of the state has stated in the return to the writ that in his solemn judgment peace and tranquillity cannot be speedily restored in the county of San Miguel unless the petitioner remains in the custody of the military authority. Therefore the matter involved affects not only the liberty of the petitioner, but the peace of the people

of San Miguel, and, incidentally, the tranquillity of the people of the entire state. Although many of the averments of the return are denied, we shall accept, for the purpose of determining the question here presented, the statements therein contained as true. And, if they are so accepted, we should not admit the petitioner to bail in the face of the declaration of the Governor that the petitioner has aided and abetted those who stand in defiance of the law, and that he is the leader of a band of lawless men engaged in acts of insurrection. To admit the petitioner to bail before we have determined the main question would, it seems to us, be invading the legitimate province of the executive department, and that we are restrained from doing by the fundamental law. Nothing we have said should be regarded as foreshadowing the decision upon the important questions which must necessarily be determined upon the final hearing.

Although the chapter of the statutes on the subject of habeas corpus is not applicable to original proceedings in this court, we usually adopt the statute for our guidance on questions of practice; and we should set the hearing of this case within five days from the return day of the writ if all the members of the court could then be present. The questions involved affect the privileges and liberties of the people of the whole state, and we think these questions are so important as to require that all the members of the court participate in their determination. We shall therefore decline to set the cause within the time fixed by statute, but do set it for hearing on Thursday, May 5th, at the hour of 10 o'clock.

The application for bail is denied.

CAMPBELL, J., not participating.

PEOPLE ex rel. POST et al. v. SAN JOAQUIN VALLEY AGRICULTURAL ASS'N et al. (Sac. 1,481.)

(Supreme Court of California. Sept. 4, 1907. Rehearing Denied Oct. 4, 1907.)

L. AGRICULTURE — DISTRICT ASSOCIATIONS — PUBLIC CORPORATIONS — EXECUTION.

An agricultural association, incorporated under St. 1880, p. 62, c. 69, dividing the state into agricultural districts, authorizing a certain number of persons within such a district to organize such an association, its real estate to be used for the purpose of holding exhibitions of the live stock and products of the district, with the view to the improvement of all industries in the same, providing for a district board of agriculture, to be appointed by the Governor, and to qualify by oath, and declaring such an association, when formed, to be a state institution, and that such board shall have exclusive control and management of the association for and in the name of the state—is a public corporation created for the local administration of a part of the affairs of the state; so that its property, used to carry on the purposes for which it was formed, is not subject to exe-

cution, though such statute authorizes it to sue and be sued.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Agriculture, §§ 7, 8.]

2. LIMITATION OF ACTIONS — FRAUD — COMPLAINT.

The complaint in an action to vacate a judgment because of fraud in not interposing a certain defense does not show a right to more than three years for bringing it, under Code Civ. Proc. § 338, subd. 4, providing that the limitation of three years for relief from fraud does not begin to run till discovery of the facts constituting the fraud, by the mere allegation that the failure to interpose the defense was not discovered till within two months before commencement of the action to set aside the judgment; no reason for failure to make the discovery being given, and it not being stated that any diligence was exercised, or that with reasonable diligence the discovery would not have been made sooner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 668.]

Department 1. Appeal from Superior Court, San Joaquin County; Paul W. Bennett, Judge.

Action by the people, on the relation of Fred J. Post and others, against the San Joaquin Valley Agricultural Association and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed and remanded.

Rehearing denied; Beatty, C. J., dissenting.

U. S. Webb, Atty. Gen., Aug. Muentner, and Aug. E. Muentner, for appellant. Nicol & Orr and Budd & Thompson, for respondents.

SHAW, J. The court below sustained a demurrer to the complaint, and thereupon gave judgment in favor of the defendants, from which the plaintiff appeals. By the action the plaintiff seeks to recover from the defendants R. W. Russell, Louis Gerlach, James H. Budd, M. A. Moore, Lotta Moore, and Nellie E. Jordan the possession of certain tracts of land, and to set aside a judgment rendered in favor of defendants Louis Gerlach, R. W. Russell, James H. Budd, and M. A. Moore against the defendant, the San Joaquin Valley Agricultural Association. The relators are members of said association and the action is prosecuted for said association's benefit to restore to it the possession of the land and to relieve it from said judgment. The defendants in possession of the land hold it under a sheriff's sale and deed, made in the enforcement of an execution issued upon the judgment. The plaintiff claims that the association is a public corporation created for the local administration of a part of the affairs of the state, and that, as such, its property is not subject to execution, unless made so by statute, that there is no such statute, and, hence that the sale and deed aforesaid are void. As to the judgment, the claim is that it was procured by actual and constructive fraud on the part of the judgment plaintiffs, extrinsic and collateral to the action in which it was given.

1. The association is a corporation formed

under the act of April 15, 1880 (St. 1880, p. 62, c. 69). A consideration of the provisions of that act, in connection with the previous legislation on the subject of agricultural societies, the provisions of the Constitution of 1879, and the subsequent legislation concerning corporations of the character of the defendant corporation, clearly shows that the association is a public corporation engaged in carrying on one of the objects committed to the state government by the Constitution. In 1859 a general law was enacted authorizing the formation of local agricultural societies. St. 1859, p. 104, c. 110. Under this act, prior to 1880, some 12 societies were formed in various parts of the state. Among them was one in San Joaquin county, known as the "San Joaquin Valley Agricultural Association." In 1854 the "California State Agricultural Society" was incorporated by the Legislature. Neither this corporation, nor any of the societies formed under the act of 1859, was a public corporation, or, at all events, neither of them was a state institution, or under the control and management of the state, but were either private corporations, or quasi public corporations formed to promote an object in which the general public was interested and by which the public would be benefited, but for the profit and emolument of the persons interested therein. *Melvin v. State*, 121 Cal. 19, 53 Pac. 416. Under the Constitution of 1849, the legislative power to appropriate money directly to such institutions, and to authorize counties to give them pecuniary assistance, was unfettered. It became customary at every session of the Legislature to pass laws appropriating money to the State Agricultural Society and to each of the several subordinate societies organized under the act of 1859. Appropriations of this character were made to the San Joaquin Valley Agricultural Association aforesaid in the years 1861, 1863, 1872, and 1878. St. 1861, p. 407, c. 385; St. 1863, p. 522, c. 348; St. 1871-72, p. 442, c. 333; St. 1877-78, p. 332, c. 271. The Legislature at almost every session from 1860 to 1872 also authorized the county of San Joaquin to donate money to said society. Similar aid was authorized to other societies in other counties. In 1863 San Joaquin county was authorized to issue its bonds to the amount of \$20,000, and give or loan the money thus raised to that society (St. 1863, p. 7, c. 4), and in 1865 a special tax was authorized to pay these bonds.

This was the situation when the present Constitution was framed and adopted in 1879. Article 4 of this Constitution contains radical measures concerning such legislation. Section 22 provides that "no money shall ever be appropriated or drawn from the state treasury for the use or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the state as a state institution, nor shall any grant or donation of property ever be made thereto by the

state." Certain exceptions were made relative to the support of orphans which are immaterial to the present discussion. Section 29 was as follows: "The general appropriation bill shall contain no item or items of appropriation other than such as are required to pay the salaries of the state officers, the expenses of the government, and of the institutions under the exclusive control and management of the state." Section 31 took from the Legislature the power to give, lend, or authorize the giving or lending of the state's credit, or that of any county, city, and county, city, or township, or other political corporation or subdivision of the state, in aid of or to any person, association, or corporation, municipal or otherwise, or to pledge the credit thereof in any manner whatever, for the payment of the liabilities of any individual, association, municipal, or other corporation whatever, or to make or authorize the making of any gift of any public money or thing of value to any individual, municipal or other corporation whatever. These limitations divested the Legislature of all power to make appropriations of money to any private or quasi public corporation or to make any gift to any municipal or public corporation not under the exclusive control and management of the state. It also deprived the Legislature of the power to authorize counties to make donations, or gifts or pledges of credit to such associations. The Constitution does not give to any department of the state government any power whatever to engage in private business or enterprise or to manage and control private corporations or quasi public corporations for private profit, although such corporations may be carrying on enterprises or performing functions which are for general public benefit and which tend to promote the general welfare. Our state government has no such powers. It is not organized to promote the general welfare in that manner or by that means, but only by and through its public governmental powers, and by means of agencies which constitute part of the state government. These previously existing societies formed no part of the state government, and hence further aid to them by appropriations of money from the state was impossible.

Under these circumstances, and for the manifest purpose of creating such agencies to carry on the same public work, agencies to which money could be appropriated from the state treasury by the Legislature, the next succeeding Legislature in 1880 enacted two laws, one declaring the state agricultural society to be a state institution, organizing the state board of agriculture and charging it with the exclusive management and control of the state agricultural society as a state institution (St. 1880, p. 40, c. 60), the other, the act here in question, dividing the state into 11 agricultural districts, to be composed of certain named counties, and providing for the organization of corporations therein, to be

known as agricultural associations (St. 1880, p. C2, c. 69). In many respects these statutes were similar, and both were obviously passed to carry out the same public policy and achieve the same general result. The general purpose of the first-mentioned act is shown by the duties enjoined on the state board, which were "to collect and disseminate all kinds of information calculated to educate and benefit the industrial classes, develop the resources, and advance the material interests of the state," and to obtain and publish "such suggestions and recommendations as experience and good policy may dictate for the improvement and advancement of the agricultural and kindred industries." The general purpose of the district associations was declared in the latter act to be "the improvement of the material industries of the state." In every legislative year thereafter, until 1903, the general state appropriation act has contained items appropriating from the state treasury various sums of money to the State Agricultural Society thus constituted, and to each of the several district agricultural associations that became organized under the act here involved. In 1895 the items relating to these district agricultural associations were vetoed by the Governor. The Legislature of 1903, and succeeding Legislatures, have, perhaps wisely, refused to appropriate money for these associations.

In the case of *Melvin v. State*, supra, it was held that the State Agricultural Society, as incorporated by the act aforesaid, was neither a private nor quasi public corporation, but was a public corporation, an agency of the state to carry out one of the functions of the state government, and that as such, in the absence of a permitting statute, it was not subject to suit by a private person. It was said in the opinion that the Legislature found ample authority for the organization of such public corporations in section 1 of article 9 of the Constitution, which declares that, "a general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." Whether this provision was intended to give this power or not, it is undoubtedly within the power of the state to organize and carry on such institutions. In the opinion in *Re Madera Irr. Dist.*, 92 Cal. 313, 28 Pac. 275, 14 L. R. A. 755, 27 Am. St. Rep. 106, the court says: "Whatever tends to an increased prosperity of one portion of the state, or to promote its material development, is for the advantage of the entire state; and the right of the Legislature to make provision for developing the productive capacity of the state, or for increasing facilities for the cultivation of its soil according to the requirements of the different portions thereof, is upheld by its power to act for the benefit of the people in affording them the right of 'acquiring,

possessing, and protecting the property,' which is guaranteed to them by the Constitution." And again, on page 315 of 92 Cal., on page 275 of 28 Pac., 14 L. R. A. 755, 27 Am. St. Rep. 106: "The means by which the Legislature may exercise this power is left to its own discretion, except as it may be limited by the Constitution. * * * It may, too, by general laws, authorize the inhabitants of any district, under such restrictions, and with such preliminary steps as it may deem proper, to organize themselves into a public corporation, for the purpose of exercising those governmental duties, upon the same principle that it authorizes the incorporation of any municipal corporation under general laws." And again (page 317 of 92 Cal., page 276 of 28 Pac., 14 L. R. A. 755, 27 Am. St. Rep. 106): "Although in this state the Legislature is required to provide such agencies under general laws, it is authorized, under its general power of legislation, to invest such corporations, when created, with the same powers which, without such restriction, it could itself have exercised; and in providing for such organizations it need confer upon them only such powers, as in its judgment, are proper to be exercised by them in the discharge of the particular functions of government which may be conferred upon them. Being the representatives of the Legislature in the various localities of the state, the requirements for organization, as well as the powers to be exercised, vary with the character of the purpose for which they may be created." The carrying out of the purposes prescribed by these statutes regarding agricultural associations is a matter of general public interest, and would tend to increase the productive power of the land, the growth of the state in population, and the wealth of the people. It is as much a matter of state concern as are school districts formed to carry on the public schools, sanitary districts for the protection and preservation of the health of the inhabitants thereof, reclamation and levee districts to drain the swamp lands therein or to protect them from overflow, or irrigation districts to procure and distribute water for irrigation of lands within their limits, all of which have been declared to be public corporations or agencies of the state. See cases herein-after cited. Although some of these institutions may be authorized by express provisions of the Constitution, all are not so authorized, and the power to create such agencies to carry on such operations exists in the government of the state without a more particular constitutional grant than those embraced in section 1 of article 4. In re Madera Irr. Dist., 92 Cal. 307, 28 Pac. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106.

The provisions of the act providing for district agricultural associations clearly evince an intention to make them public corporations. The entire state was divided into agricultural districts. Fifty or more

persons, representing a majority of the counties within one of the districts, were authorized to form an association for the purposes of the act. The association was to have perpetual succession and certain enumerated powers. Its real estate was to be used for the purpose of holding exhibitions of the live stock and products of the district, "with view to the improvement of all industries in the same." It was to be managed by a district board of agriculture, consisting of eight members, who were to be resident citizens of the district, were to hold office four years, and were to be appointed by the Governor of the state, who was also authorized to fill vacancies. Each member of such boards was required to qualify by taking the oath of office of public officers prescribed by section 3 of article 20 of the Constitution within 10 days after his appointment. Section 17 (page 64) of the act is in part as follows: "Each association so formed and organized is hereby declared and shall be recognized a state institution, and the board so appointed and qualified shall have the exclusive control and management of such institution for and in the name of the state, and shall have the possession and care of all the property of the association and shall fix the terms of office and the bonds of the secretary and treasurer, and determine their salary and duties." The Legislature in subsequent acts assumed to exercise full power over these associations. The original act designated the counties of San Joaquin, Calaveras, Fresno, Kern, Merced, Mariposa, Stanislaus, Tulare, and Tuolumne as "Agricultural District No. 2." By subsequent acts the district has been changed and reduced, and in 1893 it was made to consist of San Joaquin county alone. St. 1893, p. 282. The number of districts in the state has been increased from time to time, until there are now 45. St. 1901, p. 304, c. 142. In 1891 a new statute was enacted, substantially the same as that of 1880, declaring that all associations formed under the previous act should be continued in force and made associations under the new act. St. 1891, p. 138, c. 126. In 1897 a similar act was enacted, and the previously established associations were continued in force and made agricultural associations under the latter act. This statute also provided that such associations should have the option of converting themselves into stock companies and issuing certificates of stock. St. 1897, p. 304, c. 125. It does not appear that the defendant association has ever availed itself of this privilege. If it had done so, interesting questions would arise concerning its status and its character as a corporation which are not presented as the case stands.

All these considerations conclusively demonstrate that these associations are public agencies of the state, within its exclusive management and control, and charged with the performance of a part of the functions of the state government. Such corporations in

this state have always been held to be public corporations. *Dean v. Davis*, 51 Cal. 410; *People v. Reclamation Dist.*, 53 Cal. 348; *People v. Williams*, 56 Cal. 647; *People v. Larue*, 67 Cal. 528, 8 Pac. 84; *People v. Reclamation Dist.*, 117 Cal. 119, 48 Pac. 1016; *S. F. Sav. Union v. Reclamation Dist.*, 144 Cal. 643, 79 Pac. 374; *Hoke v. Perdue*, 62 Cal. 546; *People v. Levee Dist.*, 131 Cal. 30, 63 Pac. 676, holding reclamation districts and levee districts to be public corporations; *Hughes v. Ewing*, 93 Cal. 417, 28 Pac. 1067; *Estate of Bulmer*, 59 Cal. 131; *Kennedy v. Miller*, 97 Cal. 432, 32 Pac. 558, declaring school districts to be public corporations; *Turlock L. D. v. Williams*, 76 Cal. 368, 18 Pac. 379; *Irrigation Dist. v. DeLappe*, 79 Cal. 353, 21 Pac. 825; *People v. Selma, etc., Dist.*, 98 Cal. 208, 32 Pac. 1047; *Crall v. Poso Irr. Dist.*, 87 Cal. 145, 26 Pac. 797; *People v. Turnbull*, 93 Cal. 632, 29 Pac. 224, holding irrigation districts to be public corporations; *In re Werner*, 129 Cal. 567, 62 Pac. 97, declaring sanitary districts to be public corporations. These institutions are public corporations "formed for the government of a portion of the state" as defined in section 284 of the Civil Code, but, as is pointed out in *Dean v. Davis*, supra, "to constitute a public corporation, it is not essential that it shall exercise all the functions of government within the prescribed districts. * * * It is but an instrumentality of the state, and the state incorporates it that it may the more effectually discharge its appointed duty." See, also, *Dillon on Mun. Corp.* § 25.

The case of *Downing v. Indiana State Board of Agriculture*, 129 Ind. 443, 28 N. E. 123, 614, 12 L. R. A. 664, holding that institution to be a private corporation, is cited as opposed to these views. There is, however, a marked distinction between the laws of Indiana organizing that corporation and our statutes and constitutional provisions above referred to. There was in that case no necessity for making the institution a public corporation in order to authorize the making of appropriations to carry on the same. And the intention that it should be a public corporation under the management and control of the state was not manifested by the provisions of the statute there under consideration as it is by the terms of our statute. The property of such corporations or stage agencies, which is used to carry on the purposes for which such institutions are formed, is so far public property that it cannot be taken in execution and sold thereon to enforce payment of a judgment, unless the state has manifested its assent thereto by a law permitting it to be done. *S. F. Sav. Union v. Reclamation Dist.*, 144 Cal. 648, 79 Pac. 374; *Hensley v. Reclamation Dist.*, 121 Cal. 96, 53 Pac. 401; *Skelly v. School Dist.*, 103 Cal. 652, 37 Pac. 643; *Emeric v. Gilman*, 10 Cal. 410, 70 Am. Dec. 742; *Mayrhofer v. Board*, 89 Cal. 110, 26 Pac. 646, 23 Am. St. Rep. 451; *Witter v. School Dist.*, 121 Cal. 350, 53 Pac.

905, 66 Am. St. Rep. 33; *Whittaker v. Tumne*, 96 Cal. 100, 30 Pac. 1016; *Reclamation Dist. v. Sacramento*, 134 Cal. 490, 66 Pac. 668; *Ruperich v. Baehr*, 142 Cal. 193, 75 Pac. 782; *Gilman v. Contra Costa*, 8 Cal. 58, 68 Am. Dec. 290; *Hunsaker v. Borden*, 5 Cal. 290, 63 Am. Dec. 130; *Sharp v. Contra Costa County*, 34 Cal. 290; *Hart v. Burnett*, 15 Cal. 583; 1 *Dillon, Mun. Corp.* § 100; 2 *Dillon Mun. Corp.* 576, 577.

The statute under which these associations were organized provides that they may sue and be sued. This, however, does not imply that the public property which such association holds and uses for the public purposes which it was created to serve can be seized on execution to pay a judgment recovered in such suit. This is abundantly shown by the authorities last cited. The complaint alleges that the real property in question has always been used by the defendant association for the purpose of holding the exhibitions which the association is required to hold annually by the provisions of the statute, and that it is needed for permanent use for that purpose. By the demurrer this allegation is admitted to be true. It follows that the property was not subject to execution; that the sale and sheriff's deed under which defendants claim title and possession are void; that plaintiff is entitled to recover possession; and that, as to this point, the demurrer was improperly sustained.

2. The right of action of plaintiff to vacate the judgment against the association on the ground that it was procured by fraud is barred by the statute of limitations. The date on which the judgment sought to be set aside was rendered does not expressly appear, but it is alleged that an execution was issued thereon on the 3d day of October, 1900, and consequently it must have been rendered prior to that date. The present action to set aside the judgment was begun on July 14, 1905, four years and nine months after the execution was issued. By subdivision 4 of section 338 of the Code of Civil Procedure, an action for relief on the ground of fraud must be begun within three years, but the period of limitation does not begin to run until the discovery of the facts constituting the fraud. It is alleged that the failure of the district board of agriculture of district No. 2 to allege, in their answer in the action in which the judgment was rendered, certain facts which it is claimed would have constituted a good defense to said action, was fraudulent, and that it was by means of this fraudulent neglect that the judgment against the association was obtained. The attempt was made to bring the action within the period of limitation above mentioned by the bare averment that the failure to include the so-called defense in the answer "was not discovered by the plaintiff, or the said relators, or any of them, until within two months next before the commencement of this action." This is not a sufficient allegation to excuse

the delay. It gives no reason for the failure to make the discovery, and does not state that any diligence had been exercised, nor does it show that, if reasonable diligence had been exercised, it would not have been discovered sooner. The answer in the action was filed on May 23, 1899, so that the act constituting the fraud, if fraud it was, was actually committed at that time, which was more than six years before the present action was begun. "It is not enough to assert merely that the discovery was not sooner made. It must appear that it could not have been made by the exercise of reasonable diligence. And that which reasonable diligence would have disclosed plaintiff is presumed to have known; means of knowledge in such a case being the equivalent of the knowledge which it would have produced." *Truett v. Onderdonk*, 120 Cal. 589, 53 Pac. 29. "'Discovery' and 'knowledge' are not convertible terms, and whether there has been a 'discovery' of the facts constituting the fraud, within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded. As in the case of any other legal conclusion, it is not sufficient to make a mere averment thereof, but the facts from which the conclusion follows must first be pleaded. It is not enough that the plaintiff merely aver that he was ignorant of the facts at the time of their occurrence and has not been informed of them until within the three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them, as that they were done in secret or were kept concealed; and he must also show the times and circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged." *Lady Washington Co. v. Wood*, 113 Cal. 486, 45 Pac. 809.

For these reasons, we are of the opinion that so far as the action seeks to obtain a vacation of the judgment referred to it is barred by the statute of limitations.

The judgment is reversed, and the cause remanded.

We concur: SLOSS, J.; ANGELLOTTI, J.

6 Cal. App. 184

McVAY et al. v. CENTRAL CALIFORNIA INV. CO. (Civ. 349.)

(Court of Appeal, Third District, California. July 31, 1907.)

1. NEGLIGENCE—COMPLAINT—IDENTIFYING DESTROYED PROPERTY.

The complaint for negligent destruction of property by fire from defendant's land sufficiently identifies the property by describing it and locating it at the time of the fire on lands owned by plaintiffs in a certain township and county and adjoining defendant's land.

2. PLEADING—PRESUMPTION.

The presumption, from the allegation of a complaint for destruction of property, that plain-

tiffs were the owners thereof, is that they were tenants in common.

3. DAMAGES—PLEADING.

The averment that the loss of plaintiffs by the destruction of the property was a certain sum is the equivalent of the allegation that they were damaged in said sum.

4. NEGLIGENCE—SUFFICIENCY OF EVIDENCE—SETTING FIRES.

Evidence as to time and circumstances of setting fire on defendant's land, which spread to plaintiffs' land, held sufficient to authorize a finding of negligence in starting it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 267.]

5. APPEAL—HARMLESS ERROR.

Error in admitting evidence is harmless; other evidence to the same effect having been admitted without objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Appeal and Error, § 4164.]

6. PLEADING—ANSWER—ISSUE AS TO VALUE.

No issue as to the value of the property destroyed is raised by the pleadings; the complaint being verified and specifically alleging the value of each article, and the answer, which denied that plaintiffs were the owners of the property or that fire destroyed it, or that defendant was guilty of any negligence, containing no other denial as to the amount of damages than that "defendant denies that the loss of plaintiffs, by reason of the destruction of the property described in said complaint as therein alleged, was \$1,025," and not denying that it was of any sum less than that.

7. NEGLIGENCE—PROXIMATE CAUSE—INSTRUCTIONS.

There being evidence that the fire set by defendant on its premises was communicated to plaintiff's land by a sudden whirlwind, which defendant could neither anticipate nor control, it was entitled to the instruction, based on the doctrine of liability only for negligence which is the proximate cause of the injury, that, if it was impossible for defendant to have prevented the fire from getting beyond its control, owing to the sudden rising of the wind after the fire was set, defendant would not be liable, provided due care was taken before the fire was set.

8. APPEAL—RECORD—INSTRUCTIONS.

An instruction appearing in the transcript not authenticated or incorporated in the bill of exceptions, and being no part of the judgment roll, and, moreover, printed only as a part of instructions "requested" by plaintiffs, cannot be considered as having been given, and so covering an instruction requested by defendant and refused.

9. TRIAL—INSTRUCTIONS—PREPONDERANCE OF EVIDENCE.

An instruction: "By preponderance of the evidence is not necessarily meant a greater number of witnesses, but only such weight of evidence as satisfies the jury of the truth of the allegation to be established"—is sufficient, though Code Civ. Proc. § 1835, provides that only evidence which satisfies the "unprejudiced" mind will justify a verdict.

Appeal from Superior Court, Colusa County; H. M. Albery, Judge.

Action by W. N. McVay and another against the Central California Investment Company. Judgment for plaintiffs. Defendant appeals. Reversed.

Morrison & Cope and Ernest Weyland, for appellants. Seth Millington, J. W. Goad, and Thomas Rutledge, for respondents.

BURNETT, J. The nature of the action is shown by the following allegation of the com-

plaint: "The defendant on the 27th day of August, 1904, intentionally and negligently kindled a fire on said defendant's land in Colusa county, Cal., and adjoining the said land of plaintiffs, and negligently suffered said fire to extend beyond its own land, and so negligently watched and tended said fire that it came into the plaintiffs' said land and destroyed all the property hereinbefore described without any fault or negligence on the part of plaintiffs or either of them, and the loss of plaintiffs by reason of the destruction thereof was the sum of \$1,025."

1. The court committed no error in overruling the demurrer. The property was sufficiently described for identification, and it was located "on lands owned by plaintiffs in township seventeen (17) north, range one (1) west in Colusa county" and adjoining the property of defendant. Defendant could hardly be mistaken as to what property was intended. As to the title, it was sufficient to allege "that on the 27th day of August, 1904, and for a long time prior thereto, plaintiffs were the owners of the following described property." When such an allegation is made, the presumption follows that they are tenants in common. The suggestion that the averment "and the loss of plaintiffs by reason of the destruction thereof was the sum," etc., is not equivalent to an allegation that plaintiffs were damaged in said sum, seems hypercritical and not entitled to serious attention.

2. It is claimed that no negligence was shown, and therefore the verdict of the jury is not supported by the evidence. In this connection the following cases are cited: *Garnier v. Porter*, 90 Cal. 105, 27 Pac. 55; *Galvin v. Gualala Mill Co.*, 98 Cal. 268, 33 Pac. 93; *Sweeney v. Merrill*, 38 Kan. 216, 16 Pac. 454, 5 Am. St. Rep. 734; *Needham v. King*, 54 N. W. 891, 95 Mich. 303; *Bolton v. Calkins*, 60 N. W. 297, 102 Mich. 69. We deem it unnecessary to notice in detail these various decisions. They all substantially agree as to the law applicable to this class of cases. Indeed, there could be no dispute, and there is none here, that plaintiffs are not entitled to recover unless defendant was negligent in setting out the fire or in the management of it after it was started, and that this negligence was the proximate cause of the injury. No difficulty attends the determination of what is negligence in the abstract, but the attempt to apply the principle to concrete facts often gives rise to serious controversy. In the *Needham* Case, *supra*, the whole question of negligence in allowing fire to spread to the property of one's neighbor is discussed elaborately, and a large number of cases is reviewed. It is therein stated by the Supreme Court of Michigan that: "Fire is a dangerous element and in making use of it a degree of care is required corresponding to the danger." And the following is quoted with approval from *Cooley on Torts*: "Due care requires circumspection not only as to

time and place of starting it, but in protecting against its spread afterwards." The opinion proceeds: "There is no doubt that a party having taken reasonable precautions to avoid the spread of fire may, on a calm morning in a dry time, set fire to rubbish upon his premises, and if, during the progress of the fire, a violent wind causes the fire to escape to his neighbor's premises, he cannot be said to have been negligent. But the law does not justify the use of fire at a time and place when the probable consequences are communication with the property of others." In the case at bar there was some evidence that a brisk south or southeast wind was blowing at the time the fire was started. Some of the witnesses denied this, but there was such a conflict as to make it a proper question for determination by the jury. The thistles on defendant's premises to which the fire was set were high and close together. It was late in the summer season, and everything was dry and inflammable. If the wind was blowing, we can understand how a reasonable man might reach the conclusion that the probable consequences of starting the fire would be the destruction of the neighbor's property on the north, and therefore that the defendant had not exercised due care under the circumstances. Besides, the evidence left it a disputable proposition whether the preliminary preparations were adequate to prevent the fire from spreading. It cannot be said as a matter of law that the jury was not justified in finding that the defendant was negligent in starting the fire.

3. Complaint is made of certain rulings of the court in the admission of evidence to show the amount of damage done to plaintiffs by the fire. Granting that some of them are technically erroneous, yet no prejudice is shown, as testimony to the same effect was received without objection. And, again, there is no issue raised by the pleadings as to the value of the property destroyed. The complaint was verified and the value of each article destroyed specifically averred. The answer denied that plaintiffs were the owners of the property, or that the fire destroyed it, or that defendant was guilty of any negligence; but the only denial as to the amount of damage is as follows: "Defendant denies that the loss of plaintiffs, by reason of the destruction of the property described in said complaint, as therein alleged, was the sum of \$1,025." There is no denial that it was of any sum less than that.

4. There seems no escape from the conclusion that the court erred in its refusal to give the following instruction requested by defendant: "I instruct you that if for any reason it was impossible for the employees of the defendant company to have prevented the fire from getting beyond their control, owing to any sudden rising of the wind after the fire was set out, the defendant company would not be liable for the damages accruing to plaintiffs, providing due care was taken be-

fore the fire was set out." The instruction is based upon the proposition that, if defendant exercised due care in setting the fire, it would not be liable for any negligence in its subsequent care of said fire, if that negligence was not the proximate cause of the injury to plaintiffs. If by the exercise of due care in the management of the fire defendant could not have prevented the damage, it is not liable for its failure to exercise such care. The whole doctrine of responsibility for negligence is based upon the postulate that without such negligence the injury would not have occurred, or, in other words, that the negligence is the proximate cause of the injury. The following cases illustrate the point: *Kevern v. Providence M. Co.*, 70 Cal. 394, 11 Pac. 740; *Vizelich v. S. P. R. R. Co.*, 126 Cal. 587, 59 Pac. 129; *Puckhaber v. S. P. R. R. Co.*, 132 Cal. 363, 64 Pac. 480; *Luman v. Golden A. C. M. Co.*, 140 Cal. 706, 74 Pac. 307. Defendant was entitled to the instruction, as there was evidence that the communication of the fire to the premises of plaintiffs was caused by a sudden whirlwind which defendant could neither anticipate nor control. The instruction was adapted to defendant's theory of unavoidable casualty, which theory finds support in the testimony of some of the witnesses. That the failure to give the instruction may have resulted to the prejudice of defendant is apparent from the reflection that the jury under the evidence may have believed that defendant exercised due care in setting out the fire, but was negligent in caring for it, and also that the damage was caused by the whirlwind over which defendant could exercise no control. A verdict resting upon this state of facts would be unjustifiable as ignoring the doctrine of "proximate cause." Respondents' answer to the contention is that the principle was covered by another instruction appearing at folio 51 of the transcript. But the latter is not authenticated in any manner. It is not incorporated in the bill of exceptions, and it is no part of the judgment roll. In fact, it does not purport to have been given by the court, but it is printed as a part of "Instructions Requested by Plaintiffs." It is manifest that it cannot be considered. But, if it could be regarded, it is clear that it does not cover the contingency suggested, but requires defendant, in any event, to exercise ordinary care, in attending said fire, to escape responsibility.

Appellant criticises the action of the court in giving this instruction: "By preponderance of the evidence is not necessarily meant a greater number of witnesses, but only such weight of evidence as satisfies the jury of the truth of the allegation to be established." The contention is that section 1835, Code Civ. Proc., provides that it must satisfy the unprejudiced mind; whereas, the mind of the juror may be prejudiced. The argument is somewhat tenuous and metaphysical. The

distinction is of no practical importance, as each juror, whether prejudiced or not, must necessarily be guided by the evidence as it affects his own mind, and it is impossible for him to determine how the evidence would influence some other mind. Besides, of course, the presumption must be indulged that each juror is unprejudiced and of average intelligence.

It is due the learned trial judge to say that he had no opportunity to review the record, as no motion was made for a new trial; the appeal being from the judgment alone.

For the error pointed out the judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

6 Cal. App. 115

SNIPSIC CO. v. RIVERSIDE MUSIC CO.
(Civ. 401.)

(Court of Appeal, Second District, California.
July 24, 1907.)

APPEAL—TRANSCRIPT—CERTIFICATE OF CORRECTNESS—NECESSITY.

An affidavit of an appellant that the transcript is correct cannot be substituted for the certificate of the clerk or attorneys as to the correctness thereof required by Code Civ. Proc. § 953, and Supreme Court rule 2 (78 Pac. vii), and in the absence of the latter certificate the judgment appealed from cannot be reviewed.

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by the Snipsic Company against the Riverside Music Company. From the judgment, plaintiff appeals. Motion to dismiss appeal. Dismissed.

Howard K. James and F. G. Hall, for appellant. Purington & Adair, for respondent.

SHAW, J. This is a motion on the part of the respondent to dismiss an appeal from a judgment of the superior court of Riverside county. The transcript of the record contains no certificate either by the clerk or attorneys of the correctness of the same, nor does it contain any certificate of the clerk or attorneys that an undertaking on appeal in due form has been properly filed, or waiver thereof. Section 953, Code Civ. Proc.; Supreme Court rule 2 (78 Pac. vii). Appellant has presented an affidavit averring "the said transcript as the same is now of record is in all respects true and correct"; but the affidavit of appellant cannot be substituted for the certificate required by said section 953, Code Civ. Proc., and the rules of this court, in the absence of which, the judgment appealed from cannot be reviewed. *Ellis v. Bennet*, 3 Pac. 801; *Pacific M. Life Ins. Co. v. Edgar*, 132 Cal. 197, 64 Pac. 200.

The motion is granted, and appeal dismissed, without prejudice to another appeal.

We concur: ALLEN, P. J.; TAGGART, J.

6 Cal. App. 190

EGILBERT v. SUPERIOR COURT OF SHASTA COUNTY. (Civ. 384.)

(Court of Appeal, Third District, California. Aug. 5, 1907.)

MANDAMUS—VIOLATION OF WRIT—CONTEMPT.

Petitioner for writ of review answered a petition for a writ of mandamus to compel him as secretary of a corporation to submit its books to examination, admitting that he was then, April 22, 1907, secretary of the corporation. The cause was set for trial on May 22, 1907, on issues joined, and on May 18th petitioner resigned as secretary, not for the purpose of evading the order of the court, and on the 25th, when he was served with a peremptory writ commanding him to submit the books of the corporation to examination, he was not secretary and could not comply with the order. *Held*, that he was not chargeable with contempt in failing to obey the writ.

Application for a writ of review by W. D. Egilbert against the superior court of Shasta county to determine the validity of a judgment against petitioner for contempt. Writ granted. Petitioner discharged.

Geo. O. Perry and C. H. Braynard, for petitioner. T. W. H. Shanahan, for respondent.

CHIPMAN, P. J. The petition shows: That on April 10, 1907, a petition for a writ of mandate was filed in defendant court, and thereafter, to wit, on May 22, 1907, a peremptory writ was issued out of said court, directed to affiant, as secretary of the Pacific Power Company, commanding affiant "as such secretary immediately after the receipt of said writ to permit one T. W. H. Shanahan, at whose instance and in whose behalf said peremptory writ of mandate was granted, to inspect all of the books * * * of the Pacific Power Company"; that said peremptory writ was served on affiant on May 25, 1907; that prior to May 18, 1907, affiant was secretary of said company, but resigned as such secretary, and his resignation was accepted on said May 18th, and at no time thereafter was he such secretary or in possession of or had control of said books. It next appears that on the ——— day of June, 1907, said Shanahan made and filed in said court an affidavit setting forth, in substance, the foregoing facts: That he had made demand for the production and inspection of said books by virtue of said writ after service thereof on petitioner herein, but was not furnished access to or allowed to inspect said books, and that the said Shanahan prayed for an order of court requiring said Egilbert to show cause before said court on June 14, 1907, why he should not be punished for contempt of said court for failing and refusing to obey said writ; that affiant (petitioner herein) thereupon made and filed his affidavit in said court setting forth the fact of his resignation as such secretary and the acceptance thereof on May 18, 1907, and that since said day he had not had the custody or control of said books, and "that at the time of the service of said writ of mandate and de-

mand, and at all times thereafter, said affiant W. D. Egilbert was unable to produce or submit for inspection said books"; that on said June 14, 1907, affiant appeared in response to said order of said court, and a hearing was had and evidence introduced in relation thereto; that at said hearing said Egilbert offered to produce evidence that his resignation as such secretary "was made without any intent or effort on his part to evade or render null or of no effect the order of said superior court, but said superior court thereupon refused to receive or admit such evidence"; that the fact that said Egilbert did not have the care or custody of said books was not controverted at said hearing; that the said court made findings in said proceeding and found that said Egilbert resigned from his said office on May 18, 1907, and it was not found or determined that he so resigned for the purpose of evading any order of the court, or that he did not resign in good faith; that petitioner was adjudged to be guilty of contempt, and as punishment was fined in the sum of \$200, and in default of payment to be imprisoned one day for each \$2 thereof. Most of the allegations of the petition are admitted. It is admitted in the return of the judge that Egilbert resigned on May 18, 1907, but it avers want of knowledge as to the acceptance thereof, and on information and belief denies that it was accepted; avers want of knowledge as to the allegation in the petition that Egilbert was not the secretary of the said company at the said date or in possession of certain of said books, and therefore denies said allegation; admits that Egilbert filed his affidavit in said contempt proceedings, setting forth the facts as above shown by him; admits that at the hearing he offered to prove that he acted in good faith in resigning and through no purpose to evade any order of the said court; and admits that the evidence that Egilbert was not secretary and did not have the care or control or custody of said books was not controverted. It further appears from the return of respondent that the petition for a writ of mandate was filed April 10, 1907; that an alternative writ was duly issued on that day, returnable April 17, 1907; that Egilbert made answer April 22, 1907, and admitted that he "was and now is" such secretary; that, issues being joined the cause was set for trial for May 20, 1907, and was then tried and judgment rendered in favor of petitioner, among other things, that at all times mentioned in the petition for writ of mandate, said Egilbert was and now is such secretary; that a peremptory writ was thereupon, on May 22, 1907, duly issued, was served on Egilbert on May 25, 1907, and he failed and neglected to obey its directions, and thereupon said proceedings in contempt were commenced; that at the hearing of the contempt proceedings the court determined that said Egilbert was secretary when the alternative

writ was issued in April, but that he resigned on May 18th; that the cause was heard on May 20th; "that he failed and neglected either before or at the trial of said case to notify the court of his resignation, and allowed the court to proceed to judgment under the impression that he was secretary of the said Pacific Power Company; that at all times during said proceedings and up to the time of the present contempt proceedings he was a director of said corporation; that as such director he had actual knowledge that the judgment had been rendered against him as secretary of said corporation; that on the 25th day of May, 1907, he was duly served with a copy of the peremptory writ of mandate, the refusal to obey which resulted in the contempt proceedings." Reduced to the simplest statement, the material facts were: That in April Egilbert answered the petition for a writ of mandate, stating that he was then, April 22, 1907, the secretary of the company; that the cause was, on the issues then joined, set for trial May 20, 1907; that on May 18th he had resigned and thenceforward ceased to be secretary or to have control of the books of the company; that on May 25th, when the writ was served, he was not the secretary and could not comply with the order; that his resignation was not for the purpose of evading the order of the court. At the hearing on May 20th, the issue was the same as when Egilbert filed his answer, namely, that he was then, April 22d, the secretary of the company. If he continued to be such secretary until the hearing, May 20th, the fact should have been proven, or, if he resigned contumaciously to evade the operation of any writ that might be issued, that fact should have been shown. But the court conceded that the resignation had no such object in view, by eliminating all evidence on that point, and it not only did not find that Egilbert was secretary on May 20th, but did find that he had resigned on May 18th. The fact that Egilbert withheld from the court the fact of his resignation on May 20th, and allowed the court to grant the writ under the impression that Egilbert was then the secretary, is not the ground on which the contempt judgment was based. That judgment rested on his failure and refusal to produce the books of the company. Respondent did not appear at the hearing here and has filed no brief of points and authorities.

It clearly appears, and is not controverted, that it was beyond the power of petitioner to comply with the order when the peremptory writ of mandate issued and when it was served upon him, and that his inability to comply was not brought about through any design or purpose to evade the order of the court. Upon this state of facts the court was without jurisdiction to punish him for contempt. *Adams v. Haskell & Woods*, 6 Cal. 316, 65 Am. Dec. 517; *Ex parte Cohen*, 6 Cal. 319, cited in *Ex parte Cottrell*, 5 Cal. 420;

Ex parte Todd, 119 Cal. 57, 50 Pac. 1071; *In re Cowden*, 139 Cal. 244, 73 Pac. 156. Petitioner could show his resignation, and that he was no longer in control of the company's books, as an answer to contempt proceedings for noncompliance with the writ of mandamus. *U. S. v. Seaboard R. Co. (C. C.)* 85 Fed. 955. The Supreme Court said, in *Ex parte Hoar*, 146 Cal. 132, 79 Pac. 853: "In cases of contempt, every court exercises a special and limited jurisdiction, and its authority to impose a fine or term of imprisonment must be shown by the record of conviction"—citing *Overend v. Superior Court*, 131 Cal. 280, 63 Pac. 372.

The judgment adjudging petitioner guilty of contempt, and imposing punishment therefor, is hereby vacated and declared to be null and void.

We concur: HART, J.; BURNETT, J.

6 Cal. App. 196

BAUTER v. SUPERIOR COURT OF SHASTA COUNTY et al. (Civ. 385.)

(Court of Appeal, Third District, California. Aug. 5, 1907.)

MANDAMUS—VIOLATION—CONTEMPT.

Proceedings having been instituted against E., as secretary of a corporation, to compel him to produce the books of the company and submit the same for inspection, he resigned as secretary in good faith prior to the issuance of a peremptory writ commanding him to produce the books for examination, etc. Petitioner was elected temporary secretary to fill the vacancy until the permanent secretary, who had been selected, should take office. A copy of the peremptory writ was served on petitioner, and demand made on him to produce and submit them to inspection, but, before the time arrived for submission of the books, under an agreement with relator, petitioner resigned as secretary; the permanent secretary having assumed the office. Held that, petitioner being no party to the mandamus proceedings, the court had no jurisdiction to punish him for his failure to comply with the writ.

Petition for a writ of review by L. A. Bauter against the superior court of Shasta county and George W. Bush, judge thereof. Writ granted. Petitioner discharged.

Geo. O. Perry and C. H. Braynard, for petitioner. T. W. H. Shanahan, for respondents.

CHIPMAN, P. J. It appears from the petition herein that petitioner was adjudged to be guilty of contempt in disobeying the writ of mandate issued out of the proceedings in the cause entitled *W. D. Egilbert, Petitioner, v. Superior Court of Shasta County* (No. 384, this day decided) 91 Pac. 748, in which cause this petitioner was not a party in any capacity, and was not named therein. It is alleged that petitioner was on May 18, 1907, elected as temporary secretary of the Pacific Power Company to fill a vacancy caused by the resignation of said Egilbert, until one A. A. Martin, who had been selected as per-

manent secretary, should be able to take such office; that a copy of the said writ was served on petitioner on May 28, 1907, and demand was then made upon him to produce and submit for inspection the books of said company; that petitioner replied to said demand that the books were not in his possession or under his control, but that he would produce them as soon as he could procure possession and control of them; that thereafter he made an arrangement with T. W. H. Shanahan (who had procured said writ to issue) to submit said books to him for inspection on June 10, 1907, but that prior thereto he (petitioner) resigned as such secretary, said Martin having become able to take up the duties of said office. It is then shown that said Shanahan took proceedings to obtain an order of the court adjudging petitioner herein to be guilty of contempt for disobeying said writ of mandate; that at the hearing of said contempt proceedings, to wit, on June 14, 1907, this petitioner answered setting forth his appointment as secretary and resignation as aforesaid; that he was not a party to the mandate proceedings; that evidence was introduced and the court made findings upon the facts alleged by petitioner (but it is not shown what the findings were), and thereupon the said court decreed that this petitioner was guilty of contempt, and imposed as punishment therefor that he be fined the sum of \$100, or be imprisoned one day for each \$2 thereof.

Under the facts as they appear, the question is: Had the court jurisdiction to punish petitioner for contempt of the writ issued in a proceeding brought against Egilbert alone, to which proceeding at no stage was this petitioner a party, and in which he had no opportunity to be heard and was not heard? In our opinion the question must be answered in the negative. Whether or not petitioner was the successor of Egilbert as secretary, he was not bound by anything adjudged in the proceedings against Egilbert alone. *Ex parte Tinkum*, 54 Cal. 201. It was there held that the successor in office of the county treasurer could not be punished for contempt for refusing to obey a writ issued against his predecessor, who had gone out of office when the writ issued; that the judgment of the court against the former treasurer "had no validity against the petitioner, as his successor in office, because the court had not, by any proper proceedings had or taken in the action, made the petitioner a party defendant in the action." See *Ex parte Widber*, 91 Cal. 367, 27 Pac. 733; *Ex parte Truman*, 124 Cal. 387, 57 Pac. 223. See, also, *Sargent v. Cavis*, 36 Cal. 552; *Ex parte Hollis*, 59 Cal. 405.

The judgment adjudging petitioner guilty of contempt, and imposing punishment therefor, is hereby vacated and declared to be null and void.

We concur: HART, J.; BURNETT, J.

6 Cal. App. 174

COMMERCIAL NAT. BANK OF OGDEN v. SCHLITZ. (Civ. 343.)

(Court of Appeal, Third District, California. July 31, 1907.)

1. NEW TRIAL—NOTICE OF INTENTION—FILING.

The court may treat a notice of intention to move for a new trial as filed on the day on which it was served and was handed to the clerk, though for some unexplained reason he failed on that day to indorse it as filed; he having three days later, on his attention being called to it, marked it as filed as of the day it was left with him, and his failure to mark it on that day having been through no fault of plaintiff's attorney who handed it to him, though the fee was not then paid, no fee having been demanded, and there having been no refusal to file, and the clerk testifying that the failure to pay made no difference.

2. TAXATION—ASSESSMENT—PRESUMPTION OF REGULARITY.

As against the recitals of a tax deed that the assessment was made under a certain act, and the provisions of the tax laws that a tax deed is prima facie evidence that the assessment was levied according to law, the statement in a letter of the grantee in the deed is no evidence that the assessment was under another act, in which case it would be irregular.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1555, 1565.]

3. SAME—ASSESSMENT IN WRONG NAME.

The assessment of land in the name of another than the owner does not make it or the tax sale thereon invalid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 701.]

4. SAME—TAX DEED—DESCRIPTION OF PROPERTY.

The description in a tax deed, "strip of 50 acres on the north line of fractional N. W. $\frac{1}{4}$ of section 7," is insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1520, 1521.]

5. ADVERSE POSSESSION—PAYMENT OF TAXES.

Under Code Civ. Proc. § 325, requiring one, as a condition to establishing title by adverse possession, to occupy it for five years continuously, and pay all the taxes, the running of the statute is interrupted by the true owner paying the taxes in any of such years prior to the payment thereof by the adverse claimant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 526.]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Commercial National Bank of Ogden against John J. Schlitz. From an order granting plaintiff a new trial, defendant appeals. Affirmed.

C. L. Russell, for appellant. T. E. Clark, for respondent.

CHIPMAN, P. J. Action to quiet title. Findings and judgment were in favor of defendant. Plaintiff moved for a new trial, which was granted, and defendant appeals from the order.

Defendant urges that there was no proper bill of exceptions before the trial court on which to base a motion for a new trial, for the reason that the notice of intention was not filed in time. The notice of decision was served on plaintiff's counsel April 17,

1905. Notice of intention to move for a new trial was likewise served on April 24, 1905, but it is claimed by defendant that it was not filed with the clerk until May 27, 1905. There is evidence tending to show that counsel for plaintiff handed the notice of intention to the clerk, with other papers, on April 24th, but for some reason not clearly explained the clerk failed on that day to indorse the paper as filed. Later, on May 27th, his attention was called to the omission, and on this latter day he indorsed the paper: "Filed April 24, 1905. T. E. Clark, Clerk." The testimony of the clerk and of plaintiff's counsel was taken on the point, and we think there was sufficient to justify the conclusion of the trial court that the notice was in fact left with the clerk on the 24th of April, which was in time. His failure to mark the paper on that day as then filed is not shown to have been through any fault of plaintiff's attorney, and we do not think plaintiff should suffer from an omission of the clerk to perform an official duty. The fact that the fee was not paid until May 27th, when the omission was discovered, should not affect the question, for the clerk testified that failure to pay the fee on April 24th would have made no difference. In *Davis v. Hurgren*, 125 Cal. 48, 57 Pac. 684, cited by appellant, the clerk refused to file the notice because the fee was not paid in advance. Here no fee was demanded, and there was no refusal to file the notice. Nor can it be reasonably said that plaintiff's counsel was inexcusably neglectful. The circumstances are fully set forth in the testimony of counsel and of the clerk, and were such as to justify the court in treating the notice as filed April 24th. Section 473, Code Civ. Proc. See, also, *Stonesifer v. Kilburn*, 94 Cal. 33, 29 Pac. 332; *Cameron v. Arcata R. R. Co.*, 129 Cal. 282, 61 Pac. 955; *Murphy v. Stelling*, 138 Cal. 642, 72 Pac. 176.

Plaintiff and defendant claim through a common source of title; plaintiff by deed from Lola E. Hill and Oscar E. Hill, dated July 8, 1893, duly recorded August 15, 1893, and defendant by tax deed of the collector of the Kern & Tulare Irrigation District, dated March 1, 1898. The premises described in plaintiff's complaint and deed is a tract of land described by metes and bounds, being a part of the northwest $\frac{1}{4}$ of section 7, township 24 south, range 26 east, Mount Diablo base and meridian, containing 149.05 acres. The premises, part of which is claimed by defendant, as appears from his said deed, was assessed for the year 1896 to Lola E. Hill, by the collector of said district, and is described therein as the "Frac. N. W. $\frac{1}{4}$ of section 7, township 24 south, range 26 east," and that the portion sold to defendant for delinquent taxes is described as a "strip of 50 acres on the north line of fractional N. W. $\frac{1}{4}$ of section 7, township 24 south, range 26 east, Mount Diablo base and meridian." It appears from the assessment rolls

introduced by plaintiff that the tract was assessed to plaintiff for the years 1897 to 1904, inclusive. The acreage and description varied in different years (omitting here all of the part of section described), sometimes by metes and bounds, as in plaintiff's deed (1897, 1898, 1899, 1903, each assessment 153 acres, except 1903 for 149 acres); again, northwest $\frac{1}{4}$ (1900); south 110 acres of northwest $\frac{1}{4}$ (1901, 1902); and fractional south 149 acres of northwest $\frac{1}{4}$ (1904). Payment in full of taxes for these assessments was shown. Defendant introduced assessment rolls showing assessments to defendant (omitting all after part of section described) as follows: 1898, north 50 acres of northwest $\frac{1}{4}$, marked in red ink as follows, to wit: "Assessed also to Commercial National Bank of Ogden, Utah, vol. 3, page 2." Marked also in lead pencil on margin of book: "Double assessed page 2, vol. 3, T. C., Take Cr." 1899, same description and same note in red ink; 1900, fractional northwest $\frac{1}{4}$ * * * 50 acres; 1901, fractional northwest $\frac{1}{4}$ (being north 50 acres); 1902, north 50 acres of fractional northwest $\frac{1}{4}$; 1903, north 50 acres of fractional northwest $\frac{1}{4}$; 1904, north 50 acres of fractional northwest $\frac{1}{4}$. Defendant introduced receipts showing payments in full of assessments to him.

There is but little evidence outside of these official records. It appeared from the testimony of defendant and his son, and is uncontradicted, that defendant went into possession, as found by the court, July 20, 1898. Defendant testified: "I measured the land off myself so as to inclose what I thought was 50 acres and fenced it in. I measured 50 acres off of the north side of the land mentioned in plaintiff's complaint. I found the stakes at the corner of the land, placed there by the surveyors. I made my measurements according to each stake." He also testified that he has cultivated or pastured the land ever since. He explained that the northwest $\frac{1}{4}$ of section 7 became fractional in the distribution of an estate by a strip being cut off along the east side and a strip cut off the south side, thus leaving a fractional northwest $\frac{1}{4}$ of 149 acres. He testified that he had never had the land claimed by him surveyed and never notified plaintiff of his possession; that the land claimed by him was assessed in 1898, but he did not pay the taxes for that year; that the first taxes he paid was January 3, 1900, "for the taxes assessed to him for the year 1899"; that he never paid any of the taxes assessed to plaintiff for any year. It was admitted that the land in question is situated within the boundary of what was a legally constituted district, called the "Kern and Tulare Irrigation District," under the provisions of the act approved March 7, 1887 (St. 1887, p. 41, c. 34), and the acts supplemental to and amendatory thereof. Defendant testified that he claimed the land through purchase "on the delinquent assessment of

1890"; that this assessment was "levied to pay the indebtedness of the district for disorganizing. The district had been running several years without levying any assessment to pay expenses (the last previous assessment was in 1892) and had got considerably in debt; and the assessment was intended to cover, and did cover, all the debts of the district; the N. W. $\frac{1}{4}$ of section 7, township 24 S., range 26 E., was assessed to Lola E. Hill, and the taxes were not paid on it, and it was sold for the delinquent assessment in 1896, in the spring of 1897, and I bought the north 50 acres and paid the assessment. The tax collector of the irrigation district issued a certificate of sale to me, and it was not redeemed, and on March 1, 1898, the tax collector made me a deed to the land." Some letters were introduced by plaintiff, without objection, from which it appeared that on January 23, 1898, defendant wrote plaintiff that he had purchased 50 acres of the northwest $\frac{1}{4}$ at delinquent tax sale, but did not want the land, and would deed it to plaintiff for what it cost defendant. Plaintiff replied that defendant's letter was the first intimation it had of any such irrigation district as defendant mentioned; that plaintiff's title had been a matter of record since 1893. July 2, 1898, defendant replied, stating further facts about the district; that the last assessment prior to 1896 was in 1892, to Mrs. Lola Hill or Oscar Hill, and was paid; that the assessment of 1896 was to Mrs. Lola Hill, to whom notices were sent; that he supposed the land belonged to her "until some time ago, being at the assessor's office in Tulare county, giving in the list of my property, among which was the 50-acre piece purchased at delinquent sale, I found that the Commercial National Bank was paying the taxes on the N. W. $\frac{1}{4}$, * * * whence my communication to you." He then states: "Now regarding the * * * district, it is out of existence, the people in the district after having paid some \$35,000 in taxes, and the district being about \$10,000 in debt, and no prospect of getting water on the lands of the district, decided on disorganizing the district, which could be done legally by first paying outstanding indebtedness, and the people voted and authorized the assessment of 1896. The assessment was made and collected, and the delinquent property was sold, the same as state and county taxes, and on the 11th day of April, 1898, in the superior court of Kern county, upon showing that the affairs of the district had been wound up according to law and the outstanding debts of the district had all been paid, the court agreed (decreed?) that the * * * district should forever be dissolved." Plaintiff replied February 5, 1898, stating that the tax not having been assessed to plaintiff makes it void, as defendant will learn by consulting *Gwynn v. Dierssen*, 101 Cal. 563, 36 Pac. 103; called attention again to its deed of

1893, and that defendant's tax was not levied until 1896. Thus ends the correspondence, and this is substantially all the evidence in the case.

Briefly summarized, the court found that the land described in plaintiff's complaint was, in the year 1896, "duly and properly assessed by the assessor of said district pursuant to and as required by law * * * to Lola E. Hill"; that all the property of the district was duly equalized in that year, and to pay the outstanding indebtedness of said district its board of directors duly levied an assessment upon all the lands therein, including the said lands described in plaintiff's complaint; that said assessment on plaintiff's said land became a lien thereon and was never paid; that on February 27, 1897, said property was duly offered for sale to pay said assessment, and defendant became the purchaser of the "north fifty acres of the tract of land described" in plaintiff's complaint; that said collector of said district executed and delivered duplicate certificate of sale of said property (reciting the facts as to said sale), a copy of which was delivered to defendant; that no redemption was made, and said collector on March 1, 1898, executed and delivered to defendant a deed to said north 50 acres of the land described in plaintiff's complaint, which was duly recorded April 16, 1898. The court then finds that defendant entered into possession of said land "under and by virtue of said deed" and constructed a fence inclosing the said land, and at all times since July 20, 1898, "he has been in the quiet, peaceable, continuous, actual, open, notorious, adverse and exclusive possession of said 50 acres of land, * * * cultivating and using the same * * * and claiming the same adversely to all other persons, for more than five years before the commencement of this action." As conclusion of law the court finds that defendant was the owner of the land in question at the commencement of the action and is now such owner. The original complaint was filed June 22, 1904, and the amended complaint on August 6, 1904. Plaintiff in its specifications challenges the sufficiency of the evidence substantially as to all the findings in defendant's favor.

The reason for granting the motion for a new trial is not given, but if any sufficient reason can be found the order must be affirmed. If, however, the proceedings leading up to defendant's tax deed were legal, and a valid title passed to defendant thereunder, it is immaterial whether the findings as to defendant's adverse possession are supported by the evidence. Likewise, if title by prescription is established, the findings as to the tax title may be disregarded. It becomes necessary, therefore, to examine both sources of title upon which defendant relies. Respondent attacks the findings on the following grounds: First, that the assessment in 1896 was made under the disorganizing

act of 1893 (St. 1893, p. 523, c. 241), and not under the act of March 7, 1887 (St. 1887, p. 41, c. 34), and was therefore void because unauthorized by the act of 1893; second, that the title to the land in 1896, when assessed to Lola E. Hill, stood of record in plaintiff, and could not legally be assessed to any person other than plaintiff; third, that the attempted description of the land claimed by defendant as bid in by him and subsequently assessed to him does not definitely describe any land; fourth, that the whole of the fractional northwest $\frac{1}{4}$ of said section was assessed to plaintiff at the time the said 50-acre tract was bid in by defendant and at all times while subsequently assessed to defendant, which latter was a double assessment and void under section 3607, Pol. Code, and the concurring opinion in *Cavanaugh v. Jackson*, 99 Cal. 675, 34 Pac. 509; and the facts do not establish title by adverse possession.

The Tax Title Considered.

We do not think that the facts warrant the assumption that the assessment was made under the act of 1893. It was doubtless made in anticipation of disorganizing the district, but not as a part of or through proceedings for that purpose. The collector's deed recites that the levy was made for the year 1896 by virtue and under the provisions of the act of March 7, 1887, and its amendatory acts. The letter of defendant to plaintiff, relied upon by the latter as showing that the assessment was made under the act of 1893, does not purport to be more than an outline narrative of certain proceedings, but does not show that the levy was under the act of 1893. The decree of the court, dissolving the corporation, was not made until two years later, and could not then have been made except upon a showing in the complaint and by the evidence that the debts of the corporation were paid. The record is not before us, and we must presume regularity so far as disorganization is concerned. By the act of 1897 (St. 1897, p. 254, c. 159) the assessor was required to assess all real property in the district to the persons who own, claim, have the possession or control the property, and he must specify in the assessment book: "(a) The name of the person to whom the property is assessed (if the name is not known to the assessor, the property shall be assessed to 'unknown owners')." Section 48 (page 271) provides: That the matter recited in the certificate of sale must be recited in the deed and such deed duly acknowledged or proved is prima facie evidence that: "(a) The property was assessed as required by law; * * * (c) that the assessments were levied in accordance with law"; and "such deed * * * is (except as against actual fraud) conclusive evidence of the regularity of all the proceedings from the assessment by the assessor inclusive, up to the execu-

tion of the deed." Like provisions are found in the act of 1887. Section 32 of the act of 1887 (also section 50 of the act of 1897) provides: "When the land is sold for assessments, correctly imposed, as the property of a particular person, no misnomer of the owner or supposed owner, or other mistake relating to the ownership thereof, affects the sale or renders it void or voidable." Under the provisions of section 3628 of the Political Code, before its amendment in 1880, it was held, as in *Gwynn v. Dierssen*, 101 Cal. 563, 36 Pac. 103, that the assessment must be made to the owner, and if not known then to unknown owners. But in *Escondido H. S. Dist. v. Escondido Seminary*, 130 Cal. 128, 62 Pac. 401, it was held that an assessment to a person not the owner does not affect its validity. To the same effect: *Klumpke v. Baker*, 131 Cal. 80, 63 Pac. 137, 676. It was said in *Lake County v. Silver Bank, etc.*, Min. Co., 66 Cal. 20, 4 Pac. 876: "The ascertainment of the name of the owner is a matter with respect to which the assessor has discretionary power, and his judgment or conclusion in regard to it is final, so far as the validity of the tax is concerned." In *Klumpke v. Baker*, supra, the court said: "The name of the owner of the property assessed is an incidental provision for the sake of convenience, but a failure to give the correct name of the owner is declared by the statute not to impair the assessment." Again: "The assessment is not against the owner, but is of the property, and that must be correctly described." And this brings us to the remaining question touching the validity of the title based upon the tax deed.

The land, as said in the *Klumpke Case*, must be correctly described. The description must be definite, certain, and intelligible of itself, and not such as to require evidence aliunde to render it certain. *Keane v. Canovan*, 21 Cal. 302, 82 Am. Dec. 738; *People v. Mahoney*, 55 Cal. 286; *People v. C. P. Co.*, 83 Cal. 400, 23 Pac. 303; *State v. C. P. R. Co.*, 21 Nev. 101, 25 Pac. 442; *C. P. Co. v. Nevada*, 162 U. S. 525, 16 Sup. Ct. 885, 40 L. Ed. 1057. "A description sufficiently certain to convey land between man and man, and which, if contained in an agreement to convey, would authorize a court of equity to decree specific execution, will not answer in the proceeding to enforce the collection of a tax." *Blackwell on Tax Titles*, p. 124. Defendant's deed takes its origin in and must be governed by the description of the least quantity of the land which defendant was willing to take and pay the assessment. This description reads as follows: "Strip of 50 acres on the north line of fractional N. W. $\frac{1}{4}$ of section 7," etc. We do not think that this description meets the requirements of the rule above stated. Quantity is the least certain element of description and is no description at all unless a definite and certain basis for its ascertainment is supplied. The north line of the 50-acre tract

taken is not necessarily coincident with the entire north line of the northwest $\frac{1}{4}$. The description only calls for 50 acres on that line, but not along its whole length. If plaintiff and defendant had been bargaining for 50 acres on the north line, parol evidence might have been admissible to show their intention, but not so in tax proceedings, in their nature in invitum. The rule has been laid down that, where a given acreage is sold "off the side of a quarter section," it must be taken in a parallelogram, and when out of the corner it must be taken in a square. 4 Am. & Eng. Ency. of Law, p. 789. Even this rule could not have been applied owing to the irregular shape of the fractional tract out of which defendant sought to take the 50 acres. The uncertainty of description was attempted to be corrected in subsequent assessments, but obviously this cannot avail defendant as supporting his tax title, however much it may assist his claim by prescription.

The Title by Adverse Possession Considered.

The title by prescription turns principally upon the payment of the taxes by defendant. It was shown that plaintiff paid the taxes levied and assessed upon the fractional northwest $\frac{1}{4}$ of section 7 for the years 1897 to 1904, inclusive; that defendant had the land claimed by him assessed for 1898 and thence each year to 1904, inclusive, and paid the taxes for each year except 1898. But plaintiff paid the tax on all the land for 1903 on October 23, 1903, while defendant did not pay the tax on the tract separately assessed to him until November 23, 1903, and the tax for the year 1904 was paid by both parties on the same day, November 18, 1904. Whether the adverse occupant of land may have it assessed to himself while it is assessed also to the true owner, and may comply with section 325, Code Civ. Proc., by paying this double or second tax when for the same years the true owner also pays the tax, is a question not satisfactorily or clearly settled by our Supreme Court. In *Cavanaugh v. Jackson*, 99 Cal. 672,¹ the main opinion seems to answer the question in the affirmative. But in a concurring opinion, Mr. Justice Harrison, one of the three judges who pronounced judgment, dissented from the view of the majority and concurred only on the ground that the adverse occupant paid the tax before the true owner paid it. When the reasoning of the dissenting opinion is considered, together with some statements in *Hayes v. County of Los Angeles*, 99 Cal. 74, 33 Pac. 766, and the decision in *Carpenter v. Lewis*, 119 Cal. 18, 50 Pac. 925, is also taken into consideration, it must be apparent that the soundness of the *Cavanaugh* decision is to some extent at least to be doubted. However this may be, it seems quite clear to us that, where the true owner pays the tax upon an assessment to himself before the adverse claimant pays the

second or double tax he has caused to be assessed to himself, the latter cannot claim compliance with the statute. This view makes it unnecessary to consider the other questions arising out of the facts connected with defendant's claim of adverse possession. The prior payment of the tax by plaintiff for the year 1903, not to mention the payment by both parties on the same day for the year 1904, interrupted the running of the statute of limitations, and defendant had not completed the requisite adverse occupation when the action was commenced.

The order is affirmed.

We concur: HART, J.; BURNETT, J.

6 Cal. App. 204

MENZEL v. PRIMM et al. (Civ. 346.)

(Court of Appeal, Third District, California. Aug. 6, 1907.)

1. VENDOR AND PURCHASER—OPTIONS.

Even if a contract by which plaintiff agreed to sell mines to C. for \$7,500, of which \$3,500 was to be paid at a certain time and \$4,000 later, was an option, yet the transaction became one of sale on \$1,000 being paid, and plaintiff executing an agreement reciting that, whereas, there was then "due and owing" \$2,500 on the claim, he agreed to accept in lieu thereof the note of C. and another of even date for that amount payable 60 days later.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Vendor and Purchaser, § 3.]

2. PAYMENT—PAYMENT BY NOTE.

Where, when a payment on plaintiff's contract of sale of a mine to C. became due, he executed an agreement reciting that, whereas, there was then due and payable \$2,500, he agreed to accept "in lieu of the sum of \$2,500" a note of even date signed by C. and P., payable in 60 days, with interest, said note was not taken in payment, but as evidence of the indebtedness payable at maturity of the note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, § 70.]

3. PLEADING—ANSWER—CONSTRUCTION.

The allegation of the answer, in an action on a note, that the note was given in payment, which was contrary to defendant's contention in the case, and at variance with the language of the instrument under which the note was taken, and with the facts as disclosed, will be treated as an attempted statement that the note was given as an evidence of the indebtedness payable at maturity of the note, as was the fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 66.]

4. BILLS AND NOTES—DEFENSE AVAILABLE TO SURETY.

A surety on a note may, as against the original payee, defend on the ground of absence or failure of consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 163, 164.]

5. VENDOR AND PURCHASER—ACTION FOR PARTIAL PAYMENT—TENDER OF DEED.

Where a contract of sale of land, for a certain sum, payable in installments, is silent as to time of delivering a deed, it should be tendered before action can be maintained on a note given for one of the installments.

Appeal from Superior Court, Shasta County; C. M. Head, Judge.

Action by William Menzel against F. R.

¹ 84 Pac. 609.

Primm and another. From an adverse judgment, plaintiff appeals. Affirmed.

Reid and Dozier, for appellant. T. W. H. Shanahan and Chas. H. Braynard, for respondent Primm.

HART, J. This action was brought by the plaintiff to enforce the payment of a promissory note for the sum of \$2,500, made and delivered on the 28th day of May, 1903, by the defendants, and payable 60 days after date. The defendant, Chambers, was not served with process and made no appearance. The case was tried before the court, a jury having been waived by the parties, and judgment awarded to the defendant and respondent Primm. This appeal is from said judgment and the order refusing plaintiff a new trial.

The note which is the foundation of the action was the outcome of a certain agreement in writing, dated the 13th day of February, 1903, under the provisions of which the plaintiff, on certain specified terms, agreed to sell certain mining claims to the defendant Chambers for the sum of \$7,500, of which the sum of \$3,500 was to be paid on or before the 24th day of March, 1903, and the remainder, \$4,000, on or before the 24th day of September, 1903. The agreement provided that Chambers should have immediate possession of said mining claims for the purpose of working, mining, and developing the same, and said Chambers agreed to "put two men to work thereon within 60 days" from the date of the agreement. Chambers was given the right to extract ores from said mining claims, but was to "leave all ores so extracted upon the dump, save and except such amounts as may be necessary for assay and sampling purposes." The agreement also stipulated that the "party of the second part (Chambers) shall have the use of a boiler now on said premises," and also "the use of the lumber and timber belonging to said mining property, and, in the event of the sale of said property, will pay to said party of the first part the sum of \$250 for the timber and lagging now on the ground on said premises." And the parties finally agreed that, in the event the party of the second part shall fail to purchase said property, he shall have the right to remove all machinery which he may have placed on said mining ground. On the 26th day of March, 1903, plaintiff and Chambers entered into a second written agreement, by the terms of which the time for the making of the first payment, \$3,500, was extended to the 24th day of April, 1903, or 30 days from the 24th day of March, 1903, on which day said payment was, as originally agreed, to be made. On the 21st day of April, 1903, a third written agreement was made by plaintiff and Chambers, whereby plaintiff released said Chambers from the obligation of paying said sum of \$3,500 on the said 24th day of April, 1903, as provided in the agreement

of the 26th day of March, 1903. In that agreement, mentioned as the third, plaintiff agreed to accept from said Chambers, in lieu of the \$3,500 which the latter had promised to pay plaintiff on said 24th day of April, the sum of \$1,000 in coin and the further sum of \$2,500, to be paid on the 24th day of May, 1903. A fourth agreement in writing was made by the parties on the 28th day of May, 1903, by which the plaintiff agreed to accept from Chambers a promissory note for \$2,500 in the place and stead of that amount of money which Chambers had agreed to pay plaintiff on the 28th day of May, 1903. Said note was executed by Chambers and the respondent, and is the instrument upon which this suit is based. The second, third, and fourth agreements to which we have just referred continued in force all the stipulations, covenants, and conditions contained in the original agreement, save and except only the portion thereof stipulating as to the times of the payments of the money which the second party agreed to pay for said property.

The answer alleges that on the 15th day of April, 1903, Chambers entered into a written agreement with one T. S. Henderson, of St. Louis, Mo., under and by which said Chambers, for and in consideration of the sum of \$25,000, agreed to sell and convey to said Henderson all the mining claims mentioned in the agreement between said Chambers and the plaintiff, and said Henderson agreed to purchase the same for said sum, whereof \$5,000 was to be paid upon the making of said agreement and \$5,000 on the 15th day of September, 1903, and the balance to be paid in installments of \$5,000 at the expiration of every six months thereafter until the full purchase price was paid. The answer further alleges that, on the 10th day of August, 1903, the plaintiff and the Great Western Gold Mining Company, a corporation, of which said T. S. Henderson was president and the financial agent, and who had the general management and control of all the business affairs of said corporation, entered into a written agreement, by the covenants of which plaintiff agreed to sell and convey by a good and sufficient deed to said corporation, and the latter agreed to buy, the mining claims mentioned in the original agreement between the plaintiff and said Chambers for the sum of \$7,000, to be paid in certain specified installments; and it was further agreed by plaintiff that said corporation and its assigns might immediately, upon the execution of said agreement, enter in to and take possession of said mining claims. It is also alleged in the answer that the agreement so entered into between the plaintiff and the said corporation "was made and entered into for the purpose and with the intent that neither said Great Western Gold Company or the said T. S. Henderson, either individually or as president, fiscal agent, and the person who had general charge and management of the affairs of said company,

would make said payment of said sum of \$5,000 to said Chambers which was agreed and understood should be paid on the 17th day of September, 1903, and that said plaintiff would sell to the said Great Western Gold Company the said mining claims hereinbefore mentioned for the said sum of \$7,000." The answer avers that the promissory note set out in the complaint was given for the purpose and the intent that the same might become a payment upon said mining property, and that no demand for its payment was made until more than six months after its maturity. "For a third and separate answer," the answer reiterates that the note in dispute was made and given and accepted as part payment of the agreed purchase price of said mining claims, and avers that "up to and including the 10th day of August, 1903, said defendant, Chambers, had performed on his part all the terms, time given and conditions of" the four several agreements between him and the plaintiff. It is also alleged that the plaintiff put it out of his power to carry out his part of the agreement with Chambers by agreeing, without the knowledge or consent of the defendants, to sell said property to the corporation mentioned, and that therefore the consideration for said promissory note "wholly and entirely failed." It may here be stated that the property which is mentioned in the agreement between the plaintiff and the Great Western Gold Company is designated therein as the "Vandevere Mine," but the answer alleges that it is the identical property mentioned in the agreement between plaintiff and Chambers.

It is contended by the appellant that the agreement between the parties was intended and understood by them to be an option tendered to the defendant Chambers to purchase the property described in the instrument; while, on the other hand, the respondent maintains that it constituted a contract by the provisions of which the plaintiff agreed to sell, and the defendant Chambers agreed to purchase, said property. "The distinction between a contract to purchase or sell real estate and an option to purchase is that the contract to purchase or sell creates a mutual obligation on the one party to sell and on the other to purchase, while an option merely gives the right to purchase within a limited time without imposing any obligation to purchase." 29 Am. & Eng. Ency. of Law (2d Ed.) p. 606. In other words, an option is a contract by which the owner of property invests another with the exclusive right to purchase said property at a stipulated sum within a limited or reasonable time in the future. Or, stated in another form, it is a right "acquired by contract to accept or reject a present offer, within a limited or reasonable time in the future." 21 Am. & Eng. Ency. of Law, p. 924. When the offer thus made is, within the time stipulated, accepted by any sufficient

act or words of the party acquiring the right to accept or reject such offer, the transaction between the parties, ipso facto, ceases to be an option, but becomes a sale or contract of sale, according to the circumstances of the acceptance.

Plaintiff testified that on the 21st of April, 1903, Chambers paid him the sum of \$1,000. There is no provision in the agreement in express language which indicates that the document was intended as an option; but appellant undertakes to construe certain language contained therein as a manifestation that the parties intended and understood the instrument to be a mere offer to sell. But assuming that the original writing could be construed as a mere option, it is clear that the payment by Chambers, on the 21st day of April, 1903, of the sum of \$1,000 to the plaintiff, operated as an acceptance of said option, and that, whatever may have been the previous intention of the parties as to the nature of their transaction, it took on, from the time of such payment, the character of an agreement or contract of sale, and its terms capable of being specifically enforced. And assuming, further, that the plaintiff intended the original writing to be nothing more than an offer to sell, it is manifest that, after the receipt by him of said sum of \$1,000, and from the language of the fourth writing, executed by all the parties to this action, he, too, treated said payment of \$1,000 as an act of acceptance of the option by Chambers. The "fourth writing" referred to was made subsequently to the payment of the \$1,000 to the plaintiff, and reads in part as follows: "Whereas, there is now due and owing claims in the sum of \$2,500.00, now, for and in consideration of the sum of \$1.00 to me in hand paid by said James Chambers, I hereby agree to accept a promissory note of even date herewith, signed by said Jas. J. Chambers and F. P. Primm, in lieu of the sum of \$2,500.00, said note being payable sixty days from and after date hereof, with interest at the rate of 8 per cent. per annum until paid." In view of the fact of the payment of the \$1,000, there can be but one meaning to the language quoted, "Whereas, there is now due and owing a payment on said mining claims," and that is that the mines had been sold, and that there was then due from the purchaser the certain sum of money mentioned in said writing. To hold that, after the payment of the \$1,000 by Chambers to the plaintiff, the transaction still remained an option (we are assuming but not conceding that the original writing was only an option), would be to declare that the said sum so paid was the consideration for the right acquired by Chambers under the option; that is, the right to accept or reject an offer to sell property itself valued at only \$7,500. Such a construction of the agreement, under the circumstances, would be unreasonable and absurd.

It is further contended that, under a proper construction of the last or "fourth writing,"

the note sued on was "accepted as a payment on the contract or option, and not as an extension of time," and that therefore the respondent is not "in a position to say anything because he is in no wise concerned with any agreement except the one as to the receiving of this note as payment." The claim is, in other words, that the note was intended as an absolute payment, and respondent, not being a party to the agreement, cannot set up the defense of failure of consideration, which defense would be available to the principal, or Chambers. We do not think the facts as exhibited by the record warrant any such conclusion. On the contrary, we think it is plain, from the facts before us, that the note was not intended as a payment, but that it was designed only as an evidence of the indebtedness, and therefore operated only as a postponement or suspension of the right of action on such debt to a future time; that is, until its maturity. The contention of appellant is founded on his construction of certain language contained in the agreement (the "fourth writing") that the note is accepted "in lieu of the sum of \$2,500," etc. It is doubtful whether that language warrants the construction thus given it by appellant; but, if it may be said to be reasonably susceptible of such construction, we think that it is equally capable of the opposite interpretation that it was intended, and so given and accepted, for the purpose merely of deferring to the date of its maturity the right to bring suit upon the debt of which it constituted written evidence. But to impart to the note the effect contended for by appellant, there should be an express agreement that it was to be deemed and accepted as an absolute payment. It is well settled that the note of a debtor or of a third party, if not itself paid, does not constitute a payment unless received by the creditor under an express agreement to accept it as an absolute payment. "The presumption is not in favor of its being received as payment." *Bonestell v. Bowie*, 128 Cal. 515, 61 Pac. 78; *Dingley v. McDonald*, 124 Cal. 90, 56 Pac. 790; *Savings Bank v. Central Market Co.*, 122 Cal. 33, 54 Pac. 273; *Deleapiazza v. Foley*, 112 Cal. 390, 386, 44 Pac. 727; *Savings, etc., Soc. v. Burnett*, 106 Cal. 514, 528, 39 Pac. 922; *Steinhart v. National Bank*, 94 Cal. 362, 29 Pac. 717, 28 Am. St. Rep. 132; *Comptoir D'Escompte v. Dresbach*, 78 Cal. 15, 20 Pac. 28; *Welch v. Allington*, 23 Cal. 322. There is no express agreement here that the note should be treated and accepted as a payment. The allegation in the answer that the note was given as a payment does not affect our views upon the subject. We do not know how the respondent was led to make such an allegation in his pleading, since, in his brief, he vigorously opposes the view which the language of the averment seems to imply. We do not feel bound by the construction of a document by a pleader which is plainly at variance with the language of the instrument itself, as well as with the ex-

trinsic circumstances, as disclosed by the record, which surrounded and accompanied its execution. The allegation at best is a mere conclusion, and we are rather of the opinion that the pleader only intended to state, though, it may be admitted, by the employment of inapt language, what the fact is, that the note was given as an evidence of the indebtedness payable at the maturity of said note.

There seems to be no question raised here that a surety may defend upon the ground of an absence or failure of consideration of a promissory note to which he is a party, if the action thereon is by the original payee. The liability of a surety cannot be greater than that of the principal (*Stockton, etc., Society v. Giddings*, 96 Cal. 90, 30 Pac. 1016, 21 L. R. A. 406, 31 Am. St. Rep. 181), and, where there is a failure of consideration to support it, the note would be just as amenable to attack upon that ground by a surety as by the principal—where the suit is between the original parties, and no rights of an innocent holder are involved. But the respondent claims that he was a principal. While we cannot say that the evidence justifies that conclusion, it is nevertheless apparent therefrom that the respondent had an interest in the agreement between plaintiff and Chambers, independent of that involved in his mere liability upon the note. He testified that he became a party to the note because, among other reasons, he expected that Chambers would make money out of the property and "would reimburse me to a certain extent out of the mine. I started him in business when he had nothing, and, if he accumulated a competence, I expected to be reimbursed for what I had done for him when he was poor and needy." He also stated that he and plaintiff had "discussed the matter about accepting the note." By the statement that he expected to be "reimbursed to some extent out of the mine," the respondent evidently meant that Chambers intended to remunerate him for his acts of assistance (signing the note, etc.) as soon as he could make the money from the mines, and from this it is reasonably inferable that there was some understanding between Chambers and respondent to that effect. But whether there was such an understanding or not, or whether, as appears to be the fact, the respondent was thoroughly familiar with the antecedent transactions of plaintiff and Chambers as to the property involved, and upon the faith of such knowledge and his expectation of participating in the profits of the mines under the ownership and development by Chambers signed the note, it was, in any event, his unquestionable right in this action by the original payee to interpose the defense of want of consideration, even though he played no other roll than that of surety.

The evidence shows that the consideration for the note in dispute, for a time at least, failed absolutely, because after its maturity, and long before the commencement of this

action, the plaintiff entered into a contract with the Great Western Gold Company, by the provisions of which the latter was to buy from the plaintiff the identical property which is the object of the agreement between plaintiff and Chambers. Plaintiff himself testified: "I received \$1,000 for the same property from the Great Western Gold Company on the 16th day of October, 1903. Some time after this I received \$500 besides the \$1,000 from the Great Western Gold Company for the same property. I still hold the title and the possession of the Scottish Chief and Santa Clara mines, sometimes known as the Vandevere mines. I gave the Great Western Gold Company possession, I think, on the 16th day of October, 1903, for a time, and I have possession of it now." It is thus seen that appellant, a short time after the date of the maturity of the note here, placed himself in a position in which he could not have performed his part of the agreement with Chambers, even if he had desired to do so, unless he had been able to make such terms with the corporation as would have enabled him to convey the property to the defendants. The consideration for the note had failed by the act of the plaintiff himself. At the time of the commencement of this action his agreement with the corporation, it appears, ceased to be binding, and he again took possession of and assumed control over the property. We think that the significance of the circumstance of the contract of option between plaintiff and the Great Western Gold Company is in the fact that the plaintiff thus gave evidence of his intention of treating his contract with Chambers as no longer existing or binding. And if he did not so intend to treat it, why did he assume complete control over the property and attempt to dispose of it to other parties? If he intended to hold Chambers and the respondent to their contract, he should have first tendered them a deed to the property, or offered to convey to them such interest in it as would be commensurate with the money already paid and the sum due on the note. He admitted that at no time did he offer to execute a deed to the parties or to either of them. These views are, of course, based upon the theory that the transaction between the parties involved a contract of sale, and not an option, as contended by appellant. As we have before declared, we have no doubt that the agreement was one to sell on the part of the plaintiff, and to purchase on the part of Chambers. We think the case at bar comes within the principles laid down in the case of *McCroskey v. Ladd*, 96 Cal. 456 et seq., 31 Pac. 558, where the court says that an "action upon a note, being between the original parties thereto, is subject to an inquiry into its consideration, and is also subject to any equities existing between the parties which arise out of the execution of the note,

or are connected therewith. The note was given for a portion of the purchase price of a tract of land to be thereafter conveyed by the plaintiff under his agreement with the defendants and their associates, was executed in pursuance of said agreement at the same time with the execution of the agreement, was a part of the same transaction, and is to be interpreted and regarded as a part of the agreement made between the parties at that date." The note here was, as were all the other writings of which we have made mention, an outgrowth of the transaction between the parties and a part and element thereof, and all said writings, including the note, are to be construed as one agreement. In the case from which we have just quoted the court further says: "The respective obligations of the parties to an agreement for the conveyance of land, when the purchase money is made payable in installments, are to be construed as independent obligations, or as dependent and concurrent, according to the terms in which the agreement is express. If an installment is made payable prior to the date at which the conveyance is to be made, the obligation to pay the installment and to make the conveyance will be regarded as independent obligations, and the seller can maintain an action for the recovery of the installment without the execution or tender of a conveyance; whereas, if the payment of the installment is to be made upon the execution of the conveyance, no recovery thereof can be had, except upon the averment and proof of such execution, or a tender thereof. If the agreement is silent upon this point, the obligations will be regarded as mutual and dependent, so that neither party can have a right of action against the other without a previous performance or offer to perform on his part; and if the time for the performance of the conditions on both sides has expired, it is incumbent on either party, before he can enforce a performance by the other, to do or offer to do all that by the agreement he is required to do." The agreement here is silent upon "the point" mentioned in the opinion. The time within which the conditions here were to be performed, in the absence of express language fixing a time, can only be held to be that which expired coincidentally with the date of the maturity of the note.

Complaint is made of certain rulings of the court upon questions of admissibility of evidence, but they are not sufficiently important to demand special attention. The rulings, to which exceptions were reserved and claimed here to have been prejudicial to plaintiff, even if they be conceded to be erroneous (and we do not so hold them to be), could not, in our opinion, have resulted in injury to the appellant.

The findings are amply supported by the evidence, and the judgment is just, equitable,

and conscionable. Under the facts, as they are recorded here, any other judgment would be the reverse.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

6 Cal. App. 197

WILLS v. BOOTH et al. (Civ. 350.)

(Court of Appeal, Third District, California.
Aug. 5, 1907.)

1. EXECUTORS AND ADMINISTRATORS—ALLOWANCE TO SURVIVING WIFE—NOTICE.

Under Code Civ. Proc. § 1469, providing that if, on return of the inventory of the estate of a decedent, it appears therefrom that the value of the estate does not exceed \$1,500, the court shall, by order, require all persons interested to appear to show cause why the whole of the estate shall not be assigned to decedent's widow, and that notice thereof shall be given as provided in sections 1633, 1635, and 1638, such notice need not be given by publication, those sections providing only for notice by posting, or if, on final hearing, the judge shall deem the notice insufficient, then that he may order such further notice as may seem to him proper.

2. SAME—ACTIONS AGAINST.

The estate of decedent having been of less value than \$1,500, and so, under Code Civ. Proc. § 1469, been assigned to his widow, action cannot be maintained against the administratrix on a note of decedent.

3. SAME — PRESENTMENT OF CLAIM — COMPLAINT.

The complaint in action on a note of decedent against his administratrix must show that the claim, accompanied by a copy of the note, was presented to the administratrix, in accordance with Code Civ. Proc. §§ 1494, 1497, and was rejected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1808.]

4. BILLS AND NOTES — DEMAND NOTE — INDORSEMENT—PRESENTMENT FOR PAYMENT.

A note, payable at a definite time, being indorsed by the payees after maturity, is then to be treated as one payable on demand, so that to make the indorsers liable thereon there must be a presentment and demand on the maker within the time prescribed by Civ. Code, § 3135, or else a satisfactory showing excusing the failure to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1022-1028.]

5. SAME—ACTION AGAINST INDORSERS—COMPLAINT — EXCUSING NONPRESENTMENT FOR PAYMENT.

The complaint against the indorsers of a note does not sufficiently show excuse for not presenting it for payment to the maker; it merely alleging on "information and belief," without giving the grounds therefor, that the maker had left the state, and that the note was presented for payment at the place of its date, when the note was silent as to the place of payment, and this was not shown to have been the maker's place of residence or business, and no diligence to find the same is shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1497.]

Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by William L. Wills against William Booth and Mary A. Burleson, administratrix of I. C. Burleson, deceased. From an

adverse judgment, plaintiff appeals. Affirmed.

Coburn & Collier, for appellant. R. S. Taylor, for respondents.

HART, J. This is an action on a promissory note. A demurrer was sustained to the amended complaint, with leave granted to the plaintiff to file a second amended complaint within 10 days. The plaintiff failed and refused to further amend his complaint within the time allowed, and judgment was thereupon entered in favor of the defendants dismissing the action. From the judgment so entered, this appeal is taken.

The note in question was made and delivered by one A. M. Williams to the defendant Booth and I. C. Burleson: the latter deceased at the time of the commencement of this suit. The note was executed on the 1st day of July, 1902, for the sum of \$5,000, payable six months after date, with interest at the rate of 6 per cent. per annum. On the 4th day of January, 1903, two days after its maturity, the note was indorsed by the payees to the plaintiff. Burleson died on the 18th of October, 1903, and on the 19th day of January, 1904, his widow, one of the defendants herein, was duly appointed administratrix of his estate by the superior court of Siskiyou county. "On the 20th day of February, 1904, the inventory and appraisal of said estate was filed in said court, in which all the property belonging to said estate was appraised at the sum of \$1,400." Thereafter, and on the 5th day of April, 1904, a decree was made by the superior court distributing all of said estate to the widow. It is alleged in the complaint "that no notice to creditors of said deceased was ever ordered published, and no notice to such creditors was ever published." It is further alleged "that on or about the 8th day of June, 1903, the said A. W. Williams left the state of California, as plaintiff is informed and believes, and has never returned thereto, and since said date he has not had a place of business, as plaintiff is informed and believes." That on the 16th day of February, 1905, the plaintiff caused the said note to be presented at Hornbrook, Cal., the same being "the place where said note was dated and the place for the payment thereof; but the said A. W. Williams was not in said Hornbrook or in the state of California, nor had he been therein since on or about the 8th day of June, 1903, as aforesaid, as plaintiff is informed and believes." That thereupon, and on said 16th day of February, 1905, the plaintiff caused said note to be presented to said defendants, with a notice of the fact that Williams, aforesaid, was not in California, that the said note had not been paid, and "that plaintiff looked to said defendants for its payment." The demurrer was both general and special. The grounds of the special demurrer present one of the important questions submitted for de-

cision, and are thus stated: "That said complaint does not show that demand was made upon the maker, Williams, upon the maturity of said note or attempted to be made at the last known place of residence or business of said debtor. That notice of the absence of said A. W. Williams, the maker of said note, from the state of California, at the date when demand for payment should have been made, was not given or attempted to be given to defendants, or either of them, within the time required by law. That no notice of the nonpayment of said note was given to defendants, or either of them, within the time allowed by law therefor."

We think the court properly sustained the demurrer as to both of the defendants. The pleaded facts show that the respondent Mary A. Burleson was the widow of I. C. Burleson, who, jointly with Booth, became an indorser of the note; that is, he was one of the original payees who indorsed the note to appellant. She was duly appointed administratrix of her deceased husband's estate, and in the due course of the proceedings of administration the court set apart and assigned to her all said estate. The inventory and appraisal showed that the value of all the property of said estate did not exceed the sum of \$1,500, and it was therefore not only within the power but the duty, of the court, to assign the whole of said estate to her for her use and support. Section 1469, Code Civ. Proc.; Estate of Palomares, 63 Cal. 402; Estate of Atwood, 127 Cal. 430, 59 Pac. 771. In the last-mentioned case it is said: "After the estate is set apart, there shall be no further proceedings in the administration. Section 1469, *supra*. Evidently, notice to creditors is a proceeding in the administration, and therefore the statute is express that such notice must not be given after the estate is so set apart to the widow." The kind of notice required in such a case is prescribed by the section itself, authorizing and requiring the court to set apart the estate to the family. It is therein provided that: "Notice thereof shall be given and proceedings had in the same manner as provided in sections 1633, 1635 and 1638 of this Code." Those sections do not expressly provide for publication of notice in a newspaper, or other than by posting "in at least three public places in the county," or, "if, upon final hearing, * * * the court or judge thereof should deem the notice insufficient from any cause, he may order such further notice to be given as may seem to him proper."

The averments of the complaint show that the court acted within its jurisdiction in making the order or decree assigning the entire estate to the widow, and therefore no reason is shown why she, as administratrix, should have been made a party to this suit. The object of a suit against the representative of a deceased person is, of course, to bind the estate by any judgment which may thereby and therein be obtained, and that the same

may be paid in the due course of administration. The widow in this case, in her individual capacity, was as much a stranger to the transaction as any other person who had nothing to do with making or indorsing the note. The estate, as shown by the averments of the complaint, was not one in which claims of creditors of the deceased could be filed and allowed, or otherwise acted upon. It was, as we have seen, an estate as to the disposition of which the court had but one thing to do—make a decree, after proper proceedings, assigning the whole thereof to the widow. And if the estate had been of greater value than one which may thus be set apart to the widow, it would have to appear from the averments of the complaint that a claim, accompanied by a copy of the note (section 1497, Code Civ. Proc.), had been presented to the administratrix, in accordance with section 1494 of the Code of Civil Procedure, and that the same had been rejected. The right to sue an executor or an administrator is a statutory one, and, if it does not appear from the complaint that the statutory requirements as to claims against the estate have been complied with, a cause of action is not stated. The complaint failed absolutely to state a cause of action against Mrs. Burleson.

We think that it is now the settled rule in this state that, where indorsers of a negotiable instrument are sought to be charged, it is necessary, first, that there should be a presentment and demand upon the maker within the time prescribed by the statute, or, in default thereof, a satisfactory showing excusing the failure to do so. Section 3135 of the Civil Code provides: "The apparent maturity of a promissory note payable at sight or on demand, is: (1) If it bears interest, one year after its date, or (2) if it does not bear interest, six months after its date." It is said that a negotiable instrument indorsed after maturity is regarded as equivalent to one payable on demand. Such a bill or note, though overdue, continues to be negotiable, and is in the nature of a new bill payable on demand. *Daniel on Negotiable Instruments*, §§ 611, 996; *Beer v. Clifton*, 98 Cal. 326, 33 Pac. 204, 20 L. R. A. 580, 35 Am. St. Rep. 172. The note sued on was indorsed to the plaintiff two days after the date of its maturity, and therefore, in the hands of the indorsee, became a note payable on demand, and under section 3135, *supra*, it was the duty of the plaintiff to have made a demand upon Williams, the maker, or have shown some reasonable excuse for not so doing, before he could charge the indorsers. The case of *Machado v. Fernandez*, 74 Cal. 362, 16 Pac. 19, seems to hold a contrary view. It is there said, after referring to the several sections of the Civil Code pertinent to the subject, that a distinction is made as to the liability of indorsers between notes payable on demand with interest and those payable on demand without interest, and that in the one case the indorser is released from liabil-

ity if the note is not duly presented for payment within six months after its date, and that "in the other he is not released from liability by any mere delay in presenting it." But the Supreme Court in later cases has not adopted the rule as thus stated. "But this section," says the court in *Cousins v. Partidge*, 79 Cal. 229, 21 Pac. 745, speaking of section 3135 of the Code, "clearly applies to a case where a demand is necessary, and a demand is necessary only when it is sought to charge indorsers and others than the principal. Formerly, in order to hold indorsers on paper payable on demand, demand and notice had to be made and given within that very uncertain period called 'a reasonable time.' Now, section 3135 limits that time to a year or six months (according as the note does or does not bear interest), and after that time there cannot be a demand and notice which will bind an indorser." The rule as thus declared is followed in *Jones v. Nicholl*, 82 Cal. 33, 22 Pac. 878, the opinion being written by the writer of the opinion in *Machado v. Fernandez*, supra, and also in *Beer v. Clifton*, supra. It follows that if counsel's construction of the opinion in *Machado v. Fernandez* is correct, and it at least appears to be, the rule as therein declared has been overruled by the cases to which we have just directed attention. And any other construction of section 3135 of the Civil Code would render meaningless the section, although its purpose, so far as the second subdivision thereof would be affected by such a construction, is accomplished by section 3248 of the same Code.

The complaint here alleges, "upon information and belief," that Williams left the state on or about the 8th day of June, 1903, and that on the 16th day of February, 1906, the plaintiff caused the note to be presented at Hornbrook, Cal., "the same being the place where said note was dated and the place for the payment thereof"; but that the maker was not "in said Hornbrook or in the state of California." It is not stated that the note was presented or attempted to be presented before the 8th day of June, 1903, the time at which it is alleged that Williams left the state and five months after the plaintiff became the owner of the note. While it is dated at Hornbrook, by its terms it is not payable there, nor is there designated in it any particular place at which it is payable. There is no allegation that Hornbrook

was at any time the place of residence of the maker, and there is no averment that any effort was made to find his place of residence, if he ever had any in California. A note not payable at any particular place is payable and should be presented for payment at the residence or place of business of the maker, or wherever he may be found, at the option of the presentor; and it is only where the maker has no place of business or residence within the state, or where his place of business or residence cannot be ascertained with reasonable diligence, that presentment for payment is excused. "The complaint is insufficient because it states no facts respecting the knowledge or ignorance of Dinkelspell & Co., and their indorsers or agent, as to the actual place of residence or business of the maker of the note, and does not allege what was her last known place of residence or business, or that any inquiry or presentment was made thereat. Merely looking out for the payor at the place where the instrument is dated is not of itself due diligence, but presentment must be shown to have been made at the promisor's last known place of residence or business." *Haber v. Brown*, 101 Cal. 451, 35 Pac. 1035. Moreover, it was necessary to show more knowledge of the whereabouts of the maker than that involved in mere "information and belief." The complaint should have shown, if it were the fact, that inquiries as to his whereabouts were made of his personal acquaintances, or other persons in a position in which they were likely to know something of his movements. Information thus acquired would be, it is true, hearsay, but the defendants were entitled to know, we think, as bearing upon the question of diligence, what the plaintiff actually did in the matter of making efforts to make a demand upon the maker of the note. He was entitled to knowledge, through appropriate averments, of the sources of plaintiff's "information and belief" as to the whereabouts of the maker when the alleged efforts were made to make presentment and demand.

The complaint falls far short of stating a cause of action against either of the respondents.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

STATE ex rel. SHORES et al. v. ROSS,
Public Land Com'r.

(Supreme Court of Washington. Sept. 28, 1907.)

1. PUBLIC LANDS—TIDE LANDS—APPLICATION
FOR PUBLIC SALE.

It is the duty of one making a written application to the board of state land commissioners for a public sale of tide lands to fully state the facts, not only as to possession, but also as to improvements, whether such improvements are such as are contemplated by the statute or not.

2. SAME.

One making application to the board of state land commissioners for a public sale of tide lands who is without actual knowledge of the condition of the land as to possession or improvements is in no position to present a proper application, but he should first examine the property, and become fully advised as to the situation.

3. SAME—EVIDENCE—SUFFICIENCY.

Evidence held to show such collusion between applicant for a writ of mandamus to compel the commissioner of public lands to deliver a deed of certain tide lands and other bidders at a public sale thereof as to avoid the sale.

Application for a writ of mandamus by the state, on relation of E. A. Shores and another, against E. W. Ross, commissioner of public lands. Writ denied.

Wm. H. Pratt and Walter Loveday, for relator. John D. Atkinson, A. J. Falknor, and E. M. Hayden, for respondent.

CROW, J. This original proceeding, being an application for a writ of mandamus to compel the respondent to deliver to the relator E. A. Shores a deed for certain first class tide lands, has heretofore been presented to this court, and in a written opinion reported in 87 Pac. 262, where a complete statement may be found, it was directed that the superior court for Pierce county take evidence, make findings of fact, and certify the same to this court. In pursuance thereof, the cause came on for hearing in due course before the Honorable W. O. Chapman, judge of the superior court, and the evidence taken before him, together with his findings thereon, having been certified to this court, the entire cause is now before us for final disposition.

The honorable superior judge found (1) that the relator E. A. Shores in his application for a sale of the tide lands made misrepresentations as to possession and improvements; and (2) that at the tide-land sale there was collusion between the relator and other bidders. Having carefully examined all the evidence, we accept and approve these findings. On January 9, 1906, the relator made a written application to the board of state land commissioners for a public sale of the tide lands, in which he stated that the lands were not in the possession of any person, and that no improvements were situated thereon. The evidence shows that they were then occupied by the North Shore Lumber

Company, in connection with its sawmill; such occupancy being so open and notorious that any person could have easily learned thereof had he so desired. The relator in his application also represented that no improvements were located on the tide lands, but the superior court found there were improvements of the value of \$500. The relator now contends that it was not necessary for him to mention in his application the improvements shown by the evidence, as they were not such as are contemplated by the statute. It is unnecessary for us to pass upon this contention. It was needful and proper that the board of land commissioners should be advised of the true condition of the lots by the written application, not only as to possession, but also as to existing improvements, whether such improvements came within the statutory requirement or not, and it was the relator's duty to fully state all the facts in that regard. He now contends that he did not have actual knowledge of the exact condition of the lands as to possession or improvements, and that he has not been guilty of willful misrepresentation. Accepting this statement as true, he was then in no position to prepare and present a proper application to the board of state land commissioners, but should have deferred making his application until he could first examine the property, and become fully advised as to the situation.

The finding that collusion existed between the relator and other bidders at the sale of June 30, 1906, is clearly sustained. The collusion shown was of such a character that, under our former opinion, we are now compelled to deny the writ, without regard to the misrepresentations as to possession or improvements. The evidence shows that the relator was represented at the sale by his son, E. Arthur Shores, and his son-in-law, one Eldridge; that one Lay and one Haller, real estate speculators, were present; that Lay had called upon E. Arthur Shores the day previous, and advised him of his intention to bid; that at the sale a consultation took place between Shores, Eldridge, Haller, and Lay; that Haller withdrew, after stating that he would be satisfied with whatever Mr. Lay might do; that Eldridge, being the only bidder therefor, purchased lot 1; that Lay purchased lot 2 after slight competitive bidding; that he also purchased lot 3, being the only bidder therefor; that the total purchase price for all three lots was \$87.52; that, as shown by the evidence of disinterested expert witnesses, the three lots were on the day of sale worth at least \$2,000 market value; that a few minutes after the sale Eldridge and Lay directed the county auditor to make receipts for the entire purchase price to the relator; and that E. Arthur Shores thereupon executed and delivered to Lay an instrument reading as follows: "Tacoma, Wn., June 30, 1906. For services rendered and lots delivered after deeds are ob-

tained, I hereby agree to pay L. D. Lay five hundred dollars. E. A. Shores." The evidence falls to accurately declare what services were rendered by Lay to Shores. Lay and Haller had an agreement by which the one was to receive \$200 and the other \$300 of this sum. All the parties above mentioned deny any consultation at the sale or collusion in the matter of bids, but the purchase of the property at an exceedingly low figure and the \$500 bonus to Lay agreed upon immediately thereafter are utterly unexplained, as likewise are other suspicious circumstances disclosed by the evidence. Applying the law of this case as settled by our former opinion to the evidence and facts now before us, we cannot award the relator any relief.

The writ is denied.

HADLEY, C. J., and MOUNT, ROOT, and DUNBAR, JJ., concur.

CLAIBORNE v. CLAIBORNE.

(Supreme Court of Washington. Sept. 28, 1907.)

DIVORCE—ALIMONY—PROVISION FOR MINOR CHILD—GUARDIAN.

Under Ballinger's Ann. Codes & St. § 5723, providing that in granting a divorce the court shall make provision for the guardianship and support of any minor children, remuneration may be provided for a guardian of a minor child, and a decree that the husband pay a certain amount for the support of the wife, who has the custody of their child, and the child, is valid.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Laura Claiborne having been granted a divorce from her husband, Austin Claiborne, defendant thereafter moved to vacate so much of the original decree as awarded alimony, and an order to show cause why he had not complied therewith, and from an order overruling such motions he appeals. Affirmed.

William H. Gorham, for appellant. Blaine, Tucker & Hyland, for respondent.

MOUNT, J. On November 14, 1901, the respondent Laura Claiborne, was at her suit divorced by the superior court of King county, Wash., from the appellant. She was awarded the care and custody of a minor son. In the decree the court found "that there is no community property or other property owned by either party to this action requiring the interference of this court; * * * that the defendant is a very competent business man, and has heretofore been earning \$250 per month, and is in good health; that \$100 per month is a reasonable allowance for alimony for the plaintiff for the support of herself and younger son." Thereupon a decree was entered, which provided, among other things, as follows: "That the defendant pay to the plaintiff the sum of \$100 per month, com-

mencing on January 1, 1902, and a like amount on the 1st day of each and every month thereafter for the support of herself and younger child, to continue in force until the further order of this court." Thereafter, on November 13, 1906, the defendant in that action, having been served with an order to show cause why the allowance made by the decree as stated above had not been paid as provided in that decree, filed a motion to vacate so much of the original decree of divorce as awarded alimony for the support of his divorced wife, and on November 16, 1906, filed a motion to vacate the order to show cause why he had not complied with the decree. Both of these motions were based upon the ground that the court rendering the decree of divorce had no jurisdiction to require the husband to support his divorced wife and child, and that such order was therefore void. These motions upon the hearing were denied, and the court, after hearing the application upon its merits, directed the defendant to turn over a certain insurance policy to the plaintiff. This appeal is prosecuted from that order.

The only question presented here upon the merits is whether that portion of the decree of divorce awarding \$100 per month to the wife for support of herself and minor child is void. In the case of *State ex rel. Brown v. Brown*, 31 Wash. 397, 72 Pac. 86, 62 L. R. A. 974, we affirmed a judgment enforcing a decree like the one in this case. It is true the validity of the decree in that case was not discussed in the opinion or in the briefs of counsel. The validity of the original decree was apparently conceded. The statute, at section 5723 (Ballinger's Ann. Codes & St.), provides that "in granting a decree the court * * * shall make provision for the guardianship, custody, support, and education of the minor children of such marriage." This means that the court may appoint a guardian for minor children, and that such guardian may be remunerated by order of the court. If the statute makes no provision for the support of the divorced wife where there is no property and no children, it clearly makes provision for the support of minor children of divorced parties, and intends, at least, that where one of them is fitted for the care of the minor children, and is appointed to care for them, such party may be rewarded for such care as fairly as a stranger might be. It must follow that, in addition to the actual requirement for the child, provision by way of remuneration may be made for the guardian. This may have been the sole purpose of the decree in this case. Where there is no property, but where there are minor children of divorced parties, we are satisfied that the statute is broad enough to authorize the court to decree to either party having the care and custody of such children sufficient support for both the child and the guardian.

The original judgment therefore was not

void, and the order appealed from must be affirmed.

HADLEY, C. J., and CROW. ROOT, DUNBAR, and RUDKIN, JJ., concur.

HODGE v. HODGE.

(Supreme Court of Washington, Sept. 28, 1907.)

1. EXECUTORS AND ADMINISTRATORS—CLAIMS FOR SERVICES—FAMILY RELATION.

Where services are rendered by one who is a member of the family of the decedent, the law will not imply a contract to pay therefor, but facts from which it may be inferred that there was an understanding that they were to be paid for must be proved on presentation of a claim against his estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 733.]

2. SAME—EVIDENCE—SUFFICIENCY.

One took up his abode with his brother on a farm. The two did the work thereon, and took care of a government light for which the brother was keeper, and during the last illness of the brother the former did all the work. There was no contract of employment nor evidence of any acts to show that the former was to receive any pay for his work. *Held* as a matter of law not to authorize a recovery for the services.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 903½.]

3. APPEAL—INVITED ERROR—RIGHT TO COMPLAIN.

A party cannot complain of a judgment entered on his request and accepted by the adverse party in lieu of a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3591.]

Appeal from Superior Court, Skagit County; George A. Joiner, Judge.

Action by Woodbridge Hodge against Charles Hodge, administrator of the estate of Watson Hodge and Jennie Hodge, deceased. From a judgment for plaintiff, defendant appeals. Reversed with directions.

Million, Houser & Shrauger, for appellant. Smith & Brawley, for respondent.

MOUNT, J. Respondent brought this action to recover upon a claim for services rendered to Watson Hodge, deceased, during his lifetime. The respondent in his complaint alleged that he performed labor and services for his brother during his lifetime between December 1, 1903, and December 1, 1904, 305 days, at \$1 per day, amounting to \$305; that he cared for his brother during his last illness 143 days, from December 1, 1904, to April 23, 1905, at \$2 per day, amounting to \$286; that a claim for these amounts was presented to the appellant as administrator, and rejected. The answer of the administrator denied that respondent had rendered any services to the deceased. Upon these issues the case was tried to a jury, and a verdict was returned for the full amount claimed by the respondent. A motion for new trial was filed by the appellant. When

this motion came on for hearing, the appellant offered to allow \$50 on account of services rendered by respondent during the last sickness of Watson Hodge, and the court gave respondent the option of having a new trial granted or accepting \$50 in lieu of the award of the jury of \$286 for the services rendered during the last sickness of said deceased. The respondent accepted this offer, and judgment was thereupon entered for \$540 for services rendered prior and \$50 additional for care of said Watson Hodge, deceased, during his last sickness. This appeal is prosecuted from that judgment.

The only point made on this appeal is that the court erred in not sustaining appellant's motion for nonsuit at the close of plaintiff's evidence. The facts shown by the case are, in substance, as follows: The respondent, Woodbridge Hodge, and Watson Hodge, deceased, were brothers. The former at the time of the trial was 72 years of age. His brother at the time of his death was two years his senior. Watson Hodge died on April 23, 1905. About five or six years prior to Watson's death respondent came to this state to visit his brother Watson, whom he had not seen for about 40 years, and who at that time was living with his wife on a little farm on Samish Island, in Skagit county. Respondent thereupon made his home with Watson and his wife when he was not working for other persons. In November, 1903, Mrs. Watson Hodge died, and within a month thereafter respondent took up his permanent abode with his brother Watson, the two living together thereafter on Watson's place, doing their own cooking and house-keeping, performing such work as was to be done on the place, such as making garden, milking the cow, mowing the meadow of which there was one or two acres, and building a small fence, and taking care of a government light for which Watson Hodge was keeper at a monthly salary of \$15. Upon the proceeds of all this work the two old men lived together. About the 1st of April, 1905, Watson Hodge became sick, and was thereafter confined to his bed until his death on April 23, 1905. During this time all the work and the care of Watson Hodge devolved upon respondent. Charles Hodge, the son of Watson, lived with his family near by his father, but they appeared to give little heed to the two old men. They visited Watson Hodge two or three times a few days previous to his death. This is the substance of the evidence in the case. There is no evidence of any contract of employment of respondent by his brother Watson Hodge, and there is no evidence of any acts or conduct of the parties or circumstances even tending to show that respondent was to receive any pay other than his living for his work.

In the case of *Morrissey v. Faucett*, 28 Wash. 52, 68 Pac. 352, we stated the rule in cases like this as follows: "It is a rule universally recognized that, when the services

are rendered by one who is a member of the family of the employer, the law will not imply a contract to pay for the services from the mere fact that they have been rendered upon the one hand and the benefits thereof received upon the other, as in the case of strangers. This is also held to be the rule when there is no actual blood relationship existing between the parties, provided they sustain to each other the ordinary relations of members of the same family. It has been held, however, that, when the family relationship exists, it is not necessary to prove the terms of a direct and positive contract, but that proof may be made of words, acts, and conduct of the parties, and circumstances from which the inference may follow that there was an understanding that the services were not to be rendered gratuitously, that, when such is the case there is a contract upon which the value of the services can be recovered, and it is for the jury to say from all the conduct of the parties and from the circumstances in evidence whether there was in fact such an understanding or agreement." See, also, *McBride v. McGinley*, 31 Wash. 573, 72 Pac. 105. It is clear in this case that respondent and his brother Watson were living together as members of the same family. There was no evidence to take the case to the jury upon the question of services rendered prior to Watson's death, under the rule above stated, and therefore the court erred in not dismissing the case as to that item. The appellant cannot now complain of the judgment for \$50, because that judgment was entered upon request of the appellant, and was accepted by respondent in lieu of a new trial upon that item.

For the reasons above given, the judgment of the trial court is reversed, with directions to enter a judgment for respondent for \$50 and costs of that court, appellant to recover the costs of this appeal.

HADLEY, C. J., and FULLERTON, CROW, ROOT, DUNBAR, and RUDKIN, JJ., concur.

BRANDT v. LITTLE.

(Supreme Court of Washington. Sept. 26, 1907.)

JUDGMENT — VACATING — MERITORIOUS DEFENSE.

Where an independent action is brought to vacate a judgment as obtained without jurisdiction, a showing that defendant has or at the time of judgment had a defense is none the less necessary because the judgment may have been so obtained, especially if the lack of jurisdiction does not appear on the face of the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 849-851.]

Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by John Brandt against M. A. Lit-

tle. Judgment for defendant, and plaintiff appeals. Affirmed.

Fred H. Peterson and H. C. Force, for appellant. J. H. Allen and James A. Dougan, for respondent.

ROOT, J. This is an action in equity to vacate a judgment upon the ground that in the original action no summons, complaint, nor any process of any kind was served upon this plaintiff, who was one of the defendants therein. A demurrer was sustained to the complaint, upon the ground that it did not allege that appellant had a defense upon the merits to the original suit. Appellant electing to stand upon his complaint, a judgment of dismissal was entered, and from this the present appeal is prosecuted.

It is urged by appellant that, in an action to set aside a judgment obtained without jurisdiction, no showing of merits is necessary, and reliance is placed upon the cases of *Hole v. Page*, 20 Wash. 208, 54 Pac. 1123, and *Bennett v. Supreme Tent, Macabees*, 40 Wash. 431, 82 Pac. 744. In each of the cases cited, a motion was made in the original case to set aside the judgment, and the lack of jurisdiction appeared upon the face of the record. The general rule, however, seems to be that in cases where an independent action is brought in equity to set aside the judgment complained of—especially where the defect of jurisdiction does not appear upon the face of the record—it is necessary to make a showing that the party has, or at the time of the entering of the judgment complained of did have, a good and sufficient defense, in whole or in part, to the action, and that a different result would or should have been obtained had the complainant had an opportunity to defend in said action. In other words, the complainant upon invoking the assistance of a court of equity must show that the former judgment was inequitable. This would seem to be a wholesome and salutary rule. The time and the attention of the court ought not to be consumed in hearing a proceeding to set aside a former judgment, unless such judgment has in reality prejudiced the rights of the party complaining. If it is not made to appear that any different result would or should have been reached had he been properly served, then he is not in a position to say that anything inequitable has been done him. It is possible that there may be exceptions to this rule, as in the case of a non-resident, or perhaps, in a case where, had the defendant known of the judgment being taken against him he could have paid, adjusted, or satisfied it more advantageously, although as to these matters we do not decide at this time.

As to the necessity for a showing of merits we cite the following authorities: *Hill v. Lowman*, 15 Wash. 503, 46 Pac. 1042; *Dunklin v. Wilson*, 64 Ala. 162; *State v.*

Hill, 50 Ark. 458, 8 S. W. 401; Jeffery v. Flitch, 46 Conn. 602; Budd v. Gamble, 13 Fla. 265; Wiley v. Pratt, 23 Ind. 628; Garden City Co. v. Kause, 67 Ill. App. 108; Gifford v. Morrison, 37 Ohio St. 502, 41 Am. Rep. 537; Gerrish v. Seaton, 73 Iowa, 15, 34 N. W. 485; Piggott v. Addicks (Iowa) 3 G. Greene, 427, 56 Am. Dec. 547; Stokes v. Knarr, 11 Wis. 389; Harris v. Gwin (Miss.) 10 Smedes & M. 563; Newman v. Taylor, 69 Miss. 670, 13 South. 83; Fowler v. Lee (Md.) 10 Gill & Johnson, 358, 32 Am. Dec. 172; Herbert v. Herbert, 49 N. J. Eq. 70, 22 Atl. 789; Gregory v. Ford, 14 Cal. 139, 73 Am. Dec. 639; Bank v. Bray, 37 Mo. 194; Kramer v. Gerlach, 59 N. Y. Supp. 855, 28 Misc. Rep. 525; Dawson v. Daniel, Fed. Cas. No. 3,608; Freeman on Judgments, § 498; 16 A. & E. Ency. 386, 387; 3 Pomeroy, Equity, § 1364, and note. See, also, N. P. R. Co. v. Black, 3 Wash. 327, 28 Pac. 538; Western Security Co. v. Lafleur, 17 Wash. 406, 49 Pac. 1061.

The judgment of the superior court is affirmed.

HADLEY, C. J., and MOUNT, CROW, RUDKIN, and DUNBAR, JJ., concur.

WEES v. PAGE.

(Supreme Court of Washington. Sept. 28, 1907.)

1. TRIAL.—WAIVER OF MOTION FOR NONSUIT.
Defendant by going on with the trial and introducing evidence after denial of his motion for nonsuit waives it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 982.]

2. ESTOPPEL.—POSITION IN ANOTHER ACTION.
P., in an action which he prosecuted as agent of S. against W., having, as against the plea of payment, taken the position, testified, and proved to the satisfaction of the court that wheat received by him from W. was not received by him as agent of S., may not, in an action against him by W. for the value of the wheat, take the contrary position.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 166.]

3. PRINCIPAL AND AGENT.—AUTHORITY OF AGENT.

An agent under a power of attorney to collect moneys owing the principal has no authority to receive wheat in payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 302-305.]

4. APPEAL.—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Rejection of an instrument offered by defendant to show that plaintiff knew when it was drawn of any fraud of defendant in obtaining wheat of plaintiff, so that an action for deceit would be barred, is harmless, there being nothing on its face or in its terms suggesting a wheat item, and the person who drew it having testified that, at its date, plaintiff talked over the matter of the wheat, and then fully understood all that had been done.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4187.]

5. TRIAL.—EXCLUSION OF EVIDENCE.—WAIVER OF ERROR.

Any error in rejecting an instrument offered in evidence by defendant is waived by his

objecting to another instrument, offered in evidence by plaintiff, and containing the matter of the first instrument on which he relied, and all of it that he was in any event entitled to have admitted.

Appeal from Superior Court, Spokane County; John B. Yakey, Judge.

Action by J. H. Wees against A. J. Page. Judgment for plaintiff. Defendant appeals. Affirmed.

Merrill, Oswald & Merrill, for appellant. Warren W. Tolman, for respondent.

CROW, J. This action was commenced in July, 1904, by the plaintiff, J. W. Wees, to recover from the defendant, A. J. Page, the value of certain wheat. From a judgment in favor of the plaintiff, the defendant has appealed.

The appellant contends that the trial court erred in denying his several motions for a nonsuit and for judgment at the close of all the evidence. As appellant did not rest his case upon his motion for a nonsuit, but introduced evidence in defense, we can only consider his motion for judgment. Port Townsend v. Lewis, 34 Wash. 413, 75 Pac. 982; Gardner v. Porter (Wash.) 88 Pac. 121. It appears that on September 1, 1895, the respondent, J. H. Wees, and Mary L. Wees, his wife, executed and delivered to one S. S. Page their note for \$1,750, secured by mortgage on real estate in Spokane county; that S. S. Page, who was a nonresident of Washington, was, in making the loan, represented by appellant, A. J. Page; that in the fall of 1897 the respondent delivered to appellant a large amount of wheat, with the understanding and agreement that he was to sell the same and apply the proceeds on the S. S. Page note; that in 1901 S. S. Page, acting through A. J. Page, commenced a foreclosure action on the mortgage; that Wees and wife alleged payment, which allegation was denied; that judgment was entered without findings of fact in favor of S. S. Page; that Wees was allowed no credit on account of the wheat; that during the trial of the foreclosure action Wees for the first time discovered that appellant had not applied the proceeds of the wheat in payment on the note, and that he thereafter commenced this action to recover its value. The amended complaint included three causes of action, which were identical except as to amounts and dates. In the first cause of action the respondent alleged "that on the 9th day of September, 1897, the said plaintiff was indebted to S. S. Page in the sum of more than \$1,500, which sum of money was then due and owing from said plaintiff to said S. S. Page; that on and prior to said day the said defendant with the intent to swindle, cheat, and defraud said plaintiff, falsely and fraudulently represented and said to said plaintiff that he, the said defendant, was then and there the agent of the said S. S. Page for the hereinafter specified pur-

pose, and was then and there authorized by the said S. S. Page, as such agent, to receive, for and on account of the said S. S. Page, from the said plaintiff, the hereinafter mentioned wheat, to sell the same, and apply and pay the money arising from such sale as a credit upon said debt; that thereafter, and on or about the 9th day of September, 1897, the said plaintiff, believing said representation and statement to be true, and relying thereon, and being moved and induced thereby, and having inquired as to whether the said defendant A. J. Page was then and there the agent of said S. S. Page for the hereinafter specified purpose, and upon such inquiry said plaintiff having been informed that said defendant A. J. Page was then and there such agent, said plaintiff did deliver to said defendant as said agent, and for the purpose aforesaid, 790 bushels of wheat, which said defendant then and there received and then and there undertook, promised and agreed to and with the said plaintiff to sell the same, and to apply and pay the money received therefor in part payment of said debt." Respondent further alleged that the appellant had sold the wheat; that he had refused to pay the proceeds to S. S. Page; that he had converted the same to his own use; that appellant then and there knew he was not the agent of S. S. Page for any such purpose; that respondent had made demand for the value of the wheat; and that he did not discover the failure of appellant to pay the proceeds to S. S. Page until August 1, 1901. The appellant admitted that the respondent was indebted to S. S. Page, but denied all other allegations of the amended complaint. For his sole affirmative defense he pleaded the foreclosure action, alleged that he, A. J. Page, had conducted that suit as agent for S. S. Page; that by the final decree each and all of the matters and things in controversy herein were finally litigated and determined between the respondent and appellant; and that respondent received credit therein for the value of the wheat. The appellant contends that this present action is one for tort based on deceit; that the alleged deceit, according to the averments of the amended complaint, consisted in appellant's false and fraudulent representation that he was the agent of S. S. Page, while knowing he was not such agent; that there has been a failure to sustain these allegations, as the evidence shows appellant was such agent; that respondent so testified; that appellant's power of attorney which is in evidence so shows; that the wheat is shown to have been delivered to, and received by, appellant as such agent; that there was no deceit or falsehood as to such agency; that, the wheat having been delivered to him in his capacity as agent, he was not personally liable therefor; and that the motion for judgment should have been sustained.

Appellant is in no position to make any

such contention, being estopped by his own conduct from now claiming that he was the agent of S. S. Page to receive the wheat. His answer alleges that respondent received credit for the wheat in the foreclosure suit. The pleadings, in that action, which are in evidence, make no mention of the wheat, although payment was pleaded. No findings were filed, but the judge who tried the foreclosure action testified in this cause that he allowed no credit to Wees and wife on account of the wheat. Sufficient facts appear to indicate that A. J. Page, who prosecuted the foreclosure suit as agent for S. S. Page, then contended that he did not receive the wheat as agent for S. S. Page, but in his own behalf. In any event, the facts stand undisputed that appellant did actually receive the wheat, and that respondent received no credit therefor in the foreclosure action. In his answer herein appellant alleges that he conducted the foreclosure suit. He was a witness in that action, and by his evidence must have convinced the trial court that he did not receive the wheat as agent for S. S. Page. If his evidence had not tended to show that he received it in some other capacity, the trial judge would have allowed a credit therefor to respondent, who not only pleaded payment, but relied upon the wheat deal to show such payment. Appellant, by his evidence and conduct of that trial, succeeded in defeating respondent's defense of payment, the issue there tried, and, it being conceded that appellant did receive the wheat, it must have necessarily appeared he received it in some other capacity than as agent for S. S. Page. That being true, he should now be estopped from disputing the respondent's present contention that he was not such agent in receiving the wheat. If appellant held any individual claims against the respondent, to the payment of which he applied the wheat, he should have pleaded them in this action. He has not done so, and we must, therefore, assume that no such claims existed. He did not offer himself as a witness in this action, nor has he here attempted to explain the wheat transaction. He has elected to remain quiet on that subject. His reasons for this method of procedure he has not seen fit to disclose. He now relies upon the foreclosure proceedings pleaded by him as a former adjudication. The record in that case, as explained by the evidence of the judge who entered the decree indisputably, shows that respondent was there held not entitled to any credit on the note for the wheat. By this holding, it was necessarily and conclusively adjudicated that appellant was not agent of S. S. Page for the purpose of receiving the wheat. Should it be to the interest of the respondent to contend in subsequent litigation that appellant was agent of S. S. Page in the wheat deal, such former adjudication would preclude him from so doing. Yet appellant is now endeavoring to defeat the respondent in this action

by predicating his entire defense upon the existence of the identical agency which he disproved in the foreclosure. Such a defense would be inequitable, unconscionable, a travesty on justice, and should not be permitted by any court. It would deliver respondent's wheat to appellant without requiring him to account for the same at any time or in any manner.

But, aside from any question of estoppel, the best evidence of the agency upon which appellant now relies is the power of attorney. It is in evidence, and reads as follows: "I hereby constitute A. J. Page of Cheney, state of Washington, my true and lawful attorney in fact, authorizing him as such attorney to collect all monies owing to me in the state of Washington, whether now due or to become due. * * *" This language authorized appellant to collect money due on the note, but it did not authorize him to receive anything in payment except money. He had no authority to accept wheat. It is an elementary principle in the law of agency that power in an agent to receive payment authorizes its receipt in money only; that being the only way in which he can fully discharge his duty to his principal. Story on Agency (9th Ed.) §§ 98, 181; Carver v. Carver, 53 Ind. 241; Pitkin v. Harris, 69 Mich. 133, 37 N. W. 61; Robson v. Watts' Heirs, 11 Tex. 764; Stetson v. Briggs, 114 Cal. 511, 46 Pac. 603; Scully v. Dodge, 40 Kan. 395, 19 Pac. 807; St. John v. Cornwell, 52 Kan. 712, 35 Pac. 785. The complaint, in substance, alleges that A. J. Page falsely and fraudulently represented to respondent that he was authorized as agent of S. S. Page to receive the wheat. The evidence does not show any such authority. The representation was therefore fraudulent as alleged. Of course, if appellant received the wheat, and, after selling, actually paid the proceeds on the note, his principal, by accepting the money, would have ratified his unauthorized acts, and would have been bound. But appellant did not do so. The mere delivery of the wheat to appellant was not binding on S. S. Page as payment on the note. The amended complaint further alleged that appellant undertook, promised, and agreed with respondent to sell the wheat and apply the proceeds, that he did make the sale, but that he did not apply the proceeds as agreed. There has certainly been no failure to prove this allegation. It is, in fact, undisputed

that appellant did receive the wheat, that he sold it, and that he did not apply the proceeds as payment on the note. The motion for judgment was properly denied.

Appellant also contends that the trial court erred in sustaining respondent's objection to his offer of a writing which has been marked "Defendant's Exhibit A for identification." He contends that it was offered for the purpose of showing that respondent had learned, as early as October 11, 1898, that appellant had not applied the proceeds of the wheat as a payment on the note, and that it tended to sustain appellant's plea of the statute of limitations. The exhibit seems to have been an indefinite memorandum of some kind of settlement between the parties, making no mention of any wheat. It was not competent evidence to show any settlement, none having been pleaded, and appellant concedes that it was not admissible for any such purpose. We fail to see how it tends to show knowledge of appellant's use of the wheat on the part of the respondent. There is nothing on its face or expressed in its terms that suggests any wheat item. The party who drew the exhibit was permitted to testify that the respondent did, at its date in October, 1898, talk over the wheat, and then fully understood all that had been done. This evidence being admitted, we cannot understand how the appellant was prejudiced by the rejection of the exhibit, which in no way tended to corroborate the witness. In any event, the respondent afterwards offered another writing, prepared at the same time by the same witness, containing the identical item upon which appellant relied, but not purporting to be any settlement. On appellant's objection this offer was rejected. It would seem from this that appellant's real purpose in offering Exhibit A was to confuse the jury by suggesting some sort of a settlement not pleaded. Had he only desired to call attention to the item he claims referred to wheat, he could have done so by consenting to the offer made by respondent. In this condition of the record he waived any alleged error of the trial court in refusing to admit Exhibit A, and is therefore in no position to complain.

The judgment is affirmed.

HADLEY, C. J., and FULLERTON, MOUNT, ROOT, DUNBAR, and RUDKIN, JJ., concur.

TOWN OF TEKOA v. REILLY.

(Supreme Court of Washington. Sept. 28, 1907.)

TAXATION—UNIFORMITY—STREET POLL TAX.

Laws 1903, p. 140, c. 75, § 1, authorizing a city to impose an annual street poll tax, does not, because exempting all females and males not of age, contravene Const. art. 7, § 9, requiring taxes imposed by a city to be "uniform in respect to persons and property" within the city.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 68-89.]

Mount, J., dissenting.

Appeal from Superior Court, Whitman County; S. J. Chadwick, Judge.

Action by the town of Tekoa against James E. Reilly. Judgment for plaintiff. Defendant appeals. Affirmed.

E. A. Williams, for appellant. Canfield & Burson, for respondent.

RUDKIN, J. This is an appeal from a judgment sustaining the validity of a street poll tax imposed under section 1 of the act of March 5, 1903 (Laws 1903, p. 140, c. 75), by the town of Tekoa, a municipal corporation of the fourth class.

The validity of the legislative act under which the tax was imposed is the principal question raised by the appeal, and the only question we deem it necessary to consider, as we find no merit in the other assignments of error. In *State v. Ide*, 35 Wash. 576, 77 Pac. 961, 67 L. R. A. 280, 102 Am. St. Rep. 914, this court held that subdivision 7 of section 117 of the act of March 27, 1890 (Laws 1890, p. 184, c. 7), was void for lack of uniformity, under section 9 of article 7 of the state Constitution. We here set forth the two sections and the constitutional provision invoked, so far as deemed material: "The city council of such city shall have power * * * (7) to impose on and collect from every male inhabitant between the ages of twenty-one and fifty years an annual street poll tax not exceeding two dollars, and no other road poll tax shall be collected within the limits of such city: Provided, that any member of a volunteer fire company in such city shall be exempt from such tax." Laws 1890, p. 184, c. 7. "The city council of cities of the third and fourth class in this state shall have power to impose on and collect from every male inhabitant of such city over the age of twenty-one years an annual street poll tax not exceeding two dollars, and no other road poll tax shall be collected within the limits of such city." Laws 1903, p. 140, c. 75. "For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same." Const. art. 7, § 9. A comparison of the two sections will show that the former exempted four classes

of persons, viz., females of all ages, males under the age of 21 years, males over the age of 50 years, and volunteer firemen; while the latter exempts females and males under the age of 21 years only. There is nothing in the opinion in *State v. Ide* to indicate that the court deemed the exemption of females and males under the age of 21 years less obnoxious to the Constitution than the exemption of males over the age of 50 years and volunteer firemen; and at the present time we see no plausible reason why the former section should be nullified and the latter upheld. We must, therefore, reverse the judgment in this case on the authority of *State v. Ide*, or reconsider the question there decided.

Courts are always reluctant to overrule their own solemn judgments, and justly so. "If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would therefore be extremely inconvenient to the public if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them; and people in general can venture with confidence to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error; and, if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law." 1 Kent, 476. "It will, of course, sometimes happen that a court will find a former decision so unfounded in law so unreasonable in its deductions, or so mischievous in its consequences, as to feel compelled to disregard it. Before doing so, however, it will be well to consider whether the point involved is such as to have become a rule of property, so that titles have been acquired in reliance upon it, and vested rights will be disturbed by any change; for in such a case it may be better that the correction of the error be left to the Legislature, which can control its action so as to make it prospective only, and thus prevent unjust consequences." Cooley's Constitutional Limitations (7th Ed.) p. 86. We do not think, however, that a proper adherence to this wholesome rule forbids further inquiry in this case. No rule of property is involved, the Legislature has re-enacted the section nullified in *State v. Ide*, with slight modifications, and, if this court has heretofore er-

roneously restricted the power of the Legislature in the important matter of taxation, we deem it our highest duty to correct the error at the first opportunity. The decision in the case hinges entirely upon the meaning of the phrase, "Shall be uniform in respect to persons and property within the jurisdiction of the body levying the same." Uniformity and equality in taxation are relative terms. "Perfect uniformity and perfect equality of taxation, in all the aspects the human mind can view it, is a baseless dream." *Head-money Cases*, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798. "Perfectly equal taxation will remain an unattainable good as long as laws and government and man are imperfect." *Commonwealth v. Savings Bank*, 5 Allen (Mass.) 428. The people of this state in adopting a Constitution did not hope to attain the unattainable. They did not propose to send the tax gatherer to the almshouse, the orphan asylum, or the nursery, nor did they propose to lay a tax on the inmates of these institutions. In other words, they fully understood that, if a street or road poll tax should be imposed, certain classes of persons would of necessity be exempt from the imposition. This much was conceded in the *Ide Case*, for there the court said: "It is conceded by counsel for appellant that the uniformity rule in taxation usually prescribed by law does not preclude the Legislature from selecting and classifying in a proper and reasonable manner the subjects of the tax, and that rule is so firmly established that the citation of cases in support of it is entirely unnecessary." If the Legislature may select and classify the subjects of the tax in a reasonable and proper manner, how is a court to determine the reasonableness or appropriateness of the classification made? If up to the time of the adoption of the Constitution a street or road poll tax had never been imposed on a female or a minor in the territory of Washington or elsewhere (to our knowledge), would a reasonable and proper classification require their inclusion or exclusion? The Constitution was not the beginning of law for this state. At the time of its adoption Washington was an organized territory with a code of laws for the government of its people. Section 2863 of the Code of 1881 provided as follows: "Every male inhabitant of this territory over twenty-one and under fifty years of age must be assessed and annually pay a poll tax of two dollars, except paupers, idiots and insane persons, and all active firemen who have been a member of any fire company in this territory for the period of one year preceding the assessment of taxes"; and nearly, if not, all the municipal charters granted by the territorial Legislature authorized the imposition of a street poll tax with like exemptions. See section 7, *Seattle Charter* (Laws 1885-86, p. 241); section 8, *Spokane Charter* (Laws

1885-86, p. 302); section 48, subd. 2, *Tacoma Charter* (Laws 1885-86, p. 196); chapter 2, § 5, *Ellensburg Charter* (Laws 1885-86, p. 397); chapter 2, § 7, *Pomeroy Charter* (Laws 1885-86, p. 326); chapter 2, § 8, *Montesano Charter* (Laws 1885-86, p. 352); chapter 2, § 8, *Waitsburg Charter* (Laws 1885-86, p. 275); chapter 2, § 8, *North Yakima Charter* (Laws 1885-86, p. 376). By section 2 of article 27 of the Constitution these laws and special charters were continued in force, unless repugnant to the Constitution itself.

Are all these charter provisions to be held for naught, simply because the Constitution contains the general altruistic declaration that taxes shall be uniform with respect to persons and property? Had the framers of the Constitution been dissatisfied with the existing order of things, would we not expect to find some more satisfactory evidence of their discontent? Instead of this, the first Legislature to assemble under the Constitution imposed an annual poll tax of \$2 on every male inhabitant of the state over 21 and under 50 years of age, except paupers, idiots, and insane persons (Laws 1890, p. 553, c. 18, § 64), and authorized municipalities to impose a street poll tax with like exemptions (Laws 1890, p. 184, § 117, subd. 7). It was said in the *Ide Case* that the custom of imposing such taxes since statehood could not legalize the usurpation of power. While this is true, yet, when we consider that the custom during statehood is but the continuation of a custom running all through territorial days and sanctioned by territorial laws, a court should hesitate long before declaring it a usurpation of power. The decision in the *Ide Case* seems to have been controlled largely by the decision in *Hunsaker v. Wright*, 30 Ill. 146, but that case involved a property tax, and the question of classification or exemption under a poll tax law was not considered or decided. In *Town of Pleasant v. Kost*, 29 Ill. 490, the same court held that a statutory requisition upon male inhabitants between the ages of 21 and 50 years, except firemen, for two days labor for the repair of roads and streets, which might be commuted in money, was not in violation of the Constitution of that state. True, the authority to impose the tax was found in the police power, rather than in the taxing power of the state. Discussing the question of uniformity in *Commissioners of Ottawa Co. v. Nelson*, 19 Kan. 234, 27 Am. Rep. 101, the court said: "Neither do we suppose that capitation taxes, or poll taxes, or requirements to work on the roads, or to train in the militia, come within said constitutional provision, although evidently they are all taxes in one sense." In *City of Faribault v. Misener*, 20 Minn. 396 (Gil. 347), it was held that a poll tax imposed on qualified voters, except firemen, did not violate the constitutional requirement of equality in taxation. In the *Ide Case* it was said that the Minnesota

court was influenced largely by the long continued acquiescence of the people in the statute under which the tax in question was imposed; but, while the long acquiescence of the people in the custom of levying such taxes was alluded to, yet a much more satisfactory reason for the decision can be found in the following extract from the opinion: "While the latter clause of this section can only apply to taxes upon property, the former clause is broad enough in its terms to include any possible form of taxation, whether of persons or property, and to prohibit all exemptions whatsoever. Upon a strict construction of its language, a poll tax upon qualified voters alone is as objectionable as a poll tax on all qualified voters except firemen, for it is undoubtedly possible to levy and assess a poll tax upon every inhabitant of the city, of whatsoever sex, age, or occupation. The effect of such a construction, however, would be to prohibit taxation by the poll altogether; for there can be no doubt but that a poll tax thus levied and assessed would justify the declaration of the bill of rights of the state of Ohio: 'That the levying taxes by the poll is grievous and oppressive; therefore the Legislature shall never levy a poll tax for county or state purposes.' No such prohibition as this is contained in the Constitution of this state. The Legislature has, therefore, the power to impose a poll tax. The very language of the Constitution implies that absolute equality is not to be expected. Taxes are to be 'as nearly equal as may be,' not as nearly equal as a mathematical calculation can make them, but as nearly equal as is consistent with the general welfare of the people, and an equitable distribution of the public burdens. The Constitution does not require a theoretical equality at the expense of substantial equity. * * * And in view of the grievous and oppressive results which would follow a levy and assessment upon the whole population of

a certain sum per capita, a mode of taxation which, under the guise of equality, might, and probably would, be productive of intolerable hardship, it is clear that in the exercise of its right to levy poll taxes the Legislature must deviate to some extent from any such Procrustean standard of equality as this."

It must be apparent that a street poll tax imposed on minors or females without regard to property or ability to pay would be unjust and oppressive in the extreme. The burden of paying the tax for the entire household would ordinarily fall on the head of the family. Such a tax would lack both equality and uniformity, and was never contemplated by the framers of the Constitution. In *Thurston County v. Teulino Stone Quarries, Inc.*, 87 Pac. 634, we held that the act of 1905 (Laws 1905, p. 297, c. 156), imposing an annual road poll tax of \$2 on every male inhabitant of the state between the ages of 21 and 50 years, outside the limits of any incorporated city or town, did not violate any provision of our Constitution. While the provision now invoked applies only to municipalities, yet a court should not readily presume that the Constitution authorized or sanctioned one system of taxation within and another without the corporate limits of cities and towns. After a full consideration of the question presented, we are satisfied that the uniformity rule of taxation does not forbid a proper classification of the subjects of the tax, that the classification complained of is reasonable and proper, is sanctioned by usage, and violates no provision of the state Constitution.

The judgment of the court below is therefore affirmed, and the case of the State v. Ide, in so far as it conflicts with the views herein expressed, is overruled.

CROW, FULLERTON, and DUNBAR, JJ., concur. MOUNT, J., dissents.

ANDREWS v. HOESLICH.

(Supreme Court of Washington. Sept. 28, 1907.)

1. REPLEVIN—POSSESSION OF THE PROPERTY.

The rule that replevin will not lie against one not in possession when the demand was made or the action commenced does not apply where the property has actually been in defendant's possession, and has been wrongfully transferred by him, without plaintiff's knowledge, before commencement of the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, § 81.]

2. TENDER—KEEPING TENDER GOOD.

Even if plaintiff in replevin for an article he pawned to defendant is obliged to keep his tender good, it is enough that he deposited it in court, where it remained, before service of the summons, though not till after the filing of the complaint.

Appeal from Superior Court, King County; George E. Morris, Judge.

Action by Jacob Andrews against Joseph Hoeslich and another. Judgment for plaintiff. Defendant Hoeslich appeals. Affirmed.

John E. Humphries and George B. Cole, for appellant. Jay C. Allen, for respondent.

CROW J. This action, which was brought by Jacob Andrews against Joseph Hoeslich and the Uncle Joe Diamond Broker, a corporation, to recover possession of a diamond ring, has heretofore been before this court on an appeal prosecuted by the defendant corporation, and a statement of the pleadings and the facts involved may be found in the opinion then filed. 87 Pac. 947. At the former trial the defendant Joseph Hoeslich was not in court. He was served afterwards, and on July 28, 1906, served his answer, in which, after denying allegations of the complaint, he affirmatively pleaded that on August 27, 1904, the plaintiff left the ring with him as a pawn to secure a loan of \$50; that he issued a pawn ticket to the plaintiff; that thereafter the plaintiff sold and delivered the pawn ticket to him for the sum of \$5, in addition to the \$50 loan; and that the plaintiff then ceased to have any further interest in the ring. This affirmative answer being denied, the cause was tried on the issues thus joined between the plaintiff and the defendant Joseph Hoeslich. The trial court made substantially the same findings as those made on the former trial, sustaining all the allegations of the complaint, and further found that, within a week or so after the ring had been pawned, the defendant Joseph Hoeslich sold it without the knowledge or consent of the plaintiff; that in this action the plaintiff tendered to the defendant, and paid into court for his use and benefit, the sum of \$75, which has ever since remained in the registry of the court; and that the ring was of the reasonable value of \$216. Upon these findings a final judgment was entered in favor of the plaintiff for the return of the ring, or in

case a return could not be had, for the sum of \$141, being its value less the \$75 in the registry of the court. The judgment further provided that, if the ring should be returned, the \$75 in the registry of the court should be paid to the defendant; but that otherwise the plaintiff was not only to have judgment for \$141, but the \$75 should also be returned to him. The defendant has appealed.

The appellant's first assignment of error is based upon his exceptions to the findings of fact. We have carefully examined the evidence, and conclude that the findings are supported by its preponderance. The appellant raises the same question based upon the statute of frauds that was urged by the defendant corporation on the former appeal, but we now adhere to our views then expressed.

The appellant further contends that, as he was not in possession of the ring at the time of the commencement of this action of replevin, the respondent cannot recover. The common-law rule undoubtedly is that an action of replevin cannot be maintained against a defendant who is not in possession at the time the demand is made or the suit is commenced. This doctrine was announced in *Dow v. Dempsey*, 21 Wash. 86, 57 Pac. 355. In that case, however, it affirmatively appeared that the plaintiff instituted her action after she had learned and positively knew that the defendant, as sheriff of Spokane county, had parted with the goods by delivering them to a receiver, in obedience to an order of court. Here the court did not find, nor is it suggested by the evidence, that the respondent knew at any time prior to the commencement of the action that the appellant had sold the ring or parted with its possession. Under such circumstances, an exception must be recognized to the rule in *Dow v. Dempsey*, supra. Where, as in this case, property has actually been in appellant's possession and has been wrongfully transferred by him without respondent's knowledge, before the commencement of an action for the recovery of its possession, the rule that replevin will not lie against one not in possession at the time of the commencement of the action will not obtain. The evidence and findings show that the appellant's disposition or sale of the ring was wrongful. In an action for the recovery of the possession of personal property, when it appears for the first time during the progress of the trial that the defendant theretofore in possession had, prior to the commencement of the action, without the knowledge or consent of the plaintiff, wrongfully disposed of the property, it would be a rank injustice for any court to hold that the plaintiff cannot for that reason recover. Many well-considered cases hold that the action does not fall under such circumstan-

ces. Wells on Replevin (2d Ed.) § 145; McBrien v. Morrison, 55 Mich. 351, 21 N. W. 368; Gildas v. Crosly, 61 Mich. 413, 23 N. W. 153; Helman v. Withers, 3 Ind. App. 532, 30 N. E. 5, 50 Am. St. Rep. 295; Hollday v. Poston, 60 S. C. 103, 38 S. E. 449; Latimer v. Wheeler, 3 Abb. Dec. (N. Y.) 35; Ellis v. Lersner, 48 Barb. (N. Y.) 539; Ross v. Cassidy, 27 How. Prac. (N. Y.) 416; Brockway v. Burnap, 16 Barb. (N. Y.) 309; Nichols v. Michael, 23 N. Y. 264, 80 Am. Dec. 259; Harkey v. Tielman, 40 Ark. 551. In the last-mentioned case the Supreme Court of Arkansas said: "Actual possession of the property by defendant is not always essential at the time of the writ. That would be a very inconvenient rule, which would enable one who had wrongfully taken or detained property from the owner to refuse to deliver, and hold to the last moment before the writ, and then evade a suit by a transfer of possession. His successor might do the same and his after him, and so on toties quoties, until the costs of writs to the owner would consume the property. When one is wrongfully detaining property and refuses it on demand, he is liable to the action, although it may not remain in his possession when suit is brought." In *Sinnott v. Felock*, 165 N. Y. 444, 59 N. E. 265, 53 L. R. A. 565, 80 Am. St. Rep. 736, the Court of Appeals, in a well-considered case, held that a defendant is not liable in an action of replevin for the recovery of chattels, after they had been taken from him by process legal as to him, and not by any voluntary act on his part; but, in its opinion, in which many of the earlier cases are considered and reviewed, it clearly recognizes the doctrine announced in *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259, and other cases above cited. In this state an action to recover the possession of personal property may be prosecuted without claiming delivery until after final judgment on the merits. In such a case the reason for the common-law rule forbidding the prosecution of an action of replevin against one not in possession fails, and we see no reason why an alternative judgment for the possession of the property or the recovery of its value may not be obtained, although the evidence establishes the fact that the defendant was not in possession at the commencement of the action or at any time thereafter, provided it further appears that the defendant had theretofore been in possession, had voluntarily, wrongfully, and fraudulently parted with such possession, and that the plaintiff did not know before commencing action that the defendant had so parted with possession. The appellant, who wrongfully disposed of the ring without the knowledge or consent of the respondent, who failed to advise the respondent of such disposition prior to the commencement of this action, and who concealed his

wrongful acts from the respondent at all times prior to the trial, is now in no position to contend that judgment shall be entered against the respondent, because the evidence fails to show that he, the appellant, had possession of the ring at the commencement of the action.

The appellant further contends that the respondent did not keep his tender good. The complaint was filed on January 27, 1906, but the respondent did not deposit the \$75 in the registry of the court until March 21, 1906, and the appellant now insists that the tender was not kept good, as the money was not deposited when the complaint was filed. Under the facts before us, there is no merit in this contention. Although the respondent made a tender prior to the commencement of this action, he has proceeded upon the theory that it was necessary for him to thereafter keep such tender good. In his complaint he not only alleged the tender made when he demanded possession of the ring, but further alleged "that the plaintiff has offered, as herein before alleged, does now offer and tender to pay, the sum of seventy-five dollars (\$75) in discharge of said pledge aforesaid, and does now tender and pay into court the sum of seventy-five dollars (\$75) the amount thereof." This allegation was denied by the answer, and in our opinion on the appeal of the defendant corporation we found that it was not sustained by the evidence. Proceeding upon the theory of the respondent, we then said: "Respondent's right to maintain the suit and obtain the judgment depended upon whether he had tendered the \$75, and had at all times kept the tender good. Appellant argues with apparent seriousness that the judgment is against it for the return of the ring or its value, and that respondent retains the \$75. Such a result would be manifestly wrong, and the condition of the record is such that we cannot tell whether the tender has been kept good so that it has at all times been available to appellant or not." Notwithstanding this language, we do not wish to be understood as holding that, under the facts of this case, the respondent was under any legal obligation to bring the tender into court with the filing of his complaint, and keep it there at all times until final judgment. It may be seriously questioned whether appellant's lien on the ring was not discharged by the tender made prior to the suit. *Jones on Pledges and Collateral Securities* (2d Ed.) § 542; *Helphrey v. Strobach*, 13 Wash. 128, 42 Pac. 537. If his lien was then discharged, it might be further questioned whether it would have been necessary for the respondent to keep his tender good at the time of filing his complaint and at all times thereafter. *Weeks v. Baker*, 152 Mass. 20, 24 N. E. 905; *Hyams v. Bamberger*, 10 Utah, 3, 36 Pac. 202. The respondent, however, assum-

ed by the allegations of his complaint that he should keep the tender good. In other words, he did not plead or rely upon any claim that the lien had been discharged, but prosecuted this action upon the theory that to discharge the lien he must continue his offer to keep the tender good as a condition precedent to the recovery of the possession of the ring.

On the former appeal a reversal was granted because it neither appeared that the \$75 remained in the registry of the court at the time of final judgment, nor that the final judgment protected the appellant corporation in all of its rights. The record here shows beyond question that before service of summons was made upon the present appellant Joseph Hoeslich the \$75 tender was deposited in the registry of the court, that it has since remained there, and that the trial court has in the final judgment fully protected the appellant. This being true, he is now in no position to complain of the respondent's failure to deposit the \$75 at the time he filed his complaint. The evidence now before us establishes the fact that the respondent has fully complied with every reasonable requirement that could be made of him in the matter of tender.

The judgment is affirmed.

HADLEY, C. J., and ROOT, FULLERTON, MOUNT, DUNBAR, and RUDKIN, JJ., concur.

LIBERT v UNFRIED et ux.

(Supreme Court of Washington. Sept. 18, 1907.)

1. CHATTEL MORTGAGES—RECEIVERS—PERSONS APPOINTED TO TAKE CHARGE OF MORTGAGED CHATTELS.

Under Ballinger's Ann. Codes & St. § 5455, defining a receiver as a person appointed by a court to take charge of property pending a civil action or proceeding, and to manage and dispose of it as the court may direct, a person appointed by the court to take charge of mortgaged chattels and retain the same pending foreclosure proceedings, is a receiver, whether appointed under section 5456, providing generally when receivers may be appointed, or under sections 5877, 5878, relating to the case of a chattel mortgagee having reasonable cause to believe the debt is insecure.

2. RECEIVERS — APPOINTMENT — REQUIRING BONDS.

An order appointing a receiver on an ex parte application, which in substance directs the receiver to seize and retain property without giving a bond, is void.

3. APPEAL—APPEALABLE ORDERS.

The appointment of a receiver on an ex parte application without notice can only be temporarily valid as an emergency order, till defendants can be notified to appear and show cause, so that an order vacating on motion such an appointment is not appealable under Ballinger's Ann. Codes & St. § 6500, subd. 5, as amended by Laws 1901, p. 23, c. 31, authorizing an appeal from an order appointing or removing, or refusing to appoint or remove, a receiver, as,

should the appeal be entertained, the emergency order could not be restored or continued.

Appeal from Superior Court, Garfield County; Chester F. Miller, Judge.

Action by William A. Libert against Fred Unfried and wife. From an adverse order, plaintiff appeals. Dismissed.

Charles L. McDonald, Ben F. Tweedy, and Garrie W. Jewett, for appellant. I. N. Smith and Gose & Kuykendall, for respondents.

CROW, J. This action was commenced by W. A. Libert, plaintiff, as mortgagee, against Fred Unfried and Sylvia Unfried, his wife, mortgagors, to foreclose a chattel mortgage on a flock of sheep in Garfield county. The complaint, which was filed and served April 17, 1906, alleged that the defendant Fred Unfried had, without the knowledge or consent of plaintiff, sold about 260 head of the sheep, that unless restrained he would make further sales, that the defendants were insolvent, and that the plaintiff had, at his option, under the terms of the mortgage, elected to declare all the notes thereby secured to be due and payable. On April 19, 1906, the plaintiff made an oral ex parte application for the appointment of some suitable person to take possession of the mortgaged property and retain the same pending the foreclosure proceedings. The court forthwith entered an order directing one T. W. Owsley to take and care for the mortgaged property, and also restrained the defendants from selling or disposing of any of the sheep or their increase. This order was made without notice to, or the knowledge of, either of the defendants. It did not require Owsley to take an oath of office or give bond. It did not on its face purport to be a temporary emergency order, nor did it fix any time for the defendants to appear upon notice and show cause why a receiver should not be appointed or why a temporary restraining order should not be made. On April 30, 1906, the defendants moved the court to dissolve the ex parte restraining order and to vacate the ex parte order appointing the receiver. After hearing this motion, the trial court, on April 11, 1906, made and entered an order (1) dissolving the temporary restraining order and vacating the appointment of the receiver, and (2) restraining the defendants from selling or disposing of any of the mortgaged property; the latter order to become effective upon the giving of a \$500 bond by the plaintiff. From the order dissolving the ex parte injunction and vacating the ex parte appointment of the receiver, the plaintiff has appealed.

The respondents have moved this court to dismiss the appeal for several reasons. We will only consider their contention that the order upon which it is based is not appealable. Subdivision 5 of section 6500, Bal-

linger's Ann. Codes & St. as amended (Laws 1901, p. 28, c. 31), authorizes an appeal from an order appointing or removing, or refusing to appoint or remove, a receiver. The appellant, in the discussion of this case upon the merits, contends that Owsley was not a receiver, but that he was an agent or representative of appellant, appointed under sections 5877 and 5878, Ballinger's Ann. Codes & St. If this contention is correct, it would necessarily follow that the order is not appealable. In 1891 the Legislature passed an act relating to receivers (section 5455, Ballinger's Ann. Codes & St.) reading as follows: "A receiver is a person appointed by a court or judicial officer to take charge of property during the pending of a civil action or proceeding, or upon a judgment, decree, or order therein, and to manage and dispose of it as the court or officer may direct." Under this statutory definition any person appointed by the court to take charge of mortgaged chattels and retain the same pending foreclosure proceedings is a receiver, whether appointed under section 5455, or sections 5877 and 5878, Ballinger's Ann. Codes & St. If the appellant, upon notice to respondents, had moved for the appointment of a receiver and the court, after notice and hearing, had refused to make such appointment, or if an appointment had been then made and the court had afterwards removed the receiver, there can be no question but that either of such orders would be appealable. The record discloses no such orders. The trial court, without notice and on appellant's ex parte application, appointed Owsley, without requiring any bond or directing that the respondents should be notified to appear and show cause why a receiver should not be appointed. This order was void, as it in substance directed the receiver to seize and retain respondents' property without the giving of bond. But, ignoring the fact that no bond was required, this court has held that the appointment of a receiver on an ex parte application without notice can only be temporarily valid as an emergency order until the defendants can be notified to appear and show cause. *Larsen v. Winder*, 14 Wash. 109, 44 Pac. 123, 53 Am. St. Rep. 864, distinguished in *Cole v. Price*, 22 Wash. 18, 60 Pac. 153; *State ex rel. Washington Match Company v. Superior Court*, 34 Wash. 123, 74 Pac. 1070. In the last-mentioned case we said: "The trial court seemed to be of the opinion that its temporary appointment of a receiver continued indefinitely, if no motion to discharge the same was made. This

is not the rule. While the court may, on an ex parte application, where an emergency is shown, appoint a receiver to take temporary charge of property until notice can be given and a hearing had on the question of the necessity for a receiver, such ex parte appointment has no force beyond such hearing, and a failure to make an order after such a hearing appointing a receiver, or continuing the first appointment, would operate to discharge the temporary receiver." Had the emergency order appointing Owsley required him to take an oath of office and give bond, and had it further directed that upon notice the respondents should appear and show cause, it would nevertheless have become inoperative after such notice and hearing. If on such hearing the court afterwards determined the case to be one for a receiver, and appointed one pending the foreclosure, unquestionably the order making such appointment would be appealable. Should this court now entertain this appeal, it could not restore or continue the original emergency ex parte order of April 17th, although that seems to be the substantial object and purpose of the appeal.

The appellant, however, contends that he filed a motion for the appointment of a receiver, which was heard with respondents' motion to dissolve and vacate, and that, as the substance of the order made by the trial judge was to refuse a receiver on such hearing of appellant's motion, it is appealable. This contention cannot be sustained, for several reasons: (1) The appellant's motion did not ask for the appointment of a receiver. It only requested the court to confirm the order theretofore made, and to continue appellant's possession under his mortgage, as theretofore ordered, so as to make the property available for the satisfaction of his debt and prevent the losing of his security, relying upon sections 5877 and 5878, Ballinger's Ann. Codes & St. (2) Appellant's motion was never noted for hearing in the manner provided by statute. (3) The record shows that the only motion considered and passed upon by the trial court was the one interposed by respondents.

Appellant contends that his appeal must be sustained under subdivision 6 of section 6500, supra. An examination of the order from which he has appealed shows such contention to be utterly devoid of merit.

The motion to dismiss is sustained.

HADLEY, C. J., and MOUNT and RUDKIN, JJ., concur.

LIBERT v. UNFRIED et ux.

(Supreme Court of Washington. Sept. 18, 1907.)

1. USURY—PENALTIES AND FORFEITURES.

Under 3 Ballinger's Ann. Codes & St. § 3671, providing that if, in an action on a contract for payment of money and interest it be shown that a greater rate of interest than 12 per cent. per annum has been contracted for or taken, plaintiff shall only recover the principal, less the amount of interest accruing thereon at the rate contracted for, and defendants shall recover costs, and, if interest shall have been paid, judgment shall be for the principal, less twice the amount of the interest paid, and less the amount of all accrued and unpaid interest, where plaintiff loaned defendants \$5,000 and received their notes for that amount, bearing 12 per cent. interest, secured by mortgage, and as a bonus for the loan also received their unsecured note for \$1,000, bearing 12 per cent. interest from maturity, and plaintiff, exercising an option, foreclosed the mortgage before some of the notes secured were due, but after the \$1,000 note had by its terms matured, defendants are entitled to have deducted from the \$5,000 notes, as accrued interest thereon, all of the \$1,000 note and interest thereon after its maturity.

2. SAME—ATTORNEY'S FEES.

Under Ballinger's Ann. Codes & St. § 3671, providing that in an action on an usurious contract all that can be recovered is the principal, less certain deductions, and that defendants shall recover costs, plaintiff cannot recover attorney's fees.

3. CHATTEL MORTGAGES—SHEEP—"INCREASE THEREOF."

The words "increase thereof," in a chattel mortgage of "ewe sheep and their increase," and "two year old wether sheep," do not include the yearly clip of wool, but the offspring only.

Appeal from Superior Court, Garfield County; Chester F. Miller, Judge.

Action by William A. Libert against Fred Unfried and wife. From an adverse judgment, plaintiff appeals. Affirmed.

Charles L. McDonald, Ben F. Tweedy, and G. W. Jewett, for appellant. I. N. Smith and Gose & Kuykendall, for respondents.

CROW, J. This action was commenced by the plaintiff, William A. Libert, against the defendants, Fred Unfried and Sylvia Unfried, his wife, to foreclose a chattel mortgage. In the fall of 1905 the defendants were about to purchase a large flock of sheep from one Hamilton Gill, and the plaintiff loaned them \$5,000 to pay the purchase price. To secure such loan he took from the defendants three notes, dated October 23, 1905, one for \$1,000, falling due June 15, 1906, one for \$2,000, falling due June 15, 1907, and one for \$2,000, falling due June 15, 1908, all bearing 12 per cent. interest from date, and being secured by a mortgage on land in Garfield county and a chattel mortgage on the flock of sheep. About October 25, 1905, the defendant Fred Unfried executed and delivered to the plaintiff his additional unsecured note for \$1,000, due March 15, 1906, with 12 per cent. interest from maturity. The defendants claim this \$1,000 note

was required of them as a further exaction and extraordinary charge of interest for the use of the \$5,000 loaned them by plaintiff. The plaintiff denies this, claiming that he sold to Fred Unfried a one-half interest in a partnership existing between himself and Unfried, and took the note as payment. The plaintiff alleged that the defendants had impaired his security by selling 260 head of the sheep without his knowledge or consent, and that by reason thereof he had at his option declared the secured notes to be due and payable. Upon plaintiff's ex parte application the trial court, on April 19, 1906, appointed one Owsley receiver of the mortgaged sheep, and directed him to take immediate possession and hold the same pending the foreclosure proceedings. Upon motion of the defendants this order was afterwards vacated, and from such interlocutory order of vacation the plaintiff prosecuted a preliminary appeal to this court, which we have dismissed on this date in cause No. 6,427. 91 Pac. 774. The record on this present appeal shows that on the appeal from the interlocutory order the plaintiff gave a supersedeas bond, that under such bond Owsley has continued in possession of the sheep, that he has clipped a large amount of wool, that he has turned the proceeds thereof into the custody of the clerk of the superior court, that the plaintiff claims a lien on this wool under his chattel mortgage, and that the defendants claim they are entitled to the wool, or the proceeds of its sale, free from any lien.

Upon trial the court made findings from which, with others, the following facts appear: That the defendant Fred Unfried had violated the terms of the chattel mortgage by selling certain of the sheep without plaintiff's knowledge or consent; that \$435.60, a portion of the proceeds of such sale, was paid to plaintiff on November 24, 1905, \$50 being applied on account of interest and \$385.60 on the principal of his notes; that the unsecured note for \$1,000, dated October 25, 1905, executed by Fred Unfried, was without consideration, except that it was given as an exaction of the plaintiff, made upon the defendant Fred Unfried for the loan of \$5,000, evidenced by the three secured notes; and that the chattel mortgage does not cover the clip of wool from the sheep. The court also stated the following conclusions of law: "First. That the transaction set forth in plaintiff's complaint and in defendants' affirmative answer, arising out of the loan of defendants of the sum of five thousand (\$5,000) dollars, and the exaction by plaintiff of the rate of interest specified in said notes, together with the further sum of one thousand (\$1,000) dollars as a further and additional exaction for the use of said money, constitutes a usurious transaction, and that said one thousand (\$1,000) dollar note was and is a usurious exaction and

an unlawful charge for the loan of money, by way of a premium which the plaintiff, William A. Libert, demanded and exacted of the defendant Fred Unfried. * * * Third. That by reason of the usurious nature of the loan, and of the transaction set forth in this case, the plaintiff is not entitled to recover interest or attorney's fees or costs herein. Fourth. That defendants are entitled to the following credits on said five thousand (\$5,000) loan: (a) The sum of \$1,000 as accrued usurious interest represented by the note. (b) The sum of \$100, as being double the interest actually paid on November 24, 1905. (c) The sum of \$385.60, as being payment on the principal of date November 24, 1905. (d) The sum of \$378.20, being the amount of unpaid accumulated interest on the \$5,000 notes from November 24, 1905, to August 1, 1906, the date of decree. (e) The sum of \$42, as being the amount of interest on the \$1,000 note contracted for from date of maturity thereof (March 15, 1906) to August 1, 1906, date of decree. Fifth. That the plaintiff is entitled to recover judgment against the defendants, Fred Unfried and Sylvia Unfried, for the sum of three thousand ninety-four and $\frac{20}{100}$ (\$3,094.20) dollars, without interest, attorney's fees, or costs." Upon these findings and conclusions a final decree was entered, awarding plaintiff \$3,094.20 debt, without attorney's fees or costs, and foreclosing the chattel mortgage upon the sheep, but not on the clip of wool. The plaintiff has appealed.

There is a motion to dismiss the appeal, because (1) the notice of appeal is insufficient and (2) the certificate of the trial judge to the statement of facts is defective. We find no merit in either contention. The motion to dismiss is denied.

By his assignments of error the appellant contends that the trial court erred (1) in finding that the \$1,000 unsecured note was part of an usurious contract and without other consideration; (2) in deducting excessive amounts as penalty for the usurious contract, if it be held usurious; (3) in holding that the clip of wool was not subject to the chattel mortgage lien; and (4) in refusing to award appellant attorney's fees or any costs.

The unsecured note for \$1,000 and the three secured notes for \$5,000 were, as we find from the evidence, parts of the same transaction. The appellant claims that he and the respondent Fred Unfried entered into an oral contract to join in purchasing the sheep from Hamilton Gill, that the appellant was to advance the necessary funds to make the purchase, that the respondent Unfried was to care for the sheep, and that the two were to be partners in the sheep business. His evidence shows that the sheep were not jointly purchased, that he never paid any money on the alleged contract of partnership, that

no papers were drawn, and that no partnership business was actually transacted. In fact, according to appellant's testimony nothing was done except the making of the oral agreement. Appellant, however, contends that, within an hour, or less time, after the formation of the partnership, the respondent Unfried purchased his interest in the firm and its anticipated profits for \$1,000, giving his unsecured note in payment, and that immediately thereafter appellant made the \$5,000 loan as an entirely separate transaction, thereby furnishing funds which enabled the respondent Fred Unfried to individually purchase the sheep from Hamilton Gill. The respondents contended, and Fred Unfried testified, that the appellant exacted the \$1,000 note as a consideration or bonus for the \$5,000 loan, in addition to 12 per cent. interest. The court found with the respondent on this issue, and we are satisfied with such finding, it being sustained by the evidence. Section 5701, Pierce's Code (section 3669, 3 Ballinger's Ann. Codes & St.), reads as follows: "Any rate of interest not exceeding twelve (12) per centum per annum agreed to in writing by the parties to the contract, shall be legal, and no person shall directly or indirectly take or receive in money, goods or thing in action, or in any other way, any greater interest, sum or value for the loan or forbearance of any money, goods or thing in action than twelve (12) per centum per annum." As the appellant's three secured notes by their terms call for this maximum rate of interest, he was contracting, not only for 12 per cent. on the \$5,000 actually loaned, but also for \$1,000 in addition thereto, as compensation for such loan, which made the contract usurious. Section 5706, Pierce's Code (section 3671, 3 Ballinger's Ann. Codes & St.), provides: "If a greater rate of interest than is hereinbefore allowed shall be contracted for or received or reserved, the contract shall not, therefore, be void; but if in any action on such contract proof be made that greater rate of interest has been directly or indirectly contracted for or taken or reserved, the plaintiff shall only recover the principal, less the amount of interest accruing thereon at the rate contracted for, and the defendants shall recover costs; and if interest shall have been paid, judgment shall be for the principal less twice the amount of the interest paid, and less the amount of all accrued and unpaid interest."

Appellant's principal contention seems to be that the trial court should not have deducted the entire \$1,000, the face of the unsecured note, as interest accruing on the \$5,000 loan at the rate contracted for. He contends that the statute should be strictly construed as against the respondent, that only interest accrued at the date of judgment should be deducted, and that the \$1,000 was not accrued interest. The trial court was right in its

conclusion on this point. The \$1,000 unsecured note by its terms had matured, and, with \$48 interest thereon, was due and payable at the time of the entry of final judgment herein. It had undoubtedly been given as compensation to appellant for the use of the \$5,000, in addition to the maximum rate permitted by statute. Had it been paid by the respondents, appellant could not seriously contend that they would not be entitled to credit for twice the amount as interest paid. The evident purpose of section 3671, 3 Ballinger's Ann. Codes & St., was to compel the money lender who makes an usurious loan to credit his debtor with every dollar of accrued value which he has contracted to receive as compensation for the debtor's use of the money actually loaned. Under any fair interpretation the \$1,000 was past-due interest, and, being usurious interest, was properly deducted from the appellant's claim. This is also true of the \$378.20 additional interest which had matured on the \$5,000 after the payment of November 24, 1905, and the \$42 interest which had matured on the \$1,000 note.

A proper construction of the chattel mortgage requires us to hold that it did not give appellant a lien on the clip of wool. The mortgage described "twelve hundred head of ewe sheep and their increase; three hundred head of two-year-old wether sheep." Appellant contends that the words "and their increase" applied to the yearly clip of wool. California has a statute reading as follows: "Mortgages may be made upon the following personal property and none other: * * * Sixteenth. Neat cattle, horses, mules, swine, sheep, goats, and the increase thereof." In *Alferitz v. Borgwardt*, 126 Cal. 206, 58 Pac. 460, the Supreme Court held that the words "and the increase thereof," as applied to sheep in a chattel mortgage, did not include their wool, but their offspring only. *Stringfellow v. Sorrells*, 82 Tex. 277, 18 S. W. 689. Considering the terms of appellant's mortgage in the light of the evidence and all the surrounding circumstances, we construe the words "and their increase" to apply merely to the increase of lambs from the ewes. If it had meant wool, language definitely referring to the increase of wool from all the sheep would certainly have been used, and not language which excepted the wether sheep by referring only to the increase from the ewes. The evidence shows that at the time of the trial there had been an increase of about 500 lambs, and the trial court properly held they were subject to the mortgage lien, and that the clip of wool was not.

The trial court did not err in refusing to allow appellant any attorney's fees or costs. The statute (section 5706, Pierce's Code; section 3671, 3 Ballinger's Ann. Codes & St.) provides that he shall recover only principal, less certain deductions therein named, and

that the defendant shall recover costs. If the appellant was only to recover a portion of his principal, he certainly was not entitled to recover any further sum, whether it be called attorney's fees or costs. We think the statute is not susceptible of any construction other than the one given it by the honorable trial court.

The judgment is affirmed.

HADLEY, C. J., and RUDKIN and MOUNT, JJ., concur.

KELLER v. HAWK.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. TAXATION—REAL ESTATE—SALE FOR TAXES—TAX DEED.

When a tax deed shows on its face that several lots in a town were sold at one sale, and that the county purchased them as a competitive bidder, the deed is void. While the county treasurer has the right under the law to issue a second tax deed for the purpose of curing defects in the first, such authority cannot be exercised to overcome by false recitations in such second deed, the record upon which it is based.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1361, 1535.]

2. SAME—TAX CERTIFICATE—CONSTRUCTION.

A tax certificate, under the law, does not pass title to the land sold. It is a written certification by the county treasurer of the facts regarding the sale of real estate for taxes, and is the legal evidence upon which the holder thereof is, at the proper time, entitled to a deed, or the redemption money. It is prima facie evidence of the correctness of the facts recited therein, and, being made by the treasurer at or near the time of sale, where the recitations thereof are in conflict with the recitations of the tax deed based thereon, the recitations of the tax deed will prevail.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1463.]

3. SAME—SALE—PURCHASE BY COUNTY.

Where a county purchases real estate at a tax sale as a competitive bidder, the sale is void, and a tax certificate or tax deed which recites such fact or other facts from which such competition is necessarily disclosed is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1361.]

4. SAME—SALE—LOTS IN CITY.

Each lot in a city or town must be assessed and sold separately, and, where a tax certificate or deed shows upon its face that several lots were sold together in one sale, such certificate or deed is void.

5. SAME—ACTION TO TRY TITLE.

Where one purchases real estate at a tax sale, and goes into possession of the same under a void sale and deed, and the original owner brings an action in ejectment to recover possession, he is not required, as a condition precedent to bringing the action, to tender to the tax deed holder the amount of taxes paid by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1586.]

6. ADVERSE POSSESSION—VOID TAX DEED.

A tax deed which is void upon its face is not admissible in evidence to support an adverse possession under a statute of limitations. A

tax deed which is void upon its face cannot be aided by the statute of limitations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 462; vol. 45, Taxation, § 1594.]

Burford, C. J., dissenting.

(Syllabus by the Court.)

Error from District Court, Cleveland County; before Justice Clinton F. Irwin.

Action by S. C. Hawk against E. J. Keller. Judgment for plaintiff. Defendant brings error. Affirmed.

C. L. Botsford, for plaintiff in error. J. W. Hocker, for defendant in error.

BURWELL, J. The appellee, S. C. Hawk, was the owner of lots numbered 17 to 32, inclusive, in block numbered 11, in the town of Lexington, in Cleveland county. These lots were sold for taxes and bid in by the county. The county sold the certificate of purchase to the appellee, E. J. Keller, who, on December 24, 1898, obtained a tax deed for the same, and went into possession of the lots. On October 30, 1900, the appellee commenced this action in ejectment. The appellant answered, denying generally the allegations of the petition, and then affirmatively pleaded his tax deed. On the final trial judgment was rendered for S. C. Hawk, and Keller appeals to this court.

On December 24, 1898, the county treasurer made to Keller a tax deed, but this deed showed upon its face that all of these lots were sold together, that the county bought them as a competitive bidder, and that the sale was made at the door of the courthouse. Recognizing that this deed was void, Keller on November 13, 1900, obtained from the county treasurer another deed, which recited that there were no bidders other than the county, that the lots were sold separately (giving the amount for which each sold), and that the sale took place at the treasurer's office. This second tax deed was obtained after the commencement of this action. This fact, however, is not considered by us in deciding the case.

The certificate of sale was issued by R. Aniol, who was county treasurer and who made the sale. The first deed was executed by him also, and its recitations are in harmony with the tax certificate. The second deed was executed by J. W. Stow, who was elected in the place of Mr. Aniol, and took charge of the office at the end of Mr. Aniol's term. The tax certificate, under the law, does not pass title to the land sold. It is a written certification by the county treasurer of the facts regarding the sale of real estate for taxes, and is the legal evidence upon which the holder thereof is, at the proper time, entitled to a deed, or the redemption money. It is a prima facie evidence of the correctness of the facts recited therein.

These certificates are made out by the treasurer while the facts are fresh, and when there is slight probability of error of memory. And, where there is no other evidence offered as to what actually occurred at a sale, the recitations of the tax certificate will prevail over conflicting recitations in a deed executed by another treasurer some four years after the sale occurred, when the recitations in the tax certificate shows that the treasurer had no legal authority to execute the deed. It is true, perhaps, that, if there were a discrepancy between the records of the treasurer's office and the recitations in the tax certificate, the former will prevail; but in this case the facts, as recited in the tax certificate, are not controverted. The validity of the deed depends upon the validity of the proceedings leading up to it. If those proceedings are void, the deed is void also. The only evidence offered on the trial as to what was actually done is the tax certificate and portions of the record which are not in conflict. The tax certificate recites that these lots in question were purchased by the county; it "being the highest and best bidder," and this court has held that such a recitation shows that the county was a competitive bidder, and, if so, the deed is void. *Hanenkratt v. Hamil*, 10 Okl. 219, 61 Pac. 1050. And under the rule announced in the case of *Wilson v. Wood*, 10 Okl. 279, 61 Pac. 1045, the recitations of a tax deed do not overcome facts in conflict therewith, as shown by the tax certificate. In this last case the court expressly held the recitations of a tax deed might be contradicted by one claiming adversely to it. The tax certificate also shows that these lots were sold at one sale for \$3.73. This alone would render the sale void. Each lot in a city or town should be assessed and sold separately, and, while more than one lot may be included in the same deed, the deed must affirmatively show the amount for which each lot sold. *Frazier v. Prince*, 8 Okl. 253, 58 Pac. 751; *Lowenstein v. Sexton* (Okl.) 90 Pac. 410 (not officially reported); *Eldridge v. Robertson*, decided at the present term of court (not yet officially reported) 92 Pac. 156.

The contention that, when a deed is defective, another deed may be issued to conform to the facts, adds nothing in favor of the appellant. The second deed should conform to the facts, and it is said in 27 Cyc. p. 963, that "the authority [to issue a second deed] cannot be exercised to overthrow by false recitals in a deed the records upon which it is based." That is exactly the effect of the second deed in this case. The recitals therein, when compared with the record, are false. It is also suggested by counsel for the appellant that the appellee, plaintiff below, never tendered the taxes to the appellant. No tender was necessary. As we have heretofore said, the tax deed was

void. The United States Circuit Court of Appeals for the Eighth Circuit, in the case of *Paine v. Germantown Trust Co.*, 136 Fed. 527, 69 C. C. A. 303, said: "Where a tax sale of land is void, the payment of the taxes by the purchaser was the act of a mere volunteer, so that the landowner was not bound to pay the taxes, and interest so paid by such purchaser as a condition to his right to have the purchaser's certificates and deeds vacated." The Supreme Court of Kansas had occasion to consider the question in the case of *West v. Cameron*, 39 Kan. 786, 18 Pac. 894. That case, like this one, was a suit in ejectment. The court said: "In an action of ejectment, when it appears that the plaintiff is the owner of the property, and that the defendant holds the same under a void or voidable tax deed, as in this case, the plaintiff's action cannot be defeated by showing that the plaintiff has not tendered the amount of the taxes paid by the defendant on the land"—citing authorities. The above rule should apply in this case, especially in view of the fact that the plaintiff tendered the taxes to the treasurer and they were refused. The court, however, as a condition precedent to giving possession to the appellee, required him, in the judgment, to pay the taxes.

The appellant also insists that the action of appellee was barred by the statute of limitations, by reason of it not having been commenced within the statute after the first deed was recorded. The first deed was void upon its face. Therefore the statute of limitations did not run against it. There is apparently some conflict in the decisions upon this point; but an examination of some of these cases will show that the courts rendering them failed to distinguish between a deed which is void upon its face and one which appears upon its face to be regular, but may be defeated by reason of the irregularity of the prerequisite steps, or total failure to perform some necessary duty named in the statute as the basis for a tax deed. The Supreme Court of the United States in the case of *Rerfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 327, in an opinion prepared by Mr. Justice Miller, reviews the authorities, and in positive language declares that the statute of limitations cannot be invoked in aid of a tax deed which is void upon its face. The court considered the statutes of Arkansas, which were equally as favorable to a purchaser at a tax sale as our own. Finally the court said: "We do not discover in the statute of Arkansas, nor in the decisions of its courts cited by counsel for defendant, anything to contravene these views, and we think that both the weight of authority and sound principle are in favor of the proposition that, when a deed founded on a sale for taxes is introduced in support of the bar of a possession under these statutes of limitations, it is of no avail if it can

be seen upon its face and by its own terms that it is absolutely void." To the same effect are the following cases: *Coulter v. Stafford* (Circuit Court of Appeals for the Ninth Circuit) 56 Fed. 564, 6 C. C. A. 18; *Moore v. Brown*, 11 How. (U. S.) 414, 13 L. Ed. 751; *Daniels v. Case et al.* (C. C.) 45 Fed. 843; *Id.*, 159 U. S. 251, 15 Sup. Ct. 1038, 40 L. Ed. 140; *Callahan v. Davis*, 90 Mo. 78, 2 S. W. 216; *Land & River Imp. Co. v. Bardon* (C. C.) 45 Fed. 706; *Shoat v. Walker*, 6 Kan. 65; *Sapp v. Morrill*, 8 Kan. 677; *Hubbard v. Johnson*, 9 Kan. 632. The last three cases were where the original owner of the land remained in possession, but in the case of *Watterson v. Devoe*, 18 Kan. 223, the Supreme Court of Kansas said that, even though the purchaser at the tax sale was in possession, the statute of limitations would not run in favor of his tax deed, which was void upon its face. The justice who wrote this opinion cites the other Kansas cases referred to above. And again, in the case of *Larkin v. Wilson*, 28 Kan. 513, Chief Justice Horton, speaking for the court, said: "This court has already held that a tax deed, to be sufficient when recorded to set the statute of limitations in operation, must of itself be prima facie evidence of title; that a tax deed void upon its face will not start the statute of limitations; and also that a tax deed void upon its face will not protect a person in possession of the premises for two years thereunder." See, also, the following cases: *Mason v. Crowder*, 85 Mo. 526; *Sheehy v. Hinds*, 27 Minn. 259, 6 N. W. 781; *Cutler v. Hurlbut*, 29 Wis. 152; *Wofford v. McKinna*, 23 Tex. 36, 76 Am. Dec. 53. And in the case of *Hurd v. Brisner et al.*, 3 Wash. 1, 28 Pac. 371, 28 Am. St. Rep. 17, it is said: "If the sale was void [referring to a tax sale], which we think it was, none of the claims made by the appellant under the statute of limitations are good." It is true that there are some cases holding that statutes of limitations will run against a void deed, but the weight of authority is against that doctrine, and with the latter line of authorities are the decisions of the Supreme Court of the United States. These decisions are binding upon this court; and, besides, we believe that the Legislature did not intend that time should breathe life and force into an instrument from the face of which it could be seen that it was absolutely void. The law was intended to protect purchasers at tax sales and their grantees from hidden defects in the proceedings, and not from those which the tax deed shows upon its face, and which, under the law, persons dealing with the title are bound to know.

The judgment of the lower court is hereby affirmed, at the cost of appellant. All of the Justices concurring, except IRWIN, J., who presided at the trial below, not sitting, BURFORD, C. J., dissenting, and GARBBER, J., absent.

CORDRAY v. CORDRAY.

(Supreme Court of Oklahoma. Sept. 4, 1907.)

1. PROCESS—SERVICE BY PUBLICATION.

Where publication is relied on and jurisdiction is sought to be obtained of the defendant in an action by publication service alone, the affidavit for publication, as well as the publication notice, are matters jurisdictional, and, in order to obtain jurisdiction of the defendant in such case, both the affidavit for publication and the publication notice must comply with the provisions of the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 114.]

2. DIVORCE—SERVICE BY PUBLICATION—AFFIDAVIT.

An affidavit in an action for divorce, as a basis for service for publication, in the following form: "Sallia M. Cordray, being first duly sworn, upon oath says that she is the plaintiff in the above-entitled cause, and that defendant, J. W. Cordray, is not a resident of the territory, but to the best of her knowledge and belief is a resident of —, and that service of summons in this case cannot be had upon the said defendant in the territory of Oklahoma"—does not comply with the provisions of the statute, and a judgment rendered in such case is void for want of jurisdiction over the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 261.]

3. SAME.

Such affidavit is defective, first, in that it fails to state what, if any, diligence, was used to procure personal service of summons upon the defendant; second, in that it fails to state the nature of the action; third, that it fails to state that at the time of the making of the affidavit the defendant was out of the territory of Oklahoma.

(Syllabus by the Court.)

Error from District Court, Canadian County; before Justice Clinton F. Irwin.

Action by Sallia M. Cordray against J. W. Cordray. Judgment for plaintiff. Defendant brings error. Reversed.

Joseph G. Lowe and J. J. Carney, for plaintiff in error. Glitsch, Morgan & Glitsch, for defendant in error.

PANCOAST, J. This action was originally brought in the district court of Canadian county on November 12, 1902, by the defendant in error against the plaintiff in error, for divorce. On the day that the action was commenced, the plaintiff filed her affidavit for service by publication. Publication service was made by publishing the notice in a newspaper. The case was heard on the 23d day of February, 1903, the defendant making no appearance. The plaintiff was granted a decree of divorce and the custody of two minor children. The case remained in this condition until the 25th day of April, 1905, when the plaintiff in error appeared specially and filed his motion to vacate the judgment and decree of the court, for the reason, principally, that the court was without jurisdiction of the person of the defendant, because of the defects in the service. This motion was heard on the 13th day of December, and the motion denied. The appeal

is taken from the order refusing to vacate the judgment.

The contention of the plaintiff in error is that the judgment and decree granting the divorce and custody of the children is a nullity. The principal question presented and argued by plaintiff is that arising out of the affidavit for publication. This affidavit reads as follows: "Sallia M. Cordray, being first duly sworn, upon oath says that she is the plaintiff in the above-entitled cause, and that defendant, J. W. Cordray, is not a resident of the territory, but to the best of her knowledge and belief is a resident of —, and that service of summons in this case cannot be had upon the said defendant in the territory of Oklahoma. [Signed] Sallia M. Cordray. Subscribed and sworn to before me this 12th day of November, 1902. J. E. Jones, Notary Public. [Seal.]"

It is claimed that this affidavit is so defective and deficient that the court did not obtain jurisdiction of the defendant in this case. It is not seriously contended by the defendant in error that the affidavit is perfect, but it is claimed that it is not void, and, at most, only voidable. Where publication service is relied on, and jurisdiction is sought to be obtained of the defendant in an action by publication service alone, the affidavit for publication, as well as the publication notice, are matters jurisdictional, and, in order to obtain jurisdiction of the defendant in such case, both the affidavit for publication and the publication notice must comply with the provisions of the statute. Section 4276, Wilson's Rev. & Ann. St. 1903, provides that service may be made by publication in an action brought to obtain a divorce where the defendant resides out of the territory. Section 4377 also provides that, before service may be made by publication, an affidavit must be filed, stating that the plaintiff with due diligence is unable to make service of summons upon the defendant or defendants to be served by publication, and showing that the case is one of those mentioned in the preceding section. When such affidavit is filed, the party may proceed to make service by publication. It will be seen at a glance that this affidavit is defective; that it does not fully comply with the statute upon the subject. If it is so far defective as to not give jurisdiction of the defendant, it is void, and not voidable merely. If, however, it is only so defective as to be voidable, and not void, then the court obtained jurisdiction.

It is contended, however, that it is not only voidable, but void, first, for the reason that it fails to state that due diligence was used to procure personal service of summons upon the defendant; second, for the reason that it fails to state that the case was one of those mentioned in section 4276; third, that it fails to state that at the time of making the affidavit the defendant was out of the territory of Oklahoma. The affidavit is cer-

tainly defective in each of the provisions contended for. There is no statement whatever as to diligence used, much less any statement of facts showing diligence in attempting to obtain personal service, nor is there any statement whatever as to the nature of the action for which publication service was attempted to be had. While the affidavit states that, to the best of the knowledge and belief of the plaintiff, the defendant is a resident of —, and that service of summons in this case cannot be had upon the defendant in the territory, there is no showing that the defendant was not at that time personally at some point within the territory. The statement that to the best of the knowledge and belief of the plaintiff, if it relates to the question of the whereabouts of the defendant, is not sufficient, and the statement that service of summons cannot be had upon the defendant in the territory is not a statement of fact, but a conclusion. This statute was adopted in this territory from the state of Kansas, and has been passed upon repeatedly by that state. Among the early cases is the case of *Shields v. Miller*, 9 Kan. 390, which was a foreclosure case. The affidavit in that case was somewhat of the same form and substance as the one at bar, and the court in passing upon the case makes the statement that, from anything that appeared in the affidavit, the defendant may have been in the county where the action was brought, or even upon the land in controversy when the affidavit was filed, and therefore might easily have been served with summons personally. The Supreme Court further says that: "The affidavit is the foundation upon which jurisdiction is obtained. The plaintiff has no power or authority to obtain service by publication until after he has filed the proper affidavit. Without the affidavit, the attempted service by publication is a nullity, and without valid service every subsequent proceeding, including the judgment, the execution, order of sale, and deed, must necessarily be void."

Another case bearing upon the same subject is *Grouch v. Martin*, 47 Kan. 313, 27 Pac. 985. In this case the affidavit for publication failed to state that the action was one of those mentioned in the "preceding section." Also, in the case of *Adams v. Baldwin*, 49 Kan. 781, 31 Pac. 681, the court held the same doctrine. Again, in the case of *Patterson v. Patterson*, 57 Kan. 277, 46 Pac. 304, being a divorce case, the court say that the affidavit would be insufficient where there was an entire want of any showing that the case was one of those mentioned in the "preceding section," which is section 78 of our Civil Code of 1905. That "the filing of an affidavit complying substantially with the terms of said section is a condition precedent to the obtaining of service by publication." Again, in the case of *Shields v. Miller*, 9 Kan. 390, and *Claypoole v. Houston*, 12 Kan. 324,

and *Harris v. Clafin*, 36 Kan. 543, 13 Pac. 830, the court deals with this subject, following the former decision. In the last cited case the affidavit was held to be void. In *Lieberman v. Douglass*, 62 Kan. 786, 64 Pac. 501, the court holds that "the allegation in the affidavit that this is one of the cases mentioned in section 72 of the Code of Civil Procedure in the laws of the state of Kansas is not a statement of facts as is required in the affidavit, but a mere conclusion of law, and renders the affidavit wholly insufficient under the statute as a basis upon which constructive service can properly be predicated." The court holds in this case that the defect in the affidavit is fatal, and that the sheriff's deed and judgment were void by reason of such judgment. The affidavit in this case should have stated that this was an action for divorce. This allegation is entirely omitted, and under the numerous decisions of the Supreme Court of Kansas such allegation is held to be necessary, and a want of it is such a defect that no valid judgment can be rendered. Numerous cases in other states upon similar statutes have been decided, and the holdings are uniform with those from the state of Kansas. In the case of *Galpin v. Page*, 18 Wall. (U. S.) 350, 21 L. Ed. 959, the Supreme Court of the United States hold that "where the record states facts showing that a defendant is without the territorial limits of the court, and that he never appeared in the action, presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is upon the party who invokes the benefit or protection of the judgment or decree."

So that, applying this rule, there can be no presumption in favor of the plaintiff below that the court acquired jurisdiction in any other way than as shown by the record in this case, and the burden was upon the plaintiff below to establish by the record a compliance with the statute for service by publication. This includes an affidavit showing that the action was one for divorce, that the defendant was a nonresident of the territory, the facts necessary to show that due diligence was used to obtain personal service, and that the defendant, although a nonresident, was not within the limits of the territory. In addition to this, the burden was on the plaintiff to show that a copy of the petition had been mailed to the last known post-office address of the defendant. In the syllabus of the case of *Galpin v. Page*, supra, the court lays down the rule that a strict and literal compliance with the statutory provisions is necessary; that where the procedure is not according to the course of the common law, but under a special statutory provision and special powers thereby conferred, which are exercised in a special manner, such powers are exercised over a class not within its ordinary jurisdiction, and therefore no presumption of jurisdiction would attend the

judgment of the court. As stated in *Lewis v. Lewis*, 15 Kan. 181, these provisions with reference to publication service in divorce cases may be very inadequate, but they are worth something; and, whether adequate or not, it is the legislative direction, and, as such, must not be disregarded. They are precautionary measures calculated to guard against the danger of decreeing a divorce without the knowledge and presence of both parties. Again, our own court, in the case of *Romig v. Gillett*, 10 Okl. 186, 62 Pac. 805, has spoken upon this subject as follows: "Where a party seeks to bring a defendant into court upon service by publication under the Code, he must strictly comply with the provisions of the statute, and, unless this is done, the judgment will be void for want of jurisdiction of the person of the defendant." Again, in *Rodgers v. Nichols*, 15 Okl. 579, 83 Pac. 923, this court has spoken in a manner which we think is decisive of this case.

From the conclusions which we have reached, we think that the district court erred in overruling the motion of the plaintiff in error to vacate the judgment, and for such error the decision of the court should be reversed.

All the Justices concurring, except IRWIN, J., who tried the case below, not sitting.

BARBE v. TERRITORY.

(Supreme Court of Oklahoma. Sept. 4, 1907.)

1. LARCENY—INDICTMENT.

In a prosecution for larceny of domestic animals, an indictment which charges that the defendants "did then and there unlawfully, willfully, and feloniously, by stealth, take, steal, and carry away, without the consent and against the will of the true owner," certain personal property, "with the unlawful and felonious intent then and there" of the defendants "to deprive the said L. C. Knee thereof, and to convert the same to their own use and benefit," sufficiently charges a felonious intent to convert.

2. JUDGES—CHANGE OF JUDGE—POWERS OF SUBSTITUTED JUDGE.

Where an application for change of judge is granted on March 22, 1905, and the clerk of the district court of Comanche county is ordered to notify the clerk of the Supreme Court at Guthrie of such change of judge, and where, on the same day, at Woodward, Okl., at chambers, an order is made by the Chief Justice assigning another judge to "hold the district court in the county of Comanche, * * * and to try, hear, and determine any and all cases and matters that may come before him in said district during the absence" of the regular presiding judge therefrom, *held*, the judge so assigned has jurisdiction to try, hear, and determine any case or matter which may come before him while acting under such order of the Chief Justice.

3. CRIMINAL LAW—ACCOMPLICES—EVIDENCE—CORROBORATION—SUFFICIENCY—LARCENY.

Evidence of witnesses other than accomplices examined, and held to be sufficient to tend to connect the defendant with the commission of the offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1123.]

(Syllabus by the Court.)

Error from District Court, Comanche County; before Justice B. F. Burwell.

Robert Barbe was convicted of crime, and brings error. Affirmed.

See 86 Pac. 61.

Ross & Anderson, for plaintiff in error.
P. C. Simon, Atty. Gen., and Don C. Smith, Asst. Atty. Gen., for the Territory.

GARBER, J. The plaintiff in error, jointly with Charles Barbe, J. Stien, and Roy Barbe, was indicted by a grand jury of Comanche county, charged with the larceny of certain domestic animals. A demurrer to the indictment being overruled, upon application, a change of judge was granted, and also a separate trial for each defendant. On the 24th day of March, 1905, the jury returned a verdict, finding the defendant guilty of stealing domestic animals as charged in the indictment. A motion for a new trial having been overruled, the defendant was sentenced to imprisonment in the territorial prison at Lansing, Kan., for a period of eight years. From that judgment, plaintiff in error appeals, and asks a reversal thereof upon three assignments of error, viz.: First, the demurrer to the indictment should have been sustained; second, the court was without jurisdiction; third, the evidence was insufficient to support the verdict.

The first two assignments of error upon the same state of facts having been passed upon by this court in a very able opinion by Mr. Justice Pancoast in the case of Charles Barbe (one of the persons jointly indicted with the plaintiff in error in this case) v. Territory, 16 Okl. 563, 86 Pac. 61, renders a restatement of those questions raised by the assignment of error and conclusions of law thereon at length unnecessary at this time. In that case, as in this, it was urged that the indictment did not charge that the property was taken with the felonious intent to convert. The indictment charged that the defendants, Charles Barbe, J. Stien, Robert Barbe, and Roy Barbe, then and there being, did then and there unlawfully, willfully, and feloniously, by stealth, steal, take, and carry away, without the consent and against the will of the true owner, two cows and eight steers and six young cows, the personal property of L. C. Knee, with the unlawful and felonious intent, then and there, of them, the said Charles Barbe, J. Stien, Robert Barbe, and Roy Barbe, to deprive the said L. C. Knee thereof, and to convert the same to their own use and benefit. In passing upon the sufficiency of the indictment Justice Pancoast, speaking for the court, said: "We are of the opinion that the indictment in this case fills the requirements of the law under the rule there enunciated. The unlawful and felonious taking, the unlawful and felonious intent to deprive the owner of the property and to convert the same to the tak-

er's use, are allegations which are all contained in this indictment."

The second assignment of error in that case, as in this, challenged the jurisdiction of the Chief Justice to issue an order, while holding court at chambers, at Woodward, Okl., designating Hon. Benjamin F. Burwell, Associate Justice of the Supreme Court, and presiding judge of the Third judicial district, to hold the district court of the county of Comanche, of the Seventh judicial district, and to try, hear, and determine any and all cases and matters that might come before him in said Seventh district during the absence of Hon. F. E. Gillette, the regular presiding judge, therefrom, for the reason that there had been no time sufficient for the clerk of the district court to transmit to the clerk of the Supreme Court at Guthrie a certified copy of the order granting a change of judge, and that the Chief Justice issued the order designating a judge without sufficient notice; it appearing that the change of judge was granted on March 22, 1905, and that the order issued by the Chief Justice was issued on the same day. In passing upon that question Justice Pancoast, speaking for the court, said: "While the statute provides that notice of an order granting a change of judge shall be transmitted to the clerk of the Supreme Court and shall be by him immediately presented to the court, if in session, or, if not, then to the Chief Justice, yet we are of the opinion that this provision is not the only one that may be pursued. The only purpose of this act is to give notice to the Supreme Court, if in session, or to the Chief Justice, if the court is not in session, that an order for a change of judge has been made; but if the court, if in session, or the Chief Justice, if the court is not in session, receives notice of such order in any other manner, we think the right clearly exists to act upon the notice, if the order for a change of judge has, in fact, been granted. The manner of giving or acquiring notice of the order granting a change of judge is not jurisdictional.

The remaining assignment of error is that the evidence was insufficient, and that the court should have sustained the motion of the plaintiff in error to instruct the jury to re-

turn a verdict of acquittal. It is claimed that the conviction was secured upon the testimony of accomplices, which was not corroborated by such other evidence as tended to connect the defendant with the commission of the crime; it being admitted that the testimony of the accomplices was amply sufficient to support the verdict, if sufficiently corroborated. An examination of the record reveals, not only the commission of this crime by the defendant, but ample corroboration thereof. Dr. L. C. Knee, the owner of the cattle, testified that he saw the defendant and others in a pasture about five miles southeast of Lawton on the day preceding the night they were stolen, April 24th. Mrs. Frances Davis testified that the defendant and his wife, and other parties, who were subsequently convicted of the stealing of these same cattle, were at her house on April 24th, and that the defendant, with other parties, left her house that evening, and did not return until the next morning, at about 7 or 8 o'clock. John Burton testified that he saw the defendant, with other persons, driving the stolen cattle along about sundown in the direction of the ranch or big pasture where the defendant kept his cattle. George M. Rattan testified that he trailed the cattle into the mountains and found them among defendant's cattle on April 29th. From this brief statement of the substance of the testimony of disinterested witnesses, and from a careful reading of the entire record, it clearly appears that there was sufficient corroborating evidence tending to connect the defendant with the crime of which he was convicted and sentenced, and, when the corroborating evidence tends to connect the defendant with the commission of the offense, the requirements of the statute have been fully satisfied.

It clearly appearing that the defendant has had a fair and impartial trial, and that the evidence is amply sufficient to sustain the verdict, the judgment of the district court of Comanche county will be affirmed.

BURWELL, J., who presided in the court below, not sitting. All the other Justices concurring, except IRWIN, J., absent.

(76 Kan. 232)

B. PRINZ & CO. v. MOSES.

(Supreme Court of Kansas. July 5, 1907.

Rehearing Denied Oct. 5, 1907.)

NEW TRIAL—INSUFFICIENT EVIDENCE.

It is error to overrule a motion for a new trial, when a material fact necessarily involved in the verdict is wholly unsupported by the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 142, 143.]

(Syllabus by the Court.)

Error from District Court, Montgomery County; Thomas J. Flannelly, Judge.

Action by B. Prinz & Co. against F. C. Moses. Judgment for defendant, and plaintiffs bring error. Reversed.

See 69 Pac. 1128.

Plaintiffs in error were engaged in the mercantile business at St. Louis, Mo., and one L. H. Levison, who was engaged in the clothing business in Caney, Kan., became indebted to them in a large amount on account of clothing purchased. The account was settled by a note which was secured by a chattel mortgage on the stock of goods for \$2,000. The debt due plaintiffs in error being unpaid, they took possession of the goods in controversy under their chattel mortgage. Afterwards, in January, 1896, the defendant in error as sheriff took the goods from plaintiffs in error by a writ of attachment issued in a suit instituted by J. S. Brittain Dry Goods Company against Levison, in which, upon order of the court, the goods were returned the following July. At the time the property was attached, its value as shown by an invoice then made was \$3,815.03. When returned, it was sold and brought only \$2,000. The plaintiffs in error then brought this action in the district court of Montgomery county May 1, 1897, to recover damages sustained on account of the attachment. The jury returned a verdict in favor of the defendant, and found specially that the goods did not depreciate while in custody of the sheriff, that they were worth only \$2,500 when taken, and were of that value when returned. The plaintiffs filed a motion for a new trial, which being overruled they bring the case here for review.

S. M. Porter, for plaintiff in error. J. B. Ziegler and S. H. Piper, for defendant in error.

GRAVES, J. On trial in the district court, the defendant contended that the plaintiff was not the owner of the note and mortgage under which the goods had been taken from Levison, they having been assigned to a trustee for the benefit of creditors, and therefore the plaintiff had no authority to maintain the action. This was the principal and controlling question litigated in the case. To establish this contention, the defendant placed in evidence two deeds of trust, each being a conveyance to the same trustee, conferring power upon him to sell the property

conveyed, and out of the proceeds make payment of certain debts therein specified, when due, if not paid by the grantors. The description of the property conveyed reads: "All of the stock of merchandise consisting of piece goods, clothing, trimmings, linings, etc. also all store and office fixtures and furniture including safe, also all tools and implements, patterns and machinery used in the manufacture of clothing now located in the business house known as No. 425 North Seventh street in the city of St. Louis, Missouri, and now occupied by the said B. Prinz & Company in the conduct of a general wholesale clothing business, also all book accounts payable to said firm of B. Prinz & Company as the same appear upon the books of said firm now in said building aforesaid." The plaintiff duly objected and excepted to the introduction of these deeds in evidence. They were executed October 10, 1896, almost 10 months after the execution of the note and mortgage, and more than 9 months after the goods had been taken thereunder. It is clear that this note and mortgage are not covered by the description of the property given in the deed. If by the words, "also all book accounts payable to said firm of B. Prinz & Company as the same appear upon the books of said firm now in said building aforesaid," the parties intended to include this note and mortgage in Caney, Kan., such fact should be clearly shown. We are unable to find any evidence in the record which tends to sustain such conclusion.

The jury could not have returned a general verdict for the defendant without finding that the plaintiff did not own the note and mortgage under which the goods were taken, and upon this point the verdict is wholly unsupported by the evidence. This was an error for which a new trial should have been granted.

The judgment of the district court is reversed, with direction to sustain the plaintiff's motion for a new trial. All the Justices concurring.

(76 Kan. 271)

ATCHISON, T. & S. F. RY. CO. v. McELROY.

(Supreme Court of Kansas. July 5, 1907. Rehearing Denied Oct. 5, 1907.)

1. RAILROADS—LICENSEES ON TRACK—NEGLIGENCE.

When a railroad company stops a passenger train where other tracks are between it and the depot platform, the rights of people having business with such train, and the duty of the company toward them, are the same as if all the intervening space between the depot and the train constituted the platform.

2. SAME—LOOKING AND LISTENING.

Under such circumstances, passengers and other persons rightfully there have a right to assume that they will be protected from danger by the company, and are under no obligations to anticipate and guard against the approach of other trains. The ordinary rule of "look and listen" does not apply to such a situation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 891.]

3. SAME—EVIDENCE.

A boy about 11 years of age was sent by his father to deliver a package to a passenger on a train which was expected to stop at the station. Held, that the boy, while engaged in making such delivery and returning to the station platform, was rightfully on the premises of the railroad company, and entitled to be protected at least by the exercise of ordinary care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 869.]

4. SAME.

When a railroad company causes a passenger train to stop on a side track, leaving other tracks between it and the depot platform, it is negligence to permit another train to pass between such passenger train and the depot at a high rate of speed, and without giving warning thereof by ringing the bell, sounding the whistle, or otherwise, while business is being rightfully transacted with the standing train, and the company will be liable to any person rightfully there who is injured thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 872.]

(Syllabus by the Court.)

Error from District Court, Clay County; O. L. Moore, Judge.

Action by Clarence McElroy against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. R. Smith, O. J. Wood, and A. A. Scott, for plaintiff in error. Coleman & Williams, for defendant in error.

GRAVES, J. Clarence McElroy, a boy about 11 years of age, was struck by a passing engine on the railroad of the plaintiff in error at the station of Aurora, in Cloud county, and was injured so that his left foot had to be amputated immediately in front of his ankle. He commenced this action in the district court of Clay county May 3, 1905, and recovered a judgment of \$3,000. The railway company, being dissatisfied, brings the case here for review.

At the station of Aurora, the north-bound passenger train and the one going south pass each other. The north-bound train, as a rule, arrives first, and stops on a side track, leaving the main track between it and the depot platform. Passengers leaving the train and those getting on are compelled to cross over the main track. If the train going south arrives before the north-bound train leaves, which it does ordinarily, no stop is made until reaching the depot platform. The plaintiff on the occasion in question was sent by his father, who was engaged in business at that place, to deliver a small package of merchandise to a passenger on the north-bound train. The boy delivered the package to the passenger while the train was standing on the side track, and, before he got across the main track on his return, he was struck by the engine of the train going south as it was approaching the platform. No warning by whistle, bell, or otherwise was given to indicate the coming of the train from the north. The plaintiff did not look

or listen for the incoming train, or take any care to avoid danger therefrom. Much has been said in argument concerning the degree of care due from the company to the plaintiff, and upon the question of plaintiff's contributory negligence. Many special questions of fact were submitted to and answered by the jury for the purpose of developing these propositions. In our view of the case, however, it will be unnecessary to consider all of the questions presented. Where a railroad company finds it necessary or convenient in the transaction of its business to have a passenger train stop on a side track, leaving one or more tracks between such train and the depot platform, that method may be adopted, but if it is, then, as between the company and other people, the entire space between the depot and the train must be regarded the same as if it all together constituted the platform.

One of the special questions presented to the jury in this case, and its answer thereto, reads: "Q. 29. If you find that the defendant, the Atchison, Topeka & Santa Fé Railway Company, was negligent, then state fully, first, in what respect it was negligent; and, second, what agent or employé was guilty of such negligence. A. Because it allowed the main track next to the station to be used as a platform to transfer passengers, baggage, mail, and express from the north-bound passenger train, known as 'No. 307,' to and from the station, that said company had no proper signals, alarms, and safeguards at Aurora; second, that the train crew of the south-bound train No. 306 failed to either ring the bell or blow the whistle on approaching the station." Under this finding of fact, it will be unnecessary to consider the strict legal relation existing between the plaintiff and the company, or to define the exact degree of diligence due from the company to the plaintiff. It is conceded that the plaintiff was rightfully where he received the injury, and that the company owed him at least reasonable and ordinary care. Under this conceded rule, we think the case may be decided. What constitutes ordinary care must always be determined from the circumstances of the situation being considered. In 1 Thomp. on Neg. § 25. It is said: "The care, caution, and diligence required by the law is always measured by the circumstances of the particular case, and the rule of admeasurement is 'the greater the hazard, the greater the care required.'" The situation presented in this case shows that the plaintiff in error, when it ran the train going south into the station, was chargeable with notice that its patrons and other people were scattered over the space between the depot and the other train, engaged, as people are on such occasions, removing baggage, hurrying on and off the train, giving and receiving parting and welcoming salutations, and were generally in a state of confusion, which would make them less liable to notice the approach

of danger and less prepared to avoid it than under ordinary circumstances. It knew that the people so situated had a right to feel secure and safe from any danger on account of the negligent operation of trains in their midst, and would feel entirely free from any necessity for the exercise of care or caution. These and other conditions always present upon such occasions constitute the situation, by which must be measured the degree of care with which a person of ordinary caution and prudence would run a passenger train among people thus engaged. The conduct of the company in running its train at a high rate of speed, without warning of any kind, was culpable negligence. The plaintiff and other persons there were under no duty or obligation to anticipate and guard against negligence on the part of the railroad company. They had the right to feel secure from injury on account of passing trains. They might rest upon this feeling of security until warned or notified of danger. The ordinary rule of "look and listen" has no application to such a situation. When a railroad operates a train under such circumstances, it assumes the peril. These conclusions result from the application of the most obvious and familiar rules of human conduct. 2 Shearman & Redfield on Neg. § 525; 1 Thompson on Neg. §§ 25-31, 968 et seq.; 3 Thompson on Neg. § 2705; *Tubbs v. Michigan Central Railroad Co.*, 107 Mich. 108, 64 N. W. 1061, 61 Am. St. Rep. 320; *Terry v. Jewett*, 78 N. Y. 338; *Brassell v. N. Y. Cent. & H. R. R. Co.*, 84 N. Y. 241; *Denver & R. G. R. Co. v. Hodgson*, 18 Colo. 117, 31 Pac. 954.

The judgment is affirmed. All the Justices concurring.

(76 Kan. 289)

WARE v. SPINNEY.

(Supreme Court of Kansas. July 5, 1907. Rehearing Denied Oct. 5, 1907.)

CONTRACTS—ILLEGALITY—PARTIES IN PARI DELICTO—RELIEF—PRINCIPAL AND AGENT—ACCOUNTING.

A principal who places money in the hands of an agent to be disbursed to others, and for an illegal purpose, does not necessarily forfeit his right to such money, but may require the agent to account to him for so much of it as has not been expended or appropriated to the unlawful purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 684, 688.]

(Syllabus by the Court.)

Error from District Court, Shawnee County; A. W. Dana, Judge.

Action by E. C. Spinney against M. Ware. Judgment for plaintiff, and defendant brings error. Affirmed.

Action to recover \$2,500 given by Edmund C. Spinney to M. Ware for the alleged purpose of paying the necessary expenses incident to the convening of the board of directors of the National Aid Association, but which, it was alleged, was not used for that

purpose, and that Ware had refused to account for or return the money upon demand. Ware's answer was a general denial. On the trial it was shown that \$150 was first paid, and later a payment of \$2,350 was made, when the following receipt was given: "Topeka, Kans., Oct. 25, 1901. Received of E. C. Spinney, twenty-three hundred and fifty dollars (\$2,350) to be used to pay necessary expenses of combining the management of the National Aid Asso. and the Bankers' Union of the World, as per contract, if such combination shall be effected, and to be returned to E. C. Spinney, in case it is not. [Signed] M. Ware, S. D. Cooley." The preliminary agreement is as follows: "Oct. 12, 1901. Memorandum of agreement between L. K. Lewis, president, S. D. Cooley, secretary, M. Ware, medical director, Harry Wright, director, and the National Aid Association, and E. C. Spinney, president and general manager of the Bankers' Union of the World. (1) Cooley, Lewis, Ware, and Wright agree to work faithfully to secure a combination and amalgamation of the National Aid and the Bankers' Union of the World. (2) Spinney and the Bankers' Union of the World agree to pay Lewis, Cooley, Ware \$12,500, as follows: \$2,500 as needed subject to Ware's check, and \$10,000—\$1,000 a month. (3) Liabilities of which the National Aid has official notice not exceeding \$27,330 uncontested, and \$7,000 contested, to be assumed and agreed to be paid by the Bankers' Union of the World and Spinney, according to constitution and by-laws of the National Aid. (4) National Aid to turn over office furniture and supplies, but no money except \$1,300 with National Security Company. (5) Pt. and Secy. personally gt. that official notice has been received of liabilities in excess of amounts here named. (6) Spinney to pay all expenses directors coming together if deal fails, not exceeding \$150. L. K. Lewis, Pres., S. D. Cooley, Secy., M. Ware, Med. Dir., Harry Wright, Director, Bankers' Union of the World, by E. C. Spinney, Pres. and Gen. Mgr." In the formal agreement subsequently made, signed by the officers of the two organizations and providing for their consolidation, the following stipulations were made concerning the money in question: "(3) The said E. C. Spinney and the Bankers' Union of the World, upon their part, agree to pay to the said Lewis, Cooley, Ware, and Wright, to defray the necessary expenses of the consummation of the said consolidation, the sum of twenty-five hundred dollars, as the same shall be needed, which sum shall be subject to the check of the said M. Ware. In the event that the said Lewis, Cooley, Ware, and Wright shall earnestly and faithfully do all in their power to consummate said consolidation, and shall, through no fault of theirs or either of them fail therein, then, and in that event, the said E. C. Spinney and the said the Bankers' Union shall pay only one-half of the expenses of convening the said board of directors of the said association, which,

in no event, shall exceed three hundred dollars, one-half thereof, one hundred and fifty dollars, to be paid by the said E. C. Spinney." In the same contract was a provision to pay Lewis, Cooley, and Ware the sum of \$10,000 in 30 equal monthly installments, which installments were evidenced by promissory notes of the Bankers' Union by E. C. Spinney as president and also personally. These notes became the subject of controversy between the Bankers' Union and W. T. Scott, an assignee of Ware, in which it was held that the union was not bound upon the notes, but that Spinney was personally liable for their payment. *Scott v. Bankers' Union*, 73 Kan. 575, 85 Pac. 604; *Bankers' Union v. Crawford*, 67 Kan. 449, 73 Pac. 79, 100 Am. St. Rep. 465.

Upon all the testimony in the case the court specially found: "(1) The defendant and S. D. Cooley received from L. A. Stebbins the sum of \$150 paid to him by the plaintiff by his check of October 12, 1901. (2) The \$150 referred to in finding No. 1 was used and applied by S. D. Cooley in part payment of the expenses of holding the directors' meeting of October 26, 1901, of the board of directors of the National Aid Association. (3) The balance of the expenses of the directors' meeting mentioned in the second finding herein was paid by S. D. Cooley with the funds of the National Aid Association. (3½) That on October 26, 1901, the plaintiff deposited in the Central National Bank of Topeka, Kan., a draft or check drawn by the Bankers' Union of the World on a bank in Omaha for \$1,400, and a check drawn by the plaintiff on a bank in Omaha for \$1,000, and received in lieu thereof a deposit slip or ticket showing that plaintiff had deposited to the credit of M. Ware \$2,350 and \$50 in cash. That said money was received by said defendant to disburse to others in behalf of plaintiff. (4) The defendant received the \$2,350 deposited by plaintiff in the Central National Bank to the credit of said M. Ware on October 26, 1901. (4½) The court finds from the evidence that the purpose for which the money in controversy was delivered to and placed in the hands of defendant was to bring about, effect, and consummate a combination and consolidation of the National Aid Association, a fraternal beneficiary association, being a corporation organized under the laws of the state of Kansas, and the Bankers' Union of the World, a fraternal beneficiary association, being a corporation organized under the laws of the state of Nebraska, in pursuance of and as provided in the written memorandum of agreement of October 12, 1901, as supplemented by the written contract of October 26, 1901, in evidence herein. (5) No part of said \$2,350 deposited by the plaintiff in the Central National Bank to the credit of said M. Ware on October 26, 1901, was used in paying the necessary expenses of holding the directors' meeting of the board of directors of the National Aid Association

of October 26, 1901. (6) The directors' meeting of the board of directors of the National Aid Association of October 26, 1901, was called and held for the purpose of combining the management of the National Aid Association and the Bankers' Union of the World. (7) The combining the management of the National Aid Association and the Bankers' Union of the World contemplated was effected by the resignation of the officers of the National Aid Association and the election of such officers in their stead of persons holding the managing offices of the Bankers' Union of the World, and such resignation, election, and substitution was fully effected by the action of the directors' meeting of the board of directors of the National Aid Association of October 26, 1901. (8) The management of the National Aid Association and the Bankers' Union of the World was combined by the action of the directors' meeting of October 26, 1901, of the board of directors of the National Aid Association. (9) None of the disbursements by the defendant of the \$2,350 received by him from the plaintiff by the deposit in the Central National Bank to the credit of said M. Ware were for the necessary expenses of combining the management of the National Aid Association and the Bankers' Union of the World other than the \$670 paid Harry Wright and the \$30 paid for the banquet at the Hotel Throop. (10) The plaintiff demanded of defendant the money remaining in his hands and not used in paying the necessary expenses of combining the management of the National Aid Association and the Bankers' Union of the World before the commencement of this action. (10½) That said defendant did not comply with the demand made upon him by the plaintiff, and has not accounted for \$1,650 remaining of the \$2,350 so received by him, after paying Wright \$670, and after paying \$30 for the banquet at the Hotel Throop."

Conclusion of Law: "Plaintiff is entitled to judgment against defendant for \$1,650, with interest at 6 per cent. from November 26, 1901."

Judgment was accordingly entered, of which Ware complains.

Geo. E. Overmeyer and Frank Doster, for plaintiff in error. E. A. Austin, for defendant in error.

JOHNSTON, C. J. (after stating the facts as above). The error assigned by Ware is that the judgment of the trial court was against the law and the evidence, and contrary to the findings made by the court itself. It is insisted that the evidence, written or oral, shows Ware to have been acting in a fiduciary capacity, that the money was paid to him to induce a violation of a trust, and that, even if the \$2,500 was given to Ware as Spinney's agent to pay the expenses of the consolidation of the fraternal organizations, it was still part of a contract wherein \$10,-

000 was agreed to be paid to Ware and his associates on personal account. It is also said that there was an unexpressed purpose that the money should be corruptly used to bring about the consolidation of the companies. On the other hand, counsel for Spinney calls attention to testimony that the \$2,500 was turned over to Ware to be used, as far as necessary, to pay the expenses of calling and holding a meeting of the directors of the National Aid Association, with a view of authorizing the consolidation and also to the receipt given when the money was paid, in which it was recited that it was to be used to pay the necessary expenses of combining the organizations. He also refers to the formal contract, in which it was expressly stated that the \$2,500 was placed with Ware to defray the necessary expenses of the consummation of the consolidation, as the same should be needed. There is sufficient testimony to sustain the findings of the court as to the purpose for which the money was paid. It was placed with Ware to be paid to others in accomplishment of that purpose, and not for his own use or benefit. This provision was independent of the one in which provision was made to turn over to Ware and others \$10,000 in notes, in payment of their personal claims, and which were the subject of litigation in *Scott v. Bankers' Union*, 73 Kan. 575, 85 Pac. 604. It is contended here that the transaction was not contrary to good morals, and attention is called to the fact that the cited case proceeded on the theory that it was not illegal. While it was there held that the contract under which the notes were given to Ware and others was not binding on the Bankers' Union, it was enforceable against Spinney, who had individually signed the notes. In speaking of the transfer of the membership of the National Aid Association, which was insolvent, to the Bankers' Union, which was a going concern, Justice Graves remarked: "The transaction in which they [the notes] were given was not unlawful or contrary to public policy. The consolidation of such corporations might be desirable and useful to both associations, and proper and legitimate in every way. The officers of the National Aid Association did not attempt to sell their company nor to betray their trust. They only undertook to advise with and urge the subordinate lodges and members to consent to the proposed merger and this was proper. The National Aid Association could not exist alone, and any change which promised protection to its certificate holders was desirable. We think this effort on the part of the officers was not vicious, but commendable."

Assuming, however, that the purpose was unlawful, as some of the testimony tends to show, Spinney was not barred from a recovery of so much of the money as was expended. The general rule is that the law will not aid either party to an illegal agreement, but an exception is made where the

illegal agreement or purpose has not been carried out. This was not an action to enforce the agreement between Spinney and his agent, Ware, nor is the judgment rendered by the court in any sense an affirmance of the agreement. Granting that the purpose of the parties is unlawful, the action is rather a repudiation of that purpose and a disaffirmance of the agreement. "The broad rule has been laid down that, when money or property is delivered by a principal to his agent for an illegal purpose or carrying into execution an illegal contract, the agent cannot set up such illegal object to prevent a recovery by the principal from the agent of such money or property so long as it remains in his hands." 15 A. & E. Encyc. of Law, 1009. In the note accompanying this text may be found a large number of sustaining authorities. The agent cannot retain the money merely because the transaction in contemplation was illegal. The illegality that defeats a recovery of the money is not in the intent alone. It has been well said that: "Persons may not be punished either in civil or criminal courts for unlawful intentions. It is the consummation of these unlawful intentions that places a party without the law. If the unlawful intention is not carried out, if nothing is done under it, my servant has my property and I am entitled to its return. As in the present case he is acting under a special agency which I have a right to revoke at any time before the performance, and when so revoked I am entitled to my own. It cannot be better public policy to deny me a recovery of the stock than to encourage my agent to commit a criminal offense." *Wasserman v. Sloss*, 117 Cal. 425, 49 Pac. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209. Until the contemplated action is executed, the money converted to the illegal use, the parties are given an opportunity to repent and rescind, and the doctrine of *locus penitentiae*, as it is called, is applied. "Seeing the error of his ways the law says a party may withdraw from the transaction; and it extends to him a helping hand by offering him the inducement of giving back to him anything of value with which he has parted." *Wasserman v. Sloss*, supra. The same view was well expressed by the Supreme Court of Maine where it was said that: "The law encourages a repudiation of the illegal contract, even by a guilty participator, as long as it remains an executory contract or the illegal purpose has not been put in operation. * * * It best comports with public policy to arrest the illegal transaction before it is consummated." *Tyler v. Carlisle*, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301. In *Morgan v. Groff*, 4 Barb. (N. Y.) 524, it was said "that as long as the money deposited with an agent for an illegal purpose remains unemployed, or if the purpose be countermanded by the principal before its application, it is a debt which can be recovered from the agent by the principal, either at law or in equity."

The principle of these cases has been adopted and applied in this state. In the case of *Hardy v. Jones*, 63 Kan. 8, 64 Pac. 969, 88 Am. St. Rep. 223, an action was brought by a principal to require his agents to account to him for money placed in their hands to purchase property at a judicial sale, under an agreement which had for its purpose the suppression of competition at the sale. After the sale there remained in the hands of the agents a portion of the fund placed in their hands, and they refused to account for this, on the ground that their agreement was void as against public policy. The court refused to listen to this reason or excuse, saying: "That as long as an illegal contract remains unexecuted neither party can be held to its terms. At any time before Hardy and Turblish had acted in behalf of Jones, the latter might have revoked their authority or they, upon their part, might have refused to execute their agency, but even in such case the agents could have been compelled to account to their principal for his money. So likewise will they be compelled to account for any unexpended balance remaining over from the execution of the illegal agreement. The surplus money now held by them is not held in pursuance of an illegal agreement to suppress competition at a judicial sale. The sale has been had, and the unexpended purchase money is now held by the plaintiff in error the same as they would hold any other money of the defendant in error." See, also, *Pollock v. Agner*, 54 Kan. 618, 38 Pac. 781; *Peters v. Grim*, 149 Pa. 164, 24 Atl. 192, 34 Am. St. Rep. 599; *Adams Express Co. v. Reno*, 48 Mo. 264; *Bank v. Wallace*, 61 N. H. 24; *Norton v. Blinn*, 39 Ohio St. 145; *Kiewert v. Rindskopf*, 46 Wis. 481, 1 N. W. 163, 32 Am. Rep. 731; *Clarke v. Brown*, 77 Ga. 606, 4 Am. St. Rep. 98; *Congress, etc., Springs Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347; *Wood on Master and Servant*, § 202; *Dunlap's Paley on Agency*, *66; 9 Cyc. 554-557. The fact that Ware was an officer of and owed duties to the National Aid Association does not affect the application of the rule requiring him to account for the money received and not yet disbursed. It is assumed that he was acting unlawfully, but he was acting as the representative of Spinney, and held Spinney's money to be used for the purpose stated. Under the rule of the authorities, it is his duty to account to Spinney for the unexpended portion of the money, and this duty does not arise out of the illegal agreement and purpose, but out of the receipt and retention of the money of another, and which has not been converted to the proposed illegal use.

There appears to be nothing substantial in the claim that there was a departure from the pleadings, nor do we find any ground for a reversal.

The judgment will therefore be affirmed. All the Justices concurring.

(78 Kan. 286)

HAVEL v. DECATUR COUNTY ABSTRACT CO.

(Supreme Court of Kansas. July 5, 1907. Rehearing Denied Oct. 5, 1907.)

1. TAXATION—TAX DEED—VALIDITY—IRREGULARITIES.

A tax deed, which has been recorded more than five years, and under which the purchaser and his grantee have, since its issuance, been in the actual continuous possession of the land, making valuable improvements thereon, will not be held void on its face by reason of not being in the exact form prescribed by the statute, provided all the essential facts prescribed in the statutory form are, by a fair construction of the language of the deed, therein recited.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1504.]

2. SAME—RESIDENCE OF PURCHASER.

The residence of the purchaser who is named in a tax deed and who is not fictitious is not, in a legal sense, a recital therein, and the omission thereof will not render the deed void upon its face.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1504.]

(Syllabus by the Court.)

Error from District Court, Rawlins County; A. C. T. Gelger, Judge.

Action by Rozi Havel against the Decatur County Abstract Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with instructions to enter judgment for plaintiff.

The plaintiff in error brought suit in the district court of Rawlins county to quiet her title to a tract of land which she claimed to own in that county. The defendant abstract company answered, denying the plaintiff's title, and set up a mortgage on the land and asked a foreclosure thereof. At the trial, it developed that the plaintiff's title rested upon a tax deed issued to C. F. McGrew more than five years before the commencement of the action. The court adjudged the tax deed void, and allowed the plaintiff a first lien for taxes paid, and awarded the defendant a second lien for the amount of its mortgage, and ordered a foreclosure and sale of the lands to satisfy the liens. The plaintiff brings the case here.

J. P. Noble, for plaintiff in error. Dempster Scott, for defendant in error.

SMITH, J. As said in the brief of each party, the only question in this case is whether the tax deed is void upon its face. If the deed is void, the judgment should be affirmed; otherwise, the plaintiff is entitled to all the relief prayed for in her petition, and the defendant is entitled to nothing.

The deed was duly acknowledged and was duly recorded on the day following its issuance. The court also finds that the plaintiff and her immediate grantors had been in the actual possession of the land from the date of the deed to the time of the trial, and had paid all the subsequent taxes, and had made valuable improvements there-

on. The tract of land in question is the southeast quarter of section 17 in township 3 of range 32, in Rawlins county. The tax deed was offered in evidence, and on objection was excluded as void upon its face. Omitting the acknowledgment and certificate of filing and recording it reads:

"Tax Deed.

"Rawlins County to C. F. McGrew. Filed for record this 8th day of December, A. D. 1898, at 10:25 a. m. Paul Haller, Register of Deeds, by Frank E. Robinson, Dep.

"Know all men by these presents, that whereas, the hereinafter described tracts or pieces of ground, situated in the county of Rawlins and state of Kansas, were subject to taxation for the year A. D. 1894; and whereas, the taxes assessed upon said respective tracts and pieces of real property, for the year aforesaid, remained due and unpaid at the date of the sale hereinafter mentioned; and whereas, the treasurer of said county did, on the 3d day of September, A. D. 1895, by virtue of the authority in him vested by law, at (an adjourned sale of) the sale begun and publicly held on the first Tuesday of September, A. D. 1895, expose to public sale at the county seat of said county in substantial conformity with all the requisitions of the statute in such case made and provided each of said tracts and pieces of ground separately for the payment of the taxes, interest and costs, then due and remaining unpaid upon said tracts and pieces of ground, respectively; and whereas, at the place aforesaid, said tracts and pieces of ground could not be sold for the amount of taxes and charges thereon, and was therefore bid off by the county treasurer for said county, for the whole amount of taxes and charges then due thereon; the said amount being herein stated as follows, to wit:

The SE4 of Sec. 1, Town 1, Range 31, for.....\$20.46
The NE4 of Sec. 12, Town 1, Range 32, for.....\$13.57
The NE4 of Sec. 10, Town 1, Range 35, for.....\$19.76
The E2 of
NE4 of Sec. 9, Town 2, Range 32, for.....\$ 5.42
The SW4 of Sec. 25, Town 2, Range 32, for.....\$21.70
The NE4 of Sec. 20, Town 2, Range 34, for.....\$12.45
The SW4 of Sec. 15, Town 2, Range 36, for.....\$10.80
The SE4 of Sec. 17, Town 3, Range 32, for.....\$ 9.53
The SW4 of Sec. 24, Town 4, Range 31, for.....\$19.02

And whereas, for the sums of

\$30.65 for the SE4 of Sec. 1, Town 1, Range 31, and
\$20.22 for the NE4 of Sec. 12, Town 1, Range 32, and
\$29.46 for the NE4 of Sec. 10, Town 1, Range 35, and
\$ 8.13 for the E2
NE4 of Sec. 9, Town 2, Range 32, and
\$32.55 for the SW4 of Sec. 25, Town 2, Range 32, and
\$18.65 for the NE4 of Sec. 20, Town 2, Range 34, and
\$16.20 for the SW4 of Sec. 15, Town 2, Range 36, and
\$14.70 for the SE4 of Sec. 17, Town 3, Range 32, and
\$28.50 for the SW4 of Sec. 24, Town 4, Range 31,

—aggregating the sum of one hundred ninety-nine dollars and six cents, paid to the treasurer of said county, on the 7th day of December, A. D. 1898, the said treasurer did give to C. F. McGrew certificate of that date, as in such case provided by law, for and concerning said property, and the county clerk

of said county did on the same day duly assign to the purchaser aforesaid the said certificate of sale, and all the interest of said county in said property; and, whereas, three years have elapsed since the date of said sale, and the said tracts or pieces of ground have not been redeemed therefrom as provided by law:

"Now, therefore, I, Frank Johnson, county clerk of the county aforesaid, for and in consideration of the sum of one hundred ninety-nine dollars and six cents, taxes, costs, and interest due on said land for the year A. D. 1894, by him to the treasurer paid as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said C. F. McGrew his heirs and assigns, the real property hereinbefore described, to have and to hold, unto him, the said C. F. McGrew, his heirs and assigns, forever, subject, however, to all rights of redemption provided by law.

"In witness whereof, I, Frank Johnson, county clerk as aforesaid, by virtue of authority aforesaid, have hereunto subscribed my name and affixed the official seal of said county, on this 7th day of December, A. D. 1898.

"Frank Johnson, County Clerk. [Seal.]

"[50c. I. R. S. affixed to document.]"

The deed does not literally follow the form prescribed by the statute, and mainly for this reason it is reproduced here. It does not follow that the deed is void because not in the exact statutory form, but to sustain it we must find therein all the essential statutory requirements. *Martin v. Garrett*, 49 Kan. 131, 30 Pac. 168. The objections to the deed are set forth in the following conclusions of the court, to wit: "(5) The deed fails to describe any property taxed. It describes only property which was sold. (6) The deed is for a large number of tracts, and fails to state the amount of tax, interest, and penalty for which each separate tract is sold and conveyed, and the sums or amounts which are given do not, when computed, make the gross or aggregate consideration of the deed. (7) None of the several tracts are so numbered or marked in any way that reference can be made thereto. (8) The county and the state of the residence of the assignee, C. F. McGrew, does not appear in the deed. (9) The interest of the county in all the various tracts was conveyed in one certificate. (10) The lands were not severally and separately taxed. (11) The lands were not severally and separately sold. (12) The lands were not severally and separately bid off by the county treasurer for the county, but were by him bid off in one bunch at one time. (13) No sufficient separate consideration is given for each of the several tracts in the deed, nor for the tracts involved in this case. (14) The consideration charged for the tract in question appears to be in excess

of the amount legally chargeable for the certificate given to the assignee, C. F. McGrew, and assigned to him by the county clerk. (15) Said deed contains several separate tracts of land, and the same were not purchased at any tax sale."

A comparison of the language of the deed with the form prescribed by the statute (section 7676, Gen. St. 1901) shows conclusion 5 to be very technical. The prescribed form has the description of the land subject to taxation at the beginning of the deed, and the land sold is thereafter referred to as "the real property above described." In this deed, the land subject to taxation is described as "the hereinafter described tracts or pieces of ground," and the land sold is fully thereafter described. One way of describing the land is as definite as the other, and neither can lead to mistake.

Conclusion 6, except so far as it evinces a mistake in computation by the court, is evidently based upon the statutory form where taxes paid subsequently to the sale form a part of the consideration for the deed, which is not the case here.

The omission, noted in conclusion 7, would occur had the statutory form been literally followed.

As stated in conclusion 8, the deed does not give the residence of the assignee of the certificate, who is also the grantee, although the statutory form leaves a blank for that purpose. The mention of the county in which the purchaser resides, however, hardly amounts to one of the recitals of a tax deed in any strict sense. "A recital in a deed is defined to be the setting down or report of something done before, or, more specifically, the narrative of the previous agreements or matters of fact upon which the transaction is founded." 24 A. & E. Encyc. of L. 57. The residence of the purchaser has no relation to the tax proceedings—does not affect them in any way. Moreover, the prescribed form does not contemplate a statement that the purchaser is a resident of a certain county. The recital of fact is that the assignment was made to a certain person, who is indicated by his name and residence. The reasonable conclusion seems to be that the Legislature in preparing a form for such conveyances merely conformed to the general practice of conveyancers of adding to the name of the grantee the county and state of his residence—that the reference thereto was intended merely as a part of the designation of the purchaser, and not as an independent fact essential to the validity of the deed. Although the blanks left for the residence follow the ones left for the names of the original purchaser and his assignee, not that left for the grantee of the deed, this is plainly because in the orderly recital of the proceedings the

name of the grantee is first stated in connection with the sale of the land or the assignment of the certificate, and naturally provision is made for the addition of the county and state of his residence where his name is mentioned for the first rather than for the last time. It is worthy of mention that in *Dodge v. Emmons*, 34 Kan. 732, 9 Pac. 951, as well as in *Edwards v. Sims*, 40 Kan. 235, 19 Pac. 710, a tax deed was upheld which was set out in full in the opinion and did not state the residence of the assignee or grantee. The point here urged was not raised in either of these cases, and therefore they do not amount to authorities upon the proposition, but the fact that the obvious omission was not made a ground of attack affords some indication that the view here announced was regarded by a part of the profession as too plainly correct for serious challenge. A somewhat similar question has been raised under an earlier statute. The statutory form of tax deed formerly contained the word "witnesses" opposite the signature of the county clerk. Comp. Laws 1862, p. 879, c. 198, § 10. It was contended in *McCauslin v. McGuire*, 14 Kan. 234, that this amounted to a requirement that the clerk's signature should be attested by "witnesses," that is by at least two persons, but the contention was denied upon a full discussion. The same conclusion was stated in the last paragraph of the syllabus in *Stebbins v. Guthrie*, 4 Kan. 353. It is difficult to conceive how the statement of the assignee's residence could be of any benefit to any person claiming an interest in the land, or how the omission thereof could be prejudicial to him, any more than the omission of the residence of the maker from a promissory note. However, if it were really a recital, or if the statute specifically required it to be stated, it should be held essential. The omission is as to a mere matter of form, and, not being prejudicial, will be disregarded.

Conclusion 9 simply points out an irregularity in the certificate, and does not render the tax deed void upon its face.

Conclusions 10, 11, 12, 13, and 15 seem to be in direct contradiction of the recitals in the deed.

As to conclusion 14, a computation shows that the amount charged against the tract is about 20 cents in excess of the amount for which it was bid in by the county treasurer, with interest to date of the deed. Legal fees could easily cover this discrepancy.

We conclude that the tax deed is not void upon its face, and hence the plaintiff is entitled to the relief prayed for. The judgment is reversed, and the case is remanded, with instructions to enter judgment for the plaintiff in accordance with the views herein expressed. All the Justices concurring.

(76 Kan. 223)

HUBBARD et al. v. CHENEY et al.

(Supreme Court of Kansas. July 5, 1907.
Rehearing Denied Oct. 5, 1907.)

1. MORTGAGES—WHAT CONSTITUTE—EVIDENCE.

A deed purporting to convey land to a husband and wife jointly, where the wife is named as a grantee to secure payment of a sum of money which she loans to her husband to make up the purchase price of the land, is, as to the wife, no more than a mortgage, and, when the loan is paid, her interest terminates, and his title becomes clear and complete, and the fact that the deed was intended to operate as a mortgage may be shown by parol evidence.

2. EVIDENCE—DECLARATIONS.

In a controversy between the heirs of such grantees as to whether the deed was in fact a mortgage, the declarations of the husband at the time of the purchase and while he was in possession of the land, explanatory of the possession and of the rights claimed in the land, were competent evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 98.]

3. SAME—DOCUMENTARY—LETTERS.

Declarations of that character, included in letters shown to have been actually written while the declarant was in possession of the land, may be received in evidence, although they do not clearly show whether or when the letters were received by the one to whom they were addressed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 840-844.]

(Syllabus by the Court.)

Error from District Court, Shawnee County; A. W. Dana, Judge.

Action by Frederick R. Hubbard and others against Ernest and Maud Cheney. Judgment for defendants, and plaintiffs bring error. Affirmed.

T. F. Garver and J. B. Larimer, for plaintiffs in error. J. J. Schenck, for defendants in error.

JOHNSTON, C. J. This was an action by Frederick R. Hubbard, Leverett W. Hubbard, and Belle Hubbard Ransom, cousins and only surviving heirs to Jennie E. Cheney, against Ernest and Maud Cheney to recover an 80-acre tract of land in Shawnee county. Henry W. Cheney was the husband of Jennie E. Cheney. In 1879, Henry W. Cheney purchased the land in controversy for \$1,600, and \$300 of the purchase price was furnished by his wife, Jennie E. Cheney. Both husband and wife were named as grantees in the deed of conveyance. In May, 1904, Henry W. Cheney executed a will, leaving all of his estate to Jennie E. Cheney, his wife, and in one of the clauses stated that it was his desire that his wife should remember his nephew, Ernest R. Cheney, when she had no further use of the property; she to make such provision for him as she thought just and equitable. About a month later Jennie E. Cheney made a will which contained a number of specific devises and bequests, and left the residue of the estate to her husband. In her will it was provided: "It is also my desire that in case of the death of my hus-

band, Henry W. Cheney, while I am still living, that his estate shall go to Ernest and Maud Cheney. It is my express desire that my cousin, Charles E. Hubbard, his wife and children, are not to receive anything from my estate. * * * All the residue of my estate, real, personal and mixed property, I give, devise and bequeath to my husband, Henry W. Cheney, with no conditions or restrictions having full confidence that when he shall have no further use for the property he will remember my cousins named in paragraph two of my will [being the plaintiffs in error], and make such provision and distribution of whatever remains of my estate among said cousins, as to him may seem just and equitable." On June 14, 1904, Henry W. Cheney died, and 18 days later his wife passed away. The will of each was duly probated, and the validity of either has never been questioned. The plaintiffs insisted that they had a perfect title to the land; that the deed of 1879 to Henry W. Cheney and Jennie E. Cheney created an estate by the entirety; that, when Henry W. Cheney died, his surviving wife became the absolute owner; and that at her death it necessarily went to the plaintiffs, as the residuary legatee under the will was dead, and the land not having been disposed of by will, and Charles E. Hubbard, one of her four cousins, having been expressly excluded by the will, the three remaining cousins inherited the property. On the other side, it was contended that the deed, although executed jointly to the husband and wife, was a mere security to the wife for the \$300 which she had advanced towards the purchase price, and the wife merely held the property in trust until the repayment of the borrowed money; that, when the money was repaid, the husband became the sole owner of the property, and under the wills of both husband and wife it passed to the defendants. Whether the naming of Jennie E. Cheney in the deed was intended as a conveyance to her, or only as a means of securing the payment of the money borrowed from her, was the principal question in the trial of the cause. The following interrogatories were submitted and answered by the jury: "(1) Did Henry W. Cheney purchase the real estate in controversy about 1879? Answer: Yes. (2) If you answer question No. 1 in the affirmative, then you may state whether or not Jennie E. Cheney, his wife, loaned him \$300, or any other amount, with which to make the purchase. Answer: Yes. (3) If you answer question No. 2 in the affirmative, then you may state whether or not there was an arrangement, agreement, or understanding between Henry W. Cheney and Jennie E. Cheney, his wife, at the time of said purchase, that the title of the real estate should be taken in the name of Henry W. Cheney and Jennie E. Cheney jointly for the purpose of securing Jennie E. Cheney in the money she had loaned to Henry W. Cheney? Answer: Yes." In addition to the special find-

ings, the jury found generally in favor of the defendants, and upon these judgment against plaintiffs was given.

Plaintiffs contend here that the conveyance to husband and wife jointly created an estate by the entirety which could only be divested by a conveyance or by a written contract legally made. It is well settled that a deed to land absolute on its face, and taken as a security, is no more than a mortgage. If the land in question was purchased by Henry W. Cheney, and Jennie E. Cheney was only named as a grantee to secure the payment of the \$300 loaned to her husband to make up the purchase price, she would only hold in trust for her husband, and when her loan was paid her interest would cease, and his title become clear and complete. It was competent then to show the resulting trust, that the deed was intended to operate as a mortgage, by parol evidence, and the rule applies where the instrument is in form a joint deed the same as if it had been made to Mrs. Cheney alone. Equity, looking back of forms to the substance of things, regards the transaction as the parties themselves regarded it, namely, the giving and taking of security for borrowed money. The purpose of the parties in having the deed made to her, and that it was intended as a mere security, which had been discharged, could be proven without writings or records. *Moore v. Wade*, 8 Kan. 380; *Glynn v. Building Association*, 22 Kan. 746; *Bennett v. Wolverton*, 24 Kan. 284; *McDonald v. Kellogg*, 30 Kan. 170, 2 Pac. 507; *Marsh v. Davis*, 33 Kan. 326, 6 Pac. 612; *Hutchison v. Myers*, 52 Kan. 290, 34 Pac. 742.

It is claimed, however, that the evidence received was insufficient for that purpose, and, further, that the court admitted testimony that was incompetent. Objections were unsuccessfully made to the admission of letters written by Henry W. Cheney to his wife and sister about the time the land was purchased, and also to declarations by him and his wife respecting the purchase and ownership of the land, some of which were made long after the purchase, but during their possession of the land. These rulings are not good grounds for a reversal of the judgment. The declarations of persons in possession of real property, which illustrate the character of their possession and explain their claims of ownership, are admissible to show the character and extent of their claims. *State v. Gurnee*, 14 Kan. 111. The rule has been applied in cases where the possession and ownership of personal property is in controversy. *Stone v. Bird*, 16 Kan. 488; *Reiley v. Haynes*, 38 Kan. 259, 16 Pac. 440, 5 Am. St. Rep. 737. In an action of ejectment by the grantee against the heirs of the grantor, where the question was whether a deed absolute on its face was intended as a mortgage, the Supreme Court of Indiana held that the declarations of the grantor while in possession of the land, explanatory of the pos-

session and of the rights claimed in the land, might be received in evidence. It was also held that the declarations need not be made while the claimant is actually on the land, but that it was sufficient to establish their competency when it was shown that it was made in connection with some act relating to the character of possession, and which evidenced ownership. To that end the declarations of the deceased grantor while negotiating for buildings and insurance, and while making improvements, were held to be admissible. *Creighton v. Hopplis*, 99 Ind. 369. See, also, *Bennett v. Camp*, 54 Vt. 36; *Maus v. Bome*, 123 Ind. 522, 24 N. E. 345; *McDanel v. McDanel*, 136 Ind. 603, 36 N. E. 286; *Fyffe v. Fyffe*, 106 Ill. 646; *Duffey v. Presbyterian Congregation*, 48 Pa. 46; *Stockton Savings Bank v. Staples*, 98 Cal. 189, 32 Pac. 936; *Kingsford v. Hood*, 105 Mass. 495; *Wigmore on Evidence*, § 1779; 2 A. & E. Encyc. of Law, 690.

The letters written by Henry W. Cheney to his wife and sister about the time of the purchase of the land were competent evidence in the case, not to show that the statements contained in them were true, but to illustrate and explain the accompanying acts of purchase and possession. One of them, it is true, had very little in it that was material to the case; but its weight and force in showing that the title was in the husband, and that the wife had only held a lien on the land, was for the determination of the jury. There is no force in the objection that they failed to show that the letters were mailed by Henry W. Cheney, or that his wife ever received or saw them. They were identified as the letters of Henry W. Cheney, were shown to be in his handwriting, and, further, that they had been in the possession of Mrs. Cheney. The fact that she received the letters or the time of their reception is not as important as if the letters had been offered to show a contract or some like purpose. Since they were offered to illustrate and qualify the purchase and possession of the land, it is only important that they be shown to have accompanied the acts of purchase and possession, and hence it is immaterial whether they were received and acted upon by Mrs. Cheney. The oral declarations of Henry W. Cheney while he was in possession, testified to by a number of witnesses, are admissible under the rule stated. The declarations made by Mrs. Cheney while living on the land, to the effect that she had no title in the land, and that the only interest she ever had was a lien thereon for the \$300 loan, were declarations against interest, and are therefore admissible under another rule. Some of the statements given in evidence were rather remote from the question in issue, and some of them were immaterial; but we do not regard their admission to be prejudicial or to furnish cause for reversal.

The judgment of the district court will be affirmed. All the Justices concurring.

(77 Kan. 813)

MAYSE v. WILLIAMS.(Supreme Court of Kansas. July 5, 1907.
Rehearing Denied Oct. 5, 1907.)**MORTGAGES—RELEASE—VALIDITY.**

Laws 1899, p. 340, c. 168, repealing Laws 1897, p. 345, c. 160, which latter required the recording of assignments of mortgages and provided that "a release by the last recorded assignee shall discharge the mortgage," provided for recording assignments and omitted the quoted provision. Defendant, with the expectation of subsequently acquiring title to certain land free from a mortgage, secured the release thereof from the last assignee of record at a time when he had reason to believe that she was not the owner of the mortgage, but before a previous assignment thereof by her to a third person had been recorded. *Held* that, on foreclosure by the last assignee, defendant could not complain of a judgment which credited the sum paid by him for such release on the amount of the mortgage debt.

Error from District Court, Clark County; E. H. Madison, Judge.

Action by Noah Williams against Robert C. Mayse. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Francis C. Price, for plaintiff in error. H. J. Bone and D. R. Hite, for defendant in error.

PER CURIAM. Williams brought this action to foreclose a mortgage on Clark county land which had been executed in 1887 and assigned to him. In 1904, the records showed Nancy Brewer, of Springwater, N. Y., to be the assignee of the mortgage, and Mayse, who was trying to buy the equity of the owner of the land, wrote to her and offered her \$50 for an assignment. She replied that she was unable to find the mortgage among her papers, but would write him if she succeeded in finding it. He then wrote and offered her \$25 for a release, but asked her to make an affidavit, which he inclosed, stating that she owned the mortgage and had power to release it, but that it was lost and she was unable to find it. She refused to make the affidavit, but he accepted and paid for the release. As a matter of fact, Mrs. Brewer had assigned the mortgage with others in 1901, but was not aware of it. The assignment to Williams was not recorded until after Mayse secured the release of the mortgage and the quitclaim from the owner of the land. The court allowed plaintiff in error a credit of the \$25 paid, and found generally for plaintiff foreclosing the mortgage. It is contended that this was error.

Under Laws 1897, p. 345, c. 160, requiring all such assignments to be recorded within 90 days after the transfer, and providing in express terms that a release executed to the last recorded assignee should discharge the mortgage, the release relied upon here would have been a complete defense to the action. But in 1899 that law was repealed, and a new act (chapter 168, p. 340, Laws 1899) enacted in its place. In the latter, the provision that a release by the last assignee of record shall

be effectual to fully discharge the mortgage is omitted. The title to the act of 1897 is as follows: "An act providing for the recording of assignments of real-estate mortgages, and for the release of such mortgages by assignees thereof, and providing penalties for failing to record such assignments." And that of 1899 reads: "An act in relation to assignments of real-estate mortgages, and to repeal chapter 160 of the Session Laws of 1897." Whatever the purpose of the Legislature may have been—whether, as suggested, it believed the former provision hindered and impaired the usefulness of mortgage notes as security—it is clear that the provision was eliminated from the act of 1899, and nothing of the kind left in its place. Plaintiff in error was not a purchaser of the land in this transaction. He was attempting to secure a release and satisfaction of a mortgage from a person whom the evidence shows he had some reason to believe might not be the owner, with the expectation of afterwards acquiring the title to the land free from the mortgage. The judgment, we think, gave him all that he was entitled to under the circumstances.

Judgment affirmed.

**FARMERS' & MERCHANTS' BANK OF
LOS ANGELES v. CITY OF LOS
ANGELES. (L. A. 1,660.)**

(Supreme Court of California. Aug. 13, 1907.)
MUNICIPAL CORPORATIONS—CLAIMS—PRESENTATION—RECOVERY OF TAXES—PLEADING.

Los Angeles City Charter, § 208, provides that all claims and demands whatever against the city, except interest on bonds and bonds of the funded debt, shall be paid only on demands as therein provided for. Section 209 requires that such demands be presented to the council and referred to its finance committee, which shall indorse its approval or rejection, when the council shall consider the demands and approve or reject in whole or in part. Section 216 declares that no payment can be made from the city treasury, or out of the public funds of the city, unless the same be specially authorized by law or the charter, or unless the demand which is paid be audited as in the charter provided, and section 222 provides that no suit shall be brought on any claim for money or damages against the city until a demand for the same has been presented, as provided, and rejected in whole or in part. *Held*, that a claim against the city to recover alleged illegal taxes, under Pol. Code, § 3819, authorizing the recovery of taxes paid under protest, by suit, or under the city's charter, was not maintainable without allegation and proof that it had been presented to the city for allowance and rejected in whole or in part.

McFarland, Henshaw, and Lorigan, JJ., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the Farmers' & Merchants' Bank of Los Angeles against the city of Los Angeles. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. B. Mathews, City Atty., and Hartley Shaw, for appellant. Graves, O'Melveny & Shankland (Jeff. Paul Chandler, of counsel), for respondent.

PER CURIAM. This is an action brought by plaintiff, a banking corporation, to recover from the city of Los Angeles the sum of \$4,235.96, alleged to have been paid by plaintiff under protest for illegal taxes for the fiscal year 1902-03. A general demurrer for want of facts sufficient to constitute a cause of action was interposed to the complaint and overruled. An answer denying certain allegations of the complaint having been filed, the cause was tried, and judgment went for plaintiff. Defendant appeals upon the judgment roll.

It is contended that the complaint is fatally defective because it fails to aver that before the commencement of the action plaintiff presented any claim or demand for the amount sought to be recovered, or any portion thereof, to the city council of defendant.

The complaint of plaintiff contained no allegation whatever as to the presentation of any such claim or demand to the city council, or anything to show that the matter was in any way brought to the attention of that body before suit, except in so far as it was presented to it sitting and acting as a board of equalization on an application for the reduction of the assessment. The freeholders' charter of the city contains the following provisions in the matter of claims and demands:

"Sec. 208. All claims and demands whatever against the city of Los Angeles, except interest on bonds and bonds of the funded debt, shall be paid only on demands as herein provided for.

"Sec. 209. Said demands, * * * shall be presented to the council on forms and blanks to be provided by the city clerk, and shall be referred to its committee on finance. The said committee shall, by indorsement thereon, approve or reject the same, in whole or in part. The council shall then consider the said demands and the action of said committee thereon, and shall, if the same be just and legal, approve the same; or may, if it so determine, approve in part or reject the whole. * * *

"Sec. 216. No payment can be made from the city treasury, or out of the public funds of said city, unless the same be specially authorized by law or this charter, nor unless the demand which is paid be audited as in this charter provided. * * *

"Sec. 222. No suit shall be brought upon any claim for money or damages against the city of Los Angeles. * * * until a demand for the same has been presented as herein provided, and rejected in whole or in part. * * *

Under provisions of law of this character, it has always been held in this state that the presentation of a demand, in the manner provided, was a necessary prerequisite to the maintenance of a suit against a public corporation to recover money, and that a complaint containing no such allegation falls to state a cause of action. In *McCann v. Sierra*

Co., 7 Cal. 121, it was held, in an action for damages for trespass, that under a law providing that "no person shall sue a county in any case, for any demand, unless he or she shall first present his or her claim to the board of supervisors for allowance, * * *" it was essential to plaintiff's recovery that the complaint contain an averment of presentation of the claim. The point was made in that case that the section only applied to actions *ex contractu*, but the court held it applicable in all cases, and held the intention of the Legislature to have been to prevent the revenue of the county from being consumed in litigation, by providing that an opportunity of amicable adjustment should be first afforded to the county, before it could be charged with the costs of a suit. In *People v. Supervisors*, 28 Cal. 429, it was declared that a claimant has no cause of action against a county for the recovery of money until he has presented his claim or demand to the board of supervisors for allowance. In *Rhoda v. Alameda Co.*, 52 Cal. 350, an action for damages for injury to plaintiff's building, judgment went for plaintiff by default, and on appeal the judgment was reversed solely because there was, in the opinion of the court, no sufficient allegation of the presentation of a claim prior to suit. In *Bigelow v. Los Angeles*, 141 Cal. 503, 75 Pac. 111, it was declared that, in order that a suit might be treated as one for damages, it was absolutely necessary under the charter that a claim therefor should have been presented to the city council. In *Alden v. Alameda Co.*, 43 Cal. 270, the action was on a judgment, and there was no allegation in the complaint of the presentation of a claim to the board of supervisors. A demurrer for want of facts was sustained, and this court held that the statute prohibiting suit "in any case or for any demand, without first presenting the claim to the board, was sufficiently comprehensive to include a cause of action founded on a judgment against the county." It was here again said that the provision was intended to prevent the county from being harassed by needless and expensive litigation. In *Arblos v. County of San Bernardino*, 110 Cal. 553, 42 Pac. 1080, it was again said that statutes requiring the presentation of claims prior to suit are framed with the purpose of avoiding useless expense in litigation, and to give to the county ample opportunity to avoid such expense. These cases show that it is the policy of the law declared in such provisions that the public corporation shall always be given an opportunity to pay before being subjected to an action upon any money demand. They further show that a strict compliance with such conditions has always been insisted on by this court, and that they apply to all classes of claims not expressly excepted in the law itself.

While it is true, so far as we have discovered, that the question has never been dis-

cussed in connection with a claim for the recovery of taxes paid under protest, we can perceive no material difference between such a claim and claims of the character considered in some of the decisions above cited. Such claims are often settled and paid when presented, and the presumption is that they always will be so paid, if they are just. The policy of the law applies as well to them as to other demands against a city, and the reasons for the rule when applied to such a claim are as cogent as when applied to any other claim. We find in the law no method by which the city can voluntarily refund taxes illegally collected, without the presentation of a claim therefor, and if these provisions of the charter are not applicable, it would follow that the city must in every case be subjected to the costs of a suit, even though the proper officers consider the claim a just and legal one, and are willing to pay the same.

It is doubtful whether section 3819, Pol. Code, relating to the recovery by suit of taxes paid under protest, is applicable to the city of Los Angeles. It is in terms limited to the matter of state and county taxes. Section 46 of the city charter, providing that "the mode and manner of collecting such municipal taxes, and enforcing such tax lien, and the proceedings thereafter, shall substantially be the same as the mode and manner at the time prescribed by law for the collection of state and county taxes in said county," does not necessarily make the provisions of section 3819, Pol. Code, applicable. Although this section, enacted several years after the adoption of the Los Angeles charter, was placed in the chapter entitled "Collection of property taxes," it, strictly speaking, has nothing to do with the mode and manner of collecting taxes or enforcing the tax lien or with the "proceedings thereafter," within the meaning of those words in the above provision. But, assuming that the charter provision should be read as making it applicable, it must be construed subject to the provisions of the charter as to claims and demands against the city. Such a construction would require presentation of the claims before suit. A provision practically the same as section 3819, Pol. Code, was contained in an ordinance adopted by the city council of Los Angeles. If we assume that the provision must be construed as authorizing suit without any prior presentation of the claim to the city council, the ordinance provision must necessarily be held void because in conflict with the superior charter provisions. We do not think, however, that it must be so construed. It may very reasonably be construed as simply giving a legal claim against the city, to be presented to the city council before suit in the same manner that all other claims are required to be presented.

It is contended that there was an involuntary trust against the city, rendering a demand unnecessary. We see no force in this

contention. The money paid as taxes under protest became the property of the city, subject to no trust whatever. The taxpayer's right against the city in the matter was thenceforth only such as was conferred either by section 3819, Pol. Code, or the ordinance provision authorizing an action for the recovery of the amount of taxes paid upon a void assessment. In no sense of the words is this an action to enforce a trust.

The making of the application for the reduction of the assessment by plaintiff to the city council sitting as a board of equalization, prior to the payment by it of the money sought to be recovered, was, of course, not the presentation of any claim or demand so far as the alleged cause of action here involved was concerned. There is no force in the contention that the council could not have allowed the claim, because the action of the board of equalization in refusing to reduce the assessment was conclusive as to the validity of the assessment. As to matters concerning which the action of such a board is conclusive, there is no power of review anywhere, even in an action to recover the tax paid under protest, and plaintiff's contention in this regard would leave it without any remedy whatever. It cannot be held that the making of a proper demand here would have been a vain and useless thing, and therefore was not required. We are satisfied that the city council had jurisdiction to allow the claim if properly presented. The fact that the board of equalization had several months before refused to reduce the assessment does not conclusively establish that the city would not have allowed the claim; but, however that may be, the presentation of the claim or demand is, under the charter, a prerequisite to suit.

We can see no escape from the conclusion that the complaint, by reason of its failure to allege a presentation of a claim to the city council, must be held insufficient to support the judgment.

The judgment is reversed, and the cause remanded, with leave to plaintiff to amend its complaint within such time as may be allowed therefor by the trial court.

McFARLAND, J. (dissenting). I dissent and am of opinion that the judgment ought to be affirmed.

This is an action brought by plaintiff, a banking corporation, to recover from the city of Los Angeles the sum of \$4,235.96 alleged to have been paid by plaintiff under protest for illegal taxes for the fiscal year 1902-3. Judgment went for plaintiff, and from the judgment defendant appeals.

Defendant demurred to the complaint upon the sole ground that it does not state facts sufficient to constitute a cause of action. It did not demur upon any special ground, nor did it interpose any pleading in the nature of a plea in abatement. The general demurrer was overruled, and defendant filed an an

swer in which some of the material allegations of the complaint were denied. A jury was waived, and the court made findings covering all the issues. No motion for a new trial was made. There is no bill of exceptions or statement, and therefore there is no evidence before us, and no point as to any error committed at the trial. All the points made by appellant for a reversal arise upon the general demurrer; appellant contending that the complaint does not state a cause of action.

The material facts as alleged in the complaint and found by the court which are necessary to be here stated, and which must on this appeal be taken as true, are briefly these: In April, 1902, plaintiff gave to the city assessor of the city of Los Angeles a verified statement in due form of all the personal property which it owned, possessed, or controlled at 12 o'clock m. on the first Monday of March, 1902. This statement showed that all the money which plaintiff had on said first Monday was \$200,492.70, and the court found that "said statement was true and correct, and the plaintiff did not have in its possession or under its control any other, further, or different sum of money." But plaintiff, in addition to its general banking business, had, on adjoining premises, a safe deposit department which was entirely distinct from its general banking business, and from other vaults in which it kept money received from its general depositors. That on said first Monday of March, 1902, the defendant by its treasurer had in vault No. 19 of said safe deposit department the sum of \$352,997.30 of the moneys belonging to the city. That said moneys were a special deposit and were not in any way commingled with other deposits in plaintiff's bank, but were kept separate and distinct from all other moneys. And the court finds that "said city money, \$352,997.30, was wholly and exclusively within the control of the said city of Los Angeles through its officer the said city treasurer, W. H. Workman." Nevertheless, the city assessor arbitrarily assessed the plaintiff, against the latter's will and protest, for the said \$352,997.30, being the said city's money as aforesaid. The city tax on said sum of money was \$4,235.96, the money involved in this action. The city council of defendant met as a board of equalization in August, 1902, and the plaintiff filed with them a verified petition for the correction of said assessment by reducing the amount of money assessed to plaintiff to the extent of said \$352,997.30, and presented the facts relative thereto as above stated; but the board refused to make any reduction. Afterwards the tax collector of defendant demanded of plaintiff the payment of the said \$4,235.96 and threatened to levy, etc.; and on November 18, 1902, a few days before said tax would have become delinquent, plaintiff paid said taxes to the tax collector, and at the same

time left with him a written protest in due form, claiming that the assessment and levy made for said \$352,997.30 was illegal and void, etc.

From the foregoing it is entirely clear that the plaintiff had, upon the real merits, a most just cause of action against the defendant. To allow the city to retain money paid by plaintiff as taxes on the city's own property would be to violate any admissible conception of what is right and just. Indeed, defendant makes no pretense of a defense on the merits, but defends only on the ground that the complaint is fatally defective.

The main contention of appellant on the general demurrer, and the only one that really calls for much discussion, is that the complaint is fatally defective because it fails to aver that before the commencement of the action respondent presented any claim or demand for the amount sought to be recovered to the city council of appellant, which demand, appellant contends, was made necessary by sections 208, 209, and 222 of the city charter. Section 208 is as follows: "All claims or demands whatever against the city of Los Angeles, except interest coupons on bonds and bonds of the funded debt, shall be paid only on demands as herein provided for." And section 209 provides that such demands shall be presented to the council and be referred to the committee on finance, which committee shall by indorsement thereon approve or reject the same in whole or in part, and the demand shall then go to the council for action. "The council shall then consider the said demands and the action of said committee thereon, and shall, if the same be just and legal, approve the same, or may, if it so determine, approve in part or reject the whole." Section 222 provides that: "No suit shall be brought on any claim for money or damages against the city of Los Angeles * * * until a demand for the same has been presented as herein provided and rejected in whole or in part." And there is in the complaint in the case at bar no averment of the formal demand made in compliance with said section. It is apparent that this defense, founded upon a want of averment of demand, is, in the extreme sense, technical. It seeks to avoid a just judgment by taking refuge behind a general provision of law not intended for such purpose. But while it is true that a technical defense cannot be ignored, and must be maintained, when it blocks the way of obtaining a judgment on a meritorious cause of action by an obstacle so complete that it cannot be surmounted, or circumvented, or in any manner evaded, still the general rule is, as stated by Baldwin, J., in *Roland v. Kreyenhagen*, 18 Cal. 457, that courts are justified in "regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial rights." A court will not maintain such a technicality

unless there is no way of escaping it, unless it effectually closes every avenue through which the just judgment could be reached; and we do not think that the technical defense here under discussion is of that character.

Respondent makes numerous answers to appellant's contention, as, for instance, that the point of want of averment of demand cannot be reached by a general demurrer, but should have been presented by special demurrer or plea in abatement; that an involuntary trust was created against the city which rendered a demand unnecessary; that the verified petition by respondent before the city council sitting as a board of equalization was, in substance, a sufficient demand; that after the completion of the assessment book after equalization the respondent had no demand within the meaning of the said provision relating to presentation and demand; and that in the case at bar it amply appears that the demand here insisted on would have been a vain thing and therefore not required. We think it just to counsel for respondent to mention the foregoing points made by them in their elaborate brief; but we do not consider it necessary to pass upon these points, because we think that another contention made by them must be maintained, to wit that the contention of appellant as to the demand is governed by section 3819 of the Political Code, and by the ordinance of the city of Los Angeles designated as No. 3,448 new series. Section 46 of the city charter provides that "the mode and manner of collecting such municipal taxes, and enforcing such tax lien, and the *proceedings thereafter*, shall substantially be the same as the mode and manner *at the time* prescribed by law for the collection of state and county taxes in said county." (The italics are ours.) And at the time of the occurrences under which the present litigation arose, section 3819 of the Political Code, or such of it as is necessary to be here quoted, was as follows: "And at any time after the assessment book has been received by the tax collector, and the taxes have become payable, the owner of any property assessed therein, who may claim that the assessment is void in whole or in part, may pay the same to the tax collector under protest, which protest shall be in writing. * * * And when so paid under protest, the payment shall in no case be regarded as voluntary payment, and such owner may at any time within six months after such payment bring an action against the county, in the superior court, to recover back the tax so paid under protest; and if it shall be adjudged that the assessment, or the part thereof referred to in the protest, was void on the ground specified in the protest, judgment shall be entered against such county therefor." While section 3819 of the Political Code was enacted subsequently to the adoption of the said section 46 of the charter, yet

the latter evidently refers to the state law in force "at the time" of any payment of taxes under protest. And we are also satisfied that the language "mode and manner of collecting such municipal taxes," and "the proceedings thereafter," cover the whole scheme of taxation and include the refunding of taxes illegally collected. But substantially the same provision is found in section 55 of the said ordinance of the city, No. 2,848. That section is as follows: "At any time after the assessment book has been received by the city tax and license collector and the taxes have become payable, the owner of any property assessed therein who may claim that the assessment is void in whole or in part may pay the same to the city tax and license collector under protest, which protest shall be in writing and shall specify whether the whole assessment is claimed to be void, or if a part only, what portion, and in either case the grounds upon which such claim is founded, and when so paid under protest the payment shall in no case be regarded as voluntary, and such owner may at any time within six months after such payment bring an action against the city in any court of competent jurisdiction to recover back the taxes so paid under protest, and if it shall be the judgment that the assessment on the part thereof referred to in the protest, was void on the ground specified in the protest, judgment shall be entered against the city therefor." Whether or not the right of a party to get back illegal taxes paid under protest could, in the absence of other legislation on the subject, be properly brought within the general category of "claims and demands," need not be here discussed. The ordinance above quoted, and section 3819, Pol. Code, deal expressly with the exceptional matter of taxes paid under protest, and afford an independent remedy. There is no provision for a demand; the only restriction being that the action must be commenced within six months "after such payment." The protest gives the defendant full notice of the character and amount of the claim. And a further demand would be of no benefit. This view is fully supported by authorities cited by respondent, and particularly by the case of *Western Ranches v. Custer County*, 89 Fed. 577. That was an action to recover taxes paid under protest, and "the defendant asks judgment upon the ground that the complaint does not state a cause of action, in this, that it does not appear that the plaintiff ever presented his claim to the board of county commissioners of Custer county for allowance, as required, it is claimed, by the statute law of Montana, before an action could be maintained upon the same." But a statute of Montana provided that in all cases of a levy of taxes which is deemed unlawful by the party whose property is taxed, such party may pay the same under protest, and may bring an action to recover back the amount so paid,

and that, if it be determined that the tax so paid was illegal, may recover a judgment for the amount. The court held that this statute gave a special remedy as to taxes paid under protest, and that "a condition not named in the statute is not required," and the judge who delivered the opinion said: "For these reasons, I hold that there was no necessity for presenting this claim of plaintiff to the board of county commissioners of Custer county for allowance before plaintiff could maintain this action. The tax being an illegal one under the facts set forth in the answer, and paid under protest, the plaintiff was entitled to have the same refunded to him. The complaint under the statute cited above stated a cause of action, and it was not necessary that it should be shown that there was any demand upon the county commissioners for a refunding of the same."

The contention of the appellant that the passage of said ordinance by the city council relative to the repayment of taxes under protest was *ultra vires* and void is not maintainable. The city had full power over the assessment and collection of municipal taxes, and such power included the manner of collecting them under protest. The authority to refund is clearly an incident to the power to collect. The provision, as to paying under protest is a salutary one and beneficial to both parties. If the protested tax is finally held to be good, the municipality is not retarded in the collection of its revenue; and, if it is held to be illegal, the protestant has a remedy without running the hazard of losing his property by a refusal to pay in the first instance.

There is no merit in the contention that the taxes sought to be recovered were not paid under duress, and that the payment was therefore voluntary. The common-law rule as to distress of person or property does not apply to a statute expressly giving the right to pay under protest. *Stewart v. County of Alameda*, 142 Cal. 660, 662, 663, 76 Pac. 481, and cases there cited; *Western Ranches v. Custer County*, *supra*.

There are no other points calling for special notice.

The judgment appealed from should be affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

7 Cal. Unrep. 336

HERBERT et al. v. SUPERIOR COURT.
(S. F. 4810.)

(Supreme Court of California. May 21, 1907.)

1. COUNTIES—DIVISION—ELECTION.

The provision of the statute for submission to the voters of the district affected by the question of detachment from a county, requiring the

election to be held within 60 days after the organization of the special commission, is directory merely, so that, if the election within that time is prevented by injunction, it may be held at a reasonable time after the injunction is removed.

2. CERTIORARI—REMEDY BY APPEAL.

The right of appeal from the granting of an injunction excludes the right to a writ of certiorari.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, § 5.]

3. PROHIBITION—REMEDY BY APPEAL.

Writ of prohibition will not be granted, where, by appeal, which can be advanced to a speedy hearing, the whole case can be taken up and reasonably decided on the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, §§ 4-19.]

In Bank. Application by J. W. Herbert and others for writ of prohibition to the superior court, Fresno county; Hon. H. Z. Austin, Judge. Writ denied.

Hannah & Miller and C. G. Lamberson, for petitioners. Frank H. Short, for respondent.

BEATTY, C. J. The court has had this matter under advisement, and we are all of the opinion that the provision of the statute for submitting to the voters of the district affected by the question of detachment from Fresno county, requiring the election to be held within 60 days after the organization of the special commission, is directory merely; that it is not essential that the election should be held within 60 days; and that, if it is prevented by the injunction, it may be held afterwards, at any reasonable time after the injunction is removed. We are satisfied also that it was an error on the part of this court to issue the writ of certiorari in this case; the fact being that there is an appeal from the injunction, and the right to appeal excluding the right to a writ of certiorari.

As to the writ of prohibition, we think that is unnecessary and inadvisable under the circumstances, because by an appeal from the order granting an injunction, which would be advanced to a speedy hearing by the court on the application of either party, we can take up the whole case and decide it on its merits before any election is held, and thus prevent any complications which are apprehended by reason of the holding of an election while the question is undetermined as to whether the act is constitutional or not. For these reasons we have decided to set aside the writ of certiorari granted in the case and to deny the writ of prohibition, suggesting to the parties that they bring the matter up by an appeal as speedily as they like, when the court will advance it to an early hearing, that it may be decided at once upon the merits, and the election held as soon afterwards as the necessary arrangements can be made.

The order of the court is: The writ of certiorari be discharged, and writ of prohibition denied.

152 Cal. 1

BASHORE v. SUPERIOR COURT OF TULARE COUNTY et al. (Sac. 1,511.)

(Supreme Court of California. Sept. 13, 1907.)

1. APPEAL AND ERROR—ESTOPPEL TO ALLEGE ERROR—ACCEPTANCE OF TERMS.

Where the court, as a condition to granting plaintiff a continuance, imposed as conditions that plaintiff pay the sheriff's fees for summoning the jury, the per diem of 12 jurymen, and defendants' costs in preparing for trial, which conditions plaintiff accepted, except as to the per diem of jurors, he could not thereafter claim that the court had no authority to require payment of the sheriff's fees for summoning the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 961.]

2. MANDAMUS—RIGHT TO WHIT—DISCRETION.

Plaintiff not having been required to pay such fees before the order granting the continuance was entered, and having thereafter paid only defendants' costs in preparing for trial, the Supreme Court, in the exercise of its discretion, would not grant mandamus to compel the trial judge to reset the case for hearing.

In Bank. Petition for mandamus by John Bashore against the superior court of Tulare county and Hon. W. B. Wallace, judge thereof. Writ denied.

Chas. G. Lamberson and Frank Lamberson, for petitioner. E. O. Larkin, for respondents.

SLOSS, J. Application for a writ of mandate requiring the superior court of Tulare county and the judge thereof to set a case for trial. An alternative writ having been granted, an answer was filed, and the proceeding is submitted upon the stipulation that the allegations of the answer are true.

It appears that an action, commenced by John Bashore, the petitioner herein, against B. B. Parker and Farmers' Union & Milling Company, a corporation, was pending in the superior court of Tulare county, and was set for trial for the 13th day of February, 1906. A jury trial having been demanded by plaintiff, a venire of 40 jurors was drawn for the trial of said cause, and 29 of the jurors were in attendance on the day set for the trial. On that day the plaintiff moved for a continuance, filing in support of his application an affidavit which was clearly insufficient, under section 505, Code Civ. Proc., as a showing requiring the court to grant the requested postponement. The judge of said superior court expressed his dissatisfaction with the showing made, and announced that he would order the trial of the case continued upon the conditions that plaintiff pay (1) defendants' costs incurred in preparing for the trial; (2) the expense of summoning the jury; and (3) the expense of one day's fees for 12 jurors. The clerk thereupon entered in the minutes of the court an order reading in part as follows: "It is ordered that the trial * * * be postponed indefinitely, upon the following conditions: That said plaintiff pay to the clerk of this court the sum of \$28.10,

being the sheriff's fees for summoning the jury in this case; the sum of \$24 for per diem of twelve jurymen, and the sum of \$87.55, costs of defendants in preparing for trial. The plaintiff accepted said conditions, except as to the payment of the per diem of jurors, to which said plaintiff excepted." The court did not require the actual payment of these sums before discharging the jury and ordering the continuance.

The answer of the respondents contains certain allegations (admitted by the petitioner to be true) which are relied on as showing an express acceptance by the petitioner of all the conditions imposed by the court. For the purposes of this opinion, we shall assume that the acceptance was merely as shown by the minute entry, i. e., of all the items except as to the payment of the per diem of jurors. The plaintiff paid the sum of \$87.55, the costs of defendants in preparing for trial, but has never paid either of the other items directed to be paid by him, viz., \$28.10, sheriff's fees for summoning the jury, and \$24, per diem of 12 jurymen. Upon plaintiff's moving the court to again set the action for trial, the court refused to do so, on the ground of the failure to comply with the conditions upon which the continuance was granted. The purpose of this proceeding is to compel the superior court to set the case for trial, notwithstanding petitioner's failure to make payment of the items of \$28.10 and \$24.

The petitioner contends that these two items represent costs that he should not have been required to pay, and that, even if he was properly chargeable with them, the court by granting the postponement without actually requiring payment at the time had waived the conditions, or, at any rate, had lost the power to collect the amounts otherwise than by an execution. Code Civ. Proc. § 1007.

So far as concerns the item of \$28.10, the sheriff's fees for summoning the jury, it is not open to petitioner on the record here presented to urge that the charge was not one that the court was authorized to impose. From the face of the order granting the continuance, it appears that the plaintiff accepted this condition as well as the one with which he has complied. Such acceptance was in effect an agreement to pay the sums upon obtaining the desired postponement. As to this item, he cannot, after agreeing that its payment be made a condition to the continuance, be heard to say that its imposition was beyond the power or discretion of the court.

And we think the other contention, viz., that after the continuance had once been granted without the payment of the costs imposed the duty to pay was waived or to be enforced in some way other than by refusing to set the case for trial, if sustainable at all, should not, under the circumstances here disclosed, be carried to the extent of compelling the court by mandamus to hear plaintiff's

case. The issuance of a writ of mandate lies to a considerable extent in the discretion of the court. *Wiedwald v. Dodson*, 95 Cal. 450, 30 Pac. 580. It will not issue where it will work injustice, or produce confusion and disorder, or will operate harshly, or where it will not promote substantial justice. *Board of Education v. Common Council*, 128 Cal. 369, 60 Pac. 976. "A mandamus is only granted in the sound discretion of the court. This discretion is, of course, not a capricious or arbitrary exercise of the power of the court to refuse relief even in a proper case. Where, however, it appears that with reference to the very question at issue the conduct of the party applying for the writ has been such as to render it inequitable to grant him relief by mandamus the court may in the exercise of this discretion refuse the writ." *People v. Jeroloman*, 139 N. Y. 14, 34 N. E. 726. Here the issuance of the writ would not promote justice, but would operate to enable the petitioner to force a trial of his case at a time selected by him, while defying the court in its efforts to compel him to pay a sum which he had agreed to pay as a condition of its not being heard at an earlier time. A refusal of the writ will have no other effect than to compel the petitioner to pay what he had agreed to pay. It is eminently just and proper that he should do this. If the court, at the time when plaintiff applied for the continuance, had refused to grant it unless the required payments were then and there made, the plaintiff could not have obtained his continuance without meeting the conditions. Instead of exacting payment at the time, the court relied upon plaintiff's acceptance of the conditions and granted the continuance without enforcing immediate compliance. To issue the mandate sought by the petitioner would enable him to use the indulgence allowed him by the court as a means of escaping altogether his obligations voluntarily assumed.

Until the petitioner pays the item of \$28.10, which he agreed to pay, he is not in a position to ask this court to compel the trial court to hear his cause. We are not here deciding that noncompliance with a condition not assented to by a party moving for a continuance would deprive such party of the right to compel the court to set his case for trial. It is needless, therefore, to discuss the effect of plaintiff's failure to pay the item of \$24 per diem for 12 jurors. It is enough, for the purposes of this proceeding, to say that this application does not commend itself to our discretion, made, as it is, by a plaintiff, who, after agreeing to some of the conditions on which a continuance was granted, refuses to comply even with those to which he had assented.

The proceeding is dismissed.

We concur: BEATTY, C. J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; McFARLAND, J.

151 Cal. 29

REEVE v. COLUSA GAS & ELECTRIC CO.
(Sac. 1,128.)

(Supreme Court of California. April 4, 1907.)
COURTS—RULES OF DECISION—EFFECT OF REVERSAL.

Where the result of the vacation of an order granting a rehearing would be to bar all further consideration of the case by reason of the fact that the time for rehearing had passed, the ruling of the Supreme Court, wherein it was decided that a member of that court who had not participated in the determination of the appeal should participate in the determination of the petition for rehearing, rather than the justice of a District Court of Appeal who had acted in his stead on the determination of the appeal, under the direct provision of the amendment of 1904 to section 4 of article 6 of the Constitution, will be deemed the law of the case, and the order, on motion to dismiss, must stand without inquiry into the merits.

In Bank. Appeal from Superior Court, Colusa County; H. M. Albery, Judge.

Action by Frank Reeve against the Colusa Gas & Electric Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Motion to vacate order for rehearing denied.

Garret W. McEnerney, W. B. Treadwell, Seth Wellington, J. W. Goad, and William M. Pierson, for appellant. Garber, Creswell & Garber, J. L. Geary, Jr., and Milton Shepardson, for respondent.

HENSHAW, J. The respondent moves the court to set aside an order granting a rehearing, and for the issuance of a remittitur in accordance with the judgment of the court in bank, as heretofore made.

The case was first decided in department 2 upon an opinion reversing the judgment; Justices HENSHAW, McFARLAND, and LORIGAN joining in the decision. A rehearing was granted by the court in bank, vacating the department decision. The case was then placed on the calendar for hearing before the court in bank. In the meantime, Justice SLOSS had become a member of the court, as successor to Justice VAN DYKE, deceased, but, having an interest in the defendant corporation, and deeming himself disqualified, he had declined to sit in the case. At the time the case came on for hearing in bank, Justice McFARLAND was ill and unable to be present. In these circumstances, the court, in order to secure a full bench for the consideration of the case, availed itself of the provision of the amendment of 1904 to section 4 of article 6 of the Constitution, and, in accordance therewith, selected, from the justices of the District Court of Appeal, Justice COOPER to act in place of Justice SLOSS, and Justice HARRISON to act in place of Justice McFARLAND. The cause was then orally argued and submitted to the court in bank thus constituted, which, after due consideration, affirmed the judgment of the court below by a decision in which Justices SHAW, ANGELLOTTI, and HARRISON, and Chief Justice BEATTY

concurred, and from which Justices HENSHAW, LORIGAN, and COOPER dissented. The appellant then filed a petition asking that this judgment be vacated, and that the case be again heard before the court in bank. At the time this petition came up for determination, Justice McFARLAND had recovered his health and was again able to act, and was present, ready, and willing to act upon the matter of granting or denying the rehearing. Justice HARRISON was also present, ready, and willing to act in the matter, and offered, if the court so desired, to act thereon as a member of the court in bank to which the cause had been argued and submitted. Thereupon it was decided by the justices of the Supreme Court, all being present, that Justice McFARLAND of the Supreme Court, and not Justice HARRISON of the District Court, should participate in the determination of the petition for rehearing, and that, as the disqualification of Justice SLOSS was of a continuing nature, Justice COOPER should continue to act in the case in his place, by virtue of his original selection. The court, as thus constituted, then took up the petition for rehearing for consideration, and it was granted by four of the justices, namely, Justices HENSHAW, LORIGAN, and McFARLAND of the Supreme Court, and Justice COOPER of the District Court. The respondent asks the court to set aside this order upon the ground that Justice McFARLAND should not have acted in the matter.

The constitutional provision authorizing the substitution of a justice of the District Court of Appeal in the place of a justice of the Supreme Court is as follows: "Whenever any justice of the Supreme Court is for any reason disqualified or unable to act in a cause pending before it, the remaining justices may select one of the justices of a District Court of Appeal to act pro tempore in place of the justice so disqualified or unable to act." The motion to vacate the order for rehearing is based on two grounds: First, that the order was improvidently made; second, that the power of Justice HARRISON to act in the case continued until the judgment upon that hearing became final, or until it was vacated by the granting of a rehearing within thirty days; that until that period had elapsed his power in the case, so long as he continued qualified, ready, and willing to act, was exclusive; and hence that the order for a rehearing was void because it was made by only three justices qualified and competent to act upon the matter. This involves an inquiry into the merits, which cannot be had. We are of opinion that the ruling of the court, wherein it was decided that Justice McFARLAND should participate, and not Justice HARRISON, was a formal determination which became the law of the case. Slight consideration will show the reason for the application of the rule, and that in this case, if ever in any,

its invocation is most salutary. The time for rehearing has passed. If the order granting the rehearing should now be vacated, no further consideration of it could be had, and yet, if Justice HARRISON had participated in the consideration of the rehearing, it may not be said that his judgment would have been adverse to granting it. The result would be that the litigant who obtained a rehearing would not only be denied the right to Justice McFARLAND'S participation in the matter, but would equally be denied the right of Justice HARRISON'S participation. It would result therefore in a final judgment being given against him, notwithstanding the fact that, if Justice HARRISON had been allowed to participate, he also might have voted for a rehearing.

For these reasons we are of the opinion that the order heretofore made must stand, without inquiry into or determination of the merits of the application.

The motion to vacate is therefore denied.

We concur: BEATTY, C. J.; McFARLAND, J.; LORIGAN, J.

152 Cal. 5

ROTHSCHILD v. BANTEL, Treasurer of the City and County of San Francisco.
(S. E. 4,828.)

(Supreme Court of California. Sept. 14, 1907.)

MUNICIPAL CORPORATIONS—CUSTODY OF MONEY—LEGISLATIVE CONTROL—CONSTITUTIONAL PROVISIONS.

Immunity from legislative interference with provisions in a freeholders' charter of a municipality relative to municipal affairs, granted by Const. art. 11, § 6, as amended in 1896, is not taken away, as respects the custody of money of the municipality, by Const. art. 11, § 16½, adopted November 6, 1906, and providing that all moneys of a municipality may be deposited in a bank, "in such manner and under such conditions as may be provided by law"; this being intended merely to remove the then existing constitutional prohibition against such a deposit, even where a charter authorized it, and to authorize it if it was authorized by the charter, the "organic law" (Const. art. 11, § 8) of the municipality, and not to authorize it where it was merely authorized by a general law of the state, but prohibited by the charter of the municipality.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Joseph Rothschild against C. A. Bantel, as treasurer of the city and county of San Francisco. Judgment for defendant. Plaintiff appeals. Reversed and remanded.

William A. Kelly and Theo. J. Roche, for appellant. William G. Burke, City Atty., and A. S. Newburgh, Asst. City Atty., for respondent.

ANGELLOTTI, J. This is an action brought by a resident and taxpayer of the city and county of San Francisco against the treasurer thereof to obtain a decree enjoin-

ing him from depositing money of the municipality in his custody with banks and banking corporations doing business in said city and county. A general demurrer to the complaint was sustained, and, plaintiff having declined to amend, judgment was given for defendant. This is an appeal by plaintiff from such judgment.

That a taxpayer may maintain an action to prevent such a deposit where the same is forbidden by law was held by this court in *Yarnell v. City of Los Angeles et al.*, 87 Cal. 603, 25 Pac. 767, which was a similar action. It is not claimed that the complaint does not state a cause of action if the proposed act of the treasurer was opposed to the law relative to the keeping of municipal money applicable to the city and county of San Francisco.

Respondent bases his claim that his proposed action is authorized by law upon the provisions of an act of the Legislature of the state approved March 23, 1907 (St. 1907, p. 974, c. 522), providing for and regulating the deposit of county and municipal moneys in banks and banking corporations. This act provides that "all moneys belonging to any county or municipality within the state, may be deposited by any officer of such county or municipality having the legal custody of such county or municipal funds in any licensed national bank, or banks within this state, or in any bank, banks, or corporations authorized and licensed to do a banking business, and organized under the laws of this state," upon certain security furnished by the depository in bonds of the United States, this state, or any county, municipality, or school district within the state, of a market value at least 10 per cent., in excess of the deposit, approved by the officer making the deposit and the district attorney. Under the act interest is to be paid by the depository for the use of the money. The other provisions of the act are immaterial to the question before us. Such proposed disposition by the respondent of municipal money is, however, in terms prohibited by the provisions of the freeholders' charter of said city and county. That charter, adopted in the year 1899, provides: "The treasurer shall receive and safely keep all moneys which shall be paid into the treasury. *He shall not lend, exchange, use, nor deposit the same, or any part thereof, to or with any bank, banker or person; nor pay out any part of such moneys, nor allow the same to pass out of his personal custody,* except upon demands authorized by law or this charter, and after they shall have been approved by the auditor. * * * Section 2, c. 3, art. 4 of the charter (St. 1899, p. 272, c. 2). (The italics are ours.) Section 3 of the same chapter provides with elaborate detail, for a joint custody safe, in which shall be kept the moneys of the city and county, behind two combination locks, neither of which alone will open the same, the treasurer alone to have knowledge of one combination, and the auditor alone to have knowledge of the other.

In this safe are to be kept all money of the city and county except such as may be required each day for the payment of demands against the treasurer, the estimated amount required daily for this purpose to be taken from the joint custody safe and kept in another safe. These charter provisions prohibiting certain uses of the municipal money, requiring the officers of the city and county to keep the same in their possession, and prescribing the manner in which they shall keep them, unquestionably relate purely to municipal affairs. This is not disputed by respondent. It is unnecessary to cite authorities to the well-settled proposition that under the "municipal affairs" amendment to section 6, art. 11, of the Constitution, adopted in the year 1896, provisions in a freeholders' charter of a municipality as to municipal affairs are paramount to any law enacted by the state Legislature, and that the Legislature is without power to enact any law infringing thereon. This general proposition is also admitted by respondent.

It is, of course, true, as urged by respondent, that the people of the state who by a provision of the Constitution have granted to freeholders' charter cities this immunity from legislative interference with charter provisions relative to municipal affairs may, in like manner, take away the same in whole or in part, and leave with the state Legislature the power to enact laws which would have the effect of suspending the force of any or all charter provisions. It is claimed by respondent that they have done this as to matters covered by the charter provisions hereinbefore referred to, and that consequently the Legislature was authorized to enact a law applicable to the city and county of San Francisco so far as this particular municipal affair is concerned. The constitutional provision relied on as accomplishing this result is section 16½ of article 11, adopted November 6, 1906. It declares that "all money belonging to the state, or to any county or municipality within this state, may be deposited in any national bank or banks, within this state, or in any bank or banks organized under the laws of this state, *in such manner and under such conditions as may be provided by law,*" under certain conditions as to amount and kind of security, amount of deposits, interest, etc. (The italics are ours.) It is in the italicized words that respondent finds the conferring of authority upon the state Legislature to enact a law authorizing officers of the municipality of the city and county of San Francisco to make the contemplated deposits of municipal moneys in the face of the express prohibitions in that regard contained in the charter.

We are satisfied that the constitutional provision referred to cannot reasonably be construed as accomplishing any such result. The sole object of the enactment is apparent from its language, considered in connection with the then condition of the law upon the

subject. It had been established by the decision of this court in *Yarnell v. City of Los Angeles*, supra, that the deposit of public moneys of the city with any bank or private corporation, even when the freeholders' charter of the city in terms purported to authorize the same, was prohibited by certain provisions of the state Constitution. Under the views expressed in the opinion as to the effect of the then existing constitutional provisions, it was impossible, in the absence of an amendment to the Constitution in that regard, to make valid provision either in any general law of the state or in a freeholders' charter for any such deposit of public moneys. It was intended by the constitutional enactment in question simply to remove the constitutional prohibition then existing, and authorize such provision to be made by the proper authority, subject to certain expressed limitations. The portion of section 16½ that declares that public money may be deposited in certain banks is strictly permissive in character, and, standing alone, would afford no pretense for a claim that a city having the right to make its own provisions as to municipal affairs cannot provide that its own officers, shall retain the custody of its own moneys, and that the same shall not be deposited in any bank or loaned. The words, "in such manner and under such conditions as may be provided by law," following this provision, are simply a limitation upon the permission before given; the effect thereof being that such deposits may be made only in the manner and under the conditions provided by such laws as may properly be enacted in regard thereto. As to the state, any county, or any municipality organized under the general municipal corporation act, such laws providing for the deposit and the manner and conditions thereof may undoubtedly be enacted by the Legislature of the state. But, when we come to the matter of the safe keeping of the moneys of a municipality having a freeholders' charter, such charter, "the organic law" of the city (section 8, art. 11, Const.), so far as it speaks upon the matter at all, is, subject to the Constitution, the paramount law, and, except as provided in the Constitution, nothing contrary thereto can be "provided by law." In such a case the charter provision is the "law" referred to in the constitutional provision. The provision is not that the deposit may be made in such manner and under such conditions as may be provided by the Legislature, or by any particular kind of law, but is simply "as may be provided by law." The policy of the state as to the supremacy of the provisions of a freeholders' charter in municipal affairs is too well established to warrant the drawing of the inference from the language under consideration of any intention to authorize the state Legislature to make provision, contrary to provisions of the charter in that behalf, as to the manner in which the city and county of San

Francisco shall hold and manage its own moneys. Under the Constitution, as it now stands, that municipality undoubtedly has the right, if it so desires, to avail itself of the permission given by the state Constitution to deposit its moneys in banks, under the conditions and limitations expressed in the Constitution, but, as long as the provisions of the charter remain as they are, it is the expressed will of the people thereof that no such deposit shall be made, and that the officers of the municipality shall retain such money in their custody.

It follows from what has been said that the charter provisions control as to the matter under discussion, and forbid the proposed disposition of the municipal moneys.

The judgment of the superior court is reversed, and the cause remanded.

We concur: BEATTY, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

6 Cal. App. 215

MURPHY v. BANTEL, Treasurer, et al.

(Civ. 437.)

(Court of Appeal, First District, California. Aug. 13, 1907.)

PROHIBITION—ADEQUACY OF OTHER REMEDY.

Code Civ. Proc. § 1102, defines the writ of prohibition as a writ to arrest the proceedings of any tribunal, corporation, board, or person, when in excess of their jurisdiction. Section 1103 provides that the writ may be so issued in all cases where there is not a plain and adequate remedy at law. *Held*, on petition for a writ to prohibit the payment of a bill incurred by the ellisor of the superior court and approved by the judge, that, even if the payment of such bill by the treasurer after its approval by the judge would be in excess of his jurisdiction, yet the remedy was not by writ of prohibition, but by injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, § 4.]

Petition by J. P. Murphy for a writ of prohibition against Charles A. Bantel, treasurer of the city and county of San Francisco, and others. Writ denied.

L. W. Lovey, for petitioner. W. H. Hart, for respondents.

COOPER, P. J. The petitioner as a taxpayer asks for a writ of prohibition directed to Charles A. Bantel, as treasurer of the city and county of San Francisco, to prohibit him from paying a bill incurred by one W. J. Biggy, ellisor of the superior court, amounting to the sum of \$1,092, for the care, custody, and maintenance of one Abraham Ruef for the month of July, 1907, which bill has been approved by Hon. Frank H. Dunne, one of the judges of the superior court of the city and county of San Francisco, and ordered paid by said judge.

The writ of prohibition arrests the proceedings of any tribunal, corporation, board, or person when such proceedings are without or

in excess of the jurisdiction of such tribunal, corporation, board, or person, and there is no plain, speedy, and adequate remedy in the ordinary course of law. Code Civ. Proc. §§ 1102, 1103. The said Bantel, as treasurer of the city and county of San Francisco, would not be proceeding in excess of his jurisdiction in paying a bill which has been incurred or approved by the judge of the superior court of the city and county of San Francisco. The writ of prohibition will not lie in such case, even if it be conceded that the bill is illegal or not authorized by law. In such case the taxpayer has a remedy by proceeding in the superior court under the process of injunction to restrain the payment. This remedy is one of frequent occurrence in our courts; but we know of no practice authorizing any court to prohibit the payment of a claim, except by injunction, even although the claim may be illegal.

The writ is denied.

We concur: HALL, J.; KERRIGAN, J.

6 Cal. App. 211

DINAN v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 425.)

(Court of Appeal, First District, California. Aug. 13, 1907.)

MUNICIPAL CORPORATIONS—OFFICERS—REMOVAL FROM OFFICE—CHARTER AND CODE PROVISIONS.

The provisions of Pen. Code, §§ 758-769, for removal from office of any municipal officer for misconduct in office, by presentment by the grand jury and proceedings before a court with trial by jury, in case of a denial of the charges, are, so far as concerns a member of the police department of the city and county of San Francisco, superseded by the charter thereof, providing for such a removal only after a trial before the police commissioners; Const. art. 11, § 8, providing that the charter, on the adoption thereof by the Legislature, shall supersede all laws inconsistent with it, and article 20, § 16, as amended, providing that in case of an officer or employé of a municipality governed under a charter the provisions of the charter with reference to dismissal from office of any such officer or employé shall control.

Application of J. F. Dinan for writ of prohibition to the superior court of the state of California in and for the city and county of San Francisco and another. Writ granted.

Robert B. McMillan and Nathan C. Coghlan, for petitioner. Robert W. Harrison, for respondents.

COOPER, P. J. This is an application for a writ of prohibition against the superior court of the city and county of San Francisco and Hon. J. M. Seawell, one of the judges thereof, to arrest the trial of the defendant as being in excess of the jurisdiction of the superior court.

The petitioner sets forth in his petition that the city and county of San Francisco is a municipal corporation governed by a freeholders' charter, which was ratified and approved by the Legislature of the state Janu-

ary 26, 1899; that he is and was at all times mentioned in the petition the duly appointed and acting chief of police of said city and county, pursuant to the provisions of the said charter; that in June, 1907, the grand jury of the said city and county of San Francisco presented an accusation in writing against petitioner, in which it is alleged that he has been guilty of willful and corrupt misconduct in office in connection with certain matters and things stated in the petition. The accusation concludes with a prayer that petitioner be removed from the said office of chief of police of said city and county in accordance with the provisions of sections 758 to 772 of the Penal Code of the state. It is further alleged that the said superior court and said Hon. J. M. Seawell, one of the judges thereof, are threatening to, and will unless restrained by this court, proceed to the trial of the petitioner upon said accusation, and that he has no plain, speedy, and adequate remedy in the ordinary course of law. The defendant demurred to the petition, and on argument declined to answer, so the facts stated in the petition will be regarded as true in discussing the case. The question for determination therefore is as to the power of the superior court to remove the petitioner from office under the provisions of the Penal Code; the charter of the city and county of San Francisco having made provision for such removal.

The sections of the Penal Code by which it is claimed the proceedings are justified are the following:

"Sec. 758. An accusation in writing against any district, county, township, or municipal officer, for willful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed.

"Sec. 759. The accusation must state the offense charged, in ordinary and concise language, without repetition."

"Sec. 766. If the defendant pleads guilty, or refuses to answer the accusation, the court must render judgment of conviction against him. If he denies the matter charged, the court must immediately, or at such time as it may appoint, proceed to try the accusation.

"Sec. 767. The trial must be by a jury, and conducted in all respects in the same manner as the trial of an indictment for a misdemeanor."

"Sec. 769. Upon a conviction the court must, at such time as it may appoint, pronounce judgment that the defendant be removed from office; but, to warrant a removal, the judgment must be entered upon the minutes, and the causes of removal must be assigned therein."

The accusation is authorized by the language of the Code against any municipal officer for willful or corrupt misconduct in office. The above quoted sections of the Penal Code have been in force substantially as at present since the enactment of the

Codes in 1872, and, if said sections were the only provisions of law applicable to the case, there would be no difficulty in upholding the proceedings. We must, however, examine other provisions of law in order to determine whether or not this proceeding under the general provisions of the Penal Code can be upheld.

The charter of the city and county of San Francisco, ratified by the qualified voters of the city and county at a special election held on the 26th day of May, 1898, was adopted by the Legislature of the state on January 26, 1899. It is a statute, framed by a board of freeholders, ratified by the voters of the city and county, and finally passed upon and ratified by the people of the state through the Legislature. *People v. Williamson*, 135 Cal. 418, 67 Pac. 504. It contains a delegation of powers, and the powers so delegated are taken from the people of the state and vested in the municipality. The Constitution provides in express terms (article 11, § 8) that, upon the adoption of such charter by the Legislature, it "shall become the organic law thereof, and supersede any existing charter (whether framed under the provisions of this section of the Constitution or not) and all amendments thereof, and all laws inconsistent with such charter." The charter thus became the organic law of the city and county of San Francisco in regard to all municipal affairs, and superseded all laws inconsistent with it. It superseded the provisions of the Penal Code herein cited if such provisions are inconsistent with the provisions of the charter on the same subject. Let us then examine the charter as to the particular question here—the removal of the petitioner as chief of police.

It provides that the police department shall consist of a board of police commissioners, a chief of police, a police force, and such clerks and employes as shall be necessary. The department shall be under the management of a board of police commissioners, consisting of four members, who shall be appointed by the mayor. The chief of police shall be appointed by the board of police commissioners, and hold office for the term of four years, receiving an annual salary of \$4,000. He has control, management, and direction of all members of the department, is the chief executive officer, and is chargeable with and responsible for the execution of all laws and ordinances. His duties are set forth in the charter. He is an officer provided for in the charter, selected and appointed as therein provided, with a definite term of office and a fixed salary. The board of police commissioners are given the express power (article 8, c. 3, § 1) "to appoint, promote, suspend, disrate or dismiss any member of the department in the manner herein-after provided." It is thereafter provided (chapter 7, §§ 2, 3) as follows:

"Sec. 2. Any member of the department guilty of any offense, or violation of rules and regulations, shall be liable to be pun-

ished by reprimand, or by fine to be fixed by the commissioners, or by dismissal from the department; but no fine shall ever be imposed at any one time for any offense exceeding one month's salary.

"Sec. 3. No member of the department shall be subject to dismissal for any cause; or to punishment for any breach of duty or misconduct therein, except after a fair and impartial trial before the commissioners upon a verified complaint filed with the board, setting forth specifically the acts complained of, and after such reasonable notice to him of the time and place of hearing as the board may by rule prescribe. The accused shall be entitled upon such hearing to appear personally and by counsel; to have a public trial, and to secure and enforce free of expense to him the attendance of all witnesses necessary for his defense."

Petitioner is a member of the department. The mandate of the charter is that he shall not be subject to dismissal for any cause "except upon a fair and impartial trial before the commissioners upon a verified complaint filed with the board, setting forth specifically the acts complained of, and after such reasonable notice to him of the time and place of hearing as the board may by rule prescribe." The people of the city and county of San Francisco, by their charter, have provided for the office of chief of police and the method of his appointment. They have also provided a tribunal to hear charges against him, to try him, and to dismiss him. They have not only done this; but they have said that he shall not be dismissed in any other way. The method provided is exclusive. The people had the right under their charter to provide what officers the municipality shall have, their qualifications, their terms of office, and the methods of their removal. The chief of police is only a municipal officer. The duties of his office pertain to the city. His removal is a matter that concerns the city and no one else, except indirectly. The sections of the Penal Code above referred to are inconsistent with the provisions of the charter quoted. They provide for a trial in a different forum and by a different method. If the petitioner can be removed in the manner contemplated in this proceeding, the provisions of the charter must be set aside. The charter provides that the petitioner shall not be subject to dismissal, except by a trial in a certain manner. If the Penal Code can be invoked, he can be removed and dismissed in a different manner and before a different tribunal. Suppose that the petitioner should be tried upon the same charges both before the commissioners and the superior court, and the commissioners should find the charge untrue, while the court, under the Penal Code provisions, should find it true, and render a judgment of removal, could the judgment of the superior court be enforced? If so, the findings and determination of the police commissioners, the body provided by the charter,

for the purpose of trying charges against one of the city's own officers, must be set at naught. We do not think such is the law. Of course, if the chief of police should commit an offense against the laws of the state, he would be subject to trial under such laws, and so of every other officer of the city; but the provisions of the Penal Code invoked here deal only with the removal from office for misconduct in office. The removal from office of petitioner concerns only the municipality, and he must be removed as provided for in the charter, if removed at all. The method prescribed by the charter is the method provided by the Legislature. It has been the policy of the state, and the tendency of the late decisions and constitutional amendments, to broaden the scope of municipal corporations governed by charters as to their own affairs, to allow them to govern themselves, and to prescribe their own rules and regulations as to affairs which are purely municipal. The city, by adopting its charter, asked to be allowed to appoint, in its own manner, its chief of police, and to remove him in its own way. It was given such power by the Legislature, and the power so delegated no longer remains in the people of the state. Only at the last general election section 16 of article 20 of the Constitution was amended to read as follows: "Sec. 16. When the term of any officer or commissioner is not provided for in this Constitution, the term of such officer or commissioner may be declared by law; and, if not so declared, such officer or commissioner shall hold his position as such officer or commissioner during the pleasure of the authority making the appointment; but in no case shall such term exceed four years; provided, however, that in the case of any officer or employé of any municipality governed under a legally adopted charter, the provisions of such charter with reference to the tenure of office or the dismissal from office of any such officer or employé shall control." The amendment consisted of the proviso. The petitioner is an officer of the municipality, governed under a legally adopted charter; and the express mandate of the Constitution is that the provisions of the charter as to dismissal from office shall control. To control means to direct, regulate, or govern. Standard Dictionary. It does not express the idea of repealing, extinguishing, or doing away with. *Byrne v. Drain*, 127 Cal. 663, 60 Pac. 433. The provisions of the charter in regard to the dismissal from office would not control if the petitioner can be removed in the proceeding pending in the superior court. On the other hand, the provisions of the Penal Code would control in direct opposition to the constitutional amendment.

The views herein expressed have been sanctioned in principle by the Supreme Court in several cases. In *Croly v. City of Sacramento*, 119 Cal. 229, 51 Pac. 323, it was held that the provision of the charter of the city

of Sacramento, conferring power upon the board of trustees to try a municipal officer for incompetency and neglect of duty, were valid. The court said: "It cannot be questioned that the appointment of a superintendent of streets is a matter purely municipal, and which may properly be left to the municipality to be exercised in the manner provided in its charter, and it would seem to follow as a logical sequence that the power to remove an officer so appointed is equally a matter of purely municipal concern." In *Fragley v. Phelan*, 126 Cal. 383, 58 Pac. 923, the court, in discussing the reasons for the amendment to section 6 of article 11 of the Constitution by the insertion of the words "except in municipal affairs," said: "It was to prevent existing provisions of charters from being frittered away by general laws. It was to enable municipalities to conduct their own business and to control their own affairs to the fullest possible extent in their own way. It was enacted upon the principle that the municipality itself knew better what it wanted and needed than the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs. * * * This amendment then was intended to give municipalities the sole right to regulate, control, and govern their internal conduct independent of general laws, and this internal regulation and control by municipalities comprises those 'municipal affairs' spoken of in the Constitution." In a concurring opinion by Mr. Justice Harrison in the same case, it is said: "A city cannot claim to be exempt from general laws relating to municipal affairs if there is no provision relating to such affairs in the charter under which it is acting, whether such charter is one framed by itself, or was given to it by the Legislature. If, in framing its charter, its board of freeholders should make no provision for a public library, or for the improvement of its streets, the general laws upon those subjects would be operative within that city." In the case at bar the charter does make provision for the dismissal of the chief of police, and, *ex industria*, says, he shall be dismissed in no other manner. In *Byrne v. Drain*, 127 Cal. 663, 60 Pac. 433, it was held that an assessment under the general law was void where the charter of the city of Los Angeles provided a method of making such assessment. The court in determining the matter said that the primary question was whether "at the time of the institution and prosecution of these proceedings the provisions of the city charter or the provisions of the statutes of 1889 constituted the controlling law. If the latter control, then the proceedings are admittedly valid; if the former, then the proceedings are void upon their face." In *People v. Williamson*, 135 Cal. 415, 67 Pac. 504, it was held that, where the provisions of a charter are purely municipal in

their character, any Code provisions inconsistent therewith are to that extent superseded by the charter. The court said: "The charter supersedes all laws inconsistent therewith." In *Elder v. McDougald*, 145 Cal. 740, 79 Pac. 429, it was held that under section 8½ of article 11 of the Constitution, placing police courts under charter control, and authorizing the charter to fix the compensation of attaches, the power given by the charter of the city and county of San Francisco to the police judges to appoint stenographic reporters (whose compensation and duties are prescribed by the charter) is exclusive, and supersedes the provisions of section 869 of the Penal Code, so that a police judge, acting as a committing magistrate, has no power under that section to appoint another stenographic reporter and fix his compensation as a charge upon the municipal treasury. The opinion is an instructive one, and gives, as a reason for the conclusion reached, that, "under section 8 of the Constitution, it is declared that the provisions of a charter authorized by that Constitution shall supersede all laws inconsistent with it." From the above authorities it seems clear that all general laws inconsistent or in conflict with a charter provision must give way to the charter.

It was held by this court in the late case of *Ex parte Sweetman*, 4 Cal. App. 601, 90 Pac. 1069, that a conflict exists between an ordinance of a municipality and the general law in all cases where the same acts that are punishable under the ordinance are punishable under the general law. The only case relied upon by respondents—and which at first blush seems to lend countenance to their contention—is *Coffey v. Superior Court*, 147 Cal. 525, 82 Pac. 75. That case was in relation to an accusation in writing by the grand jury against the chief of police of the city of Sacramento under the Penal Code. It was decided before the amendment to section 16 of article 20 of the Constitution, and appears to have been decided upon the peculiar provisions of the charter of the city of Sacramento. The court said that the scheme for the removal of delinquent officials appeared to be incomplete, and that it was made the duty of the mayor, upon having knowledge of willful neglect of duty or official misconduct, to lay the matter before the board of trustees, the city attorney, or the district attorney, "in order that the public interests may be protected and the person in default be proceeded against according to law." The opinion states: "There is nowhere in the charter any provision which in terms confers exclusive jurisdiction upon the board of trustees to proceed against and remove municipal officers, nor is there apparent in any of the charter provisions an intention that its provisions should supersede the provisions of the general law as found in the sections of the Penal Code relative to the removal of delin-

quent officials from office." In the case at bar we have the mandatory provision of the charter that petitioner shall not be subject to removal except after a fair and impartial trial "before the commissioners," and the constitutional provision that the provisions of the charter shall control with reference to the dismissal from office. The provisions of the charter cannot control if the proceedings in the superior court can be allowed to control. It is our duty to enforce the charter and its provisions if we can do so. It is a special grant of power, for a particular municipality, and pertaining to a particular subject.

Let the writ be made peremptory, and the superior court of the city and county of San Francisco, and Hon. J. M. Seawell, one of the judges thereof, be absolutely restrained from any further proceedings in said matter.

We concur: KERRIGAN, J.; HALL, J.

6 Cal. App. 231

PEOPLE v. CARPENTER. (Cr. 60.)

(Court of Appeal, Second District, California.
Aug. 17, 1907.)

FALSE PRETENSES — INFORMATION — SUFFICIENCY.

An information alleging that defendant, with intent to defraud another, falsely represented that he was the owner of a patent device, that he needed a certain sum to settle expenses with his attorneys and obtain his patent, that he had an opportunity after securing the same to at once obtain a certain sum for the right to sell in a certain state, and charging that defendant exhibited a pretended telegram offering that sum, and that such other believed the false representations and was thereby induced to loan such sum to defendant, was insufficient; there being no allegation of any fact tending to show wherein the representations were false or fraudulent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, § 37.]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

A. B. Carpenter was convicted of obtaining money by false pretenses, and from the judgment, and an order denying a new trial, he appeals. Reversed and remanded, with instructions.

Lafayette Gill, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. Appeal by defendant from a judgment of conviction and from an order denying a new trial.

An information was regularly filed by the district attorney of Riverside county charging defendant with the crime of obtaining money by false pretenses. This information alleged that defendant "with intent to defraud one C. S. Gove of his property, unlawfully, knowingly, designedly, falsely, and feloniously did represent and pretend to the said C. S. Gove that he was then and there the owner of a certain patent device to light

gasoline stoves, duly issued by the government of the United States of America, and then and there in the hands of his attorneys at Los Angeles, Cal., and that he then and there needed the sum of \$150 in money to settle expenses with his attorneys aforesaid and procure his said patent, and that on getting possession thereof he had an opportunity to at once obtain the sum of \$2,500 for the right to sell the said patent in the state of California, and did then and there exhibit and read to said Gove a pretended telegram to him, said defendant, so as aforesaid, offering the said sum of \$2,500 for the said right to sell said patent in said state, and said Gove, being deceived thereby, and believing said false representations to be true, was induced by reason of said false pretenses and representations so made as aforesaid by the said defendant to loan said defendant, and did then and there deliver to said defendant, relying solely on the truth of said false pretenses, the sum of \$150 in lawful money of the United States of America, which said money was so obtained by said defendant, A. B. Carpenter, unlawfully, knowingly, and designedly to defraud said C. S. Gove out of the money aforesaid, and all of said representations were made knowingly, designedly, fraudulently, and feloniously by defendant with intent to cheat and defraud said Gove out of all said money, and by which means said Gove was defrauded as aforesaid." To this information a demurrer was filed, which, among other things, challenged the information as not containing a statement of the facts constituting the offense charged in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended; that said facts stated in said information do not constitute a public offense. This demurrer was overruled by the court, and defendant's trial and conviction followed. A motion for a new trial was interposed, based solely upon the misconduct of the jury who tried the case, in this: that the jury received evidence out of court in reference to the merits of the case other than that resulting from a view of the premises. A bill of exceptions is found in the record, embodying, however, only the affidavits and testimony received by the court on the hearing of the motion for a new trial with reference to the receipt of testimony by the jury out of court.

We are of opinion that the information is defective. "To constitute the offense charged, four things must concur, and four distinct averments must be proved: (1) There must be an intent to defraud; (2) there must be actual fraud committed; (3) false pretenses must be used for the purpose of perpetrating the fraud; and (4) the fraud must be accomplished by means of the false pretenses made use of for the purpose, viz., they must be the cause which induced the owner to part with his property." *People v. Wasservogel*, 77 Cal.

173, 19 Pac. 270. The facts going to show that an actual fraud was committed in this case do not appear in the information. There is no allegation of any fact tending to show wherein the statements and representations were false or fraudulent. "The falsity or fraudulent character of this claim, if it was in fact false or fraudulent, arose from some fact or facts not alleged, and concerning which the indictment furnished absolutely no information. * * * Nothing but the conclusion that it was both false and fraudulent is alleged." *People v. Mahony*, 145 Cal. 106, 78 Pac. 354. It is nowhere alleged that any of the representations made were untrue and in fact false. It is not sufficient to allege the fraudulent character of representations, but the fact must be alleged from which it may be determined whether or not the conclusion of their false and fraudulent character is correct. Aside from the legal conclusions, there is nothing in this indictment which negatives the presumption of innocence. Omitting these conclusions, the allegations of the information can be true and the defendant still be innocent. *People v. Griffith*, 122 Cal. 214, 54 Pac. 725. In our opinion the information was insufficient, and the court erred in overruling the demurrer thereto.

Judgment reversed, and cause remanded, with instructions to sustain the demurrer to the information.

We concur: SHAW, J.; TAGGART, J.

6 Cal. App. 229

PEOPLE v. DAVIS. (Cr. 56.)

(Court of Appeal, Second District, California. Aug. 17, 1907.)

1. CRIMINAL LAW—EVIDENCE—CONTEMPORANEOUS DECLARATIONS.

In a prosecution for an attempt to rape, it was not error to permit prosecutrix to state defendant's declarations to her at the time with reference to his conduct with other girls whom he knew.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 800, 810.]

2. WITNESSES—TESTIMONY WITHOUT QUESTIONS.

In a prosecution for assault with intent to rape, it was not error to direct prosecutrix, a girl under 16 years of age at the time the offense was alleged to have been committed, to tell in her own way all that happened at the time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 816.]

3. LEWDNESS—NATURE OF OFFENSE—LASCIVIOUS CONDUCT.

Where, in a prosecution for an attempt to rape a girl under age, defendant's acts proved tended to establish such an offense, they did not also show a violation of Pen. Code, § 288, prohibiting acts of lascivious character with a child not amounting to a crime defined by other sections of the Code.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

N. P. Davis was convicted of an attempt to rape and of an attempt to have sexual

intercourse with a girl under 16 years of age, not his wife, and he appeals. Affirmed.

J. C. Crouch, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. Appeal by defendant from a judgment and an order denying a new trial. The information filed in this case charged the defendant with attempting to commit rape by an unlawful and felonious attempt to have sexual intercourse with a girl under the age of 16 years; she not being then and there his wife. The evidence presented by the record fully justified the verdict of guilty.

The only error assigned by counsel in his brief is in relation to the admission in evidence of certain statements made by defendant to the prosecuting witness a few minutes before the performance of the criminal act. This testimony was in response to a direction of the trial court made to the witness to "tell in your own way all that happened there." She thereupon testified as follows: "He was talking about other girls that he knew. He said he knew lots of other girls. And one night I was there when there was a little girl about seven years old and a large girl. He said he knew them a long time, and he said that they used to go over on the hill—and I don't know where the hill is—over by Fourth, and he said they used to get beer and drink and have lots of fun like that, he said. He talked about them and everything, about drinking beer." We perceive no error either in the direction of the court to the witness, or in the action of the court in refusing to strike out these statements, and cannot conceive how any prejudice possibly resulted to defendant by the action of the court.

Upon oral argument, it is urged that the crime proven was a violation of section 288 of the Penal Code, and not that charged in the information. With this we do not agree. The acts committed by defendant amounted to an attempt to commit rape, and section 288 has reference only to acts of a lascivious character which do not amount to a crime as defined by other sections of the Penal Code.

Judgment and order affirmed.

We concur: SHAW, J.; TAGGART, J.

6 Cal. App. 233

Ex parte ELAM. (Cr. 61.)

(Court of Appeal, Second District, California.
Aug. 17, 1907.)

1. CONSTITUTIONAL LAW — DUE PROCESS OF LAW — DEPRIVING ONE OF PROPERTY — RESTRICTING USE OF ARTESIAN WELLS.

A landowner has no right to extract subterranean water in excess of a reasonable and beneficial use on the land from which it is extracted; and so is not deprived of property without due process by Act March 6, 1907 (St. 1907, p. 122, c. 101), declaring an artesian well

not provided with appliances for preventing the flow of water therefrom to be a nuisance, and one who maintains it or permits water to unnecessarily flow from such well, or to go to waste, to be guilty of misdemeanor, defining an artesian well to be an artificial opening in the ground through which water naturally flows from subterranean sources to the surface of the ground, and defining waste to be permitting the flow from an artesian well to run into a bay, pond, or channel, unless used thereafter for the beneficial purposes of irrigation or domestic use, or onto land, unless it be used for irrigating it or for domestic use, or the propagation of fish.

2. SAME—RIGHT TO ACQUIRE, HOLD, AND DISPOSE OF PROPERTY.

So such act does not contravene Const. art. 1, § 1, declaring it an inalienable right of all men to acquire, possess, and protect property.

3. SAME—SPECIAL PRIVILEGES.

Act March 6, 1907 (St. 1907, p. 122, c. 101), making it a misdemeanor to waste, or use for other than certain purposes, water from an artesian well, does not, because making no such provision as to waters pumped from subterranean sources, contravene Const. art. 1, § 21, forbidding the granting of special privileges to any citizen or class of citizens.

4. SAME—SPECIAL LAWS.

Nor is Const. art. 4, § 25, subd. 33, prohibiting special laws, contravened by such act, because applying only to waters from artesian wells; that is, those having a natural flow.

5. SAME—UNIFORM OPERATION OF LAWS.

Neither is such act for the same reason violative of Const. art. 1, § 11, requiring all laws of a general nature to have a uniform operation.

6. SAME—DISCRIMINATORY LAWS.

Such act does not discriminate in violation of the Constitution because allowing the use of waters from artesian wells for the maintenance of ponds for the propagation of fish, as distinguished from their maintenance for other purposes.

In the matter of the application of J. L. Elam for writ of habeas corpus. Writ denied.

G. P. Adams, for petitioner. J. D. Fredricks, Dist. Atty., and H. S. G. McCartney, Deputy Dist. Atty., for respondent.

ALLEN, P. J. This is an application for a writ of habeas corpus presented by petitioner, who alleges that he is restrained of his liberty under a commitment issued upon default in payment of a fine assessed against him for a violation of the act of the Legislature approved March 6, 1907 (St. 1907, p. 122, c. 101), entitled "An act to prevent the waste and flow of water from artesian wells, and prescribing penalties therefor, and defining waste and artesian wells."

It is petitioner's contention that this statute is violative of the Constitution of the United States and of the Constitution of the state of California, and in conflict with the general laws. Section 1 of the act under consideration provides that an artesian well which is not capped or provided with mechanical appliances for arresting the flow of water therefrom is a nuisance, and the owner of the land upon which the same is situated is declared guilty of maintaining a nuisance if he suffers it to remain so uncapped

or unprovided with mechanical appliances for arresting the flow, and any person maintaining such nuisance, or causing or permitting water to unnecessarily flow from such well, or to go to waste, is guilty of a misdemeanor. By section 2 an artesian well is defined to be an artificial hole made in the ground through which water naturally flows from subterranean sources to the surface of the ground. By section 3 waste is defined to be the causing, suffering, or permitting the flow from an artesian well to run into any bay, pond, or channel, unless used thereafter for the beneficial purposes of irrigation of land or domestic use, or into any street, road, or highway, or upon public land, unless it be used for the irrigation thereof or for domestic use or the propagation of fish. It is further provided that, when water is run upon land for irrigation purposes, if more than 10 per cent. thereof be allowed to escape therefrom, the same shall constitute waste. Section 5 provides a penalty for the violation of any of the provisions of the act.

The first point made by petitioner—which is that the act is violative of the fourteenth amendment of the Constitution of the United States, which provides that no state shall “deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law,” and of article 1, § 1, of the Constitution of this state, which provides that “all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property,” and of section 13, art. 1, which provides that no person shall be “deprived of life, liberty, or property without due process of law”—seems to have been met and demonstrated to be untenable by the Supreme Court of the United States in the case of *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729. By that case it is established that water, oil, gas, and all fugitive substances held in their natural subterranean reservoirs are exceptions to the general rule establishing absolute ownership in the proprietor of the surface of all that lies underneath; that these minerals, being migratory in their nature, having no fixed situs, are a part of the soil only so long as they are on or in it, but after they escape and go to other lands the title of the former owner is gone; that it follows therefore that no one owner of the surface of the earth within the area beneath which these minerals move can exercise his right to extract from the common reservoir in which the supply is held without diminishing the source of supply as to which all other owners of the surface must exercise their rights; that, in consequence of the nature of the deposits, of their transmissibility, of their interdependence, of the rights of all, and of the public at large, the state could lawfully exercise the power to regulate the right of the surface owners

among themselves to seek to obtain possession, and to prevent the waste of the products in which all the surface owners within the area wherein they were deposited, as well as the public, had an interest. “No divesting of private property under such a condition can be conceived, because the public are the owners, and the enacting by the state of a law as to the public ownership is but the discharge of the governmental trust resting in the state as to property of that character.” This water, the ownership of which until actual possession is acquired being in the public, or at least that portion of the public who may own the surface of the soil within the artesian belt, is subject to a reasonable use only by those interested therein. This reasonable use is determined in *Katz v. Walkinshaw*, 141 Cal. 134, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, to be the use of such amount of the subterranean water “as may be necessary for some useful purpose in connection with the land from which it is taken.” The conditions existing in this state with reference to the necessity for the conservation of irrigating waters are most clearly set out in the case last cited, and the reasons for the rule restricting the use clearly shown. Whenever a landowner exceeds this reasonable use, he is appropriating to himself that which belongs to others who are entitled to a like use, and to that extent is obstructing the free use of property so as to interfere with its comfortable enjoyment, and which, by sections 3479 and 3480 of the Civil Code, is declared to be a public nuisance. Whatever right one has, even in his own, is subject to that established principle that his use shall not be injurious to the rights of others, or of the general public. This act therefore relates to waters, the right to the use of which is common to a large portion of the community, and affects the general public right. Legislation in relation thereto affects the public welfare, and the right to legislate in regard to its use and conservation is referable to the police power of the state, which is declared in *Ex parte Whitwell*, 98 Cal. 78, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152, to be “the power to make laws to secure the comfort, convenience, peace and health of the community.” “The police power, deriving its existence from the rule that the safety of the people is the supreme law, justifies legislation upon matters pertaining to the public welfare, the public health, or the public morals.” *Ex parte Drexel*, 147 Cal. 766, 82 Pac. 429, 2 L. R. A. (N. S.) 588. It is settled law that all property is held subject to the exercise of police power, and that provisions of the Constitution declaring that property shall not be taken without due process of law have no application in such cases. *Odd Fellows’ Cem. Ass’n v. San Francisco*, 140 Cal. 230, 73 Pac. 987.

It is further contended by petitioner that the act violates section 21, art. 1, of the state

Constitution, which provides that "no special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature, nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens"; and he endeavors to demonstrate this proposition by the assumption that the surface owners are not prohibited by this act from extracting from this common source of supply any quantity thereof by means of pumps, that no attempt is made to restrict the use after the same is so pumped, and that the waste of such water so pumped is not violative of the act, and illustrates the claimed distinction by the statement that certain gun clubs within the arid region are pumping large quantities of this subterranean water, by means of which duck ponds are filled and maintained, while other gun clubs whose ponds are fed by artesian wells are restricted in the use of the flow therefrom. It may be conceded that the courts have recognized the right of gun clubs to practically create a monopoly in wild game over large areas of land, and have protected them in a so-called private proprietorship and limited dominion over such portions of the common property of the people of the state as they may induce to stay upon such preserves by feeding them and maintaining ponds therein. It may also be conceded that an exclusive right to hunt upon such preserves has also been held to be a species of property, and injunctions have been issued to prevent interference with the full exercise of such rights. *Kellogg v. Kings*, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74. But, while the maintenance of such duck ponds no doubt contributes greatly to the enjoyment of the owner of the hunting privilege, it will scarcely be contended that this is a use of the water which is beneficial to the land. Neither does it follow that because the courts have recognized such exclusive hunting privileges they must support the owners thereof in an encroachment upon another more necessary common right of the public, that of the conservation of the subterranean waters of the state for domestic uses and purposes of irrigation. We are not to be understood in thus meeting the reasons of petitioner's argument as admitting that there is anything in the language of the act in question that would affect a gun club any more than an individual, association, or incorporation. That one may show matters dehors an ordinance which is referable to the police power that such ordinance by reason of particular facts and circumstances is unreasonable and oppressive as to him is determined in *Re Smith*, 143 Cal. 370, 77 Pac. 180. No reason suggests itself why such right may not be recognized when the state has sought to exercise the same power; and, while courts may to a degree supervise such power, "they will not interfere except where the case be plain that needless oppression is worked and constitutional

rights invaded." In *re Smith*, *supra*. Nothing appears upon the face of the act, or in the record on this application, from which it can be said there is any discrimination as to the class of persons who may violate the provisions of the law. No special immunities or privileges are granted to any club, clubs, person, or persons. That some clubs may maintain their ponds by pumping, while others, more fortunate, have theirs maintained by artesian wells or running streams, or tide water from the ocean, in no way affects the question. As well might it be said that Legislative action affecting tide lands created special privileges or immunities because the duck ponds of the clubs relying upon tide waters might be affected thereby.

As we have before attempted to show, no surface owner possesses the right to extract the subterranean water in excess of a reasonable and beneficial use upon the land from which it is extracted. Any additional extraction is not in the exercise of a right. If by such exercise the rights of others are injuriously affected. Nor can an appropriator take more water than he can beneficially use. Hence it follows that no discrimination is made between parties entitled to the exercise of a common right. Under the act in question, all may exercise their full legal right with reference to this water. As to the right to use any portion of that which belongs to the public, legislative control is applicable, and if, as a matter of fact, public rights are abused by the improper extraction of this public water by means of pumps, it is presumable that the Legislature in the exercise of its proper functions will in due time arrest such waste. The game of the state belongs to the people in their collective capacity in a more general way than does the subterranean water within an artesian belt, yet no one will question the right of the state to restrict the manner in which fish may be taken from the water, whereby it is made a public offense to use a seine, while those who adopt the hook and line may take without offense. There is no special privilege or immunity granted to the man with the hook and line. The right to take at all, or in any particular season, either of game or any other thing public in its character, comes from the state and is subject to its regulation and control, and it is for the Legislature to say what reasonable restrictions are necessary for the protection of this public property. *Ex parte Kenneke*, 136 Cal. 527, 69 Pac. 261, 89 Am. St. Rep. 177.

It is further contended that this act is violative of subdivision 33, § 25, art. 4, of the state Constitution, which provides that "the Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * In all other cases where a general law can be made applicable"; and also violates section 11, art. 1, which provides that "all laws of a general nature shall have a uniform operation."

Assuming all that the petitioner claims for the act as to its establishment of a class, nevertheless "the true practical limitation of the legislative power to classify is that the classification shall be based upon some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them." *Nichols v. Walter*, 37 Minn. 272, 33 N. W. 802. "A law which operates only upon a class of individuals is none the less a general law if the individuals to whom it is applicable constitute a class which requires legislation peculiar to itself, in the matter covered by the general law, and which is germane to the purpose of the law." *People v. Central Pac. R. Co.*, 105 Cal. 576, 38 Pac. 905. It is obvious that different legislation is required peculiar to those whose lands are so situated with reference to the artesian supply that a natural flow results from a penetration into the subterranean reservoir. The distinction between wells having a natural flow and those not so constituted as natural, and reasonably indicates the necessity or propriety of legislation restricting the former class. The right to so legislate when the reason exists is determined in *Pasadena v. Stimson*, 91 Cal. 251, 27 Pac. 604, *People v. Central Pac. R. Co.*, 105 Cal. 576, 38 Pac. 905, and *People v. Mullender*, 132 Cal. 221, 64 Pac. 299. This act operates uniformly upon every one owning lands upon which is located an artesian well of the kind and character specified in the act. "Section 11, art. 1, of the state Constitution, requiring all laws of a general nature to have a uniform operation, is satisfied when the law operates uniformly upon all persons standing in the same category, and upon rights and things standing in the same relation." *Wigmore v. Buell*, 122 Cal. 144, 54 Pac. 600.

It is further contended that a discrimination exists because of the provision which permits the maintenance of ponds for the propagation of fish, as distinguished from the maintenance of ponds for other purposes. The propagation of fish has always been recognized as a legitimate pursuit and as an effort to increase the food supply of the world, and the use of water therefor a beneficial use, which, like the use for irrigation or domestic purposes, is declared by the act to be the highest use to which this natural element may be applied. The Legislature has the right to determine what uses are superior in kind and to protect the same, and it is within its province to determine that certain uses of this public property are of a higher character and superior in right to other uses. This right is subject only to the constitutional limitations against discriminations. Having so determined, and no just criticism being applicable thereto, the value of such uses must be held to be established. We are not called upon in this case to determine the

legislative right to regulate or protect the extraction of this subterranean water for transportation or sale by those owners of the surface whereon the use of water is not required for those higher uses, nor of prescriptive rights asserted or claimed in such instances, but simply to hold that for the uses which have been determined subordinate the great subterranean water supply may not be applied to the detriment of the higher uses, and that legislation directed to the conservation of such water, as in this act, is not prohibited by any constitutional provision. "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." *In re Spencer*, 149 Cal. 400, 86 Pac. 896; *Sinking Fund Cases*, 99 U. S. 718, 25 L. Ed. 496.

Writ denied.

We concur: SHAW, J.; TAGGART, J.

6 Cal. App. 225

TAYLOR et al. v. BURKS et al. (Civ. 456.)
(Court of Appeal, Second District, California.
Aug. 16, 1907.)

MANDAMUS—PETITION—PARTIES.

Code Civ. Proc. § 1085, provides that mandamus will issue to any board to compel performance of an act which the law specially enjoins. Section 1096 provides that service of the writ on a majority of the members of any board is service on the board. Section 1097 provides that punishment may be inflicted personally on any member of the board refusing to obey the writ, etc. Section 1100 makes the ordinary rules in civil actions applicable to pleadings in mandamus, except as to matters otherwise provided for. *Henning's Gen. Law*, p. 989, § 1, provides that a municipal corporation of the sixth class may disincorporate under the act, and that the council or other legislative body of such corporation shall, on receiving a petition therefor, submit the question. *Held*, that a proceeding by mandamus to compel the calling of an election to vote on the disincorporation of a city must be brought against the board of trustees of the city, and not against the members of such board individually.

Petition by T. R. Taylor and others for mandamus against Dana Burks and others. Demurrers to petition sustained.

John D. Pope, for petitioners. W. H. Anderson and Anderson & Anderson, for defendants.

TAGGART, J. Application for writ of mandate to compel defendants, as members of board of trustees of city of Ocean Park, to call an election to vote upon the disincorporation of that city, and to fix a date for such election within a reasonable time.

The petition sets out that the city of Ocean Park is a municipal corporation of the sixth class, governed by a board of trustees composed of five persons; that the defendants

are three of such trustees, and that the other two, as petitioners are informed and believe, have tendered their resignation as members of said board; that petitioners, as electors, owners of property, and taxpayers in said city of Ocean Park, on the 24th day of June, 1907, filed with said board of trustees a petition signed by a majority of the qualified electors of said city, requesting said board of trustees to submit to the electors of said city the question whether said city should disincorporate; that no action was taken on said petition until July 22, 1907, at which time said board of trustees, by the affirmative vote of all of the defendants, called said election and ordered the same to be held April 13, 1908, which date is the same day fixed by law for the regular election of trustees in cities of the sixth class. For return to the order to show cause, the defendants demur severally to the petition and file a joint answer. In support of the demurrers, it is contended that the proceeding is improperly brought, in this: that it runs against the defendants as individuals, and not officially, and that the board of trustees as such is the only party competent to act in the premises, and that it is the action of the board of trustees that is required in making the order desired. The prayer of the petition is that the defendants be "commanded to rescind the action of the board," fixing April 13, 1908, for the date of the election, and "to order an election." Neither of these things can be done by the individual members of the board.

The act which a court may, by writ of mandate, compel a tribunal, corporation, board, or person to perform, is one which the law specially enjoins, as a duty resulting from an office, trust, or station. Code Civ. Proc. § 1085. The statute under which the proceedings to disincorporate are taken (Henning's Gen. Law, p. 980) reads (§ 1): "A municipal corporation of the sixth class may disincorporate after proceedings had as required in this act. The council, the board of trustees, or other legislative body of such corporation shall, upon receiving a petition therefor * * * submit the question," etc. While the petition alleges upon information and belief that the other two members of the board tendered their resignations at the same time the action was taken as to calling the election, it nowhere appears that such resignations were accepted, or that the other two did not participate in the action taken, or that they are not now actual active members of the board. Jurisdiction of the board of trustees may be acquired by the service of the writ upon a majority of the members of the board (section 1096, Code Civ. Proc.), and punishment may be inflicted personally upon any member of the board refusing or neglecting to obey the writ or order of the court (section 1097, Code Civ. Proc.), but these very statutory provisions and distinctions appear to accentuate the necessity of the proceeding being against the board. This is entirely in

accord with the weight of the authorities displayed under the subhead "Board or Members," title "Mandamus," 13 Ency. of Pl. & Pr. p. 650, cited by petitioners. We gather the gist of this matter as declared by the text-writer in the Encyclopedia to be that primarily the proceeding should be against the board, and the individual members need not be named, but the better practice is in most cases to name the individual members, although not necessary to do so; that there are exceptional cases in which the disobedience of the board is due to the action of certain individual members of the board, in which case such members must be expressly made defendants, the reason therefor appearing in the petition for the writ.

In *Barber v. Mulford*, 117 Cal. 358, 49 Pac. 207, the practice is stated to be as follows: "While with us the more general practice in mandamus has been to proceed against the officials only, who as representatives of a body politic have refused performance of some duty owed to the plaintiff or relator, yet there seems no good reason why their principal, the legal entity which is commonly the real party to be affected by the writ, may not be joined as a defendant in the proceeding. Though seldom a necessary party, it cannot in a case like the present be called an improper one." In that case the body had acted allowing the claim, but an order had been drawn on the wrong officer. It was the duty of the president and secretary of the board to draw the order. The board was made a respondent in the mandamus proceeding, and it was held to be a proper, though not necessary, party. As said in the opinion: "No question is made as to the legality of the plaintiff's demand audited by the board, or as to the propriety of the action of that body in allowing the same." It will thus be seen from the facts of that case that there is nothing in *Barber v. Mulford* in conflict with the rule above quoted from the Encyclopedia, and it also will be noted that the term used is "officials," as distinguished from individuals or persons. In some cases it is held that the name of the official alone is necessary, and the name of the incumbent of the office is not required to be given. The ordinary rules in civil actions are applicable to pleadings in mandamus proceedings, except in respect to matters otherwise provided in the chapter under that head. Section 1109, Code Civ. Proc.; *People v. Board*, 27 Cal. 655; *Jones v. Board*, 141 Cal. 96, 74 Pac. 696.

While the petition is insufficient for the reasons given, we cannot forbear saying, in response to the argument of respondents presented as a justification for the fixing of the date of the election at so remote a time, that this appeals to us as a much better reason to be offered to the voters of the city of Ocean Park why they should not vote for disincorporation at present than to this court as an excuse why a writ of mandate should

not issue directing the board of trustees to perform a plain express duty provided by statute. The method of delay, whether by dilatory action in the board or setting the election for a remote date, under the rule declared in *Glencoe v. People*, 78 Ill. 382, appears to be immaterial. We take it that the law declared in that case is applicable here.

That the matter may be heard effectively upon its merits, it is deemed best that the demurrers be sustained for the reasons above indicated. Demurrers sustained.

We concur: ALLEN, P. J.; SHAW, J.

3 Cal. App. 662

LANTZ v. FISHBURN et al. (Civ. 196.)

(Court of Appeal, Second District, California.
May 29, 1906. Rehearing Denied by
Supreme Court July 23, 1906.)

1. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENTS—ENFORCEMENT—SALE OF LAND—TITLE OF PURCHASER.

One alleging title to lots under sales by the city treasurer on default in payment of an installment due on bonds issued on a street improvement assessment and deeds issued thereon, in pursuance of St. 1893, p. 33, c. 21, prescribing a system of street improvement bonds, etc., must affirmatively establish a strict compliance with the statutory provisions.

2. SAME—SALE OF LAND FOR NONPAYMENT OF ASSESSMENT.

Act Feb. 27, 1893, § 5 (St. 1893, p. 36, c. 21), provides that the city treasurer may sell land to pay delinquent assessment bonds, as provided for the collection of delinquent taxes. *Held*, that where the place of sale of lots by the city treasurer on default in payment of an installment on a bond issued on a street improvement assessment was given in the notice of sale as "at the easterly door of the county courthouse," and it did not appear that this was "the front of the courthouse," or that any resolution of the board of supervisors had been passed prescribing "the front door of the courthouse" as the place of sale, as required by Pol. Code, § 3768, then in force, the sale was invalid.

3. SAME.

Act Feb. 27, 1893, § 5 (St. 1893, p. 36, c. 21), provides that the city treasurer may sell land to pay delinquent assessment bonds, as provided for the collection of delinquent taxes. *Held*, that where the notice of redemption from a sale of a lot by the city treasurer on default in payment of an installment on a bond issued on a street improvement assessment, required by Pol. Code, § 3785, as it stood prior to the amendment of 1895, did not conform to the requirements of the law, and a duplicate of the notice was not filed with the county recorder, as required by that section, as amended by St. 1891, p. 134, c. 121, a deed founded on such proceedings was invalid.

4. SAME.

Act Feb. 27, 1893, § 5 (St. 1893, p. 36, c. 21), provides that the city treasurer may sell land to pay delinquent assessment bonds, as provided for the collection of delinquent taxes. Pol. Code, § 3776, prior to the amendment of 1895, required the certificate of sale to state the time when the purchaser should be entitled to a deed. Section 3785, prior to the amendment of 1895, provided that the purchaser of property sold for delinquent taxes must, 30 days previous to the expiration of the time for redemption, or before he applied for a deed, serve on the owner of the property purchased a notice stating when the right of redemption would expire or the

purchaser would apply for a deed, and that the owner should have the right of redemption indefinitely until such notice should have been given and deed applied for. *Held*, that a certificate of sale of a lot by a city treasurer on default in payment of an installment on a bond issued on a street improvement assessment, that the purchaser would be entitled to a deed on a day named on giving notice of application therefor, but, failing to recite that the right of redemption would have then expired, was fatally defective.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by H. P. Lantz, as administrator of George Locke, deceased, against J. E. Fishburn and others. From a judgment for plaintiff, and an order denying their motion for a new trial, defendants appeal. Reversed and remanded.

J. L. Murphey, for appellants. Charles Lantz, for respondent.

SMITH, J. This is a suit to quiet title, resulting in a judgment for the plaintiff. The defendants appeal from the judgment, and from an order denying their motion for a new trial.

The complaint is in the usual form, alleging title in plaintiff's testator, Geo. Locke, at the time of his death, and subsequent title in his estate. The original title of plaintiff's testator is admitted. But defendants in their answer allege title in the defendant Rheinschild, deraigning title (in the second defense set up in the answer) under sales of the two lots in controversy by the city treasurer upon default in payment of the first installment due on bonds issued upon a street assessment for the improvement of Bridge street in the city of Los Angeles, and deeds thereon issued. They also set up in a third defense, as a claim against the land, a bond issued upon a street assessment of the same lots for the improvement of the crossing of Echandla street with Bridge street; and, in a fourth defense, an alleged estoppel in pais is pleaded.

It appears from the findings that the specifications of the work under both assessments were the same as those involved in *Stansbury v. White*, 121 Cal. 433, 53 Pac. 940, *Chase v. Treasurer*, 122 Cal. 540, 55 Pac. 414, and *Chase v. Scheerer*, 136 Cal. 248, 68 Pac. 768, in which cases the assessments—and in the last two cases the bonds thereon issued—were on that account held to be void. Accordingly, in the briefs originally filed, it was assumed by the attorneys of both parties, on the authority of those decisions, that the assessments and bonds herein involved were void, and the argument was confined exclusively to the plea of estoppel. On this issue the findings of the court are adverse to the appellants, and are, we think, justified by the evidence; nor do we think the facts alleged, or those shown by the evidence, sufficient to constitute an estoppel. But in an amended brief filed by the appellants our attention has been called to the decision in the

late case of *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81, which, it is claimed, conclusively establishes the validity of the bonds here involved. In that case the specifications involved were substantially similar to those involved in the cases cited, and it was held that by effect of the curative provision of section 4 of the "act to provide a system of street improvement bonds," etc. (St. 1893, p. 36, c. 21, § 4, last sentence), the bonds there in question were valid; and this decision must be taken as the final expression of the Supreme Court upon the points there involved, and upon the same points where involved in the present case. It must be assumed, therefore, that the validity of the bonds in this case was not affected by the defects in the specifications as supposed by the counsel on both sides. But it still remains for us to inquire whether there were other defects in the proceedings of a nature to affect the validity of the bonds, or the validity of the deeds issued on the Bridge street assessment.

On the latter point, it is clear that the terms of the curative provision in question have no application, and that, assuming the bonds to be valid, the validity of the deeds must depend upon the conformity or non-conformity of the proceedings of the treasurer with the provisions of the law as prescribed in section 5 of the act cited (St. 1893, p. 36, c. 21), and in section 3765 et seq. of the Political Code, therein referred to; and on this point it is to be regarded as settled law that, to give validity to the deed, it devolved upon the defendants to prove affirmatively a strict compliance with the statutory provisions. *Shipman v. Forbes* 97 Cal. 574, 32 Pac. 599; *Gwynn v. Dierssen*, 101 Cal. 565, 566, 36 Pac. 103; *Merced Co. v. Helm*, 102 Cal. 159, 36 Pac. 399; *Miller v. Williams*, 135 Cal. 183, 67 Pac. 788; *Baird v. Monroe* (Cal. App.).¹ This, with regard to several of the proceedings necessary to give validity to the sale, the appellants failed to do; and as to some it affirmatively appears that the law was disregarded. Thus the place of sale given in the notice of sale was "at the easterly door of the county courthouse in Los Angeles county." But it does not appear that this was "the front of the courthouse," or that any resolution of the board of supervisors had been passed prescribing "the front door of the courthouse" as the place of sale, as required by the provisions of section 3768 of the Political Code, then in force. Again, from the finding of the court it appears, with regard to one of the lots, that the notice of redemption required by section 3785 of the Political Code—as it stood prior to the amendment of 1895—did not conform to the requirements of the law; nor, in the case of either lot, was a duplicate of the notice filed in the office of the county recorder, as required by the provision cited as amended

in 1891. St. Cal. 1891, p. 134, c. 121; *Kirk v. Rhoads*, 46 Cal. 403; *Ramish v. Hartwell*, 129 Cal. 446, 447, 58 Pac. 920. Again, by section 3776 of the Code, it is required that the certificate of sale must state "the time when the purchaser shall be entitled to a deed." But the recital upon this point in each of the certificates states the time to be "on the 21st day of June, 1901, upon giving notice of application therefor," though by the provisions of section 3785 it is expressly provided that "the owner of the property shall have the right of redemption indefinitely until such notice [i. e., the notice prescribed] shall have been given and said deed applied for." The term of redemption should therefore have been described as the concurrent happening of this event, and of the expiration of the year. The law requires, not merely that the fact of notice of redemption shall appear, but also that a recital of the fact shall be contained in the certificate, and upon the failure of either of these requirements the certificate and the deed thereon issued are void. Cases cited in *Baird v. Monroe* (Cal. App.) supra. We are of the opinion, therefore, that the sales under which the defendants claim title were void, and that the finding that the plaintiff is the owner in fee simple of the land cannot be disturbed.

But it is found, also, and adjudged, that the bonds themselves set up in the defendants' answer are void; and it remains to consider how far these findings and the corresponding judgment can be sustained, and in this regard the case is as follows: The proceedings for the assessment of Bridge street and the issue of bonds thereon are set forth in detail in the second defense of the answer; and this is the case also with regard to the proceedings for the assessment of Echandia street and the bonds thereon issued, which are set forth seriatim in the third defense. Upon the issues thus raised, the court finds that all the allegations of the answer as to the proceedings, from the passage of the ordinance of intention down to and including the ordinance of intention to issue serial bonds, and the failure of the owners of three-fourths of the frontage to elect to take the work, are true; and it is also found that the bonds were issued as alleged, but "are wholly void," etc. All the other allegations and denials contained in defendants' answer are found not to be true; and it is thus in effect found that none of the proceedings required by law in the improvement of a street, and the assessment of property therefor, from the making of the contract to the return of the warrant, inclusive—including the actual performance of the work—were in fact taken. All that appears from the findings therefore is that, after the usual precedent proceedings, the contract for doing the work was awarded to the defendant *Rheinschild*, and that thereupon, without any intervening proceedings

¹See note at end of case.

or acts on his part, or on that of the council, the bonds in question were issued to him. The question is thus obviously suggested whether, under the decision in *Chase v. Trout*, the bonds themselves are to be regarded as conclusive evidence, not only "of the regularity," but also of the actual performance "of all the proceedings" required by the street work act subsequent to the ordinance of intention. To this question there would seem to be but one answer. If there was in fact no contract, no work done, and no assessment, warrant or demand of payment, there was no tax due or lien therefor for which bonds could be issued, and for the Legislature to declare that the issue of a paper in the form of a bond should be conclusive evidence that these essential proceedings had been taken would seem to be beyond its competency; nor do we find anything in the decision in *Chase v. Trout* inconsistent with such a conclusion. But, however this may be, it appears from the evidence in the bill of exceptions—which was received without objection and not contradicted—that there was in the case of each improvement, a contract, an actual performance of the work, an assessment, with warrant, etc., and demand of payment, and return, and other matters negated by the general finding of the court; and, indeed, there seems to have been no dispute as to the existence of these facts. We are therefore almost forced to the conclusion that the general finding of the court that all allegations of the complaint, other than those expressly found to be true, were untrue, was the result of inadvertency, and that it did not intend so to find; and, however this may be, the finding is clearly unsupported by the evidence.

It follows that a new trial must be had, but, with regard to the further proceedings in the case, there are other points to be adverted to. Whatever may be the effect of the provision of section 4 of the bond act, making the bonds referred to "conclusive evidence of the regularity of * * * proceedings," it applies only to the proceedings "previous to the making of the certified list of all assessments unpaid, etc., and of the validity of said lien up to the date of said list." But it is only upon the receipt of this certified list from the street superintendent that the treasurer can issue the bonds; and we cannot make out from the finding of the court whether it intended to find that the list was not made as alleged, or the contrary. It is also provided in section 4 of the act that if notice from the owner of the land, accompanied with the affidavit and certificate prescribed, be given to the treasurer that "he desires no bond to be issued," then "no such bond shall be issued"; and it is alleged in the answer, with regard to each of the assessments, that such notice was not given. On this point the general findings of the court may be construed as negating this allegation, but there is no specific finding, and

we are not satisfied that the court intended so to find. Upon another trial the findings should be made more definite on these and other points.

The judgment and order appealed from are reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

We concur: GRAY, P. J.; ALLEN, J.

NOTE.—The following opinion of the Court of Appeal, by Smith, J., was reversed by Supreme Court, in 80 Pac. 352:

The suit was brought to quiet title to a tract of land described in the complaint as: "Lot five (5) in block 'K' of the Pellissier tract, in the city of and county of Los Angeles, state of California, as per map recorded in book 15, page 70, miscellaneous records of said county." The judgment was for the defendant; and the plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

It appears from the stipulations and facts shown by the record that the plaintiff's testator was owner of the land in controversy and died seised of the same, and that the plaintiff is now entitled to maintain his action, unless his testator's title was divested by the deeds appearing in the record, which are a tax deed from the tax collector to the state of California of date July 6, 1900, for the taxes of the year 1894, followed by a deed of date July 20, 1901, from the tax collector purporting to have been made upon the authorization of the controller, to one Monroe, whose title is vested in the respondent, and a deed of date July 24, 1903, from the street superintendent of the city of Los Angeles on a street assessment to the respondent himself. The latter deed, it is claimed by the appellant, shows on its face that it was made in a proceeding under the general street law of March 6, 1889, and not under the charter, under which the proceeding should have been taken (*Byrne v. Drain*, 127 Cal. 603, 60 Pac. 433); and, the point not being contested by the respondent, it will be assumed to be well taken. As to the tax deed, it is claimed by the appellant that it is void on its face for the following reasons: (1) It does not recite "the time when the right of redemption had expired," or, "the amount for which the property was sold"; and (2) that the original assessment was void. As to the first point of appellant, the recitals referred to were required by section 3785 of the Political Code as amended March 28, 1895 (St. 1895, p. 328, c. 218), which is the law governing the case, and we are of the opinion that the deed fails to comply with the statute in this respect. As to the time of redemption the deed refers to a certificate of sale bearing date July 3, 1895, and stating that, unless the real estate was redeemed within five years from the date of the sale, the purchaser would be entitled to a deed on the 5th day of July, 1900. This is all that is said in the deed, and we think it was an insufficient compliance with the statute (*Simmons v. McCarthy*, 118 Cal. 622, 50 Pac. 761); and the more especially because at the time of the sale there was no law providing for the issuance of a certificate. This, indeed, had been provided for by sections 3776 and 3777 of the Political Code, but these sections had been repealed February 25, 1895 (St. 1895, p. 19, c. 11); and, though there was at the same session an attempted amendment of the repealed sections (St. 1895, pp. 327, 328, c. 218), this, under the express provisions of the Political Code, was of no effect (Pol. Code, § 330; *Fletcher v. Prather*, 102 Cal. 413, 36 Pac. 658). Nor was this defect remedied by the curative act of 1903. St. 1903, p. 63, c. 59; *Harper v. Rowe*, 53 Cal. 233, 237. As to

"the amount for which the property was sold," all that is said in the deed is—after a statement of the amount of taxes, \$2.92—that the land was sold "to pay said taxes"; but it is not said that that was the amount for which it was sold, which was the requirement of the law. *Simmons v. McCarthy*, supra. In the deed, and in the assessment therein referred to, the land is simply described as being situate in the county of Los Angeles, state of California, "in Pelissier Tr., lot 5, blk K," which was obviously insufficient. Pol. Code, § 3650; *Knott v. Peden*, 84 Cal. 299, 24 Pac. 160; *Labs v. Cooper*, 107 Cal. 656, 40 Pac. 1042; *Miller v. Williams*, 135 Cal. 183, 67 Pac. 788.

Some of the above cases are criticized in the opinion of the lower court, and it is apparently admitted that the decision of the court "is in advance of many adjudicated cases"; the views of the court being based apparently upon the more liberal character of the existing system under which the delinquent lands are conveyed to the state and every opportunity for redemption granted to the delinquent owner. Hence it is concluded that the reason for the rule has ceased, and with it the rule itself. We agree with the court in its views as to the liberal character of the existing system (which, in our opinion, cannot be too highly commended); but we do not think that this furnishes any ground for abandoning the well-settled principle governing the exercise of statutory powers for conveyance of lands against the will of the owners. That principle is that, in the exercise of such powers, the statutory provisions must be strictly observed; and, though this principle has, in our opinion, rightly been carried to extreme lengths, and to what may be thought, by those who do not look to the grounds upon which the decisions rest, to lengths even absurd, yet we know of no class of decisions that more favorably exhibit that regard to rights of property which has always characterized our law and distinguished our courts, and, indeed, it may readily be conceived what havoc and devastation to property rights would have occurred but for this conservative conduct of the courts.

There is another question, however, presented by the record, which it will be necessary to dispose of. The plaintiff, we think, is entitled to judgment according to the prayer of his complaint, but only upon the condition of paying to the defendant the amount paid by him in the purchase of the land, or so much as may be found by the court to be due the state to entitle the plaintiff to redemption. *Couts v. Cornell* (Cal.) 82 Pac. 194, and cases cited. The cases cited are, indeed, such as were formerly recognized as cases in equity; but it has been held that an action to quiet title under section 738, Code Civ. Proc., is of the nature of a bill in equity, and the equitable maxim has been applied, that he who seeks equity must do equity. *Polack v. Gurnee*, 66 Cal. 266, 269, 5 Pac. 229, 610; *Booth v. Hoskins*, 75 Cal. 271, 17 Pac. 225; *De Cazara v. Orena*, 80 Cal. 132, 134, 22 Pac. 74; *Benson v. Shotwell*, 87 Cal. 53, 60, 25 Pac. 249; *Brandt v. Thompson*, 91 Cal. 458, 462, 27 Pac. 763. We, however, do not base our opinion exclusively upon these decisions, but upon the broader ground that, under the Code provisions, the distinction between legal and equitable forms of action has, except for certain special purposes, been abolished, and that under our practice the maxim, where the case requires it, will apply equally to legal as to equitable actions. *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423. This, it seems, has been held by the English courts since the passage of the judiciary act, but whether under the express provisions of that act, or upon other grounds, we do not know. *Snell's Equity*, 1 et seq. But we think the same result must follow under the provisions of our Code.

The judgment and order appealed from are re-

versed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

We concur: GRAY, P. J.; ALLEN, J.

STATE ex rel. DAVIS v. EGGERS, State Controller. (No. 1,728.)

(Supreme Court of Nevada. Oct. 5, 1907.)

STATES—APPROPRIATIONS—NECESSITY.

Laws 1907, p. 408, c. 185, created the state industrial and publicity commission, and provided (section 3, p. 409) that the chairman should receive from the state treasury \$2,500 a year in monthly installments, and that the members of the commission should be allowed necessary mileage and traveling expenses on affidavit of the members claiming the same that the mileage and expenses were actually and necessarily incurred in official business, etc. Held, that the act constituted a sufficient appropriation of the salary of the chairman; but, as it failed to prescribe any maximum expenditure for traveling expenses, the act was void in so far as it authorized payment of such expenses by the state, under Const. art. 4, § 19, providing that no money shall be drawn from the state treasury except under appropriations made by law.

Petition for mandamus by the state of Nevada, on relation of Sam P. Davis, against J. Eggers, state controller. On demurrer to the petition. Overruled. Writ granted.

Thompson, Morehouse & Thompson, and Jas. R. Judge, for plaintiff. The Attorney General and R. C. Stoddard, for defendant.

TALBOT, C. J. Under an act approved March 29, 1907, entitled "An act creating and establishing a state industrial and publicity commission, prescribing their duties and compensation, providing funds to be used for the accomplishment of their objects, and other matters relating thereto" (Laws 1907, p. 408, c. 185), the petitioner was appointed chairman of the commission designated. Section 3 (page 409) of the act is as follows: "The chairman of such commission shall receive, as compensation for his services, to be paid out of the treasury of the state of Nevada, the sum of twenty-five hundred dollars per annum, payable in equal monthly installments, upon the first day of each and every month, and the other two members shall serve without compensation; provided, however, that the chairman and other members of such commission shall be allowed necessary mileage and actual expenses of travel incurred in traveling upon the official business of the commission when it shall appear from the affidavit of the members, or one of the members claiming the same, that such mileage and expenses were actually and necessarily incurred, that the same is just, and was incurred while traveling upon the official business of the commission; such affidavit to be filed with the State Treasurer before any allowance can be made for such mileage or expenses." As the questions involved have been submitted upon a demur-

rer, the facts stated in the petition may be considered admitted. The petitioner alleges that he entered upon his duties on the 1st day of May, 1907, and acted as chairman of this commission during that month; that by the provisions of the act he is entitled to receive out of the state treasury a salary of \$2,500 per annum, to be paid monthly; that he is also entitled to receive and be paid out of the state treasury mileage and expenses actually incurred while traveling upon official business of the commission; that his compensation fixed and allowed by the act for the month of May, 1907, is the sum of \$208.33, and his mileage and expenses necessarily and actually incurred in the performance of his official duty for that month amount to \$16.50, for both of which sums the state became indebted to him on the 1st day of June; that the provisions of the act make appropriation by the Legislature for these sums in accordance with the provisions of section 19, art. 4, of the Constitution of this state; that these claims had been duly audited and allowed by the state board of examiners; that upon presentation and demand the respondent, as state controller, has refused, and still refuses, to draw his warrants for these claims, notwithstanding there is ample money in the state treasury. A writ of mandate requiring the issuance of such warrants is demanded. The general appropriation bill contains no provision for the payment of the salary or expenses of the petitioner. It may have been drawn previous to the act designated, which was introduced near the close of the session of the Legislature. The question involved is whether the language of section 3 quoted above constitutes an appropriation for the payment of petitioner's salary and expenses, and whether their payment is by this act, or otherwise, authorized.

Section 19 of article 4 of the Constitution provides: "No money shall be drawn from the treasury but in consequence of appropriations made by law." A similar provision is found in the federal Constitution and prevails in many of the states. In the organic acts of others the word "specific" precedes and modifies the word "appropriations." We will be aided by looking to the history, purpose, and reason for these constitutional enactments before examining decisions of a number of courts bearing on the proposition presented. As the fruit of the English revolution in 1688, which sent the king to Versailles and changed the succession to the throne, this safeguard had its origin in the British Parliament when the people of Great Britain, to provide against the abuse by the king and his officers of the discretionary power with which they were vested, demanded that the public funds should not be drawn from the treasury except in accordance with express appropriation made by Parliament. This prohibition is so wise that it has become the fundamental law of nearly every

state in the Union. It has been well said that this provision was obviously inserted to prevent the expenditure of the people's treasure without their consent. *State v. Burdick*, 4 Wyo. 272, 33 Pac. 125, 24 L. R. A. 266. Its purpose is "to secure regularity, punctuality, and fidelity in the disbursements of the public money." 3 Story's Commentaries, § 1342. "All the expenses of the government being paid by the people, it is the right of the people, not only not to be taxed without their own consent, or that of their representatives freely chosen, but also be actually consulted upon the disposing of the money. Such a provision forms a salutary check, not only upon the extravagance and profusion in which the executive department might indulge itself, but also against any misappropriation which a rapacious, ambitious, or otherwise unfaithful executive might be disposed to make. In those governments where the people are taxed by the executive no such check can be interposed. The prince levies whatever sum he thinks proper and would deem it sedition against him and his government if any account were required of him and in what manner he had disposed of any part of them. Such is the difference between government where there is responsibility and where there is none." Tucker's Commentaries; *Thomas v. Owens*, 4 Md. 225. This inhibition for keeping the expenditure of the public moneys more nearly in control of the people may be compared with the one requiring all bills for revenue in Parliament to originate in the House of Commons, and in Congress in the House of Representatives. Under our advanced, protective system, no officer or individual has control of the public moneys. The provision that no moneys shall be drawn from the treasury but in consequence of appropriations made by law requires that their expenditure shall first be authorized by the Legislature, which stands as the representative of the people. No particular words are essential so long as the will of the lawmaking body is apparent. It has been held in a number of decisions that the word "appropriate" is not indispensable. It is not necessary that all expenditures be authorized by the general appropriation bill. The language in any act which shows that the Legislature intended to authorize the expenditure, and which fixes the amount and indicates the fund, is sufficient. It is customary to create a legislative fund at the beginning of the session, and separate acts appropriating money are usual at every session.

It is provided by an act approved March 8, 1879 (Laws 1879, p. 108, c. 102), entitled "An act authorizing the payment of salaries of officers fixed by law":

Section 1: "All state officers whose salaries are fixed by law shall be entitled, from and after the passage of this act, to receive same on the first of each calendar month; pro-

vided, that nothing in this act shall be construed to mean the payment of salaries in advance." Comp. Laws, § 2088.

Section 2: "The controller is hereby authorized and directed to draw his warrant, and the state Treasurer to pay same, in accordance with the first section of this act." Comp. Laws, § 2089.

By an examination of numerous acts providing for the compensation of our state officers, it will be found that generally no fund is specified for the payment of their salaries.

By an act approved January 16, 1865 (Laws 1864-65, p. 97, c. 11), directly after the admission of Nevada into the Union, entitled "An act in relation to the compensation of members of the Legislature and state officers," per diem and mileage were provided for members of the Legislature in section 1.

Section 2 reads: "The Governor shall receive an annual compensation of four thousand dollars; the Secretary of State, Treasurer, and controller, an annual compensation of three thousand six hundred dollars each; the Attorney General, an annual compensation of two thousand five hundred dollars; * * * The compensation of the respective state officers, as provided herein, shall be payable quarterly.

"Sec. 3. The controller is hereby authorized and required to draw his warrants upon the state Treasurer, in favor of the members of the Senate and Assembly, upon presentation of certificates of compensation due, signed by the sergeants-at-arms and the presiding officers of the two houses respectively, for the amounts named therein. He shall, on the first judicial day of the months of January, April, July, and October, draw his warrants in favor of the several state officers for the quarterly compensation due them by virtue of the provisions of section two of this act."

The act nowhere mentions any fund from which the salaries were to be paid.

The act approved March 8, 1866 (Laws 1866, p. 205, c. 104), changed the compensation of the Governor and of the Lieutenant Governor, and provided that the salary of the latter should be \$3,000, payable monthly, as compensation as warden of the state prison. No fund was specified.

"An act regulating and reducing the salaries and compensation of certain state officers and attaches of the state government of Nevada," approved February 21, 1881 (Laws 1881, p. 43, c. 32), provided for the payment of reduced salaries to various state officers without mentioning any fund except for the compensation of the surveyor general and superintendent of public instruction, which was directed to be paid out of the state school fund.

The same is true of the act approved March 21, 1891 (Laws 1891, p. 104, c. 90), making further reductions in the salaries of some of the state officers, and under which the Governor, Secretary of State, Controller, Treasur-

er, Attorney General, and Surveyor General are now being paid.

The general appropriation act of the last Legislature (Laws 1907, p. 222, c. 113), under which the state government is at present being maintained, and which is very similar to former general appropriation bills, begins with this language: "The following sums of money are hereby appropriated for the purpose hereinafter expressed and for the support of the government of the state of Nevada for the years 1907 and 1908:

"Sec. 2. For the salary of the Governor, eight thousand dollars."

Then follows a list of over 80 other amounts for salaries and sums appropriated for other purposes, and no fund is specified from which these are to be paid, excepting in six instances, five of which provide that the salaries of the surveyor general and the state superintendent of public instruction and certain expenses in their offices shall be paid out of the state school fund, and one appropriating \$85,000 for the support of the university, different parts of which amount are directed to be paid from the interest from the 80-acre grant, from the contingent university fund, and from the general fund, respectively.

It would seem that warrants have generally been drawn and paid and the state government conducted from its inception on the theory that, when no fund was specified from which money appropriated by the Legislature was to be paid for the state's ordinary expenses, the general fund was implied and understood. The salaries of the other state officers are being, and have been, paid under acts which not only do not specify any fund, but which do not direct their payment to be made out of the state treasury, as section 8, first above quoted, does for the petitioner.

In *People v. Goodykoontz*, 22 Colo. 509, 45 Pac. 415, the court said: "Two questions are presented by this record: First. Is the boiler inspector an officer of one of the departments of the state, and, as such, has he a preferred claim against the state for his salary? Second. Did the Legislature make such an appropriation to pay relator's salary as made it incumbent upon the auditor to issue warrants therefor? * * * In the case of *Goodykoontz v. Acker*, 19 Colo. 860, 35 Pac. 911, it was urged that, when the salary of a public officer is fixed by law, together with the time and method of payment, this constitutes an appropriation within the terms of our Constitution and statutes. In response to this argument, the court said: 'Although the decisions are not uniform, it must be admitted that the trend of the more recent cases is in support of this argument.' * * * There is no intention to make the salary of the inspector subject to further legislation to be inferred from anything expressed in the act. It reads: 'Said inspector shall receive an annual salary of two thousand five hundred (2,500) dollars and mileage at ten cents per

mile, payable the same as other officers of the state.' And by other acts then and now in force, other state officers are paid in monthly installments at the end of each and every month; the auditor being required upon request to draw warrants upon the state Treasurer for such salaries. Nothing is left indefinite and uncertain under these provisions.

* * * The object of the constitutional provision inhibiting the payment of money from the state treasury, except by an appropriation made by law, is to prohibit expenditures of the public funds at the mere will and caprice of the crown or those having the funds in custody, without direct legislative sanction therefor; but no such evil need be feared, where, as in this case, the salary of the officer is fixed, together with the time and method of his payment. And we conclude that the act creating the office of state boiler inspector and fixing his salary, when considered in connection with other statutes, designating the time, mode, and manner of payment, constitutes a continuous appropriation for such salary, and that no further legislative sanction is necessary to authorize the proper officers to pay the same. This conclusion is in accordance with several opinions given by the Attorneys General of this state to the auditor at different times, and upon which opinions the salaries of several of the state officers have in the past been paid. See Report of Attorney General of Colorado, years 1889 and 1890, pp. 60 and 98; 1891 and 1892, page 23. So, likewise, the Attorney General of the state of Indiana has decided the same question in the same way. See Report and Opinions of Attorney General of Indiana for 1888, p. 155. This last opinion was rendered upon this state of facts: The Legislature having adjourned without making any appropriations for the salaries of the officers connected with the state government for the year 1888, the question presented was whether or not such salaries should be paid by the auditor and Treasurer without further legislation in the nature of special appropriations therefor. In an exhaustive and able opinion, it is held that it was the duty of the auditor to draw warrants for such salaries, and this conclusion was accepted without being questioned in the courts." See Report of Attorney General of Nevada, 1903-04, p. 18.

In *State v. Grimes*, 7 Wash. 193, 34 Pac. 834. it was said: "But, outside of any light which may be thrown upon the intention of the lawmakers by aid of the title, we are clearly of the opinion that the language employed in the body of the act is amply sufficient to show that the intention of the Legislature was to appropriate. They have designated the amount, and have directed that it be paid out of any moneys in the state treasury not otherwise appropriated. This, we think, is sufficient, and the appropriation contemplated by the Constitution is as plain-

ly indicated as though the formal words 'there is hereby appropriated' were used. No arbitrary form of expression is dictated by the Constitution, and none should be required. Many cases have been adjudicated in states having substantially the same constitutional provision as the one in question, and so far as we have been able to ascertain they have uniformly been determined in favor of the relator's contention. See *State of Louisiana v. Bordelon*, 6 La. Ann. 68; *Humbert v. Dunn*, 84 Cal. 59, 24 Pac. 111, and cases cited."

In *Reynolds v. Taylor*, 43 Ala. 427, the petitioner was entitled to a salary of \$2,000 as marshal and ex officio librarian, and the Legislature had made provision for payment of only \$1,000 in the general appropriation bill. The court said: "It is insisted that the application of appellee should be denied, because it is not shown that an appropriation had been made to pay his salary, as marshal, at the sum claimed by him; but that appropriations had been made to pay him \$1,000 salary per annum only, and not \$2,000, as claimed. We know that the general appropriation acts of 1866 and 1867 appropriated \$1,000 only for the payment of the salary of the marshal of the Supreme Court. This objection is sumciently answered, by a decision of this court, made more than 30 years ago. In the case of *Nichols v. Controller*, 4 Stew. & P. (Ala.) 154, it is decided that, in order to authorize the controller to issue his warrant on the treasury, for the amount of a salary, it is not necessary that there should be a special annual appropriation by act of the Legislature, where there is a general law fixing the amount of the salary, and prescribing its payment at particular periods."

Proll v. Dunn, 80 Cal. 220, 22 Pac. 143. "There is no provision in the Constitution providing or prescribing any particular form of words in which an appropriation shall be made, except that it shall be made by law.

* * * It is claimed that the act does not specify upon what fund the warrant is to be drawn; and, as the controller is required in every warrant to specify the fund out of which it is payable, therefore that it is insufficient. Several authorities are cited which are claimed to support the proposition that the act itself must specify the fund out of which the money is to be drawn, but we do not think they bear that construction, in the sense in which it is claimed for it here, and, as to the statutes, not one appropriation act in fifty designates the fund out of which the money is to be drawn. The majority of all appropriations are drawn out of a single fund, and that without any designation in the act as to what fund the money shall be drawn from. * * * Neither the Constitution nor the Code requires that an appropriation act shall specify the fund out of which the appropriation shall be paid, nor is it usual in appropriation acts to do so. If such a

specification is required, the wheels of the government ought long since to have stopped, for out of many acts which we have examined, including the general appropriation bills for the current and past years, we find none which make such designation. It has become and is the custom in this state, of very general, but not universal, application, to use the phrase 'appropriated out of any money in the treasury not otherwise appropriated.' But it seems to be mere custom, not founded upon any constitutional or other legislative requirement. And we learn from the argument that the controller interprets that phrase to mean 'out of the general fund.' We know of no law which authorizes such an interpretation. On the contrary, it would seem that everything authorized by law to be paid out of the state treasury is payable out of the general fund, if not specially made payable out of some specific fund. * * * The amount named for the general fund is supposed to be sufficient to meet the aggregate of all the appropriations made for the year, except such as have been expressly made payable out of some special fund. * * * Appropriations are made, and can only be made, by the Legislature. The Constitution has prescribed no set form of words in which it is to be done. All that is required is a clear expression of the legislative will on the subject. * * * But, says the controller, it has not designated the fund out of which the appropriation is payable. It did not in any of the former years; nor has it designated the fund out of which the salaries of any of the officers of the state, or the expenses of any of the other bureaus or departments of the government, shall be paid. 'It has not said that the money is appropriated out of any moneys in the treasury not otherwise appropriated.' What of it? The Legislature can make no appropriation except 'out of the treasury.' The remaining words are not only a form not required by law, but usually a fiction, for at the time of the passage of appropriation bills there is not usually any money in the treasury in excess of existing appropriations, and whenever the Legislature makes a new appropriation, it is to be assumed that it will provide funds to meet the same. As said by Chief Justice Field, in *McCauley v. Brooks*, 16 Cal. 11: 'Appropriations are made in anticipation of the receipt of the yearly revenues.' 'An appropriation is the act of setting apart, or assigning to a particular use or person, in exclusion of all others; application to a special use or purpose, as of * * * money to carry out some public object.' Webster's Dict. 'An appropriation of the money to a specific object would be an authority to the proper officers to pay the money, because the auditor is authorized to draw his warrant upon an appropriation, and the Treasurer is authorized to pay such warrant if he has appropriated money in the treasury.' *Ristine v. State*, 20 Ind. 830. In this act we have a clear, dis-

tinct expression of the legislative will making the appropriation. The words 'out of any moneys in the treasury not otherwise appropriated' are not necessary to the expression of that will, or the making of such appropriation. They are in common use in this state, but nowhere made necessary, and are not always used."

Humbert v. Dunn, 84 Cal. 57, 24 Pac. 111: "The question is whether these provisions of the act constitute an 'appropriation' within the meaning of that term as used in section 22, art. 4, of the Constitution, which provides that 'no money shall be drawn from the treasury but in consequence of appropriations made by law.' It is true, the usual formula, 'there is hereby appropriated the sum of ——— dollars out of any money in the state treasury not otherwise appropriated, for the payment of salaries,' is not found in the act, but the intention of the Legislature to provide for the payment of the salaries of the commissioners as they accrued is clearly manifested in the language used: 'Each member * * * shall receive a salary of two thousand four hundred dollars per annum, payable monthly'—and it is 'to be paid out of any money in the state treasury not otherwise appropriated.' There is nothing in this language indicating an intention to postpone the payment of the salaries of the commissioners until the next session of the Legislature. They are to be paid monthly, and out of any money not otherwise appropriated. 'Not otherwise appropriated' when? Clearly at the time when the services are performed and the monthly payments become due. While it is customary to use the words 'there is hereby appropriated the sum,' in bills appropriating money for the payment of salary and other expenses of the government, it is not essential to the validity of an appropriation that those words, or any of them, should be used, if the Legislature has clearly designated the amount and the fund out of which it is to be paid. * * * It is claimed that the act is unconstitutional because it does not specify the amount to be appropriated; that the amount which may be incurred as expenses is uncertain. So far as the traveling expenses are concerned, this contention may be good. We are not called upon to decide this question, however, as the only claim here is for salary, which is fixed by the act at \$2,400 per annum, payable monthly. The act provides for the appointment of three engineers as commissioners, and so far as their salaries are concerned the amount appropriated is fixed and certain."

Campbell v. Board, 115 Ind. 594, 18 N. E. 33: "It is true, as claimed, that no money can be rightfully drawn from the treasury except in pursuance of an appropriation made by law; but such an appropriation may be made impliedly, as well as expressly, and in general, as well as specific, terms. It may also be a continuing or fixed appropriation, as well as one for a temporary purpose or a lim-

ited period. The use of technical words in a statute making an appropriation is not necessary. There may be an appropriation of public moneys to a given purpose without in any manner designating the act as an appropriation. It may be said, generally, that a direction to the proper officer, or officers, to pay money out of the treasury on a given claim, or class of claims, or for a given object, may, by implication, be held to be an appropriation of a sufficient amount of money to make the required payments. *Ristine v. State ex rel.*, 20 Ind. 328."

In *Carr v. State*, 127 Ind. 204, 26 N. E. 778, 11 L. R. A. 370, 22 Am. St. Rep. 625, and in *State v. Burdick*, 4 Wyo. 272, 33 Pac. 125, 24 L. R. A. 266, it was held that, if the salary of a public officer is fixed and the time of payment prescribed by law, no special appropriation is necessary to authorize the issuing of a warrant for its payment. Other cases supporting the above and the views expressed are cited in the brief, and in a note beginning at page 638, 22 Am. St. Rep. and in *State v. Burdick*, *supra*.

In *State v. Westerfield*, 23 Nev. 473, 49 Pac. 121, an item in the general appropriation bill read: "For salary of one teacher and one assistant teacher at the State Orphans' Home, two thousand four hundred dollars, payable out of the general school fund." The court held that the general school moneys could not be applied to the Orphans' Home, and treated the words "payable out of the general school fund" as unconstitutional, null, and void, and the appropriation as if they had been omitted. It was said in the decision: "We hold that the Legislature has made a valid appropriation for the payment of the salary in question, and that the same is payable out of the general fund in the state treasury the same as the salary of the Governor and most of the other state officers, and the same as other appropriations in which no specific fund is named. * * * It will be observed that it is not required that the fund out of which the appropriations are to be made shall be named in the appropriation act."

The petitioner's claim for traveling expenses is viewed in a different light from his demand for salary. By a perusal of the language in this regard in section 3, it will be observed that not only no fund is specified, but there is no language directing payment out of the state treasury such as is contained in the provision for the salary. Section 6 of the act directs that the commission shall have the right to solicit and receive private contributions, but shall accept no money or other considerations from any firm or individual in payment of specific services or favors rendered. Section 8 provides that there may be allowed to such commission by the commissioners of the several counties a sum not exceeding in amount \$250 per year from each county in the state to be used by the commission for the purpose for which it

is established and for the best interests of the various counties and the state. There are no words in the entire act stating that the traveling expenses shall be paid from moneys donated by individuals or collected from the counties, or from the state treasury. It is not necessary to determine whether there is any implication in regard to a fund or moneys from which these expenses might be paid, for the fatal objection to their payment is the fact that no maximum or other amount is specified in connection with them at any place in the act. *Ingram v. Colgan*, 106 Cal. 118, 38 Pac. 315, 39 Pac. 437, 28 L. R. A. 187, 46 Am. St. Rep. 221; *Institute v. Henderson*, 18 Colo. 105, 31 Pac. 714, 18 L. R. A. 398. As all appropriations must be within the legislative will, it is essential to have the amount of the appropriation, or the maximum sum from which the expenses could be paid, stated. This legislative power cannot be delegated nor left to the recipient to command from the state treasury sums to any unlimited amount for which he might file claims. True, the exact amount of these expenses cannot be ascertained nor fixed by the Legislature when they have not yet been incurred, but it is usual and necessary to fix a maximum either in the general appropriation bill or in the act authorizing them specifying the amount above which they cannot be allowed.

State v. La Grave, 23 Nev. 25, 41 Pac. 1075, 62 Am. St. Rep. 764, stripped of dicta, is applicable to the question here relating to the traveling expenses, but may be distinguished as not bearing on the one involved pertaining to the salary. There it was said that, under the existing facts, it was improbable that the provisions of the statute were intended as an appropriation because the number of military companies that could have received its benefits was indefinite and uncertain. The act named an amount for each company. The number of companies which might take advantage of its provisions was uncertain, as was also the aggregate of the sums which might be drawn from the treasury. The act did not specify any maximum within which the allowances were to be confined, and no provision was made in the general appropriation bill. Hence the total money which might be drawn from the state treasury was not specific, but was not as uncertain as it is here. The language in section 3 that "the members of the commission shall be allowed actual expenses of travel incurred in travelling upon the official business of the commission" is not accompanied by any limitation of the travel to this state or elsewhere, and is broad enough, if enforced, without any maximum amount being named by the Legislature, to allow the members of the commission to travel around the world ad libitum on the business of the commission at the expense of the state. This indefiniteness does not exist in regard to the salary, which has been fixed by the Legisla-

ture, and which is certain as to the amount and as to the person to whom, and the time when, it is to be paid.

As section 3 of the act creating the commission states that "the chairman shall receive as compensation for his services to be paid out of the state treasury the sum of two thousand five hundred dollars per annum, payable in equal monthly installments upon the first day of each and every month," and the act of March 8, 1878, that all officers whose salaries are fixed by law shall be entitled to receive the same on the first day of each calendar month, and that the state controller is authorized and directed to draw his warrant and the state Treasurer to pay the same, it is clear that petitioner is entitled to his salary. No other construction would be in harmony with the plain meaning and directions of these sections. As the Legislature has named the amount of the salary and directed the issuance of warrants and its payment monthly out of the state treasury, any additional act providing for the accomplishment of these purposes which are already shown to have been intended is not required and would be an unnecessary repetition. Section 6 of "An act relating to the duties of the state controller," approved February 24, 1886 (Laws 1886, p. 97, c. 43), directs that no warrant shall be drawn on the Treasurer except there be an unexhausted, specific appropriation by law to meet the same. It is not contended that the fund is exhausted. It is evident that there is an appropriation by law for the salary of the chairman of the commission because the amount and time and manner of payment are specific and certain, but not so in regard to the travelling expenses. If the section relating to the duties of the controller is in conflict, which is not apparent, it would be controlled by the later acts fixing the salary of the petitioner as a state officer and directing the controller to draw his warrants in favor of state officers for their salaries on the first of each month.

Submission of the case was made upon demurrer as upon the merits.

It is directed that a writ of mandate issue commanding the defendant, as state controller, to draw his warrant upon the state Treasurer in favor of the plaintiff for the salary claimed, but not for the travelling expenses.

NORCROSS and SWEENEY, JJ., concur.

ILFELD v. ZIEGLER et al.

(Supreme Court of Colorado. July 1, 1907.)

1. CHATTEL MORTGAGES—SALE BY MORTGAGOR—VALIDITY.

A mortgagor, who, under the terms of the mortgage, remains in possession of the chattels, may, before default, sell the chattels subject to the mortgage.

2. SAME—ACTS CONSTITUTING CONVERSION—SALE BY MORTGAGOR OF MORTGAGED CHATTELS.

An absolute sale, to the exclusion of the rights of a mortgagee, by a mortgagor, who, under the terms of the mortgage, remains in possession of the chattels, works a conversion thereof, for which the mortgagee may maintain trover without demand.

3. PLEADING—ALLEGATIONS—DIRECTNESS.

A pleading should state the facts directly and positively, and not hypothetically or by way of recital.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 83.]

4. SAME—DEMURRER—GROUNDS.

A defect in a pleading, because it states the facts hypothetically or by way of recital, may be raised by general demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 417.]

5. CHATTEL MORTGAGES—CONVERSION OF MORTGAGED PROPERTY—ACTIONS—ANSWER—SUFFICIENCY.

In trover by a mortgagee for conversion of sheep, an answer alleging that if any of the sheep ever belonged to the mortgagor, and were intended to be included in the chattel mortgage, if any mortgage existed, the mortgagee, in permitting the mortgagor to sell and neglecting to notify defendant of his rights, if any, under the mortgage, was barred from claiming the property against defendant, is fatally defective for failing to allege any fact positively.

6. APPEAL—REVIEW—PREJUDICIAL ERROR—ADMISSION OF EVIDENCE.

Where the answer contained no positive allegation of a fact, but only by way of recital, the error in admitting evidence to prove such fact was prejudicial.

7. PRINCIPAL AND AGENT—ACTS OF AGENT—RATIFICATION.

Where a sale is completed before knowledge of it reaches the principal, and no change in the condition of the parties can occur from his delay to approve or disapprove it, mere silence does not work an estoppel, though it may be evidence of ratification.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 638.]

8. SAME.

Where one, in selling goods, did not purport to act as agent of a third person, but in his own right as owner, the third person could not be bound thereby, on the theory of ratification of an unauthorized act of his agent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 622.]

9. CHATTEL MORTGAGES—CONVERSION OF MORTGAGED PROPERTY—EVIDENCE—ADMISSIBILITY.

In trover by a mortgagee against the buyer of mortgaged chattels, evidence that similar acts of sale of mortgaged chattels by the mortgagor had been approved by the mortgagee was inadmissible, unless accompanied by evidence that the buyer knew thereof at the time he made the purchase.

10. SAME.

Where a mortgagor wrongfully sold and delivered mortgaged chattels to a buyer, and he mingled the chattels with other chattels of a similar kind, the burden was on the buyer, in trover by the mortgagee, to show what property was and what was not described in the mortgage.

11. SAME.

Where chattels covered by a mortgage are traced into the possession of one who had constructive notice thereof, and he seeks to prove that his possession was rightful, the burden of proving such possession rests on him; and if

he seeks to do so by showing a purchase of the property from the mortgagor, acting as agent of the mortgagee, the burden is on him to show that the mortgagor had such power, and that it was strictly followed.

Appeal from District Court, Larimer County; Christian A. Bennett, Judge.

Action by Charles Ilfeld against Watson Ziegler and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Hodges, Wilson & Hodges and Dorsey & Hodges, for appellant. John T. Bottom, for appellees.

CAMPBELL, J. Action for conversion. The complaint in substance alleges that plaintiff, as mortgagee of a flock of sheep and lambs, became thereby the special owner and entitled to the immediate possession thereof. The mortgage was given to plaintiff by Mateo Lujan and wife, in the territory of New Mexico, and was intended as security for their promissory notes to him and for future advances. Being of record, it was constructive notice in that jurisdiction. During the lien of the mortgage the complaint alleges that the defendants wrongfully obtained possession of the sheep and converted them to their own use, for which damages are asked. The answer, after denying the allegations of the complaint, contains this separate affirmative defense: "That if any of the sheep or lambs now or heretofore in the possession of the defendants ever belonged unto Mateo Lujan and Ambrosia V. Lujan, or either of them, and were intended to be included in said chattel mortgage, if any such mortgage ever existed, described in the plaintiff's complaint, the plaintiff, by reason of his acts in permitting the said Mateo Lujan to transfer, sell, and convey the property pretended to be included in said mortgage, and by reason of his failure and neglect to notify the defendants within a reasonable time of his rights, if any, under said chattel mortgage, if any, is barred and prevented from having any claim or demand whatsoever against the defendants, or either of them." The plaintiff filed a motion to make this defense more definite and certain, specifically pointing out that it failed to allege any fact positively or directly, was hypothetical, in the alternative, and by way of recital. The court overruled the motion, and plaintiff by replication denied the averments of the answer. The jury returned a verdict for the defendants, and from a judgment entered thereon plaintiff appeals, assigning a number of grounds for reversal. Because we must set aside the judgment for reasons presently stated, we shall not comment upon the evidence further than becomes necessary in discussing the legal questions involved.

1. First we discuss an objection here made to the complaint. It was not raised at the trial: defendants on this review for the first time questioning its sufficiency. The particu-

lar point which they make is that the facts alleged will not support trover. The argument is that since the mortgage expressly stipulates that the mortgagors may remain in possession of the property until default, and the plaintiff had not taken possession at the time of the alleged conversion, the mortgagors might convey a good title before default, subject to the lien of the mortgage; hence the sale, made, as it was, by the mortgagors before default, conveyed good title subject to the mortgage lien—citing *Lafayette County Bank v. Metcalf*, 29 Mo. App. 384, and other cases therein considered. The defendants are supposing a case not made by the complaint in the sense contended. The mortgagor, who, under the terms of the mortgage, remains in possession, may, before default or forfeiture, sell and convey title subject to the lien of the mortgage. *Jones on Chattel Mortgages* (4th Ed.) § 454, and authorities cited. But the Missouri case cited by counsel, whatever may be said of it under its own facts, is not in point here. In that case the sale was made in recognition of the rights of the mortgagee, and the property was transferred subject to the lien of the mortgage. Yet even there the majority of the court were of opinion that no demand was necessary to maintain the action, which was one for conversion. Where, as in the case in hand, the sale is an absolute one of the mortgaged property by the mortgagor in exclusion of the rights of the mortgagee, such sale itself works a default, and is a conversion of the property, for which the mortgagee may maintain trover without demand. *Jones on Chattel Mortgages* (4th Ed.) § 460. The distinction is made in *Lafayette County Bank v. Metcalf*, 40 Mo. App. 494, between a sale subject to the mortgage and one in antagonism thereto. In the latter case it was held that an antagonistic sale is a conversion, for, if given effect, it would annihilate the security. The complaint states a cause of action, and, assuming its allegations to be true, plaintiff was entitled to the possession of the property, because of the default of the mortgagor in breaking the covenants of the mortgage. Plaintiff had a special property in the mortgaged property, and was entitled to immediate possession, and this action was maintainable without previous demand. *Harrington v. Stromberg-Mullins Co.*, 29 Mont. 157, 74 Pac. 413; *Sandager v. Northern Pac. Elevator Co.*, 2 N. D. 3, 48 N. W. 438; *Reynolds v. Fitzpatrick*, 23 Mont. 52, 57 Pac. 452; *Horn v. Reitter*, 12 Colo. 310, 21 Pac. 186; *Murphy v. Hobbs*, 8 Colo. 17, 30, 5 Pac. 637; *Mouat v. Wood*, 22 Colo. 404, 45 Pac. 389.

2. The rule is elemental that in a pleading facts should be stated directly and positively, not hypothetically or by way of recital. Such defects in a pleading, under the rule prevailing in this state, are subject to a general demurrer. *Leadville Water Co. v. Leadville*, 22 Colo. 297, 45 Pac. 362. The plaintiff, however, by his motion, which he was

not obliged to make, specifically called the attention of the court and defendants to the vice in the affirmative defense of this answer. The court overruled the motion, and the defendants did not see fit to amend their pleading. This defense is fatally defective in the foregoing particulars, as well as in other respects which the parties have not referred to. If other authority than that found in our own decisions were necessary, the following cases furnish it: *Suit v. Woodhall*, 116 Mass. 547; *Jamison v. King*, 50 Cal. 132; 6 Enc. Pl. & Pr. 270; *Bryant*, Code Pleading, 204. In *Suit v. Woodhall*, the court, by Gray, C. J., in considering objections made to an answer to a declaration on an account for the price of intoxicating liquors, held the answer before the court not sufficient to warrant evidence that the liquor was sold in violation of law, because the pleading contained no clear or precise allegation that the goods sued for were sold illegally, "but only that, if it shall appear that the goods were sold as alleged in the declaration, it will also appear that they were sold in violation of law. The issue thereby tendered is, not whether there was an illegal sale, but whether in a certain contingency it will appear that there was an illegal sale. * * * And if he (plaintiff) had filed a replication, denying all the allegations in the answer, his denial would in like manner have been limited to what might be made to appear, and no issue would be joined upon what the fact was." The court in the case at bar permitted defendants to introduce in support of this defense evidence which tended to show, not only that the plaintiff, as mortgagee, authorized the mortgagors to sell the property, but by his failure within a reasonable time after the sale to repudiate it, after full knowledge of the facts, he was estopped to assert this demand against the defendants. This was clearly prejudicial error, because such issues were not tendered. There is no positive allegation in this defense that the sale was authorized, and only by recital, which is wholly insufficient, was there even an attempt to allege facts essential to a plea of estoppel.

3. Even though such issues had been present, the court erred in not properly instructing the jury as to the law relating to the inaction of a principal after the sale by an unauthorized agent. In *Union M. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 262, 303, *Hallett*, C. J., draws the distinction between the cases where mere silence of the principal after knowledge of the facts is to be considered only as evidence of acquiescence or ratification, and cases where it will operate as matter of law by way of estoppel. Where the sale is completed before knowledge of it reaches the alleged principal, and no change in the condition of the parties can occur from his delay to approve or disapprove it, mere silence may be evidence of ratification, but it does not work as an estoppel. See, also, *Breed v. First Nat. Bank*, 4 Colo. 507.

4. It is the law that there is no rule for the operation of the ratification by a principal of the unauthorized act of an agent, unless the latter at the time of the sale avowedly acts as an agent. The authorities seem to be unanimous upon this point. *Story on Agency* (9th Ed.) § 251a; 1 *Chitty on Contracts* (11th Am. Ed.) 293; *Puget Sound Lumber Co. v. Krug*, 89 Cal. 237, 243, 26 Pac. 902; *Crowder v. Reed*, 80 Ind. 1, 10; *Richardson v. Payne*, 114 Mass. 420; *Mechem on Agency*, § 127. We think it appears that the mortgagors did not avowedly act as agents of the mortgagee, but rather in their own right as owners. At least, there was evidence that they professed to act in their own behalf. And yet the court proceeded as if ratification could be had, regardless of the capacity in which the seller acted. This was error.

5. The court, over the objection of plaintiff, admitted evidence that similar acts of sale of mortgaged property by these mortgagors and other persons had been approved by the plaintiff as mortgagee. This was on the theory that such acts threw light upon the present transaction, and rendered probable defendant's claim that this sale also was authorized. There is a question as to whether, in the light of the subsequent explanation of the witness by whom such acts were sought to be proved, this evidence should have been allowed to remain in the case, or considered even as tending to prove the custom alleged; but, assuming that the evidence was properly retained, it alone is not sufficient. To make it so, it should have been accompanied by other evidence that defendants knew of such approval at the time they made the purchase; for, if they did not know of such a practice, they could not have relied upon it. *Martin v. G. F. Mfg. Co.*, 9 N. H. 51; *Schoenhofen Brewing Co. v. Wengler*, 57 Ill. App. 184.

6. Probably the question to which most of the evidence is directed and concerning which there is the greatest conflict is as to the identity of the sheep and lambs which came into defendants' possession with those described in the mortgage. There was evidence in the record tending to show that defendants themselves did not buy any sheep of plaintiff's mortgagors, but that the same were purchased by a third person and sold to the defendants by him. There is also evidence tending to show a sale direct to the defendants by the mortgagors, and that in driving the sheep from their ranch to the railroad station, and after they were received at the yards, other sheep and lambs were turned into the pens with the mortgaged sheep, and that such mingling was done both by the mortgagors and the defendants as their vendees. The plaintiff asked an instruction that if the sheep described in the mortgage were by the mortgagors wrongfully sold and delivered to the defendants, and if they, or either of them, purposely or carelessly mingled them with other sheep,

the burden was upon defendants to show what sheep were, and what were not, described in the mortgage. The instruction should have been given, and its refusal was prejudicial error. *Adams v. Wildes*, 107 Mass. 123; *Burks v. Hubbard*, 69 Ala. 379. In the *Burks* Case it was also held that where personal property covered by a mortgage is traced into the possession of one who had constructive notice thereof, and the purchaser seeks to defend his possession by proving that it was rightful, the burden of proving such defense rests upon him; and, if he seeks to do this by showing a purchase of the property from the mortgagor acting as the mortgagee's agent, the burden is upon him to show that the mortgagee had such power, and that it was strictly followed. The court erred in refusing so to charge. Upon the question of the identity of the property, and the various errors assigned to the rulings on the evidence, we forbear discussion. In the light of the foregoing announcement of the law applicable to the case, such questions, or some of them, will not be likely to arise in case of another trial.

The judgment is reversed, and the cause remanded, with leave to the parties to amend their pleadings as they may be advised, and, if further proceedings be had, that they be in accordance with the views herein expressed. Reversed.

STEELE, C. J., and GABBERT, J., concur.

L. BALDWIN & CO. et al. v. PATRICK.

(Supreme Court of Colorado. April 1, 1907.
Rehearing Denied Oct. 7, 1907.)

1. CONTRACTS—PERFORMANCE.

A buyer of cattle contracted with a third person, who agreed to advance the funds necessary to carry out the contract of sale, to manage the cattle, dispose of them, and pay to the buyer half of the net proceeds. The third person retained a part of the cattle delivered by the seller, but there was nothing to show that they were marketable, or that they could have been sold at a profit, or that he acted in bad faith in failing to dispose of them. *Held*, that he was not chargeable with the cattle unsold, or liable to the buyer for a half of their value.

2. REFERENCE—REPORT OF REFEREE—EVIDENCE.

One liable under his contract for a half of the value of cattle in his possession is not liable for an amount estimated by a referee without any evidence on which to base it.

3. PARTNERSHIP—ELEMENTS.

The elements of a partnership are community of loss, of title, of expenses, and common right to dispose of property for purposes of a partnership.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 1-14.]

4. SAME—AGREEMENT CREATING RELATION.

An agreement, whereby a third person bound himself to advance funds necessary to carry out a contract of sale, to manage the property, dispose of the same, and pay to the buyer a half of the net proceeds, does not create

a partnership between the third person and the buyer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 13-16.]

5. CONTRACTS—PERFORMANCE.

A third person, who agrees with the buyer of cattle to advance the funds necessary to carry out the contract of sale, to manage the cattle, to dispose of them, and to pay to the buyer a half of the net proceeds, gives to the buyer a right of action where all the cattle bought under the contract have been, or by the exercise of reasonable diligence might have been, sold by the third person, or where by reason of his fraud any of the cattle remain unsold.

Appeal from District Court, Pueblo County; N. Walter Dixon, Judge.

Action by Charles Gause, prosecuted on his death by George F. Patrick, administrator, against L. Baldwin & Co. and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

This is a proceeding instituted by Charles Gause against two partnerships, each of which was known as L. Baldwin & Co., and designated in the complaint as L. Baldwin & Co. No. 1, and L. Baldwin & Co. No. 2. The former was composed of Levi, J. C., Fred, and Lee Baldwin; the latter, formed the 26th of June, 1890, was composed of the same parties and Anna and Mary Baldwin and Edward F. Swift. Gause, having died during the pendency of the action, George F. Patrick, administrator of his estate, was substituted as plaintiff. The facts upon which the controversy arises, as alleged in the complaint and found by the court below, are, in brief, as follows: On the 23d of September, 1896, Gause had an agreement with T. F. Wright, manager of the Western Union Cattle, Land & Irrigation Company, for the purchase of a herd of cattle known as "Anchor X Cattle." Being financially unable to purchase and handle the cattle under this agreement, he made an agreement with the firm of Levi Baldwin & Co. No. 1 to the effect that the company should advance the necessary funds to carry out his contract with Wright, should receive and pay for the cattle delivered under said contract, and would assume full control and management of, and handle and care for, and dispose of, the cattle delivered, and that, after deducting the purchase price advanced by the company and the necessary expenses for the handling and caring for the cattle, out of the proceeds realized from the sale thereof, the remainder of the proceeds should be divided equally between them; that in pursuance of this understanding and agreement, on October 1, 1896, L. Baldwin & Co. No. 1 entered into a written contract with the Western Union Cattle, Land & Irrigation Company for the purchase of its herd of cattle estimated at 3,000 head, more or less, at \$10.50 per head. Under and in pursuance of this contract there were delivered to L. Baldwin & Co. No. 1, 3,416 head of cattle, for which they paid \$33,883.50. In March, 1897, L. Baldwin & Co. No. 1 entered

into a written contract with Simpson & Bourbonla for the purchase of 640 head of cattle, 116 head of which were known as the "Hank Bignell Cattle," which were delivered to L. Baldwin & Co., and for which they paid \$9,944. The plaintiff claims, and the court below found, that these cattle were purchased under the same agreement between Gause and the company as the Anchor X cattle, and were to be handled upon the same terms, and that he (Gause) was to receive one-half of the net profits derived therefrom. The referee finds that from the proceeds derived from the cattle sold, after deducting the purchase price and expenses, there remained in the hands of L. Baldwin & Co. No. 1 at the time of the beginning of this suit a net profit of \$11,786.73; that Gause was entitled to one-half of this amount, less \$2,900 theretofore paid him, being a balance of \$2,933.36.

The referee further finds that there remained unsold and in the possession of L. Baldwin & Co. No. 1 at the time of the commencement of this suit 1,047 head of cattle, in regard to which he makes the following finding: "There is nothing in the evidence to show what is the value of these cattle, taken as a herd. Baldwin & Co., during 1900, marketed cattle at the sum of \$18.55 per head, but these were evidently marketable cattle. As to what herds of cattle were worth per head there is nothing to show. There is the testimony of Mr. Logan that in 1899 calves were worth \$11 per head. On this basis I estimate that the cattle as a herd were worth \$17 per head. This, then, would fix the value of the cattle at the time this suit was brought at \$17,799." And he finds that there was due Gause from the defendants one-half the value of these cattle, to wit, \$8,899.50, which, together with the balance above mentioned, made a total indebtedness of Baldwin & Co. to Gause of \$11,892.86. The court below approved the referee's report and rendered judgment against L. Baldwin & Co., Levi Baldwin, Lee Baldwin, Fred Baldwin, and Anna Baldwin for this amount and costs.

O. G. Hess, Robert C. McManus, and Alva B. Adams, for appellants. Crane & Patrick, for appellee.

GODDARD, J. (after stating the facts as above). Among the numerous errors assigned, appellants challenge the correctness of this judgment upon the ground that it is not in accordance with the allegations of the complaint, or justified by the evidence introduced. By the express terms of the contract alleged, and as testified by Mr. Gause, L. Baldwin & Co. No. 1 was to receive, pay for, handle, care for, and sell the cattle, and, after deducting from the amount realized from their sale the purchase price and the amount expended for their care and management, pay to Gause one-half of the remaining net proceeds. There is no averment of

wrongful conduct or willful neglect on the part of the defendant in selling or failing to sell the cattle received under the contracts. The allegations of the complaint are, in substance: That a large per cent. of the cattle and calves delivered under the contracts had been sold at a large profit, and all of them could have been sold at and proximate to the time of said delivery for prices that would have netted large and substantial profit; that L. Baldwin & Co. No. 1 failed and neglected and refused to dispose of all of said cattle, but took possession of a large remnant of cattle and turned the same out upon the ranges, and, although for a long time subsequent to the delivery of such remnant the prices were such that all of said cattle and offspring therefrom could have been disposed of at a fair and reasonable net profit, L. Baldwin & Co. No. 1, though importuned to do so, refused and neglected to dispose of the same, and such said remnant remained in the possession of that company, or its successor, L. Baldwin & Co. No. 2. These averments were put in issue by the answer, and we find no evidence as to whether these cattle were marketable, or could have been sold at a profit, or any evidence tending to show any bad faith or willful misconduct on the part of the defendants in failing to dispose of the cattle remaining on hand at the time of the commencement of this suit. In these circumstances, we do not think the defendants are chargeable with the cattle unsold, or liable to plaintiff for one-half of their value, even if such value was ascertained upon competent testimony; and they certainly cannot be held for an amount estimated by the referee without any evidence upon which to base such estimate.

Notwithstanding the judgment must be reversed, and the cause remanded for the reasons above given, we feel it incumbent upon us, in view of another trial, to determine the further question as to the relationship of the parties under the agreement set forth in the complaint and relied on by plaintiff. Counsel for appellee contend, and the court below found, that a partnership existed between Gause and L. Baldwin & Co. No. 1 in relation to the transaction under consideration, while counsel for appellants insist that the terms of that agreement do not create that relationship between the parties, but lacks many of the essential elements of a partnership, viz., "Community of loss, community of title, community of expenses, and common right to dispose of the property for purposes of a partnership." *Beckwith v. Talbot*, 2 Colo. 639. In *Lee v. Cravens*, 9 Colo. App. 272, 288, 48 Pac. 159, 164, it is said: "Another incident of a partnership is the sharing of losses by the partners. The partnership contract may say nothing about losses, but the right to participate in profits implies a corresponding liability for losses; and it has accordingly been held that an agreement for the division of profits is admissible in evi-

dence as tending to show a partnership. Where, however, an agreement between two or more persons, in relation to the prosecution of an enterprise, provides that one of their number shall incur no risk, and be chargeable with no loss, the agreement is not one of partnership." Under the contract with the Western Union Cattle, Land & Irrigation Company and the contract with Simpson & Bourbonla, the title to the cattle purchased and their increase vested in L. Baldwin & Co. No. 1. They had the care, management, and the sole power to dispose of them. There was no community of loss between Gause and the company. If the cattle had died after the purchase by the company, or the venture had proven a failure for any other reason, the whole loss would have fallen upon the company, and Gause would not have been answerable to the company for any part of the loss it may have suffered thereby. As we construe the agreement between Gause and L. Baldwin & Co. No. 1, it did not constitute a partnership between them, but is evidence of the fact that Gause turned over to L. Baldwin & Co. his agreement with Wright for the purchase of the Anchor X cattle and all his rights thereunder, in consideration that the company should assume all responsibility of the purchase, care, and disposition of the cattle, and account for, and pay to him, one-half of whatever net profit should be realized from the transaction when consummated. Under this contract, a right of action would exist when all the cattle purchased by L. Baldwin & Co. No. 1 in pursuance of it had been, or by the exercise of reasonable diligence might have been, sold, or when it is shown that, by reason of the fraud or willful misconduct on the part of the defendant companies, any of them remain unsold.

The judgment is reversed, and the cause remanded.

Reversed.

STEELE, C. J., and BAILEY, J., concur.

PARK v. PARK et al.

(Supreme Court of Colorado. July 1, 1907.
Rehearing Denied Oct. 7, 1907.)

1. HUSBAND AND WIFE—ALIENATION OF AFFECTION—EVIDENCE.

In an action by a wife for alienation of affection of her husband, evidence *held* insufficient to justify a recovery.

2. WRIT OF ERROR—ADMISSION OF EVIDENCE—REVIEW.

Where both parties assumed that certain declarations of plaintiff's husband made to her during the marriage were inadmissible, without the husband's consent, and on his refusal to consent no attempt was thereafter made to prove such declarations, the admissibility thereof without such consent was not reviewable by writ of error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1066.]

3. SAME—PREJUDICE.

Where certain letters, offered by plaintiff and excluded, contained nothing tending in any

degree to prove her cause of action or corroborate her testimony, but contradicted her in every important particular, she was not injured by their exclusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4152.]

Error to District Court, City and County of Denver; F. T. Johnson, Judge.

Action by Julia Park against William S. Park and others. From a judgment in favor of defendants, plaintiff brings error. Affirmed.

Geo. W. Taylor and W. T. Rogers, for plaintiff in error. M. J. Bartley, for defendants in error.

CAMPBELL, J. This is an action by Julia Park, wife of Charles H. Park, to recover damages against defendants, the two sisters and the son of Charles H. Park, for alienating her husband's affections, harboring him, and causing him to abandon and desert her. The material allegations of the complaint were denied, and upon trial to the jury, after both parties had introduced their evidence, the court, upon motion of defendants, directed the jury to find a verdict in their favor. From that judgment plaintiff sued out this writ of error.

The errors assigned concern the legal sufficiency of, and the rulings of the court upon, the evidence. It is doubtful if plaintiff has conformed to the practice governing reviews in this court, so as to entitle her to be heard upon the matters argued in her counsel's brief; but we shall disregard defendants' motion to dismiss for such failure, and dispose of this writ on its merits.

Counsel for plaintiff says that a defendant who moves for a verdict admits, for the purpose of the motion, that the evidence received in behalf of plaintiff is true; and, if it is legally sufficient to support a verdict, the motion cannot be granted, citing *Schwenke v. Union Depot Co.*, 12 Colo. 341, 345, 21 Pac. 43, and *Denver Tramway Co. v. Owens*, 20 Colo. 107, 119, 36 Pac. 848. Counsel also says that any defects in plaintiff's proofs, if aided or cured by the defendants' own evidence, cannot be taken advantage of by the latter upon this review. He therefore says that, unless the court, upon all the evidence produced, would have set aside a verdict had one been returned in plaintiff's favor, this judgment must be reversed. For our present purpose, let such contention be granted. We proceed, first, to examine the evidence to see if it is legally sufficient to prove plaintiff's cause of action. The following material facts are not in serious controversy: All the parties lived in Pennsylvania, when we first hear of them. In October, 1879, the plaintiff and Charles H. Park were married. The first wife of Charles had then been dead about eight years. During the time between the two marriages, Elizabeth, the sister of Charles, kept house for him, and his son William, a boy 14 years old at the time of the second marriage, lived with the family, and

Martha occasionally was in the home. About three weeks after the second marriage, Elizabeth ceased to live with her brother. William remained in his father's home for several years. The two sisters moved to Denver, Colo., in 1889, Elizabeth in April, and Martha in June. William followed in 1890, remaining in Denver till 1891, when he went to Garfield county to live on a ranch; the sisters remaining in Denver, and Martha being engaged in teaching school, and Elizabeth in dressmaking. Meanwhile the plaintiff and her husband continued to live in Pennsylvania. Some time later, Charles H. Park first came to Denver on a visit to his sisters, where he remained for about three months, then went to his son's ranch, and afterwards returned to his wife in Pennsylvania. In May, 1897, he returned to Colorado for his permanent residence, and was followed by his wife some time in October of the same year. They kept a boarding house in Denver for several months. Later—just when is not altogether clear from the evidence—he left Denver with the intention of no longer living with his wife, and went to the ranch of his son in Garfield county, and there brought a suit for divorce, which seems afterwards to have been removed for trial to one of the courts in the city and county of Denver.

In the light of the foregoing, the particular facts presented by plaintiff, in her briefs, and which she says are legally sufficient to establish the charges she makes against defendants, have thus been stated by her counsel: That the morning after plaintiff's marriage, Elizabeth and Martha stated to her that she must have given their brother love drops and done all the courting; that they had not the least idea that he would bring a young girl like her to his home, and, when plaintiff replied that she and her husband loved each other, they laughed at her. That William made it unpleasant for her after she came to her husband's home by shooting her in the eye with an arrow while she was engaged in washing, and Elizabeth justified her nephew's conduct by saying that his father did not care if he broke every window in the house. William seemed to be of the same opinion, and stated to plaintiff that he did not see why his father married her and brought her to his home. Martha and Elizabeth insisted on having a folding door between their room and plaintiff's kept open, and insinuated that plaintiff communicated a vile disease to their brother. William virtually took charge of and "ran the house" without consulting plaintiff, and on one occasion made a violent assault upon her. Elizabeth and Martha told plaintiff their family did not want her, and that her talk about love was nonsense, there was nothing of it in the world, and that she would have to give up her husband. After defendants came to Colorado, they wrote several letters to plaintiff's husband, which plaintiff says

she saw, the purport of which was the acknowledgment of the receipt of money which her husband had sent to them, and these letters also contained invitations to the husband to come out to William's ranch; that he, but not plaintiff, was needed there. On receipt of these letters, the husband seemed to be dissatisfied, and would not be like himself, not speaking for days at a time. That after he returned from his first visit to Colorado to their home in Pennsylvania his conduct was changed, and again he seemed to be dissatisfied. That the return of Charles to Colorado in May, 1897, was without warning to plaintiff, and she was ignorant of his whereabouts for about a week, when she received a letter from him in Denver and after some correspondence between her and her husband she came to the city of Denver. Upon her arrival there, her husband was not at the train to meet her, as had been arranged, whereupon she went to the schoolhouse, where Martha was engaged in teaching, and found her there; but Martha refused to shake hands with her, and falsely told her that her husband was at William's ranch, and when plaintiff expressed an intention of going there Martha said she was not wanted. That after plaintiff and her husband had kept a boarding house in Denver for about four months, he opened up communication with defendants, and trouble with plaintiff was renewed. That William assisted his father, and furnished him money to bring the divorce suit, and that the husband got about \$500 of her money from the bank and left her without any support when he took up his permanent residence with his son at the ranch.

We have thus detailed the various facts which plaintiff claims that the evidence establishes, and which, for the purposes of this case, she says must be taken as true, and as legally sufficient to uphold a verdict in her favor, had the jury returned one. We do not say that the evidence establishes all these facts, but we may assume that her claim in that respect is well founded. In their testimony defendants positively deny ever having made any efforts whatever to induce plaintiff's husband to leave her, or to alienate his affections. In every material point the three defendants squarely contradict plaintiff in her testimony, and they are corroborated in important particulars by certain facts and circumstances which it is not necessary to mention. It nowhere appears in this record as a fact, and not at all, unless unfounded suspicions which plaintiff undoubtedly entertains, and unwarranted inferences which she deduces, are to be treated as facts, that either of the defendants ever sought improperly to influence her husband against, or to turn his affections from, her, or to persuade him to abandon or cease to live with her. There is not a particle of evidence that any of the statements which she testifies they made to her were ever communicated to her

husband either by them or her, or that his alleged desertion, or loss of affection, were in any degree caused by their acts or conduct. It may be true that neither of the defendants liked the plaintiff, or approved of her marriage, after they became acquainted with her; but, if either of them was guilty of the charges which she makes against them in her complaint, there is no legal or sufficient proof of it in this record. Had the jury returned a verdict upon this evidence in plaintiff's favor, it would have been the duty of the court to set it aside as having no legal support and manifestly against the weight of the evidence. Mere suspicions in which plaintiff indulges, and inferences from conduct that a sane mind would not draw, are not sufficient to justify a recovery of damages, and the court did right in directing a verdict for the defendants. Plaintiff's contention that her case is aided by the defendants' own evidence is wholly without merit. There is nothing in the testimony of either of the defendants, or any evidence produced by them, that tends in any degree, directly or indirectly, to sustain, or render probable, any of the charges contained in the complaint.

2. Counsel strenuously argues that the court erred in not permitting plaintiff to testify to her husband's declarations made to her during the existence of the marriage, and in refusing her offer of his letters written to her during coverture. Reliance is had on *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614, wherein the court held, in a similar action by the wife, that declarations of the husband having reference to his separation, or contemplated separation, were admissible for the purpose of showing what had probably caused such separation, though his mere declarations were not admissible to show what defendant's conduct really was. In that case the objection to such declarations which apparently defendant interposed was that declarations of a person not a party to an action are incompetent. The objection (made here) seems not to have been made there, at least was not discussed by the court, that under section 4824, Mills' Ann. St., neither husband nor wife during the marriage or afterwards shall be, without the consent of the other, examined as to any communication made by one to the other during the marriage. But assuming that such declarations are proper under the authority of the case cited, we are of opinion that no such question is here presented. The declarations of the husband apparently were considered by counsel for both parties to be incompetent without the husband's consent, and when plaintiff's counsel called him as a witness, and asked him if he would consent that his wife might testify to his declarations that occurred during the marriage in relation to the cause of separation, and he refused to give his consent, no attempt was made to interrogate plaintiff with reference thereto, or to prove such declarations. So far as the oral declarations

are concerned, we do not have before us a case where the court refused to admit them. With respect to the husband's letters to his wife, which it is said were excluded by the court, we say, first, that it does not clearly appear from the record whether they were admitted or rejected. They are reproduced in the abstract, and an examination of them shows that they contain nothing whatever tending in any degree to prove the plaintiff's cause of action, or to corroborate her testimony. Their tendency is to contradict her in every important particular, and, if they were excluded by the court, such ruling in nowise prejudiced the plaintiff.

3. Counsel uses strong and extravagant language in characterizing the conduct of the trial judge as unfair to the plaintiff. We have examined the record with much care, but are unable to discover any evidence of unfairness. Indeed, great latitude was allowed plaintiff in her attempt to show that defendants had wronged her. If any errors were committed in rulings on evidence, they were against the defendants, rather than the plaintiff.

Plaintiff signally failed to prove her case, and in directing a verdict for defendants and dismissing the action the court was clearly right, and its judgment is therefore affirmed. Affirmed.

STEELE, C. J., and GABBERT, J., concur.

LITTLETON et al. v. BURGESS.

(Supreme Court of Wyoming. Oct. 7, 1907.)

1. APPEAL—CHANGE OF VENUE—BILL OF EXCEPTIONS—NECESSITY.

The question of error on ruling on a motion for a change of venue cannot be considered where there is no bill of exceptions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2361.]

2. INJUNCTION—UNDERTAKING—PARTIES.

Rev. St. 1899, § 4043, provides that no injunction shall operate until an undertaking is given to secure the damages incurred by the party enjoined. Section 1107 provides that the county and prosecuting attorney shall prosecute or defend for the state or county in all civil or criminal suits or proceedings at law in which the state or county is a party. *Held* that, where an injunction was issued restraining the county and prosecuting attorney from prosecuting a party for violating the anti-gambling law, the undertaking properly ran to the attorney individually, as neither the state nor county was a party.

3. COURTS—JURISDICTION—ESTOPPEL TO OBJECT.

Where one invokes the power of a court of general jurisdiction to obtain an injunction, he cannot thereafter be heard to say, in avoidance of damages for injury resulting therefrom, that the court had no jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 149.]

4. SAME—DISTRICT COURT—EQUITY JURISDICTION.

The district court has original equity jurisdiction.

5. INJUNCTION — UNDERTAKING — DAMAGES — ATTORNEYS' FEES.

Although the court had no jurisdiction to enjoin a prosecuting attorney from prosecuting for a crime, attorney's fees incurred in procuring the dissolution of the injunction and in defeating the action were damages within the terms of the undertaking given on the granting of the injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 597.]

6. SAME.

The attorney's fees incurred were recoverable in an action on the undertaking, though not actually paid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 597.]

7. APPEAL—QUESTIONS REVIEWABLE.

Where, on appeal from a judgment in an action on an undertaking given on the issuance of an injunction, the record failed to show that a motion for an itemized bill for attorney's fees was made, or that objections were made or exceptions taken to the admission of evidence on the ground that such fees were not itemized, the question could not be considered.

8. PARTIES—PARTIES PLAINTIFF—WHO ARE.

All having interests in common with those of plaintiff in the subject-matter of a suit should be joined as plaintiffs; but, on a refusal to join as such, they may, on appropriate averments, be made defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, §§ 54, 55.]

9. PARTIES — DEMURRER — GROUNDS — LEGAL CAPACITY TO SUE.

Under the express provisions of Rev. St. 1899, § 3535, it is only when the plaintiff has no legal capacity to sue that a demurrer will lie on the ground that he has no capacity to sue; the words "legal capacity to sue" referring to infancy, want of authority, or any personal disability to maintain the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 118.]

Error to District Court, Sheridan County; Charles E. Carpenter, Judge.

Action by James H. Burgess against Fred Littleton and another. Judgment for plaintiff, and defendants bring error. Affirmed.

M. B. Camplin, for plaintiffs in error. Chas. A. Kutcher, E. E. Enterline, and Lona-baugh & Wenzell, for defendant in error.

SCOTT, J. This action was brought in the district court of Sheridan county by the defendant in error, as obligee, against the plaintiffs in error, as obligors, to recover upon an injunction undertaking given and executed by Littleton, as principal, and Schroeder, as surety, in an action wherein the said Littleton was plaintiff and the said Burgess, county and prosecuting attorney of Sheridan county, Wyo., was defendant. The case was tried without the intervention of a jury, and the court found and rendered judgment in favor of Burgess. Littleton and Schroeder bring the case here on error.

1. Plaintiffs in error (defendants below) complain that the trial court denied their motion for a change of venue. That question cannot be here considered, for the reason that there is no bill of exceptions, and the motion and affidavit in support thereof, not being pleadings in the case, can only be

brought into the record by such a bill. It was so decided in Perkins v. McDowell, 3 Wyo. 328, 23 Pac. 71, and that decision has ever since been the rule of practice in this court.

2. Plaintiffs in error demurred to the petition on three grounds, viz.: First, that the petition does not state facts sufficient to constitute a cause of action; second, that there is a defect in the party plaintiff, appearing on the face of the petition, in this, that "James H. Burgess" in his individual capacity, or as an individual, is not the proper party plaintiff, but that the face of the petition discloses the proper party plaintiff to be either James H. Burgess, as county and prosecuting attorney of Sheridan county, Wyo., or the state of Wyoming; third, that the plaintiff has no capacity to sue, as disclosed from the face of the petition. The demurrer was overruled, and the defendants were given time within which to plead, to which ruling they reserved an exception, and such ruling is here assigned as error.

It is alleged in the petition that James H. Burgess was the duly elected and qualified county and prosecuting attorney in and for Sheridan county during 1904 and 1905; that on August 20, 1904, the plaintiff in error Littleton commenced an action in the district court of Sheridan county against said Burgess, county and prosecuting attorney of Sheridan county, Wyo., the object and purpose of which was to restrain and enjoin the defendant therein, as county and prosecuting attorney of said county, from causing the arrest and prosecution of the said Littleton for a violation of the anti-gambling law, and from further prosecuting him in a proceeding wherein he had been duly charged and arrested for a like offense; that upon application to the judge of said district court a temporary injunction was directed to issue restraining and enjoining said Burgess, as such county and prosecuting attorney, from causing the arrest and from prosecuting said Littleton for the alleged violations of the law, upon said Littleton giving an undertaking in the sum of \$1,000 conditioned as required by law. Thereupon Littleton, as principal, and Schroeder, as surety, executed and filed the undertaking involved in this suit, which was approved by the clerk of the district court, and the writ issued and was served upon Burgess. The undertaking is in the following words, to wit: "Bond for Injunction. Whereas, in the above-entitled action, a temporary injunction has been granted as prayed in said petition on file herein, the same to become effective and be in force upon the plaintiff executing a bond to the defendants in the sum of one thousand dollars, conditioned as required by law: Now, therefore, we, Fred Littleton, as principal, and Fred Schroeder, as surety, acknowledge ourselves to be held and firmly bound unto said defendant in the sum of \$1,000.00, conditioned that the said plaintiff will pay said

defendants and each of them all damages which they may sustain if it be finally determined that said injunction ought not to have been granted. In witness whereof, we have hereunto set our hands this 20th day of August, A. D. 1904. [Signed] Fred Littleton, Principal. Fred Schroeder, Surety." It is further alleged that thereafter such proceedings were had therein that on March 22, 1905, judgment was duly entered in said cause by which it was adjudged that said temporary injunction ought not to have been granted, and the action was dismissed; that thereafter, upon proceedings in error, this court affirmed the said judgment; that said Burgess contracted and obligated himself to pay the sum of \$1,000 as attorney's fees in the defense of said action and to secure the dissolution of the injunction. In which sum he has been damaged and prays judgment therefor.

It will be observed that the injunctive suit was against James H. Burgess, county and prosecuting attorney of Sheridan county, Wyo., and that the undertaking runs to James H. Burgess as an individual. It is contended that the undertaking is not such as required by law, in that it was not made to the defendant in his official capacity, but to him personally, and that as such it did not constitute a basis for the issuance of the writ; and, also, that the writ was void because the court had no jurisdiction of the subject-matter of the action. It is provided by statute that the undertaking shall be given "to secure the party enjoined the damages he may sustain if it be finally decided that the injunction ought not to have been granted." Section 4043, Rev. St. 1899. The facts alleged in the petition were not sufficient to invoke the exercise of equitable jurisdiction. It was not such an action as is contemplated by the statute in prescribing the duties of the county and prosecuting attorney. Section 1107, Rev. St. 1899, provides that the county and prosecuting attorney shall prosecute or defend for the state or county in all civil or criminal suits or proceedings at law in which the state or county is a party. Neither state nor county was a party to the action. Both were strangers to the injunction suit, and neither had nor could have any interest in or title to the proceeds of any judgment recovered on the undertaking. In *Breeze v. Haley et al.*, 13 Colo. App. 438, 59 Pac. 333, Breeze was temporarily enjoined as county treasurer from collecting taxes. The undertaking ran to him individually, and, upon determination that the writ ought not to have been granted, suit for damages was commenced on the undertaking against the obligor and his sureties. The first complaint was entitled "Lewis H. Breeze, Plaintiff," while the second amended complaint was entitled "Lewis H. Breeze, as Treasurer of Routt County, Plaintiff, v. Ora Haley et al., Defendants." There was no answer to the complaint, and, upon admission of the

fact that Breeze had ceased to be treasurer of Routt county at the time of the commencement of the action, a motion to dismiss was sustained on the ground that at the time of the commencement of the action Breeze was not the treasurer and had no authority to bring it. The plaintiff then asked leave to withdraw his second amended complaint and to substitute and reinstate his first complaint. This motion was denied, and judgment of dismissal was ordered. The Court of Appeals reviewed the judgment and held that the words descriptive of the plaintiff in the second amended complaint were unnecessary, and further said: "No considerable injury can result to the defendants by permitting the plaintiff to abandon his second amended complaint and fall back on his first." In that case it was also said: "It is true that the collection of taxes was a duty which pertained to his office as treasurer of the county, but it was a duty for the performance of which he was personally responsible." In the case before us it was a duty pertaining to the office of county and prosecuting attorney to prosecute the case for the state, and Burgess, having qualified as such officer, was personally liable on his official bond for a failure to do so. Section 1107, Rev. St. 1899. There can be no question that he had a personal interest in the defense of the injunction suit in order to avoid personal liability upon his official bond. His authority to act in the matter of the prosecution of the criminal case was derived from his office. The state looked to him for benefits from the performance of his official duties, but whether or not he would act in the performance of those duties was a matter personal to himself. That he was about to act in the prosecution of Littleton was the matter complained of, and it was those acts which were sought to be restrained by the injunction. This being the case, it follows for the purposes of this suit that the undertaking properly ran to Burgess individually, and that the action thereon was maintainable in his name. Section 4043, Rev. St. 1899; *Breeze v. Haley et al.*, supra.

That the court had no jurisdiction to enjoin the prosecution of crime by the prosecuting officer was decided by this court in *Littleton v. Burgess*, 14 Wyo. 173, 83 Pac. 864, 2 L. R. A. (N. S.) 631. It does not, however, follow that, because of absence of such jurisdiction, no action can be maintained upon the undertaking given and upon which the writ issued. When in such a case one invokes the power of a court of general jurisdiction, he cannot thereafter be heard to say, in avoidance of damages for injury resulting therefrom, that the court was without jurisdiction. 22 Cyc. 1040, and cases there cited. The district court possesses original equity jurisdiction. In *Robertson v. Smith*, 129 Ind. 428, 28 N. E. 857, 15 L. R. A. 273, it was alleged as a defense to an action on an injunction bond that the order granting the injunction was void for want of jurisdic-

tion over the person of the defendant, and upon demurrer it was held insufficient to constitute a defense. The case is an instructive one and discusses the question of jurisdiction of the subject-matter as well as of the person, as affecting the right to recover in such cases. After reviewing the authorities and quoting from the opinions in *Adams v. Clive*, 57 Ala. 249, *Hanna v. McKenzie*, 5 B. Mon. (Ky.) 314, 43 Am. Dec. 122, and *Hugh on Injunctions*, § 1052, as sustaining the proposition that want of jurisdiction over the subject-matter of the injunction suit is not a defense to an action on the injunction bond, the court said: "We regard these authorities as establishing the proposition that, when a plaintiff files a complaint and bond, and procures an injunction to issue from a court of general jurisdiction, he is, when sued upon the bond, estopped to say that the court granting the injunction was without jurisdiction. They proceed upon the theory that it does not lie in the mouth of one who has affirmed the jurisdiction of a court in a particular matter, to accomplish a purpose, to afterward deny such jurisdiction to escape a penalty." To the cases mentioned and discussed by that court may be added the following cases, where want of jurisdiction over the subject-matter to issue the writ was also held to be no defense to an action upon the injunction bond, and which were also referred to in that case, viz.: *Stevenson v. Miller*, 2 Litt. (Ky.) 310, 13 Am. Dec. 271; *Hoy v. Rogers*, 4 T. B. Mon. (Ky.) 225; *Cumberland Coal & Iron Co. v. Hoffman S. C. Co.*, 39 Barb. (N. Y.) 16. The question is so clearly set forth and the principle so clearly stated in the above quotation that it would be useless to try to enlarge upon it. We regard it as decisive of the question here presented.

It is urged that damages within the terms of the undertaking do not include attorney's fees, and that, as the trial court had no jurisdiction to issue the writ, there was no occasion or necessity to employ counsel. The Supreme Court of Alabama, in *Rosser v. Timberlake*, 78 Ala. 162, said: "It is a mistake to suppose that, because there is no proof of present injury by the injunctive and restraining order, there was no occasion to employ counsel to defend it. Any suit brought, if not defended, may result in costs, if not in a more grievous wrong against defendant. It does not lie in the mouth of complainant, who has forced another into court, to claim exemption from liability on the plea that his suit was so harmless or frivolous as not to call for defense." In the case before us, the plaintiffs in error forced the defendant in error into court to determine at least a question of jurisdiction—a question which was a judicial one, and which he could not determine himself—and to ignore the writ might have resulted in great wrong to him. No obligation rested upon him to ignore the writ, even though it was issued without jurisdiction. *Robertson v. Smith*, supra. His

right to defend either upon the merits or upon jurisdictional grounds accrued to him upon the service of the writ (*Walton v. Develing*, 61 Ill. 201), and by no sophistry of reasoning could he be barred of that right. The right having so accrued, he had the right to be represented by counsel. If the attorney's fees were incurred to procure the dissolution of the injunction, then by the great weight of authority the defendant in error was damaged to that extent. 22 Cyc. 1053, and cases there cited; *Robertson v. Smith*, supra; *Noble v. Arnold*, 23 Ohio St. 265. In the last-mentioned case, the court said that "a distinction is to be taken between expenses incurred only in procuring a dissolution of an injunction, and such as are incurred in the defense of an action, to which the injunction is merely auxiliary, and is not essential to the relief sought." This distinction runs all through the adjudicated cases, where such fees are allowed as an element of damage in an action upon the bond. In the case before us, the object of the writ was to perpetually enjoin the defendant from doing the acts complained of, and the attorney's fee was, as appears from the petition, reasonable and necessary to procure the dissolution of the temporary injunction and defeat the action. It is held by the Supreme Court of Kentucky that when injunction is the relief sought, and in fact gives the relief if sustained, no recovery for counsel fees can be had. *Tyler v. Hamilton*, 108 Ky. 120, 55 S. W. 920; *Turnpike v. Dulaney*, 86 Ky. 518, 6 S. W. 590; *Chicago, etc., R. Co. v. Sullivan*, 26 Ky. Law Rep. 46, 80 S. W. 791. That court apparently stands alone in drawing this distinction. We think the reasoning is better in *Reese v. Northway*, 58 Iowa, 187, 12 N. W. 258, where it is held that attorney's fees are allowable for defending in the entire action where injunction is the only relief sought, and dissolution is procured only upon final hearing. This rule is announced and followed in *Creek v. McManus*, 13 Mont. 152, 32 Pac. 675. While the temporary injunction was dissolved by the trial court, such expenses for reasonable attorney's fees as were necessary in defending in the proceedings in error were so incurred to avoid a reversal of the order and a reinstatement of the injunction, and therefore properly chargeable. *Wallis v. Dilley*, 7 Md. 237. Nor does it follow that there can be no recovery for attorney's fees incurred, though not actually paid. In *Noble v. Arnold*, supra, the court said upon this subject: "An indebtedness incurred—a liability to pay—is a damage, and we think is sufficient to constitute a liability on the undertaking." Such is the well settled rule. 16 Ency. of Law, 469.

It is further objected that the attorney's fees for defending the action and those necessary for obtaining a dissolution of the injunction are not itemized or separated. It is apparent from what has already been said that upon the facts alleged there can be no

merit in this contention. If the facts were different, then the question could be raised either by motion, or by objection to evidence during the trial, but not by demurrer. The record fails to show that any motion for an itemized bill was made, or that objections were made or exceptions taken to the admission of evidence on that ground, and, even if the facts alleged disclosed the two classes of items, still the question would not be properly before us, and for that reason could not be here considered.

The second ground of demurrer is that there is a defect in the party plaintiff. This, as a statutory ground, goes to the nonjoinder of necessary parties as plaintiffs. *Powers et al. v. Bumcratz*, 12 Ohio St. 273, 293. All those whose interests are in common with those of plaintiff in the subject-matter of the suit should be joined as plaintiffs, unless upon a refusal to join as such they may upon appropriate averments be made defendants. A failure to do either, where the defect is apparent, would render a petition demurrable on this ground. The wording of the demurrer, together with the specification of the particular defect and the argument of the counsel, indicate that the objection is rather upon the ground that the action is not brought in the name of the real party in interest. Having already held in another part of this opinion that Burgess had an interest, and that neither the state nor the county had any interest in the subject-matter of the injunction suit, it follows that they were not necessary parties to the action on the bond.

That the plaintiff has no capacity to sue is not, strictly speaking, a ground for demurrer under our statute. The word "legal," as qualifying "capacity," is omitted by the pleader, and it is only when the plaintiff has no legal capacity to sue that a demurrer will lie for that cause. Section 3535, Rev. St. 1899. The words "legal capacity to sue," in the sense used in the statute, have a well-defined meaning. They are directed to the legal disabilities of the plaintiff, and the facts showing such legal disabilities are independent of the cause of action. In *Brown, Ex'r, et al. v. Critchell et al.*, 110 Ind. 31, 7 N. E. 888, it is said: "The want of legal capacity to sue, as a cause for demurrer, has reference to plaintiffs under legal disabilities, and not to a case where the facts alleged show that the plaintiff has no right to sue in that particular case. In such case the assignment should be that the complaint does not state facts sufficient to constitute a cause of action." It was so held in *Weidner v. Rankin et al.*, 26 Ohio St. 522, and *Buckingham v. Buckingham*, 36 Ohio St. 69. It is said in *Stang et al. v. Newberger et al.*, 6 Ohio N. P. 60, 8 S. & C. P. Dec. 80, that "a dictum in *Saxton v. Selberling*, 48 Ohio St. 539, 29 N. E. 179, tends somewhat in an opposite direction, but it was unnecessary to a determination of the case, and is inconsistent with the decision in *Weidner et al.*

v. Rankin et al., supra, which was seemingly overlooked by the judge rendering the opinion." It does not appear upon the face of the petition, even if the demurrer be held sufficiently specific, that the plaintiff is under any legal disability, such as infancy, want of authority, or any personal disability, to maintain the action. It is to these matters that a demurrer upon this ground is directed. *Farrell v. Cook*, 16 Neb. 483, 20 N. W. 720, 49 Am. Rep. 721; *Bliss*, Code Pl. (2d Ed.) §§ 407-409; *Haskins v. Olcott*, 13 Ohio St. 210; *Smith v. Sewing Machine Co.*, 26 Ohio St. 562; *Dale et al. v. Thomas et al.*, 67 Ind. 570; *Debolt v. Carter*, 31 Ind. 355.

Our conclusion is that the demurrer was properly overruled on each and every ground. The judgment will be affirmed.

Affirmed.

POTTER, C. J., and BEARD, J., concur.

PARDEE v. KUSTER et al.

(Supreme Court of Wyoming. Oct. 7, 1907.)

1. WRIT OF ERROR—EXCEPTIONS—REVIEW.

Under Rev. St. 1899, § 3744, providing that no exception shall be regarded unless it is prejudicial to the substantial rights of the party excepting, an exception will not be considered unless it is material to a substantial right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 612.]

2. SAME.

A party failing to show by his petition a cause of action in his favor against defendant fails to show a substantial right, and his exceptions will be disregarded.

3. PLEADING — ALLEGATIONS — CONCLUSIVE-NESS.

A party is bound by the allegations of his petition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 81-86.]

4. SAME—DEFECTS—AIDED BY VERDICT.

A petition, affirmatively showing that no allegation of an existing fact can be brought into it by amendment, and thereby perfected so that it will support a judgment, can neither be cured by answer, verdict, or judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1443, 1451.]

5. WRIT OF ERROR—REVIEW—HARMLESS ERROR—PLEADING.

Where the judgment is for defendant, the overruling of his demurrer to the petition is not available to him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4105.]

6. SAME—BURDEN OF SHOWING ERROR.

Under Rev. St. 1899, § 3744, declaring that no exception shall be regarded unless it is material, and section 4249, providing that a judgment may be reversed or modified for errors appearing on the record, a plaintiff in error has the burden of showing prejudicial error on the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3670, 4047.]

7. SAME—RECORD—PLEADINGS.

Under Laws 1901, p. 5, c. 3, § 1, providing that plaintiff in error shall file with his petition an application for an order directing the clerk of the district court to transmit to

the Supreme Court all original papers, etc., the pleadings may constitute a part of the record of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2342.]

8. SAME—CROSS-ERRORS—NECESSITY.

Where no affirmative relief is sought, defendant in error may, without assigning cross-error, show that the statement of the facts as set forth in the petition constitutes no cause of action, and that errors in the admission of evidence were harmless.

On petition for rehearing. Denied.
For former opinion, see 89 Pac. 572.

SCOTT, J. The plaintiff in error has filed her petition for a rehearing, upon the ground that the defendants in error filed no cross-assignment of error to the overruling of their demurrer to the petition. It is urged that, in the absence of such cross-assignment, the question of the sufficiency of the petition was not before the court. Taking that view, she submitted no oral argument thereon, nor did she refer to this question in her brief. The defendants in error called this court's attention to the question and devoted a considerable part of their brief to its discussion.

The case is analogous to *Fell v. Muller*, 78 Ind. 507, in which it was said: "The real question for discussion in this case is: Did the appellant's complaint state a cause of action in their favor against the appellee? If it did not state a valid or sufficient cause of action against the appellee, and we think it did not, then it is clear that the appellants were not harmed by any of the rulings of the trial court adverse to them, and the judgment below must be affirmed." In that case there was no assignment of cross-error, and the decision turned on the provisions of the Civil Code of that state to the effect that no judgment shall be reversed by reason of any error or defect in the proceedings which does not affect the substantial rights of the adverse party. Section 3744, Rev. St. Wyo. 1899, is as follows: "No exception shall be regarded unless it is material and prejudicial to the substantial rights of the party excepting." In order that the exception may be considered, it must be material to a substantial right. It is just as essential to show a substantial right either by the pleadings or the record as it is to preserve the exception. A failure to do either would furnish no basis for a review of an alleged error. That there is no substantial right upon the whole case may appear from the allegations of the petition, though, where there has been a trial, it is not generally so, and in most cases that question involves an examination of the entire record. If the party complaining shows by his petition that no valid cause of action exists in his favor against the defendant, then he has failed to show a substantial right, and in such case any and all of his exceptions should be disregarded because harmless. It will be observed that the petition was not defective by reason of the

absence of averment or want of allegation of an existing fact. The execution of the deed, its terms, the time and the purpose for which it was executed, are alleged, and, taken in connection with the other allegations, clearly set forth the claim of the plaintiff. She was bound by the allegations of her petition, and nowhere, either in the record or by suggestion in the argument, does it appear, nor are we able to discover, that any amendment could be made. The defect goes to the question as to whether she has any cause of action, or right to recover, upon a full and complete statement of all the facts. The error is fundamental, in that it affirmatively appears that no allegation of an existing fact can be brought into the petition by way of amendment, and thereby perfect it so that it would support a judgment in her favor. The error is not in failing to plead all the facts, but rested in an attempt to predicate a right of recovery upon a complete statement of facts when no such right exists. It is not the defective statement of a cause of action, but a showing of no cause of action. Such a petition can neither be cured by answer, verdict, or judgment. *Gittings v. Baker*, 2 Ohio St. 21. This case is distinguishable from the Indiana cases (*Anderson*, etc., *Ass'n v. Thompson*, 88 Ind. 405; *Farmer's Bank v. Orr*, 25 Ind. App. 71, 89) cited by plaintiff in error in support of her petition. In those cases the defect did not consist in the absence of any cause of action, but did consist in the omission of a material averment in the allegations of an existing cause of action. The theory of those cases is that, by failing to demur or to assign cross-error, the pleading was treated by the parties as being complete, and it was presumed that evidence was submitted and heard and findings made upon issues necessary to support a judgment, even though there may have been an absence of averment of some material fact. Sections 471, 720, *Elliott App. Proc.*

The defendants in error asked no affirmative relief. They had obtained a judgment in the court below with which they were satisfied. They sought neither to vacate nor modify it, and did not assign the ruling on the demurrer as error prejudicial to them or at all. The finding and judgment being in their favor, the overruling of the demurrer was not available to them. *Blessing v. Blair*, 45 Ind. 540; *Rogers v. State*, 90 Ind. 218; *Reddick v. Keesling*, 129 Ind. 128, 28 N. E. 316; *Allen v. Berndt*, 133 Ind. 355, 32 N. E. 1127; *Thrash v. Starbuck*, 145 Ind. 673, 44 N. E. 548; *Levi v. Allen*, 15 Ind. App. 38, 43 N. E. 571. Nor was the decision based upon the exception to such ruling. The presumption of the correctness of the judgment was necessarily against the contention of the plaintiff in error, and the burden was on her, not only to show error upon the record (section 4240, Rev. St. 1899), but that the error complained of was material and prejudicial to

her substantial rights (section 3744, Rev. St. 1899). In this jurisdiction a defendant in error has always been accorded the right, without assigning cross-error, to direct our attention to different parts of the record presented for review to show that an alleged error was not prejudicial. All parts of the record so presented are accessible to the defendant in error for that purpose. When the complete record is before the court, as it was in this case, the justice of the rule is apparent. It is not within the power of the plaintiff in error to open the record at certain places to sustain his contention, and close the balance to the defendant in error. The entire record was in the court for the benefit of the parties and the court. The pleadings constituted a part of the record of the case. Section 1, c. 3, p. 5, Sp. Laws 1901. If the erroneous admission of evidence may be shown to be without prejudice by consulting other parts of the bill, we see no reason why it could not also be shown by consulting the pleadings, for the latter are as much a part of the record as is the bill. The materiality of the evidence is determined by the issues, and, when the petition affirmatively shows the nonexistence of any legal cause of action, there can be no issues of fact and no right of recovery. Hence the admission or rejection of any evidence would be harmless to the plaintiff. She had no standing in court, and is therefore not in a position to allege or urge prejudicial error. When no affirmative relief is sought, the defendant in error is not precluded from showing from the record the nonprejudicial character of the error complained of, and we hold that this rule is sufficiently broad to enable him, without assigning cross-error, to urge that a full and complete statement of the facts as appears in the petition in this case constitutes an affirmative showing of no cause of action or right of recovery in the plaintiff, and that it would not for that reason support a judgment in her favor. It should be remembered that what is here stated and what we said in the opinion filed is directed and applies to the kind of a petition involved in this case, and we here express no opinion as to one which is defective merely by reason of the absence of averment.

The plaintiff in error has presented a brief upon her contention as to the construction which should be placed upon the documents construed together as the last will of the testator. We discussed the question in the opinion filed, and, after considering the authorities cited in her brief, we find nothing in conflict with that opinion. We are still of the opinion that the reference in the codicil is not merely by date, but by other words which clearly indicate that it was the document executed on May 18, 1903, by itself, which was within the contemplation of the testator. *McLeod v. McNabb*, App. Cas. (1891). It may be conceded that when A.

devises to B., and over to C., the latter, upon the accrual of his right, takes all of the property which B. would have taken under the will. By the codicil the testator substituted Reinsberg as devisee in case of his son's death. It was evidently the intention of the testator to provide that the devise of his property as contained in his will should not lapse, and, as relating back and showing the extent of that devise, the language used in the codicil is material. It is from the context of the will and the codicil thereto that this question must be determined. It will be noticed that the codicil does not merely confirm the former devise, and say that, in the event of the death of the primary devisee, then the property devised to the latter shall go to Reinsberg; but it goes further and designates the property devised over. It says that in that event all the real and personal property owned by testator at the time of his death shall go to Reinsberg, his heirs and assigns forever, unconditionally and without reserve. It is unreasonable, in the face of this language, which discloses the evident purpose of testator to prevent a lapse of the previous devise to his son, to say that such previous devise was less in its scope than the devise over. The language of the codicil as a whole shows that the testator must in confirming the provisions of his will have intended his confirmation of the devise to his son to be equally as broad as the devise over to Reinsberg. If title to the property described in the deed vested in petitioner, then no contingent interest therein vested at the same time in Reinsberg upon the death of the testator. The latter's title was to accrue and vest upon a contingency disassociated with and antagonistic to the idea of the ownership of the property ever having passed to plaintiff in error. The title by devise to the property in controversy never vested in Reinsberg, nor could it, except upon the hypothesis that the testator contemplated, and by his codicil confirmed and ratified by itself, the document which was executed on May 18, 1903. This intention of the testator is apparent and clearly appears from the codicil. It is not a case of latent ambiguity calling for parol testimony, nor is it so contended, and the question was one of construction to be determined and ascertained from the words and language used by the testator in these documents. Sections 956, 1025, cols. 1048, 1135, vol. 49 Cent. Dig. The later codicil operated as a complete revocation of the former devise of the same property to the plaintiff in error, regardless of whether the testamentary deed be construed as a codicil or treated as a will by itself. 1 *Jarman on Wills*, 171, 173; *Rood on Wills*, § 336, and cases cited in support of the text; 1 *Redfield on Wills*, 350, 351, and cases there cited.

It does not appear that the conclusions reached in the opinion filed are in any wise

erroneous, or that any new questions are presented by the petitioner.

Rehearing denied.

POTTER, C. J., and BEARD, J., concur.

DAVIS v. COEUR D'ALENE & S. RY. CO., Limited.

(Supreme Court of Washington. Oct. 10, 1907.)

STREET RAILROADS—INJURY TO PERSONS DRIVING ACROSS TRACK—CONTRIBUTORY NEGLIGENCE.

Where the driver of a wagon saw electric cars approaching a block away on the street he was about to cross, and did not wait until they passed, nor pay the slightest attention to their movement, he was guilty of contributory negligence, barring recovery for injury received in collision with the cars.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 210-216.]

Appeal from Superior Court, Spokane County; W. A. Huneke, Judge.

Action by Phillip Davis against the Coeur d'Alene & Spokane Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, with direction to dismiss.

Belden & Losey, for appellant. Samuel R. Stern, for respondent.

RUDKIN, J. This action was brought to recover damages for injuries to person and property resulting from a collision between the electric cars operated by the defendant company and the plaintiff's express wagon at the intersection of Browne street and Main avenue, in the city of Spokane. The plaintiff had judgment for the sum of \$270.83, and the defendant appeals.

The material facts are these: On the morning of March 29, 1906, the respondent came out of the alley into Browne street near Main avenue driving an express wagon loaded with empty bottles. As he proceeded along Browne street to its intersection with Main avenue, he saw the electric cars operated by appellant coming towards him on Main avenue, about a block distant. Without giving further attention to the approaching cars, he proceeded to cross Main avenue, and as he did so the cars struck the rear of the wagon, causing more or less damage to the vehicle and injury to the person of respondent, for which a recovery was sought in this action. Two grounds of negligence were charged in the complaint: First, that the cars were running at a speed of more than 8 miles per hour, in violation of the ordinances of the city of Spokane; and, second, failure to sound the whistle or ring the bell.

The only testimony offered in support of the first ground of negligence was that of a small boy 13 years of age, who testified that the cars were running about "8, or 10 or 12 miles an hour, somewhere along there." Inasmuch as the respondent saw the approaching cars and knew of their presence, it is

not easy to see how his jeopardy was increased by the failure to sound the whistle or ring the bell; but, if we concede that there was sufficient evidence of negligence on the part of the appellant to carry the case to the jury, yet we think the evidence discloses a clear case of contributory negligence on the part of the respondent, under the rulings of this court. He saw the approaching cars a block or less away, he did not stop until the cars passed, he did not increase his own speed to avoid a collision, nor did he pay the slightest attention to the movement of the cars. In *Criss v. Seattle Electric Co.*, 38 Wash. 320, 80 Pac. 525, the plaintiff saw a street car approaching at about the same distance, and proceeded to drive his team across the track in about the same manner. In *Coats v. Seattle Electric Company*, 39 Wash. 386, 81 Pac. 830, the plaintiff saw a car approaching from the rear, while driving along the track of the railway company, and proceeded to cross the track without giving further heed to the approaching car. In each case this court held that the contributory negligence of the plaintiff barred a recovery, and even a greater lack of care and caution on the part of the respondent is disclosed by this record.

The judgment is therefore reversed, with directions to dismiss the action.

HADLEY, C. J., and CROW, DUNBAR, ROOT, and MOUNT, JJ.

SPARKS v. OKLAHOMA CONST. CO.

(Supreme Court of Oklahoma. Sept. 4, 1907.)

1. BILLS AND NOTES—ACTION—PLEADING—PUBLIC POLICY.

A petition, praying for judgment upon a promissory note, containing a provision showing that it was executed in consideration of the benefits arising to the maker by reason of the construction of a railroad from a given place to another place named, by a time stated, and which is made payable to a construction company, without naming the railroad to be built, or any railroad company as an interested party, does not present such a question of public policy as to make such petition demurrable upon that ground.

2. SAME—ANSWER—BURDEN OF PROOF.

Where, in an action upon a promissory note, which sets forth as the consideration thereof the construction of a railroad to a given point by a given time, an answer is filed setting up a distinct contract providing for the conveyance of real estate as the consideration for the execution and delivery of said note, and where the reply to such answer denies under oath the execution and delivery of such contract, the burden of proving the execution and delivery thereof is upon the defendant, and a failure to prove the execution and delivery of such contract precludes its being received in evidence, and is a failure of that ground of defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1653-1654.]

(Syllabus by the Court.)

Error from District Court, Woods County; before Justice J. L. Pancoast.

Action by the Oklahoma Construction Company against J. W. Sparks. Judgment for plaintiff. Defendant brings error. Affirmed.

Snoddy & Son, for plaintiff in error. Dale & Blier, for defendant in error.

GILLETTE, J. This action was begun in the district court of Woods county June 30, 1904, by defendant in error to recover from the plaintiff in error upon two promissory notes aggregating the sum of \$100, the first of which is Exhibit A to the petition, and reads as follows: "No. 140. \$25.00. Enid, O. T., April 13, 1901. On or before September 1, 1901, for value received, I promise to pay to the Oklahoma Construction Company, or order, the sum of \$25.00, with interest from maturity at the rate of ten per cent. per annum. This note is made in consideration of the benefits accruing to me from the construction and operation of a railroad from the town of Blackwell, O. T., to and into the town of ——— located upon the ——— quarter of section 32, in township 21 north, of range 9 W. I. M., and the erection of a depot and yard facilities thereat. Now, if said railroad is built and in operation on or before the first day of August, 1901, this note shall be in full force and effect; but, if said railroad is built as above provided, this note shall be null and void. And to secure the payment hereof I hereby give and grant to the Oklahoma Construction Company, or its assigns, a lien upon an undivided interest to one red and white cow, 8 years old, now situated upon the southeast quarter of section 34, town 21, range 9 W. I. M., equal to ——— bushels of ———. J. W. Sparks. In presence of C. C. Arel." The second note for \$75 was of like tenor and effect, dated at Enid, Okl., May 6, 1901, and designated the town of Hoyle, located upon the S. W. ¼ of section 32, town 21 N., of range 9 W. I. M., as the point to which said road was to be built by August 1, 1901. The answer, filed after a demurrer to the petition had been overruled, was first a general denial of the allegations of the petition, except such allegations as were expressly admitted, but denied that the railroad was built and in operation as required by the terms of the note, and alleged that there was no depot erected or yard facilities provided on said quarter section of land the 1st day of August, 1901. The defendant, further answering, stated that the notes were based upon an illegal agreement and contract. In that, in addition to the location of the depot and yard facilities at the point mentioned, there was an agreement by which the plaintiff agreed to deliver to the defendant deeds conveying three lots in Ames, Woods county, Okl., which were to be determined by lot or drawing therefor, which agreement was as follows: "Enid, O. T., 4/26, 1901.

In consideration of the execution and delivery of a certain promissory note made by J. W. Sparks and payable September 1, 1901, to the Oklahoma Construction Company, or order, and conditioned for the construction of a certain line of railroad mentioned in the written condition to said promissory note annexed, said Oklahoma Construction Company hereby certifies that said J. W. Sparks is entitled to receive a good and sufficient deed of conveyance to three lots in the town of Ames, Woods county, Oklahoma, conveying to said J. W. Sparks good title to such lot free and clear of all lien or incumbrance, the location of said lot in said town to be determined by lot or drawing therefor, between all parties entitled thereto. And said Oklahoma Construction Company hereby guarantee the due execution and delivery of such deed of conveyance upon the determination by lot as aforesaid, and the payment of said promissory note. The Oklahoma Construction Company, By T. S. Chambers, Its Agent." A second contract of like tenor and effect was executed and delivered May 31, 1901, for one lot. The answer further alleged that there was more than 1,000 lots in the town of Ames of the value of from \$1 to \$300, and that defendant had demanded before suit was brought a deed conveying a lot in the town of Ames, which was refused. The defendant, for a further defense, declared the plaintiff to be the owner of the land platted as a town site, and through its officers informed the defendant that, unless it could sell 400 lots in said town site, no depot or yard facilities would be located there, and the defendant, being desirous of having such depot and yard facilities there, executed and delivered to the plaintiff said notes, for which he was to receive four lots in consideration of his notes, and which had never been tendered or offered to him, and conveyance of the same had been refused. In reply, the plaintiff denied the allegations of the defendant's answer which in any way denied the plaintiff's right of recovery, and, for a further reply, denied the authority of T. S. Chambers, as agent of the plaintiff, to make and deliver on behalf of the plaintiff the contract to convey lots, and denied that Chambers was an agent of the plaintiff, which denial was verified by the president of the plaintiff. Upon the issue so framed the case was tried June 1, 1905.

The first assignment of error presented by the brief of plaintiff in error is the overruling, by the trial court, of the demurrer to the petition and objections to the introduction of testimony, citing, in support of such contention, *Enid Right of Way & Town Site Co. v. Lyle*, 15 Okl. 318, 82 Pac. 810, *McGuffin v. Coyle & Guss*, 16 Okl. 648, 85 Pac. 974, 86 Pac. 962, 6 L. R. A. (N. S.) 524, and *Piper v. Choctaw Northern Town Site & Improvement Co.*, 16 Okl. 436, 85 Pac. 963.

The plaintiff in error in his brief says: "The petition shows affirmatively that the instruments sued on were illegal contracts, and that they were void, being against public policy. They showed that the promise to pay was made, not to the railroad company, but to a third party." There is nothing in the petition which justifies this statement. The notes sued on were plain promissory notes, payable to the defendant in error, and recite a particular consideration therefor, which was the building of a railroad by the defendant in error as stipulated, and the petition averred full compliance with such consideration. There was no third party mentioned. There was no railroad named to be influenced. There is nothing in the petition or contract which shows that any particular railroad company or official was to be or might be influenced by it. It was simply a contract to pay so much money when a certain thing was done, and the petition averred a full compliance with the terms of the agreement. To have held the demurrer good it would have been necessary for the court to have read into the petition and contract sued on what was not there written, and which could not be legally presented in considering the demurrer. The authorities cited are not applicable. In *Enid Right of Way & Town Site Company v. Lyle*, the company agreed, in consideration of \$75, to secure the location of a depot on the line of the Denver, Enid & Gulf Railroad at a point named, which amount was to be due and payable to the company when its road was constructed to the point named. In *McGuffin v. Coyle & Guss*, McGuffin contracted to pay Coyle & Guss, in consideration of the Atchison, Topeka & Santa Fé Railroad building a line of railroad to Cushing, Okl., by a time fixed; while in *Piper v. Choctaw Northern Town Site & Improvement Co.*, the contract was with the Watonga & Northwestern Railroad Company, and was given as a matter of inducement to the building of that company's line of road to Watonga. In this last-named case, the contract was held valid and enforceable. In the other two cases, the contracts were held invalid and not enforceable. In the case under consideration, the contract was executed and made payable, as stated, in consideration of benefits to be derived by plaintiff in error from the construction of a line of railroad and the location of a depot and yard facilities at a point named, and was not therefore a contract in consideration of some third party doing the thing contracted to be done; nor was any third party by the terms of the contract to be influenced to do the thing desired. There was no room therefore in the allegations of the contract or petition for the court, upon considering the demurrer, to conclude that the contract was void upon the ground of being against public policy. If it was void for such reason, it would be necessary to show sufficient fact

to that end by answer. The line of road to be built was from Blackwell, Okl., to Hoyle, Okl. The ownership of the road is not disclosed by the contract sued on, if there was an owner of the same at the time, and the contract by its terms and tenor appears to be simply an inducement to such construction. This was the controlling consideration of the court in the case of *Piper v. Choctaw Northern Town Site & Improvement Co.* supra, wherein an obligation to pay \$250 was held to be payable to the company building the road; such sum having been offered as an inducement to build the line of road by a time specified to a point designated. The demurrer having been overruled, as we think, correctly, the defendant answered as hereinbefore stated. No question of the nonenforceable character of the instrument sued on upon the ground of public policy was presented by the answer. To a more complete understanding of the questions the trial court had before it to consider in the trial of the cause and upon the introduction of the testimony, we will recapitulate the defenses set up in the answer of defendant to the contracts sued upon. The execution and delivery of the contract was admitted, but it was alleged that the railroad was not built or in operation August 1, 1901, and that no depot and yard facilities had been established at the point required by the contract. This was the only defense stated in the answer touching the particular provisions of the contract sued on.

A second and further defense was pleaded based upon a separate contract purporting to have been given by the construction company to defendant, which by its terms provided for the execution and delivery to defendant of four lots in the town of Ames, Okl. (a changed name for Hoyle), to be selected by lottery, which deeds, it was alleged, had never been executed, and execution of them upon demand therefor had been refused. Touching the direct defense stated that the railroad was not built with depot and yard facilities on August 1st, there was presented simply a question of fact, to which much testimony was addressed, and from which it appears that the road was constructed to the point required on the day required, and much evidence was offered upon the question as to whether or not a depot and yard facilities was on that day provided at that point. On behalf of the plaintiff, it was contended that a temporary depot was, at the time, provided, and that the plaintiff was at that time ready with depot facilities to discharge the business incident to the operation of a line of railroad, and that an agent had been supplied for that purpose. The conflicting testimony in this respect was settled by the general finding of the court that the road was constructed and in operation at the time and place required by the contract. A more perfect construction would, no doubt, follow with the lapse of time and necessity

therefor, but that the road was constructed and fixed permanently at that point at that time there can be no question, and this probably was the only requirement of the contract, although it is specified in the contract, as a part of the consideration therefor, that a depot and yard facilities should be built, but the date upon which the depot and yard facilities should be built is not specified. Touching the second ground of defense, to wit, the conveyance of lots, it is shown that two contracts were executed; the first for three lots, 13 days after the execution of the first contract sued on, and the second for one lot 25 days after the second note sued on was executed. In fact, the dates of the instruments themselves show this to be true. As to the date of the delivery of the instrument sued on and the delivery of the instrument set out in the answer, or whether or not there was a simultaneous delivery of each of such instruments, the record is silent. Numerous questions were asked tending to develop this fact, but under the rule of the court such questions were not answered. Exceptions were taken to the ruling of the court in this respect. The order of the court was based upon the fact that the instruments sued on were each a complete contract requiring no explanation because of ambiguity, and expressed a consideration moving therefor. It is true that a written instrument may be varied by an instrument in writing or by an executed parol agreement. Here it was sought to vary a written agreement by an instrument in writing, to wit, Exhibits A and B, to the answer. The execution and delivery of these instruments were not admitted. In fact, their execution and delivery by plaintiff were denied under oath in the reply to the answer, as well as the authority of the person purporting to have executed the same. This status placed the burden upon the defendant to show that the written instruments presented by the answer were obligations of the plaintiff, and, until such fact was established they could not, under the denial of the reply, be received in evidence or brought forward as contracts varying the terms of the written instrument sued on, and the rule of the court excluding them and any evidence touching their terms and tenor, until authority for their execution was shown, was correct.

No attempt was made to show that such instruments were executed or delivered by authority of the plaintiff, or to show that one T. S. Chambers, by whom they were signed, was either an officer or agent of the plaintiff, or had power or authority to execute or deliver the same. This lack of necessary evidence on behalf of the defendant to bring the instrument relied upon before the court for consideration was sufficient to exclude the same as evidence or proof of their contents. With such failure of proof on behalf of defendant, the entire ground of defense based upon such instruments was lost

to the defendant, which left his defense standing alone upon the proposition that the road was not constructed in time and in accordance with the instrument sued on, and, as we have observed, such issue of fact was determined by the trial court upon conflicting testimony, which, under the rule of this court, cannot be disturbed.

The judgment of the court below must therefore be affirmed, with costs. All the Justices concurring, except PANCOAST, J., who presided in the trial of the case, not sitting, and IRWIN, J., absent.

WOODS COUNTY BANK v. RENSING.
(Supreme Court of Oklahoma. Sept. 5, 1907.)
WRIT OF ERROR—REVIEW—OBJECTIONS NOT RAISED BELOW.

This court will not reverse, vacate, or modify a judgment which is supported by competent evidence, nor consider, in connection with error based upon such grounds, questions of erroneous procedure which were not presented to the consideration of the trial court in the motion for new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25. Guaranty, § 3928.]

(Syllabus by the Court.)

Error from District Court, Woods County; before Justice J. L. Pancoast.

Action by H. C. Rensing against the Woods County Bank. Judgment for plaintiff. Defendant brings error. Affirmed.

H. A. Noah, for plaintiff in error. Snoddy & Son, for defendant in error.

GILLETTE, J. This action was commenced in the district court of Woods county, Okla., by the defendant in error filing therein his petition, as plaintiff, against the plaintiff in error, Woods County Bank, a corporation, in which he prayed judgment against the plaintiff in error in the sum of \$675 and interest from January 1, 1902, upon an account for money deposited, in the sum of \$3,747. To which petition the defendant answered by a general denial. The case was tried to a jury on the 14th of February, 1905, resulting in a verdict for defendant in error in the sum of \$660.11, which is confessed to be a sum in excess of the plaintiff's right of recovery in the amount of 1 per cent. interest, the jury having computed the interest at 8 per cent., when 7 per cent. only were allowable, and the defendant in error consents to remit \$15 of such judgment, being a sum in excess of the 1 per cent. interest illegally computed and allowed by the jury. Special questions of fact were by the plaintiff in error submitted to the consideration of the jury to be answered with their general verdict, as follows: "(1) Was \$150 check (Exhibit C) signed by plaintiff? A. No. (2) Was \$50 check (Exhibit B) signed by plaintiff? A. No. (3) Was check \$332.28 (Exhibit N) signed by plaintiff? A. No. (4) Was plaintiff's account with defendant equally balanced December 23, 1901, with no bal-

ance due either party? A. No. (5) How much money did plaintiff pay into the bank altogether? A. \$4,422.80. (6) How much money did plaintiff draw out of the bank altogether? A. \$3,890.42." A motion for a new trial was filed in due time by plaintiff in error, which was afterwards considered by the court and overruled; seven grounds being stated in the motion, only one of which is argued in the brief of the plaintiff in error, to wit, the fourth ground, which is that the verdict is not sustained by sufficient evidence.

Counsel for plaintiff in error in their brief say: "The rule is familiar that the finding of a jury will not be disturbed if there is any competent evidence to support it. In spite of this, other circumstances may be taken into account in reaching a conclusion." That there was evidence to support the verdict there can be no question. The case turned upon the validity of three checks, one for \$50, one for \$150, and one for \$332.28. These checks were each drawn in favor of the bank; the name of defendant in error being signed to each of them. The defendant in error upon the witness stand denied ever having executed the same, denied ever having seen the last one until upon the trial of the case, and affirmed that the \$150 check given, as claimed by the officers of the bank, for the satisfaction of a promissory note, was not so given, because in fact he had satisfied that note in cash, which he paid to the president of the bank some months before the date of the check, and that when he paid it the president tore it up and put the fragments in the stove. The testimony of the officers of the bank was square at right angles with this testimony of the defendant in error, but the jury gave credence to his testimony, and the trial court, having seen the witnesses and having heard all the testimony adduced, overruled the motion for a new trial. There is therefore nothing left for this court to determine, unless we pass upon the disputed question of fact, and in doing so usurp the functions of a trial court and jury, which would be the violation of a rule so often stated that it is not necessary here to repeat.

In presenting this matter, the plaintiff in error complains of the conduct of opposing counsel in the cross-examination of the cashier of the bank. The misconduct of counsel is not made a ground for setting aside the verdict in the motion for a new trial, but the consideration of it is asked in connection with the consideration of the other grounds referred to. In the presentation of a case to this court by case-made, it is a well-settled rule that grounds for a new trial will not be considered in this court which were not, on the motion for new trial, presented for the consideration of the court below. It appears from the record that questions asked by the opposing counsel, which are alleged to be erroneous and prejudicial because of the insinuation of the existence of irrelevant facts, was objected to when propounded by counsel,

which objection was by the court sustained, and the court at the time instructed the jury not to consider it. Where, as in this case, there is evidence which unquestionably supports the verdict, this court cannot conclusively determine that an erroneous question propounded to the jury, which was objected to at the time and objection sustained, was nevertheless so prejudicial as to justify the reversal of a judgment supported by competent evidence, and especially so since such alleged error was not presented to the trial court in the motion for a new trial.

The judgment of the trial court should be credited with \$15, the rebate thereon tendered by the defendant in error, on account of the erroneous computation of interest, and when so credited the judgment of the court below will be affirmed. All the Justices concurring, except PANCOAST, J., who presided in the court below, not sitting, and GARBER and IRWIN, JJ., absent.

SCARRITT-COMSTOCK FURNITURE CO. v. HUDSPETH.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. PRINCIPAL AND AGENT—AUTHORITY OF AGENT.

Authority to an agent to sell goods does not of itself and alone apparently give to the agent authority to collect pay for the goods thus sold.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 301.]

2. SAME—BURDEN OF PROOF.

Where a traveling salesman sells goods by sample or from catalogues and price lists, sending the orders to his principal to be filled, the presumption is that such agent has not the authority to collect for such goods; and where a purchaser, subsequent to the date of ordering goods through such an agent, makes payments thereon to him, he does so at his peril, and in litigation for the value of the goods, the authority of the agent to make such collections being denied by his principal, the burden is on the purchaser to prove that the agent had such authority; and where the court instructs that such purchaser should be given credit for all payments made to such agent, unless he had notice or knowledge of the fact that such agent had no authority to collect for goods so sold, and judgment is rendered charging such payments to the seller, it will be presumed that the erroneous instructions operated to the prejudice of the seller, and a new trial should be granted by reason thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 397.]

3. SAME—AUTHORITY TO COMPROMISE.

Authority to an agent to sell goods does not carry with it authority to compromise differences which may arise between his principal and those to whom he sells goods, by reason of the goods not coming up to the standard represented; and, where a purchaser relies upon a compromise with such an agent, the burden is on him to establish the agent's authority (if such fact be in dispute) to effect compromises in such cases.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 326.]

(Syllabus by the Court.)

Error from District Court, Canadian County; before Justice Clinton F. Irwin.

Action by the Scarritt-Comstock Furniture Company against John C. Hudspeth. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Blake, Blake & Low, for plaintiff in error. Joseph G. Lowe and W. T. Beeks, for defendant in error.

BURWELL, J. One George B. Barron, as the traveling salesman for the Scarritt-Comstock Furniture Company, sold a bill of goods to John C. Hudspeth amounting in all to \$645.87, consisting of chairs, centertables, dressers, bedsteads, mattresses, and other household furniture. The bill of goods was sold from price lists and catalogue which showed pictures or cuts of the articles ordered. When the goods were received, it was found that the wholesale house had made certain substitutions where the patterns ordered were out of stock, and Hudspeth claimed that the goods were not of the quality ordered. Complaint was made to the house, and Hudspeth alleges that a settlement was made with the salesman, Barron, whereby the appellant was to knock off 25 per cent. of the price, and also that he had paid Barron on the goods subsequent to the sale, in all, \$160 on the account, and for which he held Barron's receipt. The appellant denied the receipt of this money by Barron, and also denied his authority to compromise the matter with Hudspeth.

On the question of presumption regarding the authority of the agent, Barron, to receive the money, the court instructed as follows: "The jury are instructed that if they believe from the evidence that the George B. Barron mentioned in evidence came to El Reno as the agent of the Scarritt-Comstock Furniture Company, and as such agent made the sale of the furniture mentioned in evidence, then the defendant will be entitled to credit on the account for any payments that he had made to said Geo. B. Barron as the agent of said company on said furniture, unless the jury believe from the evidence that the defendant had notice of the fact, or had knowledge that the said Geo. B. Barron was not authorized to collect for said company for said furniture, or that the circumstances and surroundings of such payment were such as to have given the defendant notice of the fact that said Barron had no authority to collect." The instruction, in effect, tells the jury that if George B. Barron, the alleged agent of the company, made the sale in question to the defendant, then the defendant should have credit for all payments made to such agent, unless the jury believe from the evidence that the defendant had notice or knowledge of the fact that Barron was not authorized to collect for the furniture for the company, or that the circumstances and surroundings of such payment were such as to have given the defendant notice of the

fact that Barron had no authority to collect. The giving of the instruction was reversible error. The presumption of law is that one who is not in possession of goods, and who sells the same on credit, has not the authority to subsequently collect therefor, and the burden is on one making such payment to such an agent to establish by a preponderance of the evidence that the agent has authority to collect. The presumption is that such authority has not been conferred, unless the agent is in possession of the goods sold. In 1 Am. & Eng. Enc. of Law (2d Ed.) p. 1014, it is said: "Where the principal has clothed the agent with the indicia of authority to receive payment as by intrusting him with the possession of the goods to be sold, the purchaser is warranted in paying the price to the agent at the time of the sale. But when the agent has not the possession of the goods, and no other indicia of authority, and is only authorized to sell, the purchaser pays the agent at his peril, and it devolves upon him to show that the agent was authorized to receive payment. An agent selling on credit has no implied authority to subsequently collect the price, unless the principal has held him out to third persons as having authority to receive payments." And again, on page 1016 of the same book, it is declared: "Independent of a controlling usage to the contrary, a traveling salesman or agent merely to solicit orders for goods has no implied authority to receive payment therefor." The following cases support the rule above declared: *Kane v Barstow*, 42 Kan. 465, 22 Pac. 588, 16 Am. St. Rep. 490; *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795; *Chambers v. Short*, 79 Mo. 204; *Abrahams v. Weiller*, 87 Ill. 179; *Kohn v. Washer*, 64 Tex. 131, 53 Am. Rep. 745; *Higgins v. Moore*, 34 N. Y. 417; *Crosby v. Hill*, 39 Ohio St. 100; *McKinley v. Dunham*, 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740; *Kornemann v. Monaghan*, 24 Mich. 36; *Meyer, Beunerman & Co. v. Stone & Co.*, 46 Ark. 210, 55 Am. Rep. 577; *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154; *Clark v. Smith*, 88 Ill. 298; *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 655; *Seiple et al. v. Irwin et al.*, 30 Pa. 513; *Janney v. Boyd*, 30 Minn. 319, 15 N. W. 308.

The burden was also on the defendant to show by a preponderance of the evidence that the salesman, Barron, had authority to compromise the difference with Hudspeth.

It may be that the evidence was sufficient to authorize the jury in finding for the defendant even under the rule announced in this opinion. This, however, is not necessary to decide. The authority to collect from Hudspeth and to make the compromise or settlement claimed by him to have been made were issues of fact, and, the burden having been placed on the appellant under the instructions, when the law placed it upon Hudspeth, the presumption is that the appellant had been prejudiced by reason thereof.

The judgment of the lower court should be reversed, and the case remanded, at the cost of the appellee, and a new trial granted. It is so ordered. All of the Justices concurring, except IRWIN, J., who presided at the trial below, not sitting.

DUNLAP v. STANNARD.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. APPEAL — REVIEW — EVIDENCE — QUESTION FOR JURY.

Whether a contract of guaranty has been materially changed or altered is a question of fact for the court or jury, and the finding thereon will not be disturbed on appeal, where it is reasonably sustained by the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3912.]

2. INTEREST—GUARANTY—JUDGMENT.

Where a contract of guaranty limits the amount of the indebtedness to be paid, and provides that it shall be without interest, it is error to include interest before judgment in the assessment of the amount of recovery.

(Syllabus by the Court.)

Error from District Court, Kiowa County; before Justice J. L. Pancoast.

Action by F. H. Stannard, doing business as F. H. Stannard & Co. against A. J. Dunlap and others. Judgment for plaintiff, and defendant Dunlap brings error. Modified and affirmed.

Keys, Rummons & Cline, for plaintiff in error. Tolbert, Berry & Hays, for defendant in error.

HAINER, J. This is an action brought by F. H. Stannard, doing business under the firm name of F. H. Stannard & Co., against Jones Bros. & Co., and A. J. Dunlap, to recover the sum of \$1,450, together with interest, on a verified account and a written contract of guaranty executed by A. J. Dunlap. A jury having been waived, the cause was tried to the court, and judgment was rendered in favor of the plaintiff and against the defendants for the sum of \$1,717.29. From this judgment the defendant A. J. Dunlap appeals.

The written instrument of guaranty upon which the plaintiff in error was held liable is as follows: "November 6, 1902. I hereby guarantee that the firm of Jones Brothers & Company, of Hobart, O. T., will pay in cash to F. H. Stannard & Co., of Ottawa, Kansas, a sum not to exceed one thousand four hundred and fifty dollars, without interest. One-half to be paid December 1, 1902, and one-half April 1, 1903. The consideration for said sum of money being nursery stock of the value wholesale of above-mentioned amount. To be shipped to said Jones Brothers & Company, at Hobart, O. T., as per contract. This guarantee to take the place of a similar one, dated October, 1902, and supposed to be lost in the mails. A. J. Dunlap." It is contended by the plaintiff in error that the contract between Stannard &

Co. and Jones Bros. & Co. was materially changed or altered, and that thereby Dunlap was relieved from liability. Whether the contract of sale was materially altered or changed was a question of fact that was submitted to the court, and its finding, if reasonably sustained by the evidence, will not be disturbed by this court. We think the evidence fully sustains the finding of the trial court upon this point, and no other reasonable conclusion could have been reached by the court upon the evidence submitted.

It is contended by the plaintiff in error that the court committed error in assessing the amount of the plaintiff's recovery. It appears that the court included in its judgment interest at the rate of 7 per cent. per annum from the time of the maturity of the obligations. The contract of guaranty expressly provided that the plaintiff in error should not be liable in a sum exceeding \$1,450, without interest. Manifestly, when the defendant in error accepted the contract of guaranty, he accepted it subject to all the terms, conditions, and limitations contained in the instrument, and the plaintiff in error could not be held for a greater sum. It follows that the court erred in including interest in the judgment against the plaintiff in error, and to that extent the judgment of the court below is hereby modified.

It is also contended by the plaintiff in error that, if he is liable at all on his contract of guaranty, then he is entitled to a credit of the sum of \$342.87. It appears that at the time of the purchase of the nursery stock by Jones Bros. & Co. the bill amounted to the sum of \$1,792.87, on which amount Jones Bros. & Co. at the time paid in cash the sum of \$342.87, thus reducing the amount of the bill to \$1,450, the amount mentioned in the contract of guaranty. Plaintiff in error contends that he only guaranteed the payment of the sum of \$1,450, and that on that amount he should have credit for the said sum of \$342.87. There is no merit in this contention. The plaintiff in error expressly obligated himself to pay the sum of \$1,450, one half of which was to be paid on December 1, 1902, and the other half on April 1, 1903. There was no limitation in the contract of guaranty upon the amount of nursery stock to be purchased by Jones Bros. & Co., but only a limitation upon the amount to be guaranteed by Dunlap, which was the sum of \$1,450, payable one half on December 1, 1902, and the other half on April 1, 1903. Hence the plaintiff in error is liable for the sum of \$1,450, the amount of credit extended by Stannard & Co. to Jones Bros. & Co. at the time of the purchase of the stock, and for which the written guaranty of the plaintiff in error was given, together with interest at the rate of 7 per cent. per annum from the date of the rendition of the judgment until the same is paid. Nor does the fact of the payment of the said sum of \$342.87 by Jones & Co. upon receipt of the shipment of the

stock in any manner change or alter the terms of the contract of guaranty.

We find no other error in the record, and the judgment of the court below, as modified, is affirmed; costs of this appeal taxed to the defendant in error.

PANCOAST, J., who tried the cause in the court below, not sitting. All the other Justices concurring, except IRWIN, J., absent.

DEMING INV. CO. v. MEYER et al.

(Supreme Court of Oklahoma. Sept. 4, 1907.)

BROKERS—REAL ESTATE AGENT—FRAUD.

Where a real estate agent, having authority to make a sale of his principal's land, reports to another agent of the principal that he can sell the land so as to net the principal a certain sum, and that he is making the sale for a greater sum, thereby disclosing that the amount which will be paid to the principal is not the full purchase price, but that the excess will be retained by the agent as his commission, and no contract is shown between the principal and agent that he shall receive any specified amount for his services, although the amount of the excess is not disclosed, the agent commits no fraud or deception by not disclosing the amount of such excess.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 48-50.]

(Syllabus by the Court.)

Error from District Court, Canadian County; before Justice C. F. Irwin.

Action by the Deming Investment Company against Frank Meyer and James Sackett. Judgment for defendants, and plaintiff brings error. Affirmed.

This is an action brought by the plaintiff in error against the defendants in error, in the district court of Canadian county, to recover the sum of \$197.50. The record discloses that the plaintiff was a corporation doing business at Oswego, Kan., and had a branch office at Oklahoma City in charge of salaried employes, whose names were, at the time of the transaction in question, R. P. Carpenter, manager, and H. W. Rule, the officeman. The plaintiff had a tract of land in Canadian county at the time which they placed on the market for sale. The defendants were real estate agents. The employes at Oklahoma City had no general authority to make sales, and what authority was given them was specifically delegated in each particular instance. At a time prior to the transaction in question, but at what time is not disclosed by the record, the defendants had authority to sell the tract of land for the sum of \$700. The conditions under which they had the authority are not disclosed by the record, nor is there anything disclosed as to what their commission would be if such sale was made. About August 1, 1900, one of the defendants communicated to the plaintiff's employe Rule, at Oklahoma City, over the telephone, that he could sell the land in question so as to net the

plaintiff in error \$900. This, it seems, was a larger sum by \$100 than the defendants had recently been authorized to sell the place for. In the conversation between the defendant Meyer and Rule over the telephone, Rule suggested that he would rather report the deal to the plaintiff in a different form, and suggested that the sale be reported at \$950, with commission at 5 per cent. To this suggestion Meyer stated, in substance, that he did not care how Rule reported the sale, but that his proposition was \$900 net to the company. He was then asked by Rule if he was getting any more, and he stated that he was; that he (Rule) could notify Mr. Deming any way he pleased, either as a commission sale or not; but that the proposition that he made was that he was to sell the place so as to net the company \$900. Rule's idea seems to have been that Mr. Deming would be better satisfied with a sale reported at a certain commission, and that it would be more readily accepted in that form. There is nothing contained in the record from which it can be determined that there was any contract for any specified commission, or that the defendants were to receive in case of sale any specified amount for their services. The sale was reported to the plaintiff by Rule at \$950, with 5 per cent. commission, \$47.50. The deed was forwarded, payment made to the defendants, and settlement made by them upon the basis of \$900 net to the company. Subsequently the plaintiff learned that the land had been sold for \$1,100, and this action is brought to recover the excess between \$950 and \$1,100, as well as the commission of \$47.50 paid.

Snyder & Clark, for plaintiff in error.

PANCOAST, J. (after stating the facts as above). The theory upon which this action was brought was that there was fraud practiced upon the plaintiff by the defendants; and that, as the agents of the plaintiff, the defendants were bound to disclose to the plaintiff all the facts and circumstances within their knowledge in any way calculated to enable the plaintiff to judge of the value of the property, as well as the propriety of accepting the offer made for it; and that, in failing to make such disclosure, the defendants had deceived the plaintiff, and because of such deception were not even entitled to any commission for the sale. A considerable number of authorities are cited in support of the position taken by the plaintiff in error to the effect that an agent who is authorized by his principal to sell the property of the latter upon specified prices and terms is in duty bound, upon learning that a more advantageous sale or exchange can be made, the facts concerning which are unknown to the principal, to communicate the same to him before the sale, as expressly authorized, and his failure to do so amounts to a fraud in law. The trial court found against the plaintiff in error upon the facts

disclosed in the case. In fact, there is no contradictory evidence contained in the record. The finding must have been based entirely upon the defendant Meyer's evidence, and, if there is any fraud or deception disclosed in the record, it is shown by his evidence alone.

There is no question as to the correctness of the law cited by the plaintiff, but is the rule contended for applicable to the facts disclosed in this case? These defendants were simply real estate agents. They reported the facts, as far as the facts are disclosed at all, to the branch office of the plaintiff. In this report they disclosed the fact that the purchaser was paying more than \$900 for the land, and that the excess was what they expected to receive for their labor. If this land had been put into the hands of these agents to sell at a specified price, and they had contracted to sell the same at that price and take for their services a specified sum or commission, then they would have been in duty bound to have reported to their principal any excess which they might have received, and take for their services the commission agreed upon. But the record does not disclose such a state of facts, and although it does disclose that they had, prior to the sale, been authorized to sell the land for a smaller sum than they did sell it at, and at a still smaller sum than the plaintiff received from the sale, yet there is nothing to indicate what their commission was to be, or that it was to be any specified sum. The report in the telephone conversation between Meyer and Rule was sufficient to show that the defendants were receiving some greater sum than \$900 for the land, and the plaintiff therefore had notice of the nature of the transaction. The only deception, if any at all, was practiced by Rule in reporting to the home office, but the defendants were in no wise responsible, as they left the manner of Rule's reporting the sale to his own judgment, specifically giving him to understand that he would report it as he pleased, but that they were to make the sale so as to net the company \$900. The evidence as disclosed by the record is very distinct upon this proposition. We must therefore conclude that the rule of law sought to be invoked by the plaintiff in error in this case is not applicable here, because of the fact that some of the essential elements are lacking, and that there was no fraud or deception practiced on the part of the defendants in error. We see no reason why a person may not report a sale of a piece of land to his principal for a certain sum, when it is understood that the property is being sold for a greater amount, and that the excess will be retained as a commission for the services performed.

There being no error in the record, the judgment of the court below is affirmed. All the Justices concurring, except IRWIN, J., who tried the cause below, not sitting.

SCHOOL DIST. NO. 57 OF LOGAN COUNTY et al. v. EAGER.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. BILLS AND NOTES—BANK CHECK—TIME FOR PRESENTMENT.

The holder of a bank check is entitled to a reasonable time in which to present it for payment; and, where the holder of a check lives in the same place that the bank on which the check is drawn is located, he has during the banking hours of the next day after receiving it in which to present it for payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1091-1103.]

2. SAME—MISTAKE IN SIGNATURE.

It is the duty of one, when signing a check, to see to it that he signs it properly; and where a treasurer of a school district, in paying a debt of the district, delivers a check signed in his individual name, and the bank refuses to cash it, because the maker of the check had no funds on deposit in the bank, and several days afterwards the check was changed by the maker, by adding his official character, as treasurer of the school district, to his signature, and before the close of the banking hours of the second day after the check was corrected the bank on which it was drawn failed (the next day after the correction of the check being Sunday), the loss will fall upon the maker of the check, which in this case was the district.

(Syllabus by the Court.)

Error from Probate Court, Logan County; J. C. Strang, Judge.

Action by W. P. Eager against school district No. 57 of Logan county and others. Judgment for plaintiff. Defendants bring error. Affirmed.

Devereux & Hildreth, for plaintiffs in error. Cottaral & Hornor, for defendant in error.

BURWELL, J. The appellant school district owed W. P. Eager \$248.72, as evidenced by certain school district warrants. On March 8, 1904, the treasurer of the district gave to Mr. Eager a check for these warrants, and on March 12, 1904, he discovered that he had written the check for some \$5 too much money, and on that day he took up the original check, which was destroyed at the time, and issued in lieu thereof another check for the correct amount. This check, like the other one, was drawn on the Guthrie National Bank, but was signed by the treasurer in his individual name. Mr. Eager presented this check for payment, but payment was refused, because the treasurer of the district, Mr. M. L. Scovill, signed the check in his individual name, instead of signing it as treasurer of the school district. The account with the bank was in the name of M. L. Scovill, as treasurer of the school district and he had no individual account with the bank. On April 2, 1904, the check was corrected by Mr. Scovill, by affixing to the check his official character, and on April 4, 1904, the bank failed before the close of banking hours. April 3d was Sunday. The contention is that the appellee, W. P. Eager, was guilty of laches, and therefore should suffer the loss occasioned by the failure of

the bank. It was the duty of the treasurer of the school district, when delivering the check, to see that it was in form and properly signed, and for his negligence in failing to attach to his signature his official character the appellee is not chargeable. The appellee never received a check against the deposit of the school district until April 2, 1904. The check before that time was drawn against an account of M. L. Scovill, but who, in fact, had no account there.

The appellee, under the record, was not guilty of laches in presenting the check of the treasurer of the school district after receiving the same duly signed. Wilson's Rev. & Ann. St. 1903, provide: Section 3703: "A check is a bill of exchange drawn upon a bank or banker, or a person described as such upon the face thereof, and payable on demand without interest." Section 3704: "A check is subject to all the provisions of this chapter concerning bills of exchange, except that, first, the drawer and endorsers are exonerated by delay in presentment, only to the extent of the injury which they suffer thereby." Section 3605: "When a bill of exchange is payable at a specified time after sight, the drawer and endorser are exonerated if it is not presented for acceptance within ten days after the time which would suffice, with ordinary diligence, to forward it for acceptance, unless presentment is excused." Section 3680: "If a bill of exchange, payable at sight, or on demand, without interest, is not duly presented for payment within ten days after the time in which it could, with reasonable diligence, be transmitted to the proper place for such payment, the drawer and endorsers are exonerated unless such presentment is excused." It will be observed that, on a bill of exchange payable on sight or demand, the payee has 10 days in which to present it for payment.

The appellee insists that the law also gives to the holder of a check 10 days in which to present it for payment. We are not willing to give the language of the statute the interpretation contended for. The Legislature have said that the drawers or indorsers of a check are exonerated by delay in presentment only to the extent of injury occasioned thereby, and with this and certain other exceptions a check is subject to all of the provisions of the Code concerning bills of exchange. Checks as a rule are used in paying obligations that are due, and take the place of the cash itself; and, while a check is not an assignment of the fund against which it is drawn until accepted by the drawee, still the law recognizes that the funds are placed in bank for the purpose of paying checks drawn by the depositor on the bank. Hence the law requires one holding a check to use reasonable diligence in presenting it for payment. By the weight of authority, where the holder of a check is in the same place where the bank is located, it must be presented before the close of the

banking hours of the bank on the day following the day of its receipt. California has the same statute as this territory regarding checks, and the Supreme Court of that state have adopted the rule stated herein. In the case of *Ritchie, Osgood & Co. v. Bradshaw & Co.*, 5 Cal. 228, it is said: "The payee of a check, in presenting it for payment, in order to hold the drawer, is bound to the exercise of reasonable diligence. That reasonable diligence in the presentation of a check drawn upon a banker has, by the uniform current of authority, been held to have been sufficiently exercised by the presentation for payment upon the next day during the usual banking hours." To the same effect are the following cases: *Himmelman v. Hotelling*, 40 Cal. 111, 6 Am. Rep. 600; *Simpson v. Pacific Mutual Life Ins. Co.*, 44 Cal. 139; *Holmes v. Roe*, 62 Mich. 199, 28 N. W. 864, 4 Am. St. Rep. 844; and *Tiedeman on Commercial Paper*, p. 725, § 443. See, also, 5 Cyc. p. 531.

The statute expressly excepts checks from the operation of this law on bills of exchange, in that a check must be presented without delay; but, if the holder delays beyond a reasonable time for presentment, the drawer is exonerated only to the extent of his injury. The check was properly signed, as stated before, on April 2d, and the appellee should have presented it for payment on the 3d of April, but for the fact that that day was Sunday. Therefore he had all of the banking hours of the 4th of April in which to present it. Under the statutes of this territory, when the performance of an act falls on Sunday, it may be performed on the following Monday. The appellee was entitled to recover under the law and the facts as found by the trial court and the admissions of the parties.

The judgment of the trial court is hereby affirmed, at the cost of appellant. All of the Justices concurring, except IRWIN, J., absent.

BARNES v. TERRITORY.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. CRIMINAL LAW—VERDICT—IMPEACHMENT BY JUROR.

Upon the trial of a criminal cause, a juror who participates in the verdict will not be permitted to impeach his verdict by affidavit, deposition, or sworn statement. Public policy forbids that a juror should be heard to discredit his verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2392.]

2. SAME—HARMLESS ERROR.

An erroneous statement of the law, made by the trial judge in a colloquy with counsel during the argument to the jury, will not be sufficient ground upon which to set aside the verdict, where it is obvious from the entire record that it could not have prejudicially influenced the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3085.]

(Syllabus by the Court.)

Error from District Court, Oklahoma County; before Justice B. F. Burwell.

Jake Barnes was convicted of gaming, and brings error. Affirmed.

Chambers & Taylor, for plaintiff in error. W. O. Cromwell, Atty. Gen., and Don C. Smith and J. H. Cline, Asst. Attys. Gen., for the Territory.

BURFORD, C. J. The plaintiff in error, Jake Barnes, was jointly charged by information with one D. C. Stout with the crime of carrying on certain gambling games. The case was tried to a jury, and Barnes was convicted and Stout acquitted. After judgment of conviction, Barnes filed his petition in error and case-made in this court.

There are but two alleged errors presented for our consideration. In support of his motion for new trial the defendant offered to prove by one of the jurors that after they had been considering the case a portion of two days and nights, and the jury had been balloting eleven for conviction and one for acquittal, it was agreed by the jurors that they would all vote for acquittal of Stout and all for conviction of Barnes, and that pursuant to such agreement they arrived at the verdict which was returned. The court excluded the offered evidence, and it is contended that this is error. This court settled this question adversely to the contention of plaintiff in error in the case of Colcord v. Conger, 10 Okl. 458, 62 Pac. 276, and there is nothing in this case that calls for a modification of the rule there stated. It is there stated in the syllabus: "Upon grounds of public policy jurors will not be heard, by affidavit, deposition, or other sworn statement, to impeach or explain their verdict, or show on what ground it was rendered, or that they made a mistake, or misunderstood the law or the result of their finding, or to show what items entered into the verdict, or how they arrived at the amount. Jurors will only be heard in support of their verdict or conduct when the same is attempted to be impeached." At that time we stated that the only courts which had adopted a different rule were Kansas, Iowa, and Tennessee. To these should now be added Idaho. We are content with the rule as then stated, and adhere to it. There was no error in excluding the testimony of the jurors as to the manner in which they reached their verdict.

The next contention of plaintiff in error is that the court, during the progress of the argument by counsel for the defendant, engaged in a friendly colloquy as to the law defining the crime for which the plaintiff in error was being tried, and in the course of such colloquy the trial judge made the statement in the presence of the jury "that it did not make any difference whether anything was played for or not, but under our statute faro, monte, poker, roulette, and craps are absolutely prohibited, even though the games are played for fun." It may be conceded that

this statement was equivalent to a declaration by the court of the law relating to the crime in question, and, while it was an erroneous statement of the law, the question as to whether it was reversible error depends upon whether or not in any state of the case it might have prejudiced the jury and influenced their verdict. The territory introduced a number of witnesses, all of whom testified that the room over the defendant's saloon, known as the "Southern Club," was a gambling room, and that on the day charged in the indictment and for a long time previous thereto the games of craps, faro, roulette, and klondyke were played there for money, and that the defendant usually received the money from the tables or games. Every witness testified that the games were dealt or played for money, and there was not a particle of evidence to the effect that any games were played or conducted in said gambling house for fun or amusement. The only controverted or uncertain question in the proof was as to who were the owners or managers of the place. The defense introduced no testimony. Upon this state of facts the statement of the court could not have in any manner prejudiced the defendant's case before the jury, and hence was not such error as will warrant a reversal of the judgment.

The judgment of the district court of Oklahoma county is affirmed, at the costs of the plaintiff in error. All the Justices concur, except BURWELL, J., who tried the case below, not sitting, and IRWIN, J., absent.

NETTOGRAPH MACH. CO. v. BROWN et al.

(Supreme Court of Oklahoma. Sept. 7, 1907.)

1. WRIT OF ERROR—BRIEF—FAILURE TO FILE—REVERSAL.

Where the plaintiff in error has completed his record and filed it in this court, and has served and filed a brief in compliance with the rules of this court, and the defendant in error has neither filed a brief nor offered any excuse for such failure, the alleged errors will be taken as confessed, and the judgment may be reversed without an examination of the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3108-3110.]

2. SAME.

By rule 6 of this court, where the defendant in error in a civil cause fails to file a brief in support of the judgment attacked by the appeal, the court is given the discretion to either affirm or reverse the cause, and may reverse the judgment without examining the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3108-3110.]

(Syllabus by the Court.)

Error from Probate Court, Oklahoma County; Ledru Guthrie, Special Judge.

Action by the Nettograph Machine Company against A. J. Brown and E. C. Trueblood. Judgment for defendants, and plaintiff brings error. Reversed.

Grant & McAdams, for plaintiff in error.

BURFORD, C. J. The Nettograph Machine Company, a corporation organized under the laws of the state of Missouri, brought its action in the probate court of Oklahoma county against the defendants, A. J. Brown and E. C. Trueblood, administrators of the estate of Jennie Brown, deceased, to recover judgment upon a promissory note in the sum of \$500 executed by the defendants on the 24th day of September, 1903, to the Oklahoma Trust & Banking Company, due in 90 days from date, with 6 per cent. interest from maturity, and \$50 attorney's fees, and by the payee assigned to the Nettograph Machine Company, of St. Louis, the plaintiff in the action. The defendants set up by way of answer that the note was executed for 60 Nettograph machines and the right to use them in Oklahoma and Indian Territory, and alleged that the agent of the plaintiff made certain false and fraudulent representations by which the defendants were induced to execute the note, and they seek to either rescind and recover damages, or to recoup damages against the note if the sale is affirmed. It appears that the contract was in writing and is full and complete, but contains no warranty or representations as to the character of the machines or the work that they can accomplish. On the trial the defendants were permitted, over the objection of the plaintiff, to introduce evidence tending to establish certain oral representations in the nature of warranties or of representations as to the qualities of the machines or the character of the work they were capable of performing, also of the earning capacity of the machines, which were operated by the "nickel-in-the-slot" device. The cause was tried to a jury, and verdict returned for the defendants. The plaintiff filed his motion for new trial, which was overruled, and judgment rendered in favor of defendants for the costs. The plaintiff brings the cause to this court by petition in error, and has filed a brief in which a number of specific errors are alleged and authorities cited in support of its position. The defendants have filed no brief and offered no excuse for their default.

The failure of the defendants in error to appear or file any brief must be taken as a confession of the alleged errors, at least sufficient to warrant a reversal of the judgment. Enc. Pl. & Pr. 729; *Parson v. Haskell*, 30 Ill. App. 444; *Mattoon v. Holmes*, 14 Ill. App. 392; *Green v. Blalack*, 25 Tex. 417; *Richter v. Fresno Canal Co.*, 101 Cal. 582, 36 Pac. 96; *Davis v. Hart*, 103 Cal. 530, 37 Pac., 486. This court has by rule required briefs to be filed in all civil causes, and has given the court the right to exercise its discretions as to the disposition to be made of the case when no brief is filed. The rule is as follows: "Rule VI. In each civil cause filed in this court, counsel for plaintiff in error shall serve his brief on counsel for defendant in error within forty days after filing his petition in error, and

shall at the same time file fifteen copies of said briefs with the clerk of the Supreme Court. And the defendant in error shall have thirty days after service on him of plaintiff in error's brief, in which to serve and file answer briefs. Proof of service of brief must be filed with the clerk of this court within ten days after service. In case of failure to comply with the requirements of this rule, the court may continue or dismiss the cause, or reverse or affirm the judgment." 82 Pac. xiii. From a reading of plaintiff's brief and a casual inspection of the record, we feel so confident that there is fatal error in the record that we are satisfied no injustice is being done by a reversal.

The judgment of the probate court of Oklahoma county is reversed, and a new trial ordered, at the costs of defendants in error. All the Justices concur, except IRWIN, J., absent.

DROVERS' LIVE STOCK COMMISSION CO. v. CUSTER COUNTY STATE BANK et al.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. ATTACHMENT—BOND TO PAY JUDGMENT—ACTION THEREON.

In an action on an undertaking given by the defendant in an attachment case under section 4107 of the Statutes of Oklahoma of 1893 to secure the release of the attached property, it is necessary to aver and show by the evidence that the attached property was restored to the defendant, or there can be no recovery on the undertaking.

2. REFORMATION OF INSTRUMENTS—EQUITABLE RELIEF.

Equity will not subject the property of one party to the payment of the debt of another; and a mistake will not be corrected in an equitable action, unless the plaintiff shows by his bill that without such correction it will suffer loss or injury, but even then the court will not enter a decree that will injure another, in order that the plaintiff may not suffer loss.

(Syllabus by the Court.)

Error from District Court, Custer County; before Justice C. F. Irwin.

Action by the Drovers' Live Stock Commission Company against the Custer County State Bank and others. Judgment for defendants, and plaintiff brings error. Affirmed.

I. H. Lookabaugh, H. H. Howard, and George R. Jobson, for plaintiff in error. S. H. Reid, M. D. Libby, and Fred Gillette, for defendants in error.

BURWELL, J. The plaintiff in error commenced suit against the Custer County State Bank, E. W. Crane, and J. W. Winans for money on an account. A writ of attachment was sued out and certain property seized thereunder. The Custer County State Bank then executed a bond under the statute, which recited the bringing of the suit, the levying of the attachment on property belonging to the Custer County State Bank, describing the property, and then the bond closed with

the conditional agreement to pay any judgment that might be rendered against it. Crane and Winans were not parties to this bond. On the trial judgment was rendered in favor of the plaintiff and against E. W. Crane and J. W. Winans for \$5,654, and \$139.95 costs, but against the plaintiff and in favor of the Custer County State Bank. The plaintiff in error then commenced the present suit to reform the undertaking given by the Custer County State Bank for the release of the property, so as to bind the bank and the sureties to pay any judgment that might be rendered in the case, instead of "against it" (the bank). The petition also alleges that execution had been issued against Crane and Winans, and returned "No property found." The plaintiff also prays for judgment against the Custer County State Bank and the sureties on the bond for the amount of the judgment and costs against Crane and Winans. A demurrer was filed to the petition, and sustained by the court. The plaintiff elected to stand on the petition, and the court entered judgment dismissing the case, and the plaintiff has come here on appeal.

We are clearly of the opinion that the petition fails to state a cause of action. The purpose for executing a bond like the one in suit is to secure the return of the property attached, and there is no allegation in the petition to the effect that after the Custer County State Bank executed the bond in question the attached property was returned to it. Such an allegation was indispensable, and the fact that the court, after the bond was approved, ordered the attached property to be released, and the plaintiff attached a copy of such order to his petition, is not sufficient. The burden is on the pleader to show that the attached property actually was returned. The bond was executed under the terms of section 4107 of the Statutes of Oklahoma for 1893, and this statute contemplates restitution of the attached property. In the case of *James McGonigle et al. v. William Gordon et al.*, 11 Kan. 167, the Supreme Court of Kansas, in passing upon the question here presented, said: "In an action on an undertaking given by the defendant in an attachment case to secure the release of the attached property, it is necessary to aver and show by the evidence that the attached property was restored to the defendant, or there can be no recovery on the undertaking."

It is also admitted by counsel for the appellant in their trial that the Custer County State Bank was not indebted to the plaintiff, the Drovers' Live Stock Commission Company, in any sum whatever, and it is insisted that the bank should not have been made a party to the suit. The record as presented by the plaintiff (and by the record we mean the bond) recites that the property attached was the property of the Custer County State Bank, and the conditions of the bond are that the bank and the sureties on

the bond will pay any judgment that may be rendered "against it" (the bank); and the allegation of the petition in this case is that the property was attached as the property of Crane and Winans. This allegation is not enough to justify a reformation of the bond. The plaintiff has come into a court of equity asking for relief against a mistake; but, even though a mistake has been made, before relief will be granted, it must appear that the plaintiff, without such correction, will suffer injury and be deprived of the benefits of his attachment. If the property attached actually belonged to the bank, the bond was in proper form; for its property could not be legally subjected to the payment of another's debts. If the property attached was in fact the property of Crane and Winans, the plaintiff should have so stated in its petition. That the property was attached "as the property of Crane and Winans" would not be sufficient to justify the court to reform the bond. The plaintiff should have alleged, not that it was attached as the property of Crane and Winans, but that it was duly attached in the action, and that it was the property of such defendants, and not the property of the Custer County State Bank. Equity delights in doing full and complete justice, and, if this property which was attached was (as recited in the bond) in fact the property of the Custer County State Bank, then the attaching of it by the plaintiff as the property of Crane and Winans presents no equitable cause of action. The plaintiff cannot in equity complain that he has been prevented from subjecting the bank's property to the payment of the debts of Crane and Winans.

Judgment affirmed. Costs taxed to appellant. All of the Justices concurring, except IRWIN, J., who presided at the trial below, not sitting.

CITY OF GUTHRIE v. McKENNON.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. JUDGMENT—FRAUD—ACTION TO VACATE.

A judgment of a court of record, obtained and procured to be entered by reason of the fraud and deceit of the party benefited thereby, is voidable at the suit of the judgment debtor, which suit may be maintained, under the provisions of section 18 of the Code (Wilson's Rev. & Ann. St. 1903, § 4216), within two years after the date of the discovery of the fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 838.]

2. SAME—TIME FOR APPLICATION.

The provisions of sections 562 and 569 of the Code (Wilson's Rev. & Ann. St. 1903, §§ 4760, 4767), which limits the time in which a procedure thereunder may be instituted to reverse, vacate, or modify a judgment to two years from the date of the judgment, does not apply, so as to estop the bringing of an equitable action to cancel a judgment on the ground of fraud within two years from the date of the discovery of such fraud.

3. SAME—PLEADING.

In an action to set aside a judgment on the ground of fraud practiced in procuring the

same, where the petition alleges and shows that judgment has been obtained upon a chose in action which the party obtaining such judgment did not at the time own, but that the same was owned and had been reduced to judgment by a third party, and where by such petition it is shown that the petition upon which the alleged fraudulent judgment was entered set out that such third party claimed some interest in the chose in action with reference to which the plaintiff was not fully advised, and prayed an order that such third party be impleaded and brought in, that the right of all the parties might be fully adjudicated, which petition was verified, such verification reciting the fact that the plaintiff was the owner of the chose, except such interest as such third party might have therein, *held*, that such petition does not state a cause of action, because it appears therefrom that the plaintiff had notice of such facts and circumstances as would put a person of ordinary prudence upon inquiry, which inquiry would have disclosed the defense, if any, the defendant in such action might have.

(Syllabus by the Court.)

Error from District Court, Logan County; before Justice Jno. H. Burford.

Action by the city of Guthrie against Chandler McKennon, administrator. Judgment for defendant, and plaintiff brings error. Affirmed.

James Hepburn, City Atty., and Lawrence & Huston, for plaintiff in error. J. C. Strang and Devereux & Hildreth, for defendant in error.

GILLETTE, J. This action was commenced October 30, 1903, in the district court of Logan county, by filing in said court a petition setting forth facts which were relied on to support a judgment vacating and holding for naught another judgment of said court in favor of the defendant and against the plaintiff, city of Guthrie, which judgment so sought to be vacated was entered upon an agreed statement of facts November 20, 1900, in the sum of \$4,234.86. A demurrer was filed to the petition and sustained by the court February 16, 1904. Four days later, on February 20, 1904, an amended petition was filed, against which another demurrer was lodged and sustained February 13, 1905. The case comes to this court, praying judgment reversing the order of the lower court sustaining such demurrer.

It appears from the petition filed that the judgment complained of was based upon certain items of indebtedness of the city, which were allowed, and warrants issued to John E. Ford by a commission appointed and acting under and by force of an act of the Legislature of December 25, 1890, entitled "An act for the purpose of providing for the allowance and payment of the indebtedness heretofore created by the people of the cities of Guthrie, East Guthrie, West Guthrie and Capitol Hill, and now consolidated into the city of Guthrie" (St. 1890, § 553), which items of indebtedness are numbered and described, and are shown by the petition to have been the items of indebtedness considered by the

court in the rendition of the judgment now complained of; it being alleged that John E. Ford during the lifetime of Francis R. McKennon sold said items to said McKennon, who afterwards died, and whose estate, at the suit of T. F. McKennon, administrator, recovered judgment for and on account of. The petition shows that on November 29, 1899, the Guthrie National Bank, in an action brought against the city of Guthrie, recovered judgment against the city of Guthrie upon the same items of debt that McKennon, as administrator, sued for and recovered upon November 20, 1900, a year subsequent to the judgment in favor of the bank for the same. The petition alleges: That the McKennon judgment was and is fraudulent and was fraudulently obtained, for that T. F. McKennon, at the time of bringing such suit as administrator, knew that the estate of Francis McKennon did not own such items of indebtedness. That Adelbert Hughes, city attorney of the city of Guthrie, confessed judgment against the city in favor of T. F. McKennon, administrator, relying upon the sworn statement of T. F. McKennon in the verification of plaintiff's petition and his verbal statement to the effect that Francis R. McKennon, deceased, was at the time of his death the owner and holder of such items of indebtedness, when in fact he was not so the owner of such items; but, believing the same to be true because of such representations, he entered into a written stipulation upon the filing of which the judgment complained of was entered, which, among other things, contains a stipulation as follows: "It is further stipulated that plaintiff herein is the owner and holder of the claims mentioned, set out, and sued upon in this action." That when the said T. F. McKennon brought such suit against the city of Guthrie the mayor and members of the city council and the city attorney of the city of Guthrie were deceived by the sworn statement and allegations of said T. F. McKennon, in his said action against plaintiff, and by his oral and positive statements made to Adelbert Hughes, city attorney, and to others, during the pendency of said action in court; and they relied upon and believed the allegations in said petition contained, and the oral allegations of said T. F. McKennon, and had no reasonable cause or ground to believe otherwise until long after judgment had been entered upon said items in favor of said T. F. McKennon as aforesaid. The petition of T. F. McKennon set out and stated as follows: "Plaintiff avers that the Guthrie National Bank claims some interest in a portion of said claims, the exact nature of which the plaintiff is not able to state." And in the prayer for judgment it asks that the Guthrie National Bank might be impleaded and required to set up any claim it had upon the items of indebtedness sued upon. The verification of the petition by T. F. McKennon contained the following: "That he is the bona fide owner and

holder of the claims described in the foregoing application and motion, to the best of his knowledge and belief, except such interest, if any, as the Guthrie National Bank may have or hold in a portion of the said claims." The judgment complained of, and sought to be set aside, was entered upon the agreed facts, without making the Guthrie National Bank a party or requiring it to come in and set up its interest in said claims. That at the time the judgment was rendered in favor of T. F. McKennon a stipulation was entered into by counsel for said McKennon and the city attorney for said city which in terms set forth that said action was subject to appeal to the Supreme Court, but that it was to be held and considered by the parties as a pending action in the district court until a cause pending in the Supreme Court wherein the city of Guthrie was plaintiff in error and one F. B. Lillie was defendant in error should be by the Supreme Court determined, and, when so determined, the determination of the Supreme Court should be entered in this case in all respects as though the same had been appealed to the Supreme Court; that is to say, if the Lillie Case was affirmed by the Supreme Court, such affirmation should be entered and considered as an affirmation by the Supreme Court of the pending case, and a reversal would likewise operate as a reversal of the said action. The record shows that the case of City of Guthrie v. Lillie was finally disposed of in the Supreme Court June 10, 1902, without judgment upon the merits of the appeal. The petition averred that the plaintiff was without adequate remedy, except in equity, and prayed for judgment vacating the McKennon judgment, and for an order staying and enjoining its enforcement by the said defendant McKennon.

Two questions are now presented for the consideration of this court: First, was this action at the time of its commencement barred by the statute of limitations? and, second, does the petition state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant? On behalf of the defendant in error it is urged that the two-year statute of limitations provided for in sections 569 and 562 of Civil Code (Wilson's Rev. & Ann. St. 1903, §§ 4767, 4760) governs the rights of the parties in this action, and that by reason of it the cause was barred at the time it was commenced. In response to this position of defendant in error the plaintiff in error presents two propositions—the first that, under the stipulation "that the cause should remain a pending action until the Lillie Case was disposed of in the Supreme Court," such case not having been disposed of in the Supreme Court until June 10, 1902, the two-year statute had not run at the date of the commencement of this action, October 30, 1903; and, second, that the right of the plaintiff to bring this action was not governed exclusively by the provi-

sions of sections 569 and 562 of the Code, but rather by section 18 (Wilson's Rev. & Ann. St. 1903, § 4216) which provides in substance that an action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the fraud, and shall be barred within two years thereafter; the petition alleging that the fraud complained of was not discovered until July 15, 1903.

As to the first proposition stated, the position of the plaintiff in error cannot be maintained. The judgment entered against the city and in favor of McKennon was so entered November 30, 1900, under the provisions of sections 569 and 562, and the procedure there provided, for the vacation of a judgment, the statute of limitations began to run when the judgment was entered, and the fact that it might be vacated or modified upon an appeal does not affect the running of the statute. Such statute began to run when the judgment was rendered, and the right to proceed under such statute was barred two years thereafter, and this time elapsed one year before this action was commenced. The stay of execution, provided for in the agreement entered of record to the effect that the judgment should abide the determination of the Supreme Court in the Lillie Case, was equivalent to a procedure in error to reverse, vacate, or modify the judgment upon the grounds of error in the procedure by which it was obtained. Such agreement did not involve a question of fraud extraneous of the record, and therefore had no relation to or bearing upon the question of fraud practiced in obtaining the judgment. The statute under consideration provides that the limitations provided for shall begin to run from the date of judgment, and we think it did begin to run in this case November 20, 1900, if the rights of the parties are to be measured by the limitations provided for in sections 569 and 562.

This brings us to the consideration of the second proposition of the plaintiff in error, to wit, that the action may properly be sustained because of the fact that limitations upon actions of this kind do not begin to run against the right to maintain the same until after the discovery of the fraud. In this we think the plaintiff in error is correct. Sections 569 and 562 are provisions of the Code of Civil Procedure which relate to proceedings to reverse, vacate, or modify judgments or orders in the courts in which they are rendered. Under such statute and the proceeding provided for an affirmative judgment reversing, vacating, or modifying the judgment to which the proceeding relates would leave the action pending in the court for trial as it stood before the alleged fraudulent judgment was entered, or it would authorize the entry of some other judgment if, as a conclusion of the proceedings, it should be determined that the original judgment should be modified; and a proceeding for such purpose, although based upon the

ground of fraud in procuring the original judgment, must be commenced within two years from the date of such judgment or the proceeding will not lie. But that is not this case. This is an equitable action to cancel or enjoin the enforcement of an adverse right, upon the ground that it was fraudulently obtained; and we think it immaterial whether the right obtained by fraud and deception was a judgment which might be enforced against the person deceived and defrauded, or the acquiring by such means of title to specific real or personal property. The injury complained of amounts to the same thing. It is the deprivation of legal right and equity, and this action is brought for the purpose of canceling a judgment or a right complained of as having been fraudulently obtained. The judgment prayed for seeks the absolute cancellation and nullification of the judgment complained of, on the ground of fraud, and was, therefore, a civil action, as contemplated by article 3 of the Code of Civil Procedure, and subdivision 2 of section 18 of said article, which provides that the same may be brought within two years after the discovery of the fraud, or, rather, that such cause of action did not accrue until the time of the discovery of the fraud, and might be brought within two years from that date. The petition alleges that the fraud or fraudulent transaction complained of was not discovered until July 15, 1903, and, the action having been brought October 30, 1903, it was brought within time under the provisions of this statute, and was not barred by its limitations.

The demurrer under consideration challenges the sufficiency of the petition to constitute a cause of action; and, considering the allegations of the petition under this ground of the demurrer, we say generally that a party may have a good defense to an action, but, if he fails to make such defense when the case is called for trial, he will not be permitted to come in afterwards and say that the judgment was wrong, simply because he had a good defense. On the other hand, if a party is prevented by fraud from making his defense, such fraud vitiates any right acquired. This brings us to a consideration of the petition with reference to the allegations of fraud therein contained, and the sufficiency of such allegations to justify an annulment of such judgment on account of the acts of fraud therein complained of.

The allegations of the petition hereinbefore stated and set forth, and which are relied on as sufficient to vitiate the judgment complained of, are, first, that T. F. McKennon knew, when he brought suit as administrator of the estate of Francis R. McKennon, that such estate was not at that time the owner of the items of indebtedness for the recovery of which judgment was asked; second, that the mayor and members of the city council, including the city attorney, were deceived by the sworn statements and allegations of the

said T. F. McKennon in his said action, and by his oral and positive statements to Adelbert Hughes, during the pendency of said action, that he was in possession and control of the items of indebtedness sued on, and the owner of the same, which statements were false, and made for the purpose of deceiving the plaintiff and its officers, and did deceive them, and that by reason of the verified petition of said McKennon and his said declaration of ownership Adelbert Hughes, city attorney of said city, was deceived, and because of such deception entered into the stipulation under and by force of which the judgment was rendered, which stipulation, among other things, admitted the ownership by T. F. McKennon as administrator, of the items sued on. We are of the opinion that this is not a sufficient allegation of fraud to justify the annulment of a judgment entered in a cause upon a stipulation or agreement as to the facts in the case. We think that the declaration of a party litigant to the effect that he has a right to recover because of his ownership of the chose in action is not the practice of such deceit and fraud as is contemplated in the axiom that fraud vitiates and annuls any right acquired by it.

In the consideration of this matter, however, we are not left to the consideration alone of the bare allegations of the petition to the effect that the defendant was deceived by T. F. McKennon; for, turning to his (McKennon's) petition and verification of the same, shown by the record, we find the allegations such as to put a man of ordinary prudence upon his inquiry, for it is there averred "that the Guthrie National Bank claims some interest in a portion of the said claims, the exact nature of which the plaintiff is not able to state." And in the prayer for relief the interest of the Guthrie National Bank was noted in the following language: "Plaintiff further prays that, if it be necessary in order to fully determine the matters and things herein involved, the said Guthrie National Bank may be impleaded herein and required to set up any claim which it may have upon any of the said claims hereinbefore set out and referred to." And the verification of said petition by T. F. McKennon was as follows: "T. F. McKennon, being first duly sworn, upon his oath deposes and says that he is the administrator of Francis R. McKennon in the above-entitled proceeding; that he is the bona fide owner and holder of the claims described in the foregoing application and motion, to the best of his knowledge and belief, except such interest, if any, as the Guthrie National Bank may have or hold in a portion of the said claims." Now, when we remember that the basis of this action is the fact, as alleged, that the Guthrie National Bank, at the time McKennon brought this action, had already reduced the items of debt claimed by McKennon to judgment, and it is

because of that alleged fact that it is now sought to set aside the judgment of McKennon, we have before us, we think, not an actionable question of fraud, but rather a question of negligence, in which the one guilty of negligence is seeking relief from the legitimate result of his own acts; for the petition of McKennon upon which judgment was confessed gave notice of the possible adverse claim of the Guthrie National Bank, and the verification was modified to except the claims of the Guthrie National Bank, whatever they might be. To confess judgment upon a petition containing such allegations precludes the plea that the confession was the result of fraud in claiming to be the owner of the items sued upon, when in fact they were owned by the Guthrie National Bank.

The courts from time immemorial have laid down the doctrine in fraud cases that what is sufficient to put a man of ordinary intelligence upon inquiry touching a particular fact is equivalent to the ultimate knowledge of the existence of such fact; and, tried by this rule, the city of Guthrie must be held to have had knowledge of the right of the Guthrie National Bank in the items sued on at the time judgment was confessed, and which judgment is now herein complained of. The allegations in and verification of the petition of McKennon, which was before the lower court at the time the demurrer was sustained to the petition herein, were, we think, sufficient to justify that court in sustaining a demurrer to the petition, which attempted to set up a cause of action upon the ground of fraud in procuring the judgment complained of. The following authorities are instructive upon this proposition: *Wood v. Carpenter*, 101 U. S. 141, 25 L. Ed. 807; *U. S. v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Crim v. Handley*, 94 U. S. 652, 24 L. Ed. 216; *Andres v. Millard (C. C.)* 70 Fed. 515; *Nevins v. McKee*, 61 Tex. 412; *Snow v. Mitchell*, 37 Kan. 639, 15 Pac. 224, 16 Pac. 737; *Brownson v. Reynolds*, 77 Tex. 254, 13 S. W. 986; *Carolus v. Koch*, 72 Mo. 645; *Zellerback v. Allenberg*, 67 Cal. 296, 7 Pac. 908.

The judgment of the court below is affirmed. All the Justices concurring, except BURFORD, C. J., who presided in the trial court, not sitting, and IRWIN and GARBER, JJ., absent.

GAFFNEY v. CLINE et al.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. APPEAL — REVIEW—SUFFICIENCY OF EVIDENCE.

A judgment will not be reversed by this court on account of the insufficiency of evidence, when the evidence reasonably supports the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3934.]

2. SAME—FINDINGS OF TRIAL COURT.

When a trial court, in a case tried to it without a jury, finds that one of the parties

was guilty of fraud and undue influence, and that the other party was incapable of contracting by reason of being intoxicated at the time, and the evidence reasonably supports such findings, they will not be disturbed by this court on appeal, on the theory that they are against the weight of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

3. TRIAL—GENERAL FINDINGS.

A general finding for a party to an action is equivalent to finding in his favor each fact in issue in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 960.]

(Syllabus by the Court.)

Error from District Court, Logan County; before Justice Jno. H. Burford.

Action by Robert A. Gaffney against Albert Cline and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Cotteral & Hornor, for plaintiff in error. Martin, Tibbetts & Green, for defendants in error.

BURWELL, J. Robert Gaffney, on November 4, 1903, traded to Albert Cline lots numbered 7 and 8 in block numbered 6 in West Guthrie, Logan county, for a farm of 80 acres, described as follows: The N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 29, in township 17 N., of range 1 W., in Logan county. The deeds of the respective parties were executed and delivered to P. Jelsma, who was to hold them, as well as a note for \$367.67 and a mortgage on the farm land executed by Gaffney to Cline for the difference in the trade, until abstracts were furnished. These papers were sealed up in an envelope upon which was indorsed by the parties the following: "Deliver these papers, when called for by R. A. Gaffney or Albert Cline, as soon as abstracts show title as per deeds." Jelsma having refused to deliver the papers conveying the 80 acres of land to Gaffney, the latter commenced an action to compel him to do so. Cline filed an answer, which was a general denial, and also alleged fraud and undue influence, and claimed that at the time the papers were executed he was intoxicated and incapable of making a legal contract. The answer contains other defenses, but we will not discuss them, although they have been considered. The court rendered judgment for Cline and against Gaffney for costs, denying plaintiff any relief, and ordered Jelsma to return to Gaffney and Cline the papers executed by them, respectively.

The record really presents the question as to whether or not the evidence supports the judgment. We think it reasonably supports it, and therefore must affirm the same. The court evidently concluded that Jelsma, who Cline alleged pretended to act as his agent, conspired with Gaffney to cheat and defraud Cline out of his farm, and that Jelsma tried to get Cline drunk for that purpose. That Cline was drunk there can be no doubt under the evidence, and as to whether or not he

was intoxicated to that extent that he was incapable of making a legal contract this court will take the finding of the trial court, it being reasonably supported by the evidence. The whole transaction has the earmarks of a sharp deal and a combination of effort on the part of Gaffney and Jelsma to take advantage of Cline's intoxicated condition; and it is just that they be denied the fruits of such conduct.

The judgment of the lower court is hereby affirmed, at the cost of the appellant. All of the Justices concurring, except BURFORD, C. J., who presided at the trial below, not sitting, and IRWIN, J., absent.

GATES v. SETTLERS' MILLING, CANAL & RESERVOIR CO. et al.

(Supreme Court of Oklahoma. Sept. 4, 1907.)

1. WATERS AND WATER COURSES—IRRIGATION—PRIOR RIGHT.

The right to the use of water from a public stream for irrigation purposes depends upon the construction of appropriate ditches, the conducting of water through such ditches to the place of intended application, and the application of such water to beneficial uses, all within a reasonable time; and he has the best right who is first in time.

2. APPEAL—REVIEW—FINDINGS OF COURT.

Where the question of priority of right to divert water from a running stream for the purposes of irrigation, and the question as to whether either of the claimants had used reasonable diligence in prosecuting his work and in making application to beneficial uses of the water, are controverted questions of fact, dependent upon the weight of contradictory testimony and the credibility of witnesses, this court will not disturb the finding of the trial court, if there is competent evidence reasonably tending to support the finding and judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3934.]

3. WATERS AND WATER COURSES—PRIORITY OF WATER RIGHTS—DISTRIBUTION.

Where there are conflicting claims for priority in the use of water rights for irrigation purposes, the court, in an application for injunction, may make equitable distribution of the supply of water according to the priority of the claimants and the quantity each has by his labor and diligence acquired the right to divert.

4. APPEAL—REVIEW—CONFLICTING EVIDENCE.

Where a question depends upon the weight of the evidence for its determination, and the evidence is conflicting, or of a vague and uncertain character, the appellate court will not review such question.

(Syllabus by the Court.)

Error from District Court, Woodward County; before Justice John L. Pancoast.

Action by C. W. Gates against the Settlers' Milling, Canal & Reservoir Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Stanley & Stanley, D. P. Marum, and Stanley, Vermillion & Evans, for plaintiff in error. F. C. Price and Charles Swindall, for defendants in error.

BURFORD, C. J. This action involves the question of priority of right to divert water from the Cimarron river for irrigation purposes. Oklahoma has not so far been credited to the arid belt, and agriculture has been successfully conducted by the aid of nature's supply of moisture; but in some localities, in the higher altitudes pertaining to the extreme western counties of the territory, irrigation upon a small scale has been profitably resorted to, and an increasing public interest is being developed in not only the expediency, but the necessity, for extensive irrigation of agricultural and meadow lands in the fertile valleys of western Oklahoma. In the year 1897 our Legislature passed an irrigation act. 1 Wilson's Rev. & Ann. St. 1903, p. 814, c. 44, §§ 3282-3304. This statute was repealed in 1905, and a more comprehensive law substituted, which is still in force. Laws 1905, p. 274, c. 21, art. 1. It is conceded that neither of the parties to this litigation proceeded under either of these statutes; but both, as we understand the case, base their claims upon the general rule of law applicable to such cases. Yet, if any rights were acquired and became vested under the statute of 1897, the statutory provisions must control as to such rights.

It appears from the record that the plaintiff in error, Gates, commenced his suit in the district court of Woodward county against the Settlers' Milling, Canal & Reservoir Company on November 6, 1903, to enjoin the defendants from diverting water from the Cimarron river, on the ground that such diversion was a material interference with a prior right acquired by him to the use of the water for irrigation purposes. Gates bases his claim to priority upon an appropriation made by J. H. Williamson, through a ditch constructed in the early part of the year 1901, which was about three miles in length and took the water from the river about two miles below the point where the defendant's ditch connected with the river. Williamson sold his land and ditch and his water rights to Gates in July, 1902. A portion of the flow of water in the Cimarron river was actually appropriated to beneficial uses for agricultural purposes during the years 1901 and 1902. The irrigating ditch used by the defendants, which is made the subject-matter of this controversy, was commenced about the year 1902, and has its headgate above the point where the plaintiff procures his water supply. But it is contended that this ditch is but a continuation and change of work begun in 1896 and continuously carried on until the time of the bringing of this suit. The Settlers' Milling, Canal & Reservoir Company was incorporated under the laws of the territory of Oklahoma on June 4, 1895, for the purpose, as shown by its articles of incorporation, of "constructing a ditch to convey water to lands to be used for milling purposes, or for the purpose of irrigation of farming

lands." The stockholders and officers of this company were the farmers and landowners whose lands were to be benefited by the irrigation project, and the capital stock paid in consisted almost entirely of the work done by the individual stockholders in constructing the ditch, dam, flumes, and other necessary work in repairing the same. The year the company was incorporated it did some work in repairing and strengthening a dam in the Cimarron river which had been partially constructed and used by Mr. Mophet, one of the stockholders and the president of the company. About 150 loads of stone were hauled and dumped into the river bed to strengthen the old dam. The purpose of the company was to divert the water from this point and make use of the old Mophet ditch, which it seems the corporation succeeded to by common consent. In the spring of 1896 100 loads more of stone were put in to support the old dam. Later on in the year a break occurred in the dam, and piling was driven in and supported by more stone put in for that purpose. The dam was completed across the river, 225 feet in length. Owing to frequent rises in the river that year, heavy timbers and sod were used to strengthen and repair the work, which was completed at an estimated cost of \$2,000. This improvement was a distance of 12 miles from a railway station, in a sparsely settled country, and 40 miles from where some of the timbers and piling had to be obtained and hauled. The company also caused a survey to be made from the old Mophet headgate, along the old Mophet ditch, in an easterly course a short distance, and thence continuing east to Horse creek, where it was necessary to construct a flume to carry the water across this creek. The old ditch was cleaned out, and a new portion constructed and completed, a distance of one mile, from the old headgate to Horse creek. In the spring of 1897 work was begun upon the flume, which was constructed by driving three rows of cedar piling into the ground from 8 to 11 feet, upon which was built of lumber an aqueduct 100 feet long and 18 inches deep to carry the water over the creek. The ditch was extended another half mile beyond this flume, and a full head of water turned in and conducted through the flume and into the laterals, carrying the water to the farms of T. C. Mophet and G. C. Mophet, and by them applied to about 40 acres of land and crops. The company also in 1897 applied to the Secretary of the Interior for reservoir and right of way privileges over the public lands, which application was granted and confirmed. It also gave notice, under the provisions of the statute of 1897, of its intention to appropriate water, which notice was recorded in the office of the register of deeds for Beaver county.

During the year 1898 water was flowing through this ditch and flume until April or May, when a flood in Horse creek swept the flume away and carried it down the river.

Instead of rebuilding the flume, the ditch was extended up the west side of Horse creek one-fourth of a mile, to a point where the ditch and bed of the creek were on the same grade, and the water was conducted across the bed of the stream, by throwing up a sand barrier, and back down the east side of the stream, through a new ditch, until it again connected with the old ditch, and was applied during the season to crops east of Horse creek, consisting of 60 acres of kaffir and 40 acres of wheat. The ditch and levees across Horse creek were washed out and repaired a number of times during the season of 1898. In 1899 the levee across Horse creek was rebuilt, and the water was applied to 70 acres of land, some of which was meadow. A rise in the river wrecked one end of the dam, and it was repaired by putting in rock and piling. In 1900 the ditch was completed to Red Bluff, making $3\frac{1}{4}$ miles of ditch built by the defendant company, and 130 acres prepared for crop, which it was the purpose to irrigate, and water was applied to 100 acres. On April 8, 1900, an unprecedented rise in the river caused it to cut a new channel, running straight across and cutting off the Horseshoe bend, and leaving the diversion improvements of the Settlers' Company a mile south of the new channel, and completely cutting off its water supply. An attempt was made by the company to turn the river back into its old channel by damming the cut-off, and about 400 loads of stone, sand, brush, and other obstructions were placed in the channels, without beneficial results. It was then found necessary to go farther up the river, and divert the water at a new point, and construct a new ditch to a connection with the old ditch at the old headgate; and this was done and the water turned into it. It was then discovered that the channel of the river had cut below the bed of the ditch, and the water would not rise high enough to flow through the old ditch. The next year (1901) the extension ditch was deepened and the water carried to the old headgate, across Horse creek by the sand levee, and applied to a small area of land. This raised the sheet water so as to produce subirrigation for 130 acres of crops and 70 acres of grass land. The river channel at the cut-off continued to deepen, and the sand dam washed out, and the ditch filled with sand for several rods before the next season, and after repeated efforts to overcome the difficulties it was determined to abandon this scheme and adopt a new point of diversion and scheme of distribution. In the spring of 1902 the company selected a new point of diversion, where Horse creek empties into the Cimarron, and constructed a ditch from this point to a connection with the old ditch between there and Red Bluff, and paralleled it into the valley designed to be irrigated. This new route reached practically the same territory to be irrigated, ran in the old chan-

nel a portion of the way, and followed the old right of way for some distance. The work made good progress, and at the time of the trial about eight miles of ditch and laterals were completed, and several hundred acres of land were receiving water. This last improvement is the one attacked by plaintiff's petition. At the time this new route was adopted and the new work done the plaintiff had appropriated a portion of the flow of the river for his uses, and the priority of the contesting claimants is the sole question for determination.

The cause was tried to the court without the intervention of a jury, and a decree entered making an equitable distribution of the water according to the amount that each had actually appropriated for beneficial uses, as shown by the evidence and as found by the court, at the time the suit was instituted. The court made a general finding upon which the decree was based. It is contended that the court found certain facts specially, and we are asked to apply the law to these findings. A close inspection of the record fails to disclose that any request was ever made by either party for a special finding of fact, and in the absence of such request the finding of the court, however full and complete, amounts to no more than a general finding. 8 Enc. Pl. & Pr. 933-935; Conner et al. v. Town of Marion, 112 Ind. 517, 14 N. E. 488; Caress v. Foster, 62 Ind. 145; Bake v. Smiley, 84 Ind. 212. Nor will the incorporation of the oral opinion of the court into the case-made give it any special significance, and this court will only look to the record as embraced in the entry upon the journal. This question was specifically decided in Guss v. Nelson, 14 Okl. 296, 78 Pac. 172.

The ditch of the plaintiff was begun in January, 1901, and carried on to completion in May, 1901, when the water was conducted through the ditches and water actually applied to the irrigation of cultivated lands. It seems the settled law in the states where irrigation problems have been dealt with that, in order to acquire a vested right in the use of water for such purposes from the public streams, three things must concur: There must be the construction of ditches or channels for carrying the water; the water must be diverted into the artificial channels, and carried through them to the place to be used; and it must be actually applied to beneficial uses, and he has the best right who is first in time. The plaintiff in error contends, first, that the defendant's present place of diversion and location of its ditch is not a continuation of the former works, and that its right of appropriation must be confined to the time of the construction of its last diversion works and appropriation; and, secondly, that, if the last work done is a continuation of the former efforts, the work was not carried on with such diligence as to warrant its claim of

priority. There seems to be no serious difficulty in determining the law on these questions; but the difficulty, if any, lies in the application of the law to the facts. The law requires that there must be reasonable diligence by one intending to appropriate water from a stream, both in the prosecution of the improvements necessary to conduct the water to the place of use and in the application of the water to beneficial uses. Moss v. Rose, 27 Or. 595, 41 Pac. 666, 50 Am. St. Rep. 743; Arnold v. Passavant, 19 Mont. 575, 49 Pac. 400; Conaut v. Jones, 3 Idaho, 606, 32 Pac. 250; Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Elliot v. Whitmore, 23 Utah, 342, 65 Pac. 73, 90 Am. St. Rep. 700; Hall v. Blackman, 8 Idaho, 272, 68 Pac. 21; Gould on Waters, §§ 226-239; Long on Irrigation, § 47; Ft. Morgan Land Co. v. South Platte Ditch Co., 18 Colo. 1, 30 Pac. 1032, 36 Am. St. Rep. 259; Becker v. Marble Creek Co., 15 Utah, 225, 49 Pac. 893; Kinney on Irrigation, § 164; Union Mill & Mining Co. v. Dangberg (C. C.) 81 Fed. 75. And a failure to use due diligence will be treated as an abandonment as against a subsequent appropriator whose right has attached pending the completion of the first appropriator's right.

But both questions of fact contended for by plaintiff in error were determined against him by the trial court. There was a large number of witnesses examined, and some of the testimony is of a vague and uncertain character, while some is contradictory; but there is competent evidence reasonably tending to support the finding and judgment of the court. Practically all the evidence introduced was upon the question of the work done each year by the defendant Settlers' Company and its predecessors in their efforts to successfully conduct the water from the Cimarron river through the various channels and flumes constructed across Horse creek, and the number of acres of agricultural land it was applied to each year, covering a period of seven or eight years. It appeared from the testimony of these witnesses that the Cimarron river was a sandy, treacherous stream, in which it was difficult to construct a dam or barrier which would serve to turn the water into the irrigation ditches; that in the spring of each year the rises in the river would fill the ditches with sand and destroy the dams, flumes, and other improvements; that the timber, lumber, and materials for piling, dams, and flumes had to be transported with teams long distances; and that the work had to be done by farmers and settlers, who could only give part of their time to this work. It was also shown that the river changed its channel and left the diversion works a mile or more from the new channel, effectually cutting off the supply of water and making it necessary to survey and construct another connection with the river at a new point of diversion; and each year the company or its members

were making repairs on the old, or constructing new, works to enable them to utilize the water supply. Reasonable diligence was required of them. As to what constitutes reasonable diligence must be governed by the circumstances of each particular case, and necessarily varies with each particular case. It is a question of fact, and must be determined from all the evidence in the case. The trial court heard this evidence and found, for the defendant company, that it was the prior appropriator of the water to the amount and extent it had actually applied to beneficial uses at the time the plaintiff made his appropriation, and gave to the plaintiff the right, after this quantity was taken by the defendant, to take an amount equal to the quantity beneficially applied by it, after which the defendant's right would again attach to any excess. We cannot disturb this action of the trial court. It has become the settled rule of this court that the finding of a court upon the facts will be treated the same as the verdict of a jury, and, where there is competent evidence reasonably tending to support the verdict or finding, this court will not weigh the evidence or attempt to determine the preponderance, but will affirm the action of the trial court.

There are other questions argued in the briefs, but each of them depends upon the weight of the evidence, and we cannot review them.

The judgment of the district court of Woodward county is affirmed, at the costs of the plaintiff in error. All the Justices concur, except PANCOAST, J., who tried the case below, not sitting, and IRWIN, J., absent.

BROWN v. DONNELLY.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. INJUNCTION—DISSOLUTION AT CHAMBERS—MOTION BY DEFENDANT—REVIEW.

A district judge at chambers (proper notice having been given of the time and place of hearing) has power to dissolve a temporary injunction, even though it was granted upon a hearing at which both parties were present. The statute of Oklahoma, which provides that, where a temporary injunction is granted without notice to the defendant, he may upon notice apply to have the same dissolved, confers upon the defendant the right to be heard by the court or judge upon such motion, and is not intended to prohibit the court or judge, in the exercise of discretionary powers, from hearing such a motion, where the temporary injunction was granted upon notice in the first instance. This court will not reverse an order made by the judge of a district court at chambers on account of error in admitting or excluding evidence on a motion to dissolve a temporary injunction, unless such error affects the substantial rights of the party appealing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Judges, § 125; vol. 3, Appeal and Error, § 4063.]

2. SAME—JURISDICTION.

Where two persons are contesting in the land department over a tract of government

land, and each is in possession of a portion thereof, the district court cannot, under the rules of equity jurisdiction, by mandatory injunction take the land in the possession of one of the contestants and give it to the other.

3. SAME—MOTION TO DISSOLVE—RULING—MODIFICATION.

All orders made by a district court or a judge thereof, on a hearing for a temporary injunction or on a motion to dissolve the same, in so far as they affect the subject in controversy, are only temporary, and may be modified in the final judgment, giving to the respective parties that order or judgment which the rules of equity require.

4. SAME.

Where two persons are contesting in the land department for a tract of government land, and one obtains by mandatory injunction land which was in the possession of the other, and plants the same to corn, and, before the corn is harvested, the judge of the district court dissolves the temporary injunction and orders the crop divided, this court will not reverse such order dividing such crop, unless, from the evidence, it can be said that the trial judge exceeded his authority. The order so dividing the crop on the motion to dissolve the hearing, is not a final judgment, and the rights of the parties to the corn may be litigated on the final trial, each being accountable for that portion of the crop which he received. On the final hearing, all of the issues involved in the case may be litigated, and judgment rendered declaring the rights of the respective parties in relation thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3818; vol. 27, Injunction, § 341.]

(Syllabus by the Court.)

Appeal from District Court, Noble County; before Justice John H. Burford.

Action by Morris Brown against Laura Donnelly. Judgment for defendant, and plaintiff appeals. Affirmed.

H. B. Martin, for appellant. Dale & Blerer and W. M. Boles, for appellee.

BURWELL, J. This is an action in the nature of mandatory injunction between two homestead claimants. On the preliminary hearing the court found that the plaintiff, Morris Brown, was in possession of 5 acres of the N. E. $\frac{1}{4}$ of section 22, township 23 N., of range 1 W. of the Indian meridian, in Noble county, territory of Oklahoma, and that this 5 acres was in substantially square form and located in the southeastern portion of the claim, adjoining the eastern boundary thereof, and immediately north of the creek, and that the plaintiff was entitled to the possession and control of the entire north 80 acres of the land, except any part which might be occupied by the residence of the defendant and the improvements immediately surrounding the same, and about 5 acres which the defendant then had planted to corn. The court then made an order giving the plaintiff, Brown, possession of the north 80 acres of the quarter section, except any part thereof which might be occupied by the residence of the defendant and her improvements immediately surrounding the same. The order also provided that the plaintiff should not have possession of 5 acres which

the defendant had planted to corn until November 1, 1899. The defendant was then enjoined from interfering with the plaintiff in the occupancy of the land, the possession of which was given him by the order of the court. The order contained other provisions regarding the use of timber, the privilege of watering stock, etc. This order was made by the court on July 22, 1899. On July 31, 1905, six years after the temporary injunction had been granted, the defendant filed a motion to dissolve the same. The motion came on for hearing before Hon. John H. Burford, Chief Justice, sitting at chambers as district judge at Perry, Okla., in the absence from the district of the regular presiding judge. On this hearing the temporary injunction was dissolved, and it was also ordered that the defendant be placed back in possession of the land taken from her by the temporary injunction. The plaintiff appeals to this court.

The order made by the trial court, dispossessing the defendant and enjoining her from interfering with the plaintiff in his occupancy of the land so taken away from her, was in excess of its authority (*Black v. Jackson*, 177 U. S. 349, 20 Sup. Ct. 648, 44 L. Ed. 801), and it was just and equitable that the defendant be restored to the possession of the land which had been taken from her and given to the plaintiff. It was the duty of the judge to give back to the defendant that which the court had erroneously taken away from her in this same action. The contention of the plaintiff that the trial judge, in dissolving the temporary injunction, entered a final judgment, is without merit. The only order made by the trial judge that was in any way final in its character was the order regarding the division of the growing crops. The plaintiff had raised a crop of corn on land that the court had erroneously taken from the defendant and given to him. The defendant had been deprived of the benefits of the land, and the trial judge simply said that the plaintiff should be treated as a tenant and the defendant as a landlord as to such crop, the plaintiff taking two-thirds, and that he should deliver to the defendant one-third. The plaintiff cannot complain of this. The court might (and still keep within its lawful powers) have been less considerate of his interests. In 22 Cyc. p. 1001, it is said: "The dissolution of a preliminary injunction merely puts the parties in the same position in which they were prior to its issuance." And again, on page 1000 of the same book, the author says: "On dissolving an injunction, affirmative relief cannot ordinarily be granted to a defendant, in the absence of a cross-bill asking it, although, where the injunction has taken property from the defendant, the order should grant restitution thereof." The trial judge followed this well-established rule as near as he possibly could under the circumstances.

It is next insisted that, the district court

having granted the temporary injunction upon notice, the judge of the court could not dissolve it at chambers. In support of this contention we are cited to section 9 of the organic act of the territory (*Wilson's Rev. & Ann. St.* 1903, p. 75), which confers the judicial power of the territory upon the Supreme Court, district courts, and other courts, and then provides that the said Supreme and district courts, and the respective judges thereof, shall and may grant writs of mandamus and habeas corpus in all cases authorized by law. Now it is said that, as the organic act confers power on the judges of the district courts to grant writs of mandamus and habeas corpus, by implication power to grant temporary injunctions and to vacate the same when granted by the court was withheld. If this section of the organic act were all of the law upon the subject, there would be some justification for the position; but there are other portions of the organic act which must be considered. The Supreme and district courts by this same organic act are vested with chancery as well as common-law jurisdiction and authority to redress all wrongs committed against the Constitution or laws of the United States or of the territory affecting persons or property. And then (section 11 of the act) part 2 of the law of Nebraska, entitled "Code of Civil Procedure," as far as locally applicable, was put in force in Oklahoma until after the adjournment of the first session of the Legislative Assembly of the territory. Attention is directed to certain provisions of these laws thus put in force.

Section 252, part 2, Code of Civil Procedure of Nebraska, provides: "The injunction may be granted at the time of commencing the action, or at any time afterwards before judgment, by the Supreme Court or any judge thereof, the district court or any judge thereof, upon it appearing satisfactorily to the court or judge, by affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto." Then section 263 provides how a temporary injunction may be dissolved: "Section 263. If the injunction be granted without notice, the defendant, at any time before trial, may apply, upon notice, to the court in which the action is brought, or any judge thereof, to vacate or modify the same. The application may be made upon the petition and affidavits upon which the injunction is granted, or upon affidavits on the part of the party enjoined, with or without answer. The order of the judge allowing, dissolving or modifying an injunction shall be returned to the office of the clerk of the court in which the action is brought and recorded and obeyed, as if made by the court." When Congress put in force these two sections of the Nebraska laws, it clearly recognized the right of a judge of the district court to dissolve a temporary injunction, whether granted by the court or judge. Section 4426 of *Wilson's Revised & Annotated Statutes of Oklahoma*

is virtually the same as section 252 of the Nebraska procedure act, and section 4437 of Wilson's Revised & Annotated Statutes of Oklahoma for 1903 is exactly the same as section 263 of the Nebraska procedure act quoted above. Congress, having put these two sections of the Nebraska laws in force, thereby conferred all of the powers therein named upon the judges of the district courts of the territory, and clearly recognized the right of the territorial Legislature to re-enact these or other similar laws upon the same subject. The power was clearly thereby conferred upon the judges of the courts, and could not be taken away by the Legislature. It could only change the procedure. The writs of mandamus and habeas corpus are, by reason of their peculiar character, usually named specifically in Constitutions and organic law, such as the organic act of this territory, while injunctions are not necessarily named specifically, because this class of actions fall strictly within chancery jurisdiction. Nor is the judge of the court prohibited from dissolving a temporary injunction because the statute provides that, "if the injunction be granted without notice, the defendant, at any time, before the trial, may apply, upon notice, to the court in which the action is brought, or any judge thereof, to vacate or modify the same." By this statute, if the injunction is granted without notice, the defendant is entitled as a matter of right to have the court or judge hear him upon the question of the dissolution of the same. The language was not intended to limit the power of the court or judge where the injunction is granted upon notice, but to require it or him to hear the defendant where it is granted without notice.

The assignment that the trial judge committed error in the admission and exclusion of evidence, even if well taken, did not prejudice the plaintiff on his hearing. The court records which were excluded appear in the case-made, and, even if they had been considered, the temporary injunction should have been dissolved. If the district court, in a former action, took from the plaintiff a part of the land in question, as contended by counsel, and gave it to the defendant, and error was committed thereby, he should have appealed from the judgment therein rendered. The defendant was in possession of the land that was restored to her by the trial judge at the commencement of this action, and as to whether she was put into possession of it originally by a just or erroneous judgment cannot be litigated in this action, and the files pertaining thereto were immaterial. The files in this case would be considered by the judge in passing upon this motion to dissolve the injunction, even though they were not formally admitted in evidence. The fact that the defendant was in default of answer, if such be the fact, does not help the plaintiff. His petition did not state a cause of action for

mandatory injunction; hence the defendant, although she did not deny any allegation of the petition, could move to dissolve the temporary injunction.

It is not necessary to determine as to whether or not the trial judge had the authority in law to require the plaintiff to execute a supersedeas bond, in order to prevent that part of the order directing the possession of the land to be given back to the defendant from being carried into execution. The order made by the trial judge has been reviewed, and a determination reached that such order was correct. The error, if any was made, has not deprived the plaintiff of any substantial right.

We have examined the appellee's cross-assignments of error, and are of the opinion that the order made, in so far as it affects the growing crops, under all of the circumstances, should, with the other provisions thereof, be sustained. The evidence on the final hearing as to the condition of the growing crop may be more satisfactory than it appears from this record.

The order of the district judge of Noble county is affirmed, at the costs of appellant. All of the Justices concurring, except BURFORD, C. J., and HAINER, J., who took no part in this court, and IRWIN, J., absent.

GUNN v. TERRITORY.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. OBSCENITY — OFFENSE AGAINST PUBLIC MORALS—EVIDENCE.

One Bessie Patterson applied to the defendant, W. H. Gunn, at his office, for employment as an office girl. The two were in the office alone. The defendant requested the prosecutrix to submit to a physical examination in order that he might determine if she was virtuous, and upon her refusal he ran his hands under her clothes and placed them upon her lower limbs, and used vile, indecent, lewd, and lascivious language to her. *Held*, that such acts did not constitute a violation of section 2552 of the Statutes of Oklahoma of 1893, which makes it a misdemeanor to "willfully and wrongfully commit any act * * * which openly outrages public decency, and is injurious to public morals." The acts complained of were not open or public, and did not outrage public decency, nor injure public morals, but constituted a personal injury inflicted privately.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Obscenity, § 1.]

2. SAME.

The section of the statute under which the defendant was convicted is intended to cover only those acts for the punishment of which no other penalty is by statute provided.

(Syllabus by the Court.)

Error from Probate Court, Oklahoma County; Wm. P. Harper, Judge.

W. H. Gunn was convicted of crime, and brings error. Reversed and remanded.

W. A. Smith, for plaintiff in error. W. O. Cromwell, Atty. Gen., and Don C. Smith, Asst. Atty. Gen., for the Territory.

BURWELL, J. Section 2552 of the Statutes of Oklahoma of 1893 provides: "Every person who wrongfully commits any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages public decency, and is injurious to public morals, although no punishment is expressly prescribed therefor by this chapter, is guilty of a misdemeanor." The indictment in this case charges "that the defendant, Dr. W. H. Gunn, did, in Oklahoma county and in the territory of Oklahoma, on the 10th day of January, A. D. 1906, commit an act which openly outraged public decency and was injurious to public morals, in this: That, at the time and place aforesaid, the said defendant, being a physician, was maintaining an office in his residence at No. 316 North Walnut street, in Oklahoma City, Okl. T., and on said day one Bessie Patterson, being an unmarried female of the age of 17 years, and of previous chaste and virtuous character, through the directions of an employment agent, applied to the said defendant at his office for employment as an office girl; that said defendant was alone in his office at said time with the said Bessie Patterson; that he then and there, willfully and wrongfully, informed said Bessie Patterson that before he could employ her as an office girl it would be necessary for him to make a physical examination of her to see if she was a virtuous girl, and requested the said Bessie Patterson to then and there occupy his operating chair, which she refused to do. He thereupon insisted on making a physical examination of the said Bessie Patterson, and for said purpose undertook to, and did, run his hands under the clothes and place them upon the lower limbs of her, the said Bessie Patterson, and against her will and protest, and did, then and there, unlawfully, willfully, and wrongfully, use all kinds of vile, indecent and lewd and lascivious language, in the presence and hearing and to the said Bessie Patterson, which language is so indecent, lewd and lascivious it is not proper to state herein, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the territory of Oklahoma." Upon the trial, the jury found the defendant guilty, and the court sentenced him to one year in the county jail and to pay a fine of \$500.

Does the indictment charge a public offense? The indictment charges the defendant with openly outraging public decency, and committing an act injurious to public morals. The facts pleaded in the indictment do not sustain the charge. If the defendant did the acts charged, he outraged decency and committed an act injurious to morals; but he did not openly outrage public decency and commit an act injurious to public morals. The statute is directed against acts which are committed openly and affect the public. As to whether an act is committed openly is gen-

erally a mixed question of law and fact, but it cannot be seriously contended that a doctor's private office is such a place as to give an act committed therein the character of an open act, especially when no one was present except the one against whom the act was committed. The Supreme Court of Indiana held, in the case of *Jennings v. State*, 16 Ind. 335, that a statute similar to the one under which the defendant in this case was prosecuted was so indefinite that it did not define any public offense, and hence no one could be convicted under it; but the Court of Special Sessions of the First Division of the City of New York (*People v. Most*, 36 Misc. Rep. 139, 73 N. Y. Supp. 220) upheld a conviction under a statute almost identical with ours. However, the validity of the statute is not questioned by appellant, and we will not pass upon that question. By referring to cases which discuss the meaning of the words "openly" and "public," as, for instance, "open adultery," "public nuisance," and "public morals," etc., one will see that the acts charged against the defendant do not fall within the purview of the statute. That the acts charged constituted an assault there can be no doubt. The prosecution is not for that crime. The punishment in the opinion of some for that offense may be inadequate in the circumstances of this case, but we must interpret the law as it is, and not as we may wish it were. The Legislature has made the law, and it is the duty of the courts to follow it as enacted.

The section of the statute under which the defendant was convicted is intended to cover only those acts for the punishment of which no other penalty is by statute provided. Conceding the validity of the statute under which the defendant was indicted, the acts charged constituting the crime of assault, he must be prosecuted, if at all, for that crime. To be sure, if the assault was made with the intent to commit some other crime defined in the crimes act, the defendant could be prosecuted for such crime. But the rule is that, if the acts charged constitutes any specific crime defined in the statutes one should be prosecuted for such crime, and not under a blanket statute like the section quoted above.

The judgment of the lower court is hereby reversed and remanded, with directions to the lower court to proceed in conformity with the views expressed in this opinion, and to dismiss said action. All of the Justices concurring, except IRWIN, J., and GARBER, J., absent.

GOLDSTANDT-POWELL HAT CO. v. CUFF.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. SALES—ACCEPTANCE OF GOODS PURCHASED—FINDINGS OF JURY—SHIPMENT OF GOODS NOT PURCHASED.

Where an action is brought by a wholesaler against a retail merchant for the price of

goods sold and delivered, and the defense is that the goods not paid for were not the goods ordered, and that they were returned to the wholesale house within two weeks after they were received, and that they were never exposed for sale, and the evidence is conflicting, the issue of acceptance is one of mixed law and fact, which the jury must decide under proper instructions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 453.]

2. SAME.

Where a retail merchant orders goods of a certain class and quality from a wholesale dealer, and it ships a part of the goods ordered, and also other goods which were not ordered, the retailer may pay for the goods of the kind and quality ordered without making himself liable for the goods not ordered; and where he does not accept the goods not ordered, but within a reasonable time, in the light of the surrounding circumstances, returns them, he will not be liable therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 495.]

(Syllabus by the Court.)

Error from Probate Court, Pottawatomie County; William N. Mahen, Judge.

Action by the Goldstandt-Powell Hat Company against J. J. Cuff. Judgment for defendant, and plaintiff brings error. Affirmed.

R. N. McConnell and Chambers, Taylor & Hooker, for plaintiff in error. O. G. Pitman, for defendant in error.

BURWELL, J. The Goldstandt-Powell Hat Company is engaged in the wholesale business in Kansas City, Mo., and on or about November 17, 1904, it, through its traveling salesman, sold the defendant a bill of goods consisting of hats, caps, gloves, etc. The goods were not all shipped at one time. The first shipment, amounting to about \$100, was received by the defendant at his place of business in Maud, Okl., during the first week in December, 1904. When the defendant opened the boxes in which the goods were shipped, he found only about \$40 or \$50 worth of the goods were of the sizes and kinds of goods ordered. These he put on the shelves for sale. The remainder of the shipment he set back and never offered to the trade. On December 17, 1904, the defendant wrote to the wholesale house, stating that the goods sent to him were not what he had ordered, and requesting the house to send him the remainder of the goods as per his order given the traveling salesman. On December 19, 1904, he received the remainder of the order, and, finding that the goods sent him in that shipment were not the goods ordered, he boxed them up, as well as the other goods which he had not ordered, and returned them to the wholesale house at Kansas City; but, although it received due notice from the transportation company and the defendant, it never would receive the goods, and brought this suit for the purchase price thereof. The defendant paid for the goods not returned by him. On the trial the jury found for the defendant.

It is contended by the appellant that, under

the above state of facts, no matter whether or not the goods shipped were of the kind and quality ordered, the defendant was estopped from saying that he did not accept them. As to whether or not the goods shipped were of the kind and quality ordered, and were accepted by the defendant, were issues which the court submitted to the jury, which found in favor of the defendant. These findings, being supported by the evidence, are conclusive and binding upon the court. Mr. Justice Clifford, in the case of *Garfield v. Paris*, 96 U. S. 557, 24 L. Ed. 821, commenting upon the law on this subject, said: "Accept and receive" are the words of the statute in question, but the law is well settled that an acceptance sufficient to satisfy the statute may be constructive; the rule being that the question is for the jury whether the circumstances proved, of acting or forbearing to act, do or do not amount to an acceptance within the statute. Questions of this kind are undoubtedly for the jury." And again, in the same opinion: "Controlling authorities already referred to show that the question whether the goods or any part of the same were received and accepted by the purchaser is one for the jury, to which list of citations many more may be given of equal weight and directness." See, also, *Am. & Eng. Enc. of Law* (2d Ed.) vol. 24, p. 1088.

Nor did the defendant, by accepting and paying for the goods ordered, make himself liable for the goods shipped to him which he did not order. The defendant had a right to pay for the goods ordered and return those not ordered. He could also insist upon the plaintiff delivering the remainder of the goods ordered, or waive the same. The authorities cited by counsel for appellant regarding the interpretation of contracts for the sale of different articles of personal property at one sale, and their insistence that a vendee under such circumstances must receive all of the different articles, have no application to this case. The jury found that the articles returned by the defendant were not ordered by him, and hence they were not included in the contract of purchase.

The judgment of the probate court of Pottawatomie county is affirmed, at the cost of appellant. All of the Justices concurring, except IRWIN, J., absent.

McCLELLAN v. MINOR.

(Supreme Court of Oklahoma. Sept. 4, 1907.)

1. WRIT OF ERROR—REVIEW OF EVIDENCE.

Where the case-made does not contain an averment by way of recital to the effect that it contains all the evidence introduced on the trial of the cause, this court will not review any question which requires an examination of the evidence in order to arrive at its correct determination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2916, 2917.]

2. SAME—CASE-MADE—VERIFICATION.

The certificate of the judge to a case-made verifies and makes conclusive, as to their truth-

fulness, all recitals and averments made in the case; but this rule does not apply to certificates of counsel, or to other matters incorporated into the case.

(Syllabus by the Court.)

Error from District Court, Kay County; before Justice Bayard T. Hainer.

Action by Otis A. Minor against John F. McClellan. Judgment for plaintiff. Defendant brings error. Affirmed.

D. S. Rose, for plaintiff in error. Hackney & Lafferty, for defendant in error.

BURFORD, C. J. This was an action by Minor against McClellan to enforce specific performance of a contract to convey real estate. Issues were made and the cause tried to the court. Upon the evidence introduced the court found the issues in favor of the plaintiff and decreed specific performance of the contract. The defendant below brings the cause here on petition in error and prays for a reversal of the judgment.

None of the questions presented and argued by counsel for plaintiff in error can be determined without a review of the evidence introduced on the trial of the cause. The case-made attached to the petition in error contains what purports to be the evidence; but this court has established the rule that, unless the case-made contains the recital or its equivalent, the case contains all the evidence introduced on the trial of the cause, this court will decline to consider any question dependent upon an examination of the evidence for its determination. *Frame v. Ryel*, 14 Okl. 536, 79 Pac. 97; *Board of Washita County v. Hubble*, 8 Okl. 169, 56 Pac. 1058; *Sawyer Lumber Co. v. Champlain Lumber Co.*, 16 Okl. 90, 84 Pac. 1093; *B. K. & S. W. Ry. Co. v. Grimes*, 38 Kan. 241, 16 Pac. 472; *Ryan v. Madden*, 46 Kan. 376, 26 Pac. 680; *Pelton v. Bauer*, 4 Colo. App. 339, 35 Pac. 918; *Eddy v. Weaver*, 37 Kan. 540, 15 Pac. 492; *Hill v. Bank*, 42 Kan. 364, 22 Pac. 324.

The case in question contains a statement signed by counsel, as follows: "The foregoing contains a true and correct statement of all the pleadings, motions, orders, evidence, findings, judgments, decrees, and proceedings upon which judgment was rendered." This is not equivalent to a statement that the case contains all the evidence introduced on the trial of the cause. Nor is a statement or certificate of counsel of any greater weight or significance than any other document copied into the case. The court verifies and makes conclusive every recital contained in the case; but this rule does not apply to certificates of counsel or of other officers which may be incorporated into the case. This court said, in *Sawyer Lumber Co. v. Champlain Lumber Co.*, 16 Okl. 90, 84 Pac. 1093: "There is a certificate of counsel that the case contains all the evidence, and also a certificate of the stenographer that his transcript contains all the evidence; but neither of these certificates

are authorized or recognized. The case itself must contain the positive averment, by way of recital or other equivalent showing, that it does contain all the evidence submitted or introduced on the trial of the cause, and in the absence of such recital this court will not review any question depending upon the facts for its determination." This rule is conclusive of the case at bar.

Notwithstanding this rule, we may say that we have examined the whole record, and, upon the assumption that the case does contain all the evidence, we are of the opinion that the cause was rightly decided upon the law and facts, and that the plaintiff in error is in no position to complain.

The judgment of the district court of Kay county is affirmed, at the costs of plaintiff in error. All the Justices concur, except *HAINER, J.*, who tried the cause below, not sitting, and *IRWIN, J.*, absent.

ROGERS v. McCORD-COLLINS MERCANTILE CO.

(Supreme Court of Oklahoma. Sept. 4, 1907.)

1. MOTIONS—CONCLUSIVENESS OF ADJUDICATION.

Generally, when an order is made denying a motion to quash service of summons, and a final judgment is rendered, an appeal will lie from such judgment, and the ruling arising upon the motion to quash service may be assigned as ground for reversal, and, if no appeal is taken, the matter arising on the motion to quash service becomes res adjudicata and a bar to the right of the defendant to raise the same question upon a subsequent motion involving the same subject-matter.

2. APPEARANCE—GENERAL APPEARANCE.

Where a motion is made in which questions are raised which go to the jurisdiction of the court over the parties, and in which questions are also raised which cannot be raised by special appearance, but can only be heard upon a general appearance, the parties will be taken and held to have entered a general appearance, and in such case defects in the service of summons will be deemed and held to have been waived, even though such appearance be made after judgment and upon a motion to vacate and set aside such judgment.

(Syllabus by the Court.)

Error from Probate Court, Lincoln County; Fred A. Wagoner, Judge.

Action by the McCord-Collins Mercantile Company against J. M. Rogers. Judgment for plaintiff, and defendant brings error. Affirmed.

S. A. Cordell and J. B. A. Robertson, for plaintiff in error. S. D. Decker, for defendant in error.

PANCOAST, J. This action was brought in the probate court of Lincoln county to recover the sum of \$127.50. Summons was regularly issued and was served on the 24th day of November, 1904, by leaving a certified copy thereof, with the indorsements thereon, at defendant's usual place of residence. On the 5th day of June, 1905, the

plaintiff appeared specially and moved to quash and set aside the summons and service thereof, for the reason the defendant was not at the time of service a resident of the county or territory. Evidence was introduced upon this motion, and overruled by the court, and judgment was thereupon rendered as upon default. Following this, on the 15th day of June, 1905, the plaintiff in error filed a motion, supported by affidavits, praying that the judgment rendered on the 5th day of June be set aside, upon the ground that the defendant was a nonresident when service was made, and that the court had no jurisdiction of the person of the defendant. Evidence was introduced upon this motion also, and heard by the court, and after consideration thereof the court overruled the same. Time was given to make a case upon the last order. The case made, however, contains the record of the action of the court upon the motion to quash, as well as upon the motion to set aside the judgment, although no time was given to make a case upon the first motion. No extension of time having been given to make a case upon the ruling upon the motion to quash service, the action of the court in that regard cannot be considered in this appeal, except in so far as the court may be apprised of the first action of the court, and in so far as it may be necessary to consider the same in connection with the subsequent orders. It seems, however, from the record, that this motion was heard, and upon the hearing that evidence was introduced and considered, which was held by the court insufficient, and the return of the sheriff and the service was sustained.

It is insisted by the plaintiff in error that both of these motions ought to have been sustained. There was, however, evidence offered and considered, and we think that the return of the sheriff was sufficient as against the evidence offered by the defendant. The affidavits offered by the defendant are very unsatisfactory. The affidavit of the wife of the defendant was incompetent and could not have been considered by the court. The other affidavits contain conclusion and evidently appeared to the court as evasive and unsatisfactory. Upon this, however, the only question that can be considered here is the question arising upon the motion to set aside the judgment. This same question, having been presented to the court upon the motion to quash service, became *res adjudicata*, and the court would have been justified in overruling the motion upon that ground, if none other. An order overruling a motion to quash summons and service is as conclusive on appeal from a subsequent order involving the same question, and becomes *res adjudicata* to the same extent, as if the order had been made upon the final judgment. Generally, when an order is made denying a motion to quash service of summons, and a final judgment is rendered, an appeal will

lie from such judgment, and the ruling arising upon the motion to quash service may be assigned as ground for reversal, and, if no appeal is taken, the matter arising on the motion to quash service becomes *res adjudicata* and a bar to the right of the defendant to raise the same question upon a subsequent motion involving the same subject-matter. While there are exceptions to the letter of this rule, yet, whenever the exceptions have been recognized, they have been based upon what seems necessary for the full protection of the rights of the parties. "Orders made on motions affecting the substantial rights of parties from which an appeal lies, if the matter in question has been fully tried, are as conclusive upon the issue necessarily decided as are final judgments." *Halverson v. Orinoco*, 89 Minn. 470, 95 N. W. 320; *Board of Commissioners of Wilson County v. McIntosh*, 30 Kan. 234, 1 Pac. 572.

It is insisted by the plaintiff in error that a void judgment can always be attacked, even collaterally. As an abstract proposition of law this is probably correct, but this was not a void judgment. At most it was only voidable, and it is also true that the court upon a proper showing could have quashed the service, inasmuch as the service was not personal, but by leaving a copy at what was claimed as the usual place of residence of the defendant. This could only be taken advantage of by a special appearance, and, should the defendant in such a case at any time make a general appearance, such general appearance would have waived any defect of service. Not only that, but a general appearance in such a case may be made even after judgment, and when so made will have the effect of waiving any defect which may appear in the service.

In the brief of the plaintiff in error in this case, they argue two propositions which can in no wise be taken advantage of by special appearance, and an appearance in any case which is designated as a special appearance, and in which special appearance propositions are contended for which cannot be taken advantage of by a special appearance, but can only be heard upon a general appearance, the parties will be taken and held to have made a general appearance. Counsel argue, upon pages 10 and 11 of their brief, that the judgment was rendered without testimony; also, that the petition was not subscribed by the plaintiff in error, and for this reason the court erred in rendering judgment; also, the service was made on Thanksgiving Day. The first two of these propositions are not matters that can be considered under the head of a special appearance. They are matters that do not pertain to the jurisdiction of the person, and the defendant, having presented these two matters to the court, will be deemed to have entered a general appearance in the action, and, having entered a general appearance, all matters affecting the service are waived, and the court will be held

to have jurisdiction of the person of the defendant.

There being no proposition that can be considered except those arising upon the motion to set aside the judgment, which proposition involves alone the question of service, and these matters having been waived by the general appearance, and the argument of the propositions not pertaining to the question of service and all matters pertaining to service being shown by the record to have become *res adjudicata*, and there being no other proposition presented to this court, the judgment of the probate court will be affirmed. All the Justices concurring, except IRWIN, J., absent.

HOLT v. CLASSEN et al.

(Supreme Court of Oklahoma. Sept. 4, 1907.)

PUBLIC LANDS—ENTRIES—PRIORITIES.

A settlement or entry on public land already covered of record by another entry, valid upon its face, does not give a second entryman any right in the land notwithstanding the fact such entry may subsequently be relinquished or ascertained to be invalid by reason of facts debaring the record of such entry; and one first entering after the relinquishment or cancellation has priority over one attempting to enter prior to such relinquishment or cancellation. Following *McMichael v. Murphy*, 197 U. S. 304, 25 Sup. Ct. 460, 49 L. Ed. 766.

(Syllabus by the Court.)

Error from District Court, Oklahoma County; before Justice James K. Beauchamp.

Action by Amelia M. Holt against A. H. Classen and others. Judgment for defendants and plaintiff brings error. Affirmed.

The amended petition upon which this action is predicated sets forth that the plaintiff is the sole surviving heir of Levi Holt, who on or about the 11th of March, 1890, filed his soldier's declaratory statement and application to make homestead entry on the S. W. $\frac{1}{4}$ of section 27, township 12, range 3 W. I. M., in the proper United States land office in accordance with the laws of the United States, and established rules of the land department. It appears from the petition and exhibits that one Ewers White was at the time a homestead entryman of the tract involved, that his entry had been contested by one Blanchard, and White's homestead entry was held for cancellation by the commissioner of the general land office. Holt's declaratory statement and application to enter the land was made during the time, and while White had a right to appeal from the decision of the commissioner to the Secretary of the Interior, which appeal was in due time perfected, and White's entry thereby preserved in tact pending a determination by the Secretary of the Interior of the matters presented by such appeal. While the right of White to the land was pending before the Secretary, White, on November 29, 1890, relinquished his homestead entry to the tract, and Murphy was allowed to make

homestead entry thereon. The allowance of such entry at that time, and while Holt's application to file declaratory statement was pending and suspended, was held by the Department of the Interior to be erroneous; but, in view of the fact that Murphy's entry was of record, the department ruled that Murphy would be allowed 30 days from the date of notice to show cause why his entry should not be canceled and Holt's application placed of record. This order brought on before the department a contest between Murphy and Holt which resulted ultimately in a determination by the Secretary of the Interior in favor of Holt's right to enter the land. Pending the contest between Holt and Murphy, Holt died, and his rights were revived in the name of Amelia M. Holt, plaintiff herein, as sole surviving heir, and she thereafter was represented before the department by the defendant C. W. Ransom, who on June 14, 1897, and after the determination by the Secretary of the Interior of the right of the heirs of Levi Holt to enter the tract as a homestead, filed in the local office a waiver of the preference right of such heirs to make homestead entry of the tract in accordance with the decision of the Secretary of the Interior, and asked on behalf of such heirs to withdraw all claims in consideration (as recited in said waiver) of the receipt of \$2,000 to them in hand paid by Samuel Murphy, which waiver was signed by C. W. Ransom and acknowledged before S. M. Dille, register of the local land office, and the defendant Samuel Murphy was thereafter permitted to make homestead entry of the tract.

The petition of the plaintiff then alleges that the act of Ransom in waiving plaintiff's right was without her knowledge or consent; that no part of the consideration received by Ransom was ever paid to her; that she relied upon Ransom as her attorney to keep her informed as to her rights, but that he deceived her by concealing from her the fact that a preference right of entry had been awarded to the heirs of Levi Holt, and of the fact that he had entered a waiver of the rights of said heirs to the tract as above stated; and that she did not discover the fraud until about the 8th day of September, 1901. The petition of plaintiff further recites that the defendants on the 14th day of June, 1897, conspired and confederated with the said Ransom to cheat and defraud plaintiff out of her right to said land, and acted together with said Ransom in executing and filing said waiver as above set forth, and charges that the defendant C. W. Ransom, for a consideration paid by the other defendants, and by the assistance and counsel of the other defendants, except the Classen Company, filed a waiver of all of plaintiff's rights to said land, in the local land office. It is further charged that on the 19th of January, 1898, the defendant fraudulently procured a patent to the land to be issued

by the government to the defendant Samuel Murphy, and that he thereafter fraudulently conveyed 120 acres of said land to the other defendants, retaining to himself 40 acres thereof. The petition then in detail charges specific acts of fraud on the part of each one of the defendants (except the Classen Company) participated in by all the defendants, each and all of which acts were entered into, done, and performed with the intent and purpose of each of said defendants, thereby to cheat and defraud the plaintiff out of her right to enter said premises awarded her by the said decision of the Secretary of the Interior. The acts of the several defendants by which the plaintiff claims to have been defrauded consisted in manipulating the title to said land by deeds and mortgages in such way as to place the same beyond the reach of any action by the plaintiff to recover the same, and as well also to distribute the value of said premises ratably among the said defendants. The value of said premises is alleged to be the sum of \$175,000, and to that extent the plaintiff alleges she has been damaged by the wrongful and fraudulent acts of the said defendants set out in the petition.

To the petition of the plaintiff each of the defendants filed their separate demurrers upon three grounds: (1) That the action was barred by the statute of limitation; (2) that it did not state facts sufficient to constitute a cause of action; and (3) that there is a misjoinder of parties defendant. The cause coming on before the trial court upon these demurrers, the court sustained the same as to each of the defendants upon the second ground, and from this ruling and judgment of the court the cause comes to this court for review, upon the error alleged to have been committed in sustaining such demurrers. The foregoing is a statement of the material facts set out in the petition and exhibits thereto attached.

John S. Jenkins, for plaintiff in error. J. H. Everest and C. T. Smith, for defendants in error.

GILLETTE, J. (after stating the facts as above). In considering this case, based upon the facts above stated, we shall consider the same in the light only as presented by the brief of the plaintiff in error, and in such brief the plaintiff in error states: "There is but one question raised in this case: Did the application of Levi Holt to enter the land in controversy initiate a right to said land in favor of Levi Holt, which application was made, and received by the register and receiver of the local land office, and the legal fees tendered on the 11th day of March, 1890, and suspended on the same day, to await the determination of White et al., on appeal; said application being made four days after the final judgment of the commissioner, and before an appeal was taken to the Secretary?"

This presentation of the issue narrows the question for our determination to the single proposition: Was the tendered entry of Holt rightfully received and held suspended at the time it was tendered March 11, 1890, and while the homestead entry of Ewers White remained in tact upon the land?

It will be observed that Holt's application was not in any sense an application to contest the validity of any existing entry of or right to the land, but was an application to enter the same and file thereon a soldier's declaratory statement, which application was by the officials of the local land office received, but held suspended pending a complete determination of the then existing rights of White et al., under the entries which segregated the tract from the public domain. If the land was in fact segregated from the public domain at the time Holt tendered such entry, the local land office had no jurisdiction to accept another original right or application to enter the land, which in and of itself would be an act of segregation. It is true that one homesteader believing himself entitled to the land may enter a contest for the determination of such right against all existing entries or applications, but this is the extent of his right under such conditions. A tendered homestead entry or application to enter a tract of land already segregated from the public domain carries with it no legal right thereto. A homestead right to a tract of the public domain may be initiated in two ways: First, by an actual bona fide settlement upon the land; second, by a homestead entry thereof at the local land office. A valid initiatory right may be secured in either of these ways, and one is as effective as the other. The first of these inceptive rights that is exercised establishes an inchoate right to the land. If each of these rights are initiated at the same time by different persons, the land office will call a hearing to determine which, in point of time, was first, and award the land accordingly. If a tract of land already segregated from the public domain by an existing entry could have another valid right thereto attached, as an original homestead right, then such right might be initiated by settlement as well as by a tendered entry at the land office; but this proposition is squarely denied by the decision of the Supreme Court of the United States in *McMichael v. Murphy*, 197 U. S. 304, 25 Sup. Ct. 460, 49 L. Ed. 766, involving this same tract of land. In that case it appears that, while White's homestead entry was still in tact, of record, *McMichael*, on June 3, 1889, attempted to initiate a homestead right thereto by establishing a residence thereon. He was ejected from the land, and the land having subsequently been patented to one Murphy, whose right thereto attached by a homestead entry allowed subsequently to the settlement right of *McMichael*, he (*McMichael*) brought suit against Murphy seeking thereby to have Murphy's title to the land held a trust for his

use and benefit. This court denied him that right (*McMichael v. Murphy*, 12 Okl. 155, 70 Pac. 189), and the Supreme Court of the United States, reviewing this decision (197 U. S. 304, 25 Sup. Ct. 460, 49 L. Ed. 766), says: "Following the adjudicated cases, we hold that White's original entry was *prima facie* valid, i. e., valid on the face of the record, and *McMichael's* entry, having been made at a time while White's entry remained uncanceled, or not relinquished, of record, conferred no right upon him, for the reason that White's entry, so long as it remained undisturbed of record, had the effect to segregate the lands from the public domain and make them not subject to entry. Upon White's relinquishment they again became public lands, subject to the entry made by Murphy." It will be observed that the Supreme Court uses the word "entry" without distinguishing between a homestead entry at the land office and the initiation of a homestead right by settlement, but holds that lands are segregated by a homestead entry, from the public domain, and no valid entry can thereafter be made upon the land until it is restored to the public domain by a cancellation of the entry that segregated it. Following this decision of the Supreme Court of the United States, the Supreme Court of this territory, in *Holt v. Murphy*, 15 Okl. 12, 79 Pac. 265, a case involving this same tract of land and the rights thereto of these same parties, held: "(1) A homestead entry, valid upon its face, constitutes such an appropriation and withdrawal of the land as to segregate it from the public domain, and, so long as it remains a subsisting entry, precludes it from subsequent entry. (2) A homestead application to enter land already covered by a subsisting homestead entry can confer no right whatever upon the applicant. (3) Where an application to enter land already covered by homestead entry is received by the local land office and rejected, and an appeal is taken from such action, it is not a pending application that will attach on the cancellation of the previous entry, since the appeal cannot operate to create, as matter of law, any right not secured by the application." The rule thus laid down by this court is in accord with the determination of the Supreme Court of the United States in *Hodges v. Colcord*, 193 U. S. 192, 24 Sup. Ct. 433, 48 L. Ed. 677, wherein said court uses the following language: "Gayman's homestead entry was *prima facie* valid. There was nothing on the face of the record to show that he had entered the territory prior to the time fixed for the opening thereof for settlement, or that he had in any manner violated the statute or the proclamation of the President. This *prima facie* valid entry removed the land, temporarily at least, out of the public domain, and beyond the reach of other homestead entries." An examination of the case last above cited shows that such an entry, although void, by reason of the dis-

qualification of the entryman to make it, nevertheless operates to so segregate the tract involved from the public domain as to preclude the initiation of another homestead right to the same tract by entry, until the voidable entry has been canceled.

The authorities here cited, we think, justify the conclusion that the question presented in this case by the plaintiff in error should be determined in the negative.

The judgment of the court below is therefore affirmed. All the justices concurring, except IRWIN, GARBER, and HAINER, JJ., absent.

(19 Okl. 106)

**FIRST NAT. BANK OF BARTLESVILLE
v. BLAKEMAN.**

(Supreme Court of Oklahoma. Sept. 4, 1907.)

1. WITNESSES — GENERAL REPUTATION — EVIDENCE.

On the trial of a cause to a jury, where the defendant testifies as a witness in his own behalf and is not impeached in any manner recognized by the rules of evidence, it is reversible error to permit him to introduce evidence of his general reputation for truth and veracity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1084-1086.]

2. SAME.

The rule stated in the opinion as to when a party will be allowed to corroborate his own testimony by evidence of previous good character.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1284.]

(Syllabus by the Court.)

Error from District Court, Pawnee County; before Justice Bayard T. Hainer.

Action by the First National Bank of Bartlesville against George W. Blakeman. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Biddison & Eagleton, for plaintiff in error.
Wrightsmen & Fulton and James B. Diggs, for defendant in error.

BURFORD, C. J. The plaintiff in error, the First National Bank of Bartlesville, commenced its action in the probate court of Pawnee county against the defendant in error, George W. Blakeman, to recover judgment upon a promissory note for the sum of \$349.30, bearing date January 21, 1902, payable to T. C. Milton, or order, and purporting to be signed by Geo. W. Blakeman. The note was indorsed by Milton to the plaintiff in error, and, payment being refused after maturity, the bank sued Blakeman as maker of the note. Blakeman denied under oath the execution of the note. The cause went to the district court on appeal for trial *de novo*. The case was tried to a jury on the sole issue as to the genuineness of the signature of the maker of the note. A number of witnesses testified to the facts relevant to the issue, and the defendant, Blakeman, testified as a witness in

his own behalf, denying unequivocally that he had signed or authorized the signing of the note sued on. No person testified to having seen him sign the note, and the payee, Milton, was not produced as a witness by either party. There was some testimony by experts as to the genuineness of the signature. There was no evidence offered for the purpose of impeaching the testimony of Blakeman, nor was there, on cross-examination of Blakeman, any attempt made to show that he had made contradictory statements, or that he had committed any criminal or immoral acts. No evidence was offered attacking his general reputation for truth and veracity. During the trial the defense offered several witnesses, and, after qualifying them as character witnesses, they were permitted to testify, over the objection and exception of the plaintiff, that the reputation of Blakeman for truth and veracity was good in the neighborhood in which he lived. The case was submitted to the jury, and verdict returned in favor of the defendant, Blakeman. The bank filed a motion for new trial, in which it alleged as error the ruling of the court in admitting the evidence of the general reputation of the defendant. The motion was overruled, and judgment rendered for the defendant. The bank appeals, and assigns as error the overruling of its motion for new trial.

But one question is presented or argued by counsel for plaintiff in error. The sole question for our determination is: Was it reversible error for the court to permit the defendant, whose character had not been attacked, to introduce evidence of his general reputation for truth and veracity? The plaintiff in error insists upon the extreme rule that it is never permissible to offer evidence of general reputation unless the general character for truth and veracity is attacked by the adverse party, while the defendant in error insists upon the other extreme—that anything which tends to discredit the testimony of a witness is an impeachment of the witness, and entitles him to offer testimony in support of his general reputation for truthfulness. Both parties are sustained by respectable authority, but we think neither of them suggests the safe rule. The question as to when and under what conditions a witness may be corroborated by evidence of general good character is one that has been as much discussed by text-writers and jurists, and upon which there is as irreconcilable confusion, as many others found in the books in this country of many jurisdictions. This court has never been called upon to adopt a rule on the subject, and we feel it our duty to explore the field fully and select the path which seems to lead to the most logical and beneficial results. It is useless to attempt to reconcile the many judicial decisions upon the main subject and its related branches; nor would it be profitable to make a critical review of them.

There are a few general principles which pervade all the adjudicated cases, and these have been carefully stated and learnedly considered by the eminent text-writers on Evidence, and we may safely base our conclusions upon a consideration of their labors.

One of our earliest American writers upon the law of evidence, and one whom every lawyer and jurist of to-day venerates, Prof. Greenleaf, in volume 3, § 469, of the fifteenth edition of his work says: "Where evidence of contradictory statements by a witness, or of other particular facts, as, for example, that he has been committed to the House of Correction, is afforded by way of impeaching his veracity, his general character for truth being thus in some sort put in issue, it has been deemed reasonable to admit general evidence that he is a man of strict integrity and scrupulous regard for truth. But evidence that he has on other occasions made statements similar to what he has testified in the cause is not admissible, unless where a design to misrepresent is charged upon the witness in consequence of his relation to the party or to the cause, in which case it seems it may be proper to show that he made a similar statement before the relation existed. So, if the character of a deceased attesting witness to a deed or will is impeached on the ground of fraud, evidence of his general good character is admissible. But mere contradiction among witnesses examined in court supplies no ground for admitting general evidence as to character."

We find the subject thus discussed in Underhill on Evidence, § 352: "The direct impeachment of a witness by any of the means which have been above explained creates and issue respecting his general character for truthfulness. Evidence to support this, and to show that he is a person in whose testimony the jury may have confidence, is therefore relevant. But evidence of reputation is not relevant merely because there is a contradiction between adverse witnesses, or because the credibility of a witness is shaken on cross-examination, though its admission in such cases may not be reversible error. A distinction has sometimes been made by which it has been held that general evidence of the character of the witness for truthfulness is not relevant, if he was impeached merely by showing that he had made contradictory statements. This distinction is repudiated by a majority of the decisions, which support the proposition that general evidence of the character of the witness as a truthful person is always admissible, whenever any attempt, though it may have been unsuccessful, has been made to impeach it, as, for example, where another witness is asked what is his character for truth, and replies that it is good."

In 3 Jones on Evidence, § 870, the author, in discussing this question, says: "While it

is clear that a direct attack upon the reputation of a witness admits evidence to sustain his credibility, the question whether such evidence is rendered admissible by collateral attack is involved in more difficulty. It has sometimes been held that, if it appears from the cross-examination of a witness that he has been guilty of immoral conduct or charged with a criminal offense, he may be sustained by evidence of good character for truth. So it was held that, when a witness was assailed by evidence that he had been suborned and paid for his testimony, his good character for veracity might be shown. So the same class of testimony has been received in an action on an insurance policy, where the defendant had sought to prove that the plaintiff had burned his building and made false proofs of loss, and in an action for forgery, where the defendant sought to prove that a witness for the state had himself committed the forgery, proof of the good character of such witness was allowed. As we have seen, although it is held in some of the cases that answers on cross-examination which tend to disparage the character of the witness are sufficient to render admissible sustaining evidence of his good character, and although there is considerable authority in the decisions to support this view, the practice would undoubtedly lead to great confusion and the multiplicity of collateral issues, unless carefully guarded by the discretion of the trial judge. It is well settled that when, either by cross-examination or other evidence, it is shown, that the witness has been convicted of a crime, his good reputation for truth since such conviction may be shown; and such testimony is not received where it appears that the witness was acquitted, or merely charged with crime, without a conviction. So, where a witness admitted on cross-examination that he had been drunk on various occasions, it was held that this did not render testimony admissible as to his general good character for veracity." And in section 871 the same author says: "It has sometimes been held that, where proof has been offered of the inconsistent or contradictory statements of a witness, his credit may be sustained by proof of his good reputation for truth and veracity; that, since the object of the attack is to impeach the witness, the mode of such attack is immaterial, and the same reason exists for sustaining the witness as where witnesses are called to testify to his bad reputation. But it is the better view, and one sustained by the weight of authority, that in such cases the witness cannot be fortified by evidence of good character. Although the contradiction in his statements may tend to show that he ought not to be believed in the particular case, this does not necessarily touch his general good character for truth or integrity, since the inconsistency may be the result of mistake or forgetfulness. On the same prin-

ciple, and perhaps for stronger reasons, it is no ground for the introduction of evidence to sustain the character of a witness that other witnesses have contradicted him by testifying to a different state of facts; and this remains true, although the contradiction is of such a character as to incidentally impute immorality or crime."

That learned and scholarly jurist, Mr. Justice Elliott, upon the subject under consideration, in his work on Evidence (volume 2, § 995), says: "When the reputation of a witness for truth has been impeached, the party calling a witness has a right to call other witnesses to prove that his reputation is good. Good character, it has been held, may be shown, where the witness has been impeached by proof of conviction of crime. But this principle is not always applied, at least where there is no real attack by way of impeachment. If the witness has been impeached by proof that he made contradictory and inconsistent statements out of court, some of the cases allow his good character to be shown in corroboration, while others refuse to admit such testimony. However, to render testimony of good character competent and admissible in support of the witness, an attack must necessarily have been made on his character." And in section 971 he proceeds to show how a witness may be impeached, by showing, either by cross-examination or by opposition witnesses, bias, malice, prejudice, interest, or corruption; by showing inconsistent and contradictory statements of the witness; by showing general bad character, or reputation for truth and veracity.

In Bradner on Evidence, § 16, it is said: "Testimony to support the character of a witness cannot be given in evidence, unless the credibility of the witness is impeached."

Prof. Wigmore, in his critical and extensive contribution to the literature of the law, has gone over this subject more analytically and completely than any other text-writer, and in section 1104 of Wigmore on Evidence he gives us the following: "Good character for veracity is as relevant to indicate the probability of truth-telling as bad character for veracity is to indicate the probability of the contrary. But there is no reason why time should be spent in proving that which may be assumed to exist. Every witness may be assumed to be of normal character for veracity, just as he is assumed to be of normal sanity. Good character, therefore, in his support, is excluded until his character is brought in question, and it becomes worth while to deny that his character is bad. The question thus always arises under the general rule: When is the witness' character brought into question by the opponent, so as to open the way to evidence of good character in denial? This must depend on the nature of the opponent's impeaching evidence. It may be a direct assault on the witness' character, in which

case no doubt exists. But it may be evidence of a doubtful or ambiguous import; for example, of bias, of a prior self-contradiction, of an error of fact, and so on through the whole series of kinds of discrediting evidence. It is obvious that the theory of each of these kinds of evidence must be considered before it can be said whether it affects the witness' character."

From these several statements of the law we think it a fair and reasonable deduction that when a witness has testified, and the opposite party has, either upon cross-examination of such witness or by the introduction of independent testimony, impeached such witness in any one of several particulars, it is competent to corroborate him by evidence of his general reputation for truth and veracity. But it is not every act of the adverse party which would have the effect to discredit the witness or his testimony that entitles him to such corroboration. The weight of modern authority seems to classify the cases in which evidence of general reputation in support of a witness is admissible practically as follows:

First. Where there has been a direct attack upon the character of the witness by offering evidence tending to show that his general reputation for truth and veracity is bad. This rule is universal and unquestioned.

Second. Where the witness has been impeached by evidence of particular acts of criminal or moral misconduct, either on cross-examination or by record of conviction. While this rule is not universally adopted by the American courts, it is supported by the following cases: *Lewis v. State*, 35 Ala. 386; *People v. Ah Fat*, 48 Cal. 61; *People v. Amanacus*, 50 Cal. 233; *State v. Fruge*, 44 La. Ann. 165, 10 South. 621; *Vernon v. Tucker*, 30 Md. 456; *Russell v. Coffin*, 8 Pick. (Mass.) 143; *Gertz v. Fitchburg R. Co.*, 137 Mass. 77, 50 Am. Rep. 285; *People v. Rector*, 19 Wend. (N. Y.) 569; *Carter v. People*, 2 Hill (N. Y.) 317; *People v. Gay*, 7 N. Y. 378; *Stacy v. Graham*, 14 N. Y. 492; *Webb v. State*, 29 Ohio St. 358; *Wick v. Baldwin*, 51 Ohio St. 51, 36 N. E. 671; *Warfield v. Ry. Co.*, 104 Tenn. 74, 55 S. W. 304, 78 Am. St. Rep. 911; *Smith v. Tate*, 40 Tex. Cr. R. 290, 50 S. W. 363; *Luttrell v. State*, 40 Tex. Cr. R. 651, 51 S. W. 930; *Paine v. Tildon*, 20 Vt. 554; *George v. Pilcher*, 28 Grat. (Va.) 299, 26 Am. Rep. 350; *Reynolds v. Railroad Co.*, 92 Va. 400, 23 S. E. 770; *Clark v. State*, 117 Ga. 254, 43 S. E. 853; *Clark v. Bond*, 29 Ind. 555; *Warfield v. L. & N. Ry.*, 104 Tenn. 74, 55 S. W. 304, 78 Am. St. Rep. 911.

Third. Impeachment by evidence of corruption on the part of the witness in connection with the case in which he appears.

Fourth. Impeachment by evidence of contradictory or inconsistent statements, admitted on cross-examination or shown by the testimony of other witnesses. Upon this last rule the authorities are in irreconcilable

conflict, and are about equally divided; but the better reason seems to favor the right to corroborate the witness, whose evidence is in this manner discredited, by allowing proof of his general reputation for truth and veracity. *Hadjo v. Gooden*, 13 Ala. 718; *Holley v. State*, 105 Ala. 100, 17 South. 102; *Mercer v. State*, 40 Fla. 216, 24 South. 154, 24 Am. St. Rep. 135; *McEwen v. Springfield*, 64 Ga. 159; *Clark v. State*, 117 Ga. 254, 43 S. E. 853; *Paxton v. Dye*, 26 Ind. 394; *Clem v. State*, 3 Ind. 480; *Board v. O'Conner*, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16; *State v. Boyd*, 38 La. Ann. 374; *Davis v. State*, 38 Md. 15; *People v. Rector*, 19 Wend. (N. Y.) 583; *Isler v. Dewey*, 71 N. C. 14; *Burrell v. State*, 18 Tex. 713; *Sweet v. Sherman*, 21 Vt. 23; *Stevenson v. Gunning's Estate*, 64 Vt. 601, 25 Atl. 697; *State v. Staley*, 45 W. Va. 702, 32 S. E. 198.

There are other particular cases in which, in the exercise of a wise discretion, the trial court may properly allow evidence of general reputation of a witness in support of such witness; but there must be some special or particular element introduced into the case by the adverse party by which such witness is impeached or discredited. But the foregoing rules embrace the general classes of cases in which such practice is allowable. In the examination of the case under consideration, we find nothing in the evidence nor in the cross-examination of the defendant, which brings the case within any of the adjudicated cases. The question as to whether he signed the note sued on was the vital and controlling question. He testified that he did not sign the note, that he did not see the payee on the day the note purported to have been executed, and offered other corroborating evidence to support his position. The bank offered some expert evidence upon the question of the identity of the signature, and attempted to prove that the defendant had made certain admissions from which it might be inferred that he had signed the note. There was nothing involving moral turpitude of the defendant in the transaction. If a crime had been committed, it was by the person who forged the note. It is not sufficient, to entitle one to corroborate his evidence by general character, that the facts to which he testifies are contradicted or disproved by other witnesses. The testimony introduced by the defendant that his general reputation for truth and veracity was good was liable to have great weight with the jury and to have influenced their verdict. It was reversible error to admit such evidence under the circumstances presented by the evidence in the case.

The judgment of the district court of Pawnee county is reversed, at the costs of the defendant in error, and the cause remanded, with directions to grant a new trial. All the Justices concur, except HAINER, J., who tried the case below, not sitting, and IRWIN, J., absent.

GLAZIER v. HENEYBUSS et al.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. LIMITATION OF ACTIONS—SUSPENSION.

A person cannot prevent the operation of the statute of limitations by delay in taking action incumbent upon him.

2. ABATEMENT AND REVIVAL — DEATH OF PARTY.

Section 4624, Wilson's Rev. & Ann. St. 1903, fixing one year as the time within which an action may be revived in the names of the representatives or successors of the plaintiff, is not a mere limitation upon a remedy, but conditions the very right to revive; and parties seeking to avail themselves of its benefits must strictly comply with its terms.

3. SAME—CONSENT OF DEFENDANT.

Under section 4624, Wilson's Rev. & Ann. St. 1903, upon the death of the plaintiff an order to revive an action in the names of the representatives or successors of a plaintiff shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made. The statute is not suspended until the appointment of the legal representatives, but begins to run after the expiration of a reasonable time from the death of the plaintiff in which a legal representative might have been appointed.

4. SAME.

Where the plaintiff in an action died on the 10th day of April, 1902, and without the consent of the defendant the order of revival in the name of the administratrix was made on the 1st day of December, 1903, and thereafter upon the hearing it was found that the order was not made within one year from the time it might have been first made, *held*, that the action was barred by the statute, and section 4624 warranted a dismissal of the action.

(Syllabus by the Court.)

Error from District Court, Noble County; before Justice Bayard T. Halner.

Action by Henry E. Glazier against T. H. Heneybuss and Martha Heneybuss. On the death of plaintiff, Lydia E. Glazier, administratrix, was substituted. Judgment for defendants, and plaintiff brings error. Affirmed.

Smith & Scott, for plaintiff in error. Doyle & Cress, for defendants in error.

GARBER, J. This action to recover on two promissory notes was brought on the 27th day of September, 1901, in the district court of Noble county, by Henry E. Glazier, as plaintiff, against the defendants in error, defendants below. Henry E. Glazier died on the 10th day of April, 1902. On May 12, 1902, his death being suggested to the court, on application of his heirs leave was granted to substitute his legal representatives as plaintiff. On March 27, 1903, upon the application of plaintiff in error, and over the objection of the defendants, the heirs were substituted as plaintiffs. On December 1, 1903, the order substituting the heirs as plaintiffs was set aside, upon the application of plaintiffs in error, and over the objections and exceptions of defendants in error an order was made reviving the action in the name of Lydia E. Glazier, administratrix of the estate of Henry E. Glazier, deceased. On January 28,

1904, the defendants filed their answer to the amended petition, alleging that the court was without jurisdiction and that the action could have been revived in the name of the administratrix within 30 days after the death of the plaintiff, and that the action was, therefore, barred by the statute of limitations. The administratrix filed a reply, admitting all the facts set up in the answer, except that the cause could have been revived in the name of the administratrix within 30 days after the death of the plaintiff, and that said action was barred by the statute of limitations. The issues thus joined were submitted to the court, a jury being waived, and judgment rendered in favor of the defendants for costs. The court found that the cause had not been revived within the time allowed by law for the revival of an action after the death of the plaintiff. From that judgment the plaintiff in error prosecutes this appeal, and asks a reversal of the cause upon the ground that the statute of limitations begins to run, not from the death of the plaintiff, but from the date of the appointment of the administratrix.

This question is presented to this court for the first time, and necessitates a consideration and construction of sections 4620 and 4624 of Wilson's Rev. & Ann. St. 1903. At common law the action abated upon the death of the party before trial or verdict, and, if the cause of action was of the character that did not survive, death put a final end to the suit. If the cause was one that did survive, or could survive, plaintiff or his personal representative was required to bring a new action. In order to obviate the necessity of bringing a new action, and to remedy that defect of the common law, requiring a new action to be brought where the cause of action survived, statutes have been adopted, in England and in the various states of the Union, providing that the representatives of the deceased party, within limitations and upon compliances with certain conditions, might be made parties to the suit and action proceed. Section 4620 of our statute provides: "Upon the death of the plaintiff in an action, it may be revived in the names of his representatives, to whom his right has passed. Where his right has passed to his personal representatives, the revivor shall be in their names; where it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names." In this case, upon the death of the plaintiff, the right of action passed, not to his heirs, but to the administratrix of his estate. The subject-matter of the action was a part of the personal estate, and subject to the payment of the debts of the deceased, if judgment be secured and satisfied. The attempted revival in the names of the heirs was, therefore, a nullity, and is of no consequence in the determination of the question in this case.

This was virtually admitted by plaintiff in

error in filing a subsequent motion asking that the order of revival in the names of the heirs be set aside and the action be revived in the name of the administratrix. Hence the real battle in this case is waged over the construction of section 4624, fixing the time in which an order of substitution and revival might have been made in the name of the administratrix. The section reads as follows: "An order to revive an action, in the names of the representatives or successors of a plaintiff may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been made. * * *". These sections of our statute were taken from the Kansas statute, and with their adoption came the construction of the Supreme Court of that state. The simple statement of the familiar and accepted rule of construction would ordinarily be considered a final and satisfactory disposition of the case, especially when the foreign state has repeatedly construed the section in question; but in this case a strenuous and heated controversy is waged over the question as to what construction has been placed upon that section of the statute by the Supreme Court of that state, and numerous authorities are cited in support of the respective sides of the controversy. As a precautionary measure, before entering upon an investigation of the authorities, for perspicuity, we add the term "latest" to the statement of the general rule of construction, so as to read: By the adoption of the statute of a foreign state, we adopt the "latest" construction of that statute at the time of its adoption by the Supreme Court of that state.

In the case of *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316, removed from the state court of Kansas to the Circuit Court of the United States upon the authority of *Toby v. Allen*, 3 Kan. 399, *Hanson v. Towle*, 19 Kan. 273, and *Nelson v. Herkel*, 30 Kan. 456, 2 Pac. 110, it was held that the operation of the statute was suspended until an administrator had been appointed, and, while that case was pending on appeal in the Supreme Court of the United States, the same question was presented to the Supreme Court of the state of Kansas in the case of *Bauserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051, and upon a careful examination and consideration of the question, and a review of the prior decisions of that court, it was held that an action by another creditor against the defendant was barred by the statute, because the plaintiff had unreasonably delayed to apply for the appointment of an administrator. Chief Justice Horton, who had delivered the opinion in *Nelson v. Herkel*, supra, after referring to the cases cited above as holding that "the death of the debtor operates to suspend the statute," added: "But this court has never said, when the question was properly presented, that a creditor can indefinitely prolong the time of limitation by his own omission or refusal to act,

or that the death of the debtor operates to suspend the statute of limitations indefinitely"—citing *Amy v. Watertown*, 130 U. S. 320, 9 Sup. Ct. 537, 32 L. Ed. 933, wherein it was said: "When a party knows that he has a cause of action, it is his own fault if he does not avail himself of those means which the law provides for prosecuting his claim, or institute such proceedings as the law regards sufficient to preserve it;" also the cases of *Atchison, etc., Railroad Co. v. Burlingame Twp.*, 36 Kan. 638, 14 Pac. 271, 59 Am. Rep. 578, and *Rork v. Douglas Co.*, 46 Kan. 175, 26 Pac. 393, as establishing the proposition that "a person cannot prevent the operation of the statute of limitations by delay in taking action incumbent upon him," and that "to permit a long and indefinite postponement would tend to defeat the purpose of the statutes of limitations, which are statutes of repose, founded on sound public policy, and which should be so construed as to advance the policy they were designed to promote," and, following these decisions, the court arrived at the conclusion that the plaintiff's claim was barred by the statute, and said: "A reasonable time within which a creditor, having a claim against a decedent and wishing to establish the same against his estate, should make application for administration, would be, under the statute, 50 days after the decease of the intestate, or at least within a reasonable time after the expiration of 50 days; but a creditor cannot, as in this case, postpone the appointment for months and years, and then recover upon his claim. If he can do so for several months, or several years, he can do so for any indefinite length of time, and then resort to administration and establish his claim. This is certainly not in accord with the policy of the statutes, and is not a fair construction of our prior decisions."

In the case of *Bauserman v. Blunt*, supra, in the Supreme Court of the United States (147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316), Mr. Justice Gray, delivering the opinion of the court, in reviewing the various decisions of the Supreme Court of the state of Kansas upon this question, referring to the case of *Bauserman v. Charlott*, supra, in conclusion, said: "That decision was evidently deliberately considered and carefully stated, with the purpose of finally putting at rest a question on which some doubt had existed. It is supported by satisfactory reasons, and is in accord with well-settled principles; and there is no previous adjudication of that court to the contrary. In every point of view, therefore, it should be accepted by this court as conclusively settling that the operation of the statute of limitations of Kansas is suspended after the death of a debtor for 50 days only, during which the creditor could not apply for the appointment of an administrator, or, at most, for a reasonable time after the expiration of the 50 days."

As the proceedings to revive an action and

the proceedings to revive a judgment are substantially the same, and must correspond to the same formula, we cite the following cases in support of the rule herein announced: *Angell v. Martin*, 24 Kan. 335; *Railway Company v. Smith*, 40 Kan. 192, 19 Pac. 636; *Cunkle v. Railroad Co.*, 54 Kan. 194, 40 Pac. 184; *Berkley v. Tootle*, 62 Kan. 701, 64 Pac. 620; *Reaves v. Long*, 63 Kan. 700, 63 Pac. 1030; *Steinbach v. Murphy*, 70 Kan. 487, 78 Pac. 823.

In the case at bar the order of revival in the name of the administratrix was not made until 1 year, 7 months, and 21 days after the death of the plaintiff, and not until 1 year, 6 months, and 19 days after the suggestion of the death of the plaintiff and leave to revive was granted in name of personal representatives. The answer and reply put in issue the question of fact, when the order of revival "might have been first made." The plaintiff in error was a resident of Noble county, and upon the death of the deceased, April 10, 1902, she could have applied for letters of administration, and, upon giving 30 days' notice, have been appointed administratrix of the estate of the deceased. On the 12th day of May, 1902, she suggested the death of the deceased, and upon giving 30 days' notice from that date, had she filed her petition, she could have been appointed the legal representative and had the order of revival "made forthwith"; but, instead, the order of revival was not made until December 1, 1903, or nearly 18 months after the time in which it "might have been made." Without the consent of the defendants, and no showing for the delay, can it be said that the district court erred in finding that the order of revival was not made within one year from the time it "might have been first made?" There is either a limitation, or there is none. The Legislature has undoubtedly said that there is a limitation. If there is, in the language of the statute, "the order of revival upon the death of the plaintiff may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made." Without a revivor an action abates upon the death of the party, and without a statute there can be no revivor. The language "shall not be made" is peremptorily prohibitive. It imposes an absolute prohibition upon the granting of the order after the lapse of one year after the time when it "might have been made." At the expiration of that time the right ceases to exist. It is true the order of revival could not have been made until the appointment of the administratrix; but it was within the power of plaintiff in error to have had that appointment made. It was a condition precedent to the order of revivor. The law required her to act. She offers no evidence explanatory of the delay. She knew of the death of the plaintiff. The law said: "You may be ap-

pointed administratrix. If you file your petition and give the required notice." There were no other petitions filed for that appointment; and her petition, when filed, was not contested.

It is argued, however, in support of the position that the statutes should not begin to run until the appointment of a legal representative, that unscrupulous persons could prevent the appointment by contest and appeal for over one year, and, although the action might involve the whole estate, it would be forever barred. The plain language of the statute reads, "From the time when the order might have been first made," and is sufficient answer to that argument. It is not for the courts to mitigate, by opinion, the harshness of the law of limitations. It is their duty to declare the law as they find it. The limitation of revivor is arbitrary, exacting, requiring diligence, good faith, prompt action, and he who seeks its benefits must be able to show that he has complied with all its terms. Hardship or inconvenience is insufficient. Practical impossibility, alone, will satisfy. 19 A. & E. Ency. of Law, 216. It was clearly the duty of the plaintiff in error to file her petition for letters of administration and secure the appointment as administratrix of the estate. Section 4624, construed in connection with those statutes governing the appointment of legal representatives, gave her ample time, and during the diligent prosecution of the necessary steps to secure her appointment the statute of limitations would be suspended. Under the pleadings and evidence in this case the trial court was warranted under section 4625 in dismissing the action.

We have carefully examined the authorities cited by counsel which support the general rule; but, having adopted the statutes of the state of Kansas with the construction placed thereon by the Supreme Court of that state, they are not applicable in this case. The case of *Steinbach v. Murphy et al.*, supra, decided by the Supreme Court of that state in 1904, clarifies any uncertainty that may appear in the opinion of that court rendered in 1896 in the case of *Rexroad et al. v. Johnson*, 4 Kan. App. 333, 45 Pac. 1008.

There being no other error assigned or presented, upon the authorities above cited, the judgment of the district court of Noble county, dismissing the action, is affirmed.

HAINER, J., who tried the case below, not sitting. All the other Justices concurring, except IRWIN, J., absent.

WILLOUGHBY v. KELLY.

(Supreme Court of Oklahoma. Sept. 4, 1907.)
APPEAL — REVIEW — EVIDENCE — CORPORATIONS—STOCK BOOK.

Where, as in this case, the contents of a bank stock book are relied upon to establish the fact that at the date of the bank's failure

the defendant was a stockholder in the bank and liable as such, the contents of such book are not conclusive in the absence of testimony showing the same to have been accurately and correctly kept. And where the testimony as a whole throws doubt upon the facts sought to be established by the introduction of such evidence, and presents proof from which a conclusion may be adversely drawn, the conclusions of the trial court adverse to the conclusions sought to be established by such stock book will not be disturbed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

(Syllabus by the Court.)

Error from District Court, Logan County; before Justice Bayard T. Halner.

Action by J. A. Willoughby, receiver of the Capitol National Bank of Guthrie, against E. P. Kelly. Judgment for defendant, and plaintiff brings error. Affirmed.

This action was brought by J. A. Willoughby, receiver of the Capitol National Bank of Guthrie, to recover from the defendant \$1,000, the amount of the levy of the Comptroller of the Currency upon 10 shares of stock of the said bank belonging, as alleged, to defendant. The assessment was made by the Comptroller May 9, 1904. The defendant admitted the regularity and legality of the levy, but denied liability thereunder. From the proceedings had upon the trial of the case in April, 1905, it appeared from the stock book of the bank offered in evidence that the defendant, Kelly, was the owner of 10 shares of the capital stock of the bank from and after January 31, 1902. The defendant, on becoming the owner of such stock, was elected a director of the bank, which position he filled for about a year, when he tendered his resignation in writing, which was accepted in November, 1903, at which date he claimed his entire connection with the bank as director and stockholder ceased, and therefore denies any liability for the assessment.

It appears from the record that the defendant, Kelly, was solicited by the president of the bank to become a director of the corporation, and that he consented, and in order to qualify him for such position, the president of the bank, Billingsley, caused the transfer of 10 shares of his stock from his name to that of the defendant, and thereafter the defendant qualified as a director, affirming in his oath of office that he was the owner of 10 shares of stock in the bank. It appears, however, that the defendant was not in fact the real owner of the stock, and the same was never delivered to him. Stock certificates were issued in his name, but the same were not signed by the president or attested by the corporate seal. When thus partially issued, they were placed in the vault of the bank, and were there found when the receiver took charge, and no dividends thereon were ever paid to defendant. The defendant testified that when the stock was issued in his name he immediately reassigned it, by signing a blank for the assignment thereof printed on

the back of the stock certificate, but the blank for such assignment, printed on the stock found in the vault, was not signed. It is shown by the defendant's testimony that when he resigned as director he intended to sever all connection with the bank, including a retransfer of the stock to Billingsley. He was not present at the directors' meeting when his resignation was formally accepted in November, 1903, although the bank records show him to have been present. That he was in the city of Guthrie that day, and that he went to the bank, but upon arriving there was informed by the president that it was all over, and that one G. A. Nelson had been elected in his place. The defendant at the time asked the president of the bank if there was anything else for him to sign to show he had no interest in the bank, and he was told that everything had been signed, and that his stock had been transferred. Corroborating this testimony of the defendant, the record shows that on February 27, 1904, three months after the date upon which Kelly's resignation was accepted and his stock canceled, as stated by the president, Billingsley, a special stockholders' meeting was called and held. That at such meeting the owners of 960 shares were present, as follows:

A. G. Brower.....	400 shares	
C. R. Brooks.....	10 "	
Chas. E. Billingsley.....	510 "	
G. A. Nelson.....	10 "	
J. C. Robb.....	30 "	— 960

Absent stockholders:		
T. A. Neal.....	10 "	
J. G. Edmonson.....	30 "	— 40

Total	1,000 "	—1,000
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And at this meeting a 53 per cent. assessment was levied upon all the stock of the bank.

From the testimony the trial court found the issues in favor of the defendant, and the plaintiff brings the case to this court alleging error. Other necessary facts are set out in the opinion.

Flynn & Ames and R. A. Kleinschmidt, for plaintiff in error. Strang, Devereux & Hildreth and Lawrence & Huston, for defendant in error.

GILLETTE, J. (after stating the facts as above). It is manifest that the only question to be determined in this case is as to whether or not the defendant was a stockholder in the Capitol National Bank at the time of its failure, April 4, 1904. From the facts stated, it must be conceded that he never was at any time a stockholder of the bank in good faith. This fact, however, does not relieve him from liability to the creditors of the bank to the extent that the law makes stockholders liable in case of the bank's failure, for he could not hold himself out as a stockholder, or knowingly permit the bank so to do, without assuming complete responsibility to the full extent that the law fixes liability upon stock-

holders in good faith. That in January, 1902, he permitted his name to appear as a stockholder in the bank and qualified as a director, upon the faith of his interest in the bank to the extent of 10 shares, is admitted. That he continued in this relationship to the bank voluntarily until his attempted resignation in the summer of 1903 is settled by the record, and that he was liable to the creditors of the bank as an officer and stockholder until the 21st day of November, 1903, there can, we think, be no question. It is here, then, that the real contest in this case begins and turns upon the settlement of the question as to whether or not, when he resigned as a director of the bank, he relinquished and transferred the stock then carried on the books of the bank in his name, for the record does not show the bank to have been in a failing condition at that time, and does show his resignation as a director and the acceptance of the same upon that date. It further shows a purpose on his part at that time to entirely sever his connection with the institution, and, in considering the question as to whether he did so sever his connection, it must be remembered that he did not have actual possession of the 10 shares of stock which had been assigned to him and carried on the books of the bank in his name. They were in the bank vault only partially filled out, but at that time upon being informed by the president of the bank that he had been relieved as a director, he made inquiry if there was anything else necessary for him to sign to secure his complete release of any connection with the bank, and was informed by the president that there was not. This certainly barred him from any interest in or demand against the assets of the bank, and concluded the bank as a bank from demanding anything from him. He did not have possession of stock to cancel or surrender. He was relieved as a director and the stock which had been carried in his name, in fact belonged to the president, and the president informed him that nothing further was necessary. It is therefore a naked legal proposition as to whether or not he is liable upon an assessment against him by the Comptroller of the Currency. Section 12 of the national bank act (13 U. S. Stat. 102, c. 106, Rev. St. 1878, § 5151 [U. S. Comp. St. 1901, p. 3465]) provides: "The shareholders of every national banking association shall be held individually responsible, equally and ratably and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein."

Was he, at the time of the failure of the bank, a stockholder? As between him and president, Billingsley, whose stock had been assigned to him, he was not, and, as between him and the bank for any profit of the bank, he was not. But it is urged that the stock book still showed him a stockholder. This book we understand from the evidence to have been originally a book containing blank

shares of capital stock, with stubs which, when a share of stock is issued, is filled out giving a history of such issuance, and the proofs of record show that when the bank closed A. G. Brown was the owner of stock certificate 30 of 100 shares, issued January, 1896; No. 31 of 100 shares issued January, 1906; and No. 63 of 200 shares issued May 28, 1902, a new issue of stock not receipted for. C. E. Billingsley was the owner of certificate No. 53 of 25 shares, issued December, 1900; No. 54, 25 shares; No. 56, of 25 shares; No. 57 of 50 shares; No. 58, 50 shares; No. 59, 50 shares; No. 65 of 270 shares issued May, 1902; a new issue not receipted for; No. 69, 75 shares issued March, 1903; a reissue from original certificate No. 67 of 15 shares; No. 71 of 10 shares issued April, 1904; a reissue of all of certificate 58; No. 71 of 10 shares, C. R. Brooks, issued January, 1902; a transfer from all of certificate 29; No. 60 of 30 shares, J. G. Edmonson; transfer from all of certificates 46, 47, 48, 49, and 51, issued January, 1902; No. 66 of 10 shares to T. A. Neal, issued March, 1903; a transfer of 10 shares from original certificate No. 55 issued for 25 shares; No. 70 of 30 shares issued to J. C. Robb, issued December, 1903; a reissue of all of original certificate No. 54; No. 62 of 10 shares to E. P. Kelly, issued January 31, 1902; a reissue of all of original certificates 32 and 52. As will be seen, these certificates named are for 1,000 shares. The whole stock of the bank and the defendant's 10 shares of stock are included in the list. The record shows, with reference to the introduction of this evidence: "Mr. Kleinschmidt: We offer in evidence that part of the stock book showing the shares held by the various stockholders of the Capitol National Bank. The Court: It may be considered in evidence." Then follows the certificates of which the foregoing is an abstract. No other parts of the stock book are shown in the record.

It is urged that this stock certificate book is a book of original entries, and therefore the best evidence of who the stockholders were at that time. Touching this question, we have to say that, as against the bank, it is probably the best evidence. The result to be ascertained from the book are such results as the book is made to speak through the methods in which it has been kept. There is no evidence in this record that the results deducible from this book are the facts in the case, or that the book has been correctly and accurately kept. We say, therefore, that as against the bank the result logically deducible therefrom is the best evidence, and as against the bank almost conclusive, but as against third persons adversely interested such effective application of record testimony of this kind cannot be made. A man's liability cannot be fixed by the bookkeeping of some other party, and in such case such testimony has weight or lacks weight according as the correctness of the

bookkeeping is admitted or shown. In this case we have but a portion of the bank stock book before us, and no satisfactory conclusion can be deduced therefrom. It is confidently urged that just \$100,000 of outstanding stock was shown by the certificates hereinbefore described. That is true. But is this all and conclusive of the fact that such list of outstanding stock and stockholders measures accurately and conclusively what stock and stockholders were alone liable as such when the bank failed. The defendant's stock passed to his name January 31, 1902. We have no doubt but that the entire capital stock of the bank was at that time subscribed for and owned, and yet four months afterwards certificate No. 63 for 200 shares was issued to A. G. Brower and marked "a new issue." At the same time (May, 1902), stock certificate 65 to C. E. Billingsley for 270 shares, marked "new issue." This is approximately one-half the capital stock of the bank. It surely was not an original issue of stock, and what other stock is taken up by such new issue of stock is left wholly to conjecture. Stock certificate No. 66, for 10 shares, to T. A. Neal, issued March, 1903, was a transfer from original certificate No. 53, which original certificate was for 25 shares, and stock certificate 69, for 5 shares, to C. E. Billingsley, issued November 21, 1902, was a transfer from original certificate No. 67, which original certificate was for 15 shares.

It will be observed that this record evidence touching the last two named certificates shows that, at the time of the failure of the bank, there was outstanding, on certificates No. 55 and 67, 25 shares of the capital stock of the bank, and these are not included in the record offered to make up the 1,000 shares of stock, which plaintiff claims was outstanding and alone liable. It will also be observed that stock certificate 67, with 10 shares thereof not accounted for in the record of the stock book offered in evidence, was issued long subsequent to the date of the plaintiff's certificate. The record is silent as to who it was issued to. If presumptions may be indulged in, it would be fair to presume that certificate 67, for 15 shares, was issued to Billingsley, and that afterwards he caused certificate 69 to issue for 5 of these shares. Such a presumption would show 510 shares in C. E. Billingsley. The facts are that the proofs offered from the stock book are most unsatisfactory and inconclusive. The trial court manifestly accepted the evidence touching the transactions of the bank on February 27, 1904, as more reliable, and which shows the stock of the bank outstanding at that time to be in Brower, Brooks, Billingsley, Nelson, Robb, Neal, and Edmonson, and on which date a 53 per cent. levy was made on the stock of the bank in the name of those persons as stockholders; Billingsley paying such assessment on 510 shares. We think the trial court had a right to adopt this view of the testimony, which

by the well-settled rule of this court cannot be disturbed where a conflict in the testimony appears.

Under the conclusion here reached the principal ground set forth in the motion for a new trial is immaterial, which was that a letter, dated July 10, 1903, was signed by E. P. Kelly, and which signature he denied. This act of Kelly's, if admitted, would not change the conclusion here reached, for his connection with the bank was not concluded until the following November, when his resignation as a director was accepted, and at which time he was informed by the president of the bank that his connection with the bank was wholly severed.

Finding no reversible error in the record, the judgment of the trial court is affirmed. All the Justices concurring, except HAINER, J., who presided in the court below, and IRWIN, J., absent.

BLACKWELL, E. & S. W. RY. CO. et al. v. BEBOUT.

(Supreme Court of Oklahoma. Sept. 4, 1907.)

1. EMINENT DOMAIN—PROCEDURE—ENTRY ON LAW.

The statute of Oklahoma authorizing railroad corporations to exercise the right of eminent domain, and providing the procedure by which the damages to the landowner may be ascertained, and giving to the owner of the property as well as the corporation the right to institute such proceedings, does not provide an exclusive remedy; but the common-law remedy afforded the owner in such cases may be pursued, at the election of the landowner, where his property is entered upon and appropriated for railway purposes.

2. ABATEMENT—EMINENT DOMAIN—PENDENCY OF PROCEEDINGS—BAR TO RECOVERY OF DAMAGES BY SUIT.

Where condemnation proceedings have been instituted for the purpose of ascertaining the rights of the parties for the appropriation of right of way by a railroad company and of fixing the compensation of the landowner, such landowner cannot maintain an action at law to recover damages for the injury done to his property, and if such suit is brought it should be dismissed at the plaintiff's costs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, § 35.]

3. SAME—RIGHTS OF PARTIES.

After a railroad company has entered upon private lands and appropriated its right of way, either with or without the consent of the owner, either party may institute condemnation proceedings to determine the relative rights of the parties and ascertain the damages sustained by the owner of the property, or the landowner may sue for damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 694, 698.]

4. APPEAL—VERDICT—PRESUMPTIONS.

Where the person in whose favor a verdict is rendered is entitled to interest, and there is nothing in the record from which it can be determined whether or not the jury took into consideration the matter of interest in fixing the amount of their award, it will be presumed that they included interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3760.]

5. SAME.

The judgment of the court must follow the verdict, and where the verdict is general and for a sum in gross, and the question of interest was not reserved by the court, and there is nothing in the record to indicate that the jury omitted interest, it will be presumed that it is embraced in the amount of their finding, and the court cannot add interest to the amount found by the verdict of the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3760.]

6. APPEAL—REVIEW—DETERMINATION.

Where there is no error in the amount fixed by the verdict of the jury, and the judgment is erroneous as to amount and as to the taxation of costs, this court will not grant a new trial, but will vacate the erroneous judgment and enter in this court the judgment which the trial court should have rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4507.]

(Syllabus by the Court.)

Error from District Court, Woods County; before Justice J. L. Pancoast.

Condemnation proceedings by the Blackwell, Enid & Southwestern Railway Company and the St. Louis & San Francisco Railroad Company against J. J. Bebout. Judgment for defendant, and plaintiffs bring error. Modified.

Flynn & Ames, Jesse J. Dunn, and Dale & Blierer, for plaintiffs in error. A. C. Towne, for defendant in error.

BURFORD, C. J. The defendant in error was the owner of the southeast quarter of section 28, township 20 north, range 10 west, in Woods county, Okl. The Blackwell, Enid & Southwestern Railway Company, without his consent, and before commencing any proceedings to acquire a right of way, constructed its railroad across said tract and appropriated a portion of it for its right of way, and subsequently leased or transferred its property to the St. Louis & San Francisco Railroad Company. After the strip of land for right of way had been taken and was being used for railway purposes, the Blackwell, Enid & Southwestern Railway Company instituted proceedings for condemnation of said strip for its right of way and for the assessment of damages. Commissioners were appointed and made the assessment and filed a report, fixing the damages at \$275. In these proceedings the land was described in the notice, the application for appointment of commissioners, and the report of the commissioners assessing the damages, as the southwest quarter, when it should have been the southeast quarter, the land in controversy. The appraisers were sworn by a United States commissioner, an officer not authorized to administer oaths in such matters. These proceedings were all corrected by amendments by leave of the court, and a new report properly sworn to filed by the commissioners on September 21, 1903.

In order to acquire the right to bind the landowner in condemnation proceedings, the court must have jurisdiction of the property

to be condemned, and also of the owner. In our judgment the proceedings in this case were so defective that the jurisdiction of the subject-matter was not acquired until the filing of the amended and completed report of the appraisers and the amendment of the notice and application to the court for the appointment of viewers, which was all done on the 21st day of September, 1903. Bebout, the landowner, had made his written demand for a jury trial prior to this date, and also refiled the original demand on said date. He had 30 days from the filing of the report of the appraisers in which to file his demand for a jury trial. In view of the failure to describe the land in either notice, the application or the report of the commissioners, and the failure of the commissioners to take any oath either before or after making the assessment and award of damages, we are satisfied that his time did not begin to run until the amendment and perfecting of the proceedings on September 21, 1903. Hence his demand for a jury trial was in time, and there was no error in allowing a jury trial upon the issue of the amount of compensation to be awarded the landowner.

The condemnation proceedings were initiated by the Blackwell, Enid & Southwestern Railway Company by service of the original defective notice upon Bebout upon the 20th day of December, 1902, and from that date to the time of trial various steps were taken in court looking to the completion and confirmation of the proceedings. On November 8, 1902, Bebout filed in the district court of Woods county his petition against the Blackwell, Enid & Southwestern Railway Company, and also the St. Louis & San Francisco Railroad Company, claiming damages for the right of way of said roads across his land. Four several summonses were issued, and an attempt made to serve the defendants; but the first three were successively set aside by the court upon special appearance and motion of the defendants. The fourth summons, which was finally served upon the defendants, was issued December 8, 1903, and served on the 10th day of December, 1903. The defendants appeared and pleaded to the petition, and, among other defenses, set up the pendency of the condemnation proceedings in the same court, to have the damages ascertained for the same causes. The reply was a general denial. On February 3, 1905, the Blackwell, Enid & Southwestern Railway Company served upon Bebout an offer to confess judgment for the sum of \$550, and filed the same in court on the same day. On February 7, 1905, the court, by special order with consent of all parties, consolidated these two cases and ordered them tried together. The consolidated case was tried to a jury, and a verdict returned assessing damages in favor of Bebout for the sum of \$480. Afterwards, on February 24, 1905, the court rendered judgment on the verdict for the sum of \$589.20, which was the amount of the verdict, \$480 plus \$109.20,

which the court allowed and added as interest from the date of the appropriation of the land by the railway company to the date of trial. The plaintiffs in error objected to the allowance of any interest by the court, and subsequently moved to modify the judgment and for a new trial; all of which were overruled by the court, and exceptions saved. It appears from the record in this case that the Blackwell, Enid & Southwestern Railway Company went upon the land in controversy and constructed its road across a portion of the tract, prior to the time that any proceedings were begun to have determined the compensation of the landowner. Subsequently, and before the landowner had begun any proceedings to recover compensation, the railway company instituted the condemnation proceedings which resulted in an award of \$275 and the deposit of that sum in court for the use of Bebout. It was urgently contended by the company that Bebout had waived his right to a jury trial by having failed to file his demand for a jury trial within 30 days after the commissioners had filed their first report; but, as we have already said, the proceedings were so defective that jurisdiction by the court was not acquired of the subject-matter until the amendments were made inserting the correct description of the land, and the filing of the last report of award, which all appears to have been done on the same day. Bebout appeared to these amended proceedings and demanded a jury trial, which was allowed him. During the pendency of these proceedings he instituted his independent suit against both of the railway companies for damages, and issues were formed involving the identical questions in controversy in the condemnation case. It was contended in the court below, and also here, that the landowner was not entitled to maintain this independent suit for damages, but that his remedy was by the statutory proceedings for ascertaining the damages in such cases, and the determination of this question practically controls all other questions in the cause.

Our statute relating to the rights, powers, and duties of railway corporations, among other provisions, contains the following (section 109, art. 9, c. 18; Wilson's Rev. & Ann. St. 1903, § 1038): "Every railroad corporation incorporated under this act and any railroad corporation authorized to construct, operate or maintain a railroad within this territory, has power and is authorized to enter upon any land for the purpose of examining and surveying its railroad, and to take, hold and appropriate so much real estate as may be necessary for the location, construction and convenient use of its road, including all necessary grounds for buildings, station, workshops, depots, machine shops, switches, side-tracks turn-tables, snow defenses and water stations; all material for the construction of such road and its appurtenances, and the right of way over adjacent land sufficient

to enable such corporation to construct and repair its road and the right to conduct water to its water stations, and to construct and maintain proper drains, and may obtain the right to such real estate by purchase or condemnation in the manner provided by the law." And also the following (section 112; Wilson's Rev. & Ann. St. 1903, § 1041): "If the owner of any real property over which said railroad corporation may desire to locate its road, shall refuse to grant the right of way through and over his premises, the district judge of the county or subdivision in which said real property may be situated as provided in this article, shall, upon the application or petition of either party, and after ten days' notice to the opposite party either by personal service or by leaving a copy thereof at his usual place of residence, or in case of his non-residence in the territory by such publication in a newspaper as the judge may order, direct the sheriff of said county to summon three disinterested freeholders of said county or subdivision (or if there be none such then of the territory) as commissioners, who shall be selected by said judge, and who must not be interested in a like question. The commissioners shall be duly sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which such owner may sustain by reason of such railroad; and they shall assess the damages which said owner will sustain by such appropriation of his land; and they shall forthwith make report thereof in writing to the clerk of the said court, setting forth the quantity, boundaries and value of the property taken, or amount of injury done to the property which they assess to the owner; which report must be filed and recorded by the clerk, and a certified copy thereof may be transmitted to the register of deeds of the county or subdivision where the land lies, to be by him filed and recorded (without further acknowledgment or proof) in the same manner and with like force and effect as is provided for the record of deeds. And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises: Provided, that if the corporation shall need or require for the purpose of constructing said railroad, to take and occupy any real property in any unorganized county, or in other unorganized country where there is no district court established, then the judge of the district court of the nearest organized county or subdivision (wherein such court is established) upon the line of said road, shall appoint commissioners to assess said damages; and he and they shall perform all other duties required of district judges and commissioners by the terms of this article, and either party shall have the right to appeal as

in other cases herein provided: And provided further, that the report of the commissioners may be reviewed by the district court, on written exceptions filed by either party, in the clerk's office within sixty days after the filing of such report; and the court shall make such order therein as right and justice may require, either by confirming, modifying, or rejecting the same, or by ordering a new appraisalment on good cause shown; or either party may within thirty days after the filing of such report file with the clerk a written demand for a trial by jury; in which case the amount of damages shall be assessed by a jury, and the trial shall be conducted and judgment entered on the verdict in the same manner as civil actions in the district court. If the party demanding such trial does not recover a verdict more favorable to him than the assessment of the commissioners, he shall not recover costs in the district court; and all costs in the district court may be taxed against him: And provided further, that either party may appeal from the decision of the district court to the Supreme Court and the money so deposited shall remain in the hands of the clerk, as aforesaid, until a final decision be had and subject thereto. But such review or appeal shall not delay the prosecution of the work on said railroad over the premises in question, if such corporation shall first have paid or deposited with said clerk the amount so assessed by said commissioners; and in no case shall said corporation be liable for the costs on such review or appeal, unless the owner of such real property shall be adjudged entitled, upon either review or appeal, to a greater amount of damages than was awarded by said commissioners. The corporation shall in all cases pay the costs and expenses of the first assessment. And in case of review or appeal, the final decision may be transmitted by the clerk of the proper court, duly certified, to the proper register of deeds to be by him filed and recorded as hereinbefore provided for the recording of the report, and with like effect."

From these provisions it is clear that the railway company had the right to take such portion of the tract of land belonging to Bebout as was required for the construction and operation of its railroad, and that either the railway company or the landowner, if they failed to agree upon the amount of damages, had the right to give notice to the other party and apply to the judge of the district court for the appointment of commissioners to assess the damages. This right and power to initiate the proceedings by which the damages were to be ascertained is as completely conferred upon the landowner as upon the railway corporation. The corporation has the right to appropriate private property for its uses without the consent of the owner upon the condition only that it shall make just compensation therefor. If the Blackwell, Enid & Southwestern Railway Company

went upon the land of Bebout and attempted to appropriate any portion of it for railway purposes, he had the right to require them to stop work until the damages could be ascertained and deposited with the clerk of the court. If he failed to require this to be done, and stood by until the work was completed, he gained no greater rights than he had before, and the railway company got no better rights by his silence. The failure to have the damages determined in advance did not change the rights or relations of the parties. The provisions of the statute were still adequate for the determination of the rights of both parties and for the enforcement of such rights when determined.

A corporation having the right of eminent domain may exercise that right wherever their necessities require it, and in exercising such power the only requirement is that such corporation shall make just compensation for such private property as it takes or damages. Ordinarily, the power of eminent domain is exercised under statutory regulations, and where either party is given the right to initiate proceedings for the ascertainment of the damages and to invoke the process of the law specially provided for such cases, such statutory provisions have been held to be exclusive. It is said in 15 Cyc. 980, that: "Where a statutory remedy is given the owner of the property, such statutory remedy is usually held to be exclusive and to supersede the common-law remedies afforded the owner, particularly where condemnation proceedings are pending." And the text is abundantly supported by the authorities. *Kaukauna Water Co. v. Green Bay, etc.*, Canal Co., 142 U. S. 254, 12 Sup. Ct. 173, 35 L. Ed. 1004; *Kuhl v. C. & N. W. Ry. Co.*, 101 Wis. 42, 77 N. W. 155; *Land v. W. & W. Ry. Co.*, 107 N. C. 72, 12 S. E. 125; *Shortle v. Railway Co.*, 130 Ind. 505, 30 N. E. 639; *Ft. Wayne v. Hamilton*, 132 Ind. 487, 32 N. E. 324, 32 Am. St. Rep. 263; *Rehman v. New Albany, etc., Ry. Co.*, 8 Ind. App. 200, 35 N. E. 292; *Calro, etc., Ry. Co. v. Turner*, 31 Ark. 494, 25 Am. Rep. 564; *Hamor v. Bar Harbor Water Co.*, 78 Me. 127, 3 Atl. 40; *Dunlap v. Pully*, 28 Iowa, 469; *Brickett v. Haverhill Co.*, 142 Mass. 394, 8 N. E. 119; *Brown v. Beatty*, 34 Miss. 227, 69 Am. Dec. 389; *Fremont, etc., Ry. Co. v. Mattheis*, 35 Neb. 48, 52 N. W. 698; *Little Miami R. R. Co. v. Witacre*, 8 Ohio St. 590; *Cherry v. Lane Co.*, 25 Or. 487, 36 Pac. 531; *Phillips v. St. Clair Incline Co.*, 153 Pa. 230, 25 Atl. 735; *Milwaukee, etc., v. Strange*, 63 Wis. 178, 23 N. W. 432; *Aldrich v. Ches-hire Ry. Co.*, 21 N. H. 359, 53 Am. Dec. 212; *R. V. Ry. Co. v. Fink*, 18 Neb. 82, 24 N. W. 439. And it seems to be the settled rule that the entry upon the property and the appropriation of the right of way and construction of a railroad, prior to the initiation of condemnation proceedings, will not defeat the right of either party to institute proceedings to condemn, whether the entry was with or without the consent of the landowner. 15

Cyc. 835; Grand Rapids, etc., Ry. Co. v. Chesebrough, 74 Mich. 466, 42 N. W. 66; Cory v. Chicago, etc., Ry. Co., 100 Mo. 282, 13 S. W. 346; Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. 757; Jones v. New Orleans, etc., Ry. Co., 70 Ala. 227; Newgass v. St. Louis, etc., Ry. Co., 54 Ark. 140, 15 S. W. 188; San Francisco, etc., Ry. Co. v. Taylor, 86 Cal. 246, 24 Pac. 1027; Florida Central Co. v. Bell, 43 Fla. 359, 31 South. 259; Chicago, etc., Ry. Co. v. Goodwin, 111 Ill. 273, 53 Am. Rep. 622; Daniels v. Chicago, etc., Ry., 41 Iowa, 52; Oregon Ry. v. Mosler, 14 Or. 519, 13 Pac. 300, 58 Am. Rep. 321; Justice v. Nequehoning Valley Co., 87 Pa. 28; Searl v. Lake Co. School Dist., 133 U. S. 553, 10 Sup. Ct. 374, 33 L. Ed. 740; Albion Ry. Co. v. Hesser, 84 Cal. 435, 24 Pac. 288; Railroad Co. v. Armstrong, 46 Cal. 85; Dunlap v. Ry. Co., 50 Mich. 470, 15 N. W. 555; Secombe v. Milwaukee & St. P. Ry. Co., 23 Wall. (U. S.) 108, 23 L. Ed. 67; In re Metropolitan Elv. Ry. (Sup.) 12 N. Y. Supp. 506; Mead v. Elev. Ry. Co. (Super. Ct.) 24 N. Y. Supp. 908; Jacksonville, etc., Ry. Co. v. Adams, 28 Fla. 631, 10 South. 465, 14 L. R. A. 533. Upon the other hand, there are many cases asserting the doctrine that where there is nothing in the statute to indicate an intention on the part of the Legislature that the remedy by condemnation should be exclusive, it is merely a cumulative remedy, and the landowner has his election as to which remedy he will avail himself of. 15 Cyc. 982; Smith v. Chicago & W. Co., 67 Ill. 191; Strickler v. Midland R. R. Co., 125 Ind. 412, 25 N. E. 455; Chicago, etc., R. R. Co. v. Patterson, 26 Ind. App. 295, 59 N. E. 688; Atchison, etc., Ry. Co. v. Weaver, 10 Kan. 344; Cohen v. St. L., Ft. Scott & Wichita R. R. Co., 34 Kan. 158, 8 Pac. 138, 55 Am. Rep. 242; Parsons Water Co. v. Knapp, 33 Kan. 752, 7 Pac. 568; Lee v. Pembroke Iron Co., 57 Me. 481, 2 Am. Rep. 59; Harrington v. St. Paul, etc., Ry. Co., 17 Minn. 215 (Gil. 188); Hickman v. Kansas City, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684; Ash v. Cummings, 50 N. H. 591; White v. N. W. N. C. R. R. Co., 113 N. C. 610, 18 S. E. 330, 32 L. R. A. 627, 37 Am. St. Rep. 639; Fries v. Wheeling, etc., R. R. Co., 56 Ohio St. 135, 46 N. E. 516; Schuylkill Nav. Co. v. McDonough, 33 Pa. 73; Parker v. East Tenn. Ry. Co., 13 Lea (Tenn.) 669; Younklin v. Milwaukee Light, etc., Co., 112 Wis. 15, 87, N. W. 861. While the former rule seems to be supported by the greater weight of authority, we think the rule giving to the landowner, when his land has been invaded and taken without his consent for railway purposes, the election to proceed under the statute for ascertaining damages in condemnation proceedings, or to maintain an independent suit for his damages, is more in consonance with our embryonic condition and more certainly insures the adjustment of all adverse rights and interests in such cases, and we adopt such rule as the law of this jurisdiction. However, under this rule, it is

not permissible for a landowner to wage a suit for damages for the same injuries which may be adjudicated in condemnation proceedings when such condemnation proceedings are pending, or to commence such suit after the initiation of such proceedings. To proceed in the one case excludes the right to proceed in another. 15 Cyc. 983.

While both parties were dilatory in commencing proceedings to determine the damages in this case, it appears that Bebout filed his petition for damages prior to the commencement of the condemnation proceedings by the railway company, but he failed to procure service of summons until after the condemnation proceedings had been perfected. Hence, under the statute fixing the commencement of an action as of the date of the summons which is actually served, it follows that the suit of Bebout for damages was not commenced until after the condemnation proceedings were instituted and perfected by amendments. The trial court erred in consolidating and trying the causes together. Everything that Bebout claimed could be determined in the condemnation proceedings, and, in any event, these proceedings were perfected and at issue before the action for damages was at issue, and when the condemnation cause went to trial the other case should have been dismissed. But the error in the proceeding only goes to a question of costs. Bebout was entitled to a jury trial in the condemnation case. He had not waived this right, and, as all the costs of the trial were made in the consolidated cases, no injury was done. The railway company, under the verdict of the jury, was liable for the costs of trial and final judgment in any event, and it is not to be presumed that any more or greater expense was incurred in trying the consolidated cases than would have been incurred in trying the condemnation case. Nor were any other controverted issues involved. The only question submitted to the jury was the difference in value of Bebout's land before and after the construction of the railway improvements. The conclusions here reached make it apparent that the action for damages brought by Bebout was improperly brought, and must necessarily be at his costs. The condemnation proceedings were proper and involved all the rights of both parties growing out of the appropriation of the land and the right of way by the railway company, and by the terms of the statute (Wilson's Rev. & Ann. St. 1903, § 1041) the Blackwell, Enid & Southwestern Railway Company was liable for all the costs of the assessment of damages up to the time Bebout filed his demand for a jury trial, and, having by the verdict of the jury recovered a verdict more favorable than the award of the commissioners, he was entitled to recover all the costs in the condemnation proceedings. It appears from the record that the total costs accrued in both cases was \$276.40.

Of this sum \$89 accrued in the damage suit prior to the consolidation. In no event is it proper to charge any of said amount against the Blackwell, Enid & Southwestern Railway Company.

The plaintiffs in error contend that the Blackwell, Enid & Southwestern Railway Company offered before trial to confess judgment in the condemnation proceedings for the sum of \$550, and that, inasmuch as Bebout only recovered \$480 by the verdict of the jury, he should not recover any costs which were incurred after the offer to allow judgment was made. The statute (Wilson's Rev. & Ann. St. 1903, § 4715) provides that: "The defendant in an action for the recovery of money only may, at any time before the trial, serve upon the plaintiff or his attorney an offer in writing to allow judgment to be taken against him for the sum specified therein. * * * If the plaintiff fails to obtain judgment for more than was offered by the defendant, he shall pay the defendant's costs from the time of the offer." If the proceedings brought by the railway company to condemn its right of way and to have the damages done to the landowner assessed by commissioners is "an action for the recovery of money only," then the contention of the plaintiffs in error as to costs is well taken. We do not think it comes within the designation of the statute. The condemnation cause was instituted by the railway company for the purpose of authorizing it to take private property for its use without the consent of the owner. The question of damages and of compensation is an incident to the main cause. It is a special proceeding, initiated in a particular and special manner, different from that in bringing an ordinary action for the recovery of money. The commissioners are required to determine the quantity, boundaries, and value of the property taken or amount of injury done to the property of the owner, and on demand for jury trial the issues are tried de novo, and the question of the necessity for the taking and the quantity claimed are issues of fact that ordinarily may be inquired into in such proceedings. It must necessarily follow that such a proceeding is not one for the recovery of money only, and the offer of the plaintiff in error to confess judgment before trial for a greater sum than the amount awarded in the verdict of the jury cannot affect the question of taxation of costs.

The next complaint arises upon the action of the court in adding to the amount of the verdict of the jury the sum of \$109.20 as and for interest. There is nothing in the record to indicate that the jury did not in the assessment of damages include the total amount that they deemed the defendant in error entitled to, and, in the absence of any indication to the contrary, the presumption is that they included in their award of damages every element that the landowner was

entitled to. This question was before this court in the case of *St. Louis, El Reno & Western Railway Company v. Oliver*, 18 Okl. —, 87 Pac. 423, and, after reviewing the Kansas cases upon the subject, the rule was laid down that: "In a case tried by jury, where it is clearly apparent that the prevailing party is entitled to interest upon the amount found in the verdict, and it is unquestionably clear that the jury allowed no interest, or where the court reserved the question of allowance of interest until after verdict, and it is clearly ascertainable from the verdict or uncontroverted facts the dates from which and to which interest should be allowed, and the rate is fixed, the court may make the computation and add the interest so found to the sum found in the verdict, and render judgment for the aggregate amount." This rule goes as far as the law will warrant, and we think it unsafe to extend it. The case at bar does not come within this rule. The court did not reserve the question of interest from the jury. It was the duty of the jury to assess the entire damage, and we must presume that they did so. "In an action for the breach of an obligation not arising from contract, * * * interest may be given in the discretion of the jury." Wilson's Rev. & Ann. St. 1903, § 2727. In the state of the record, we must presume that the jury exercised its discretion. It was error for the court to add any additional sum to the verdict, and the amount so allowed must be deducted from the judgment. It was the duty of the court to render judgment upon the verdict. There was no error in the assessment of damages by the jury, and the judgment must follow the verdict.

We find no error necessitating the granting of a new trial. The trial court should have modified the judgment as to amount and as to costs.

The amounts all appearing approximately certain in the record, this court will set aside and vacate the judgment and make it conform to the judgment that the district court should have rendered. And said judgment for the sum of \$589.20 and for costs is set aside and vacated, and judgment is now here rendered upon the verdict of the jury. And it is now hereby ordered and adjudged that the defendant in error, J. J. Bebout, do have and recover of and from the Blackwell, Enid & Southwestern Railway Company the sum of \$480, with interest thereon at the rate of 7 per cent. per annum from the 21st day of February, 1905, and the sum of \$187.41, costs accrued in said condemnation proceedings; and said cause No. 737, *J. J. Bebout v. Blackwell, Enid & Southwestern Railway Company and St. Louis & San Francisco Railroad Company*, is dismissed at the costs of the plaintiff, J. J. Bebout. And said condemnation proceedings are in all things confirmed and made effectual. The costs in this court are ordered taxed to the

defendant in error. All the Justices concur, except PANCOAST, J., who tried the cause below, not sitting, and IRWIN, J., absent.

LANE v. CHOCTAW, O. & G. R. CO.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. PLEADING—AMENDMENT OF PETITION—OPERATION AND EFFECT.

Where an amended petition is filed in a cause, and no part of the original petition is referred to or adopted into the amended petition, such original petition is superseded, and is no part of the record; and while it may be introduced in evidence by the adverse party, the same as any other writing signed by the party, subject to be explained, its contents cannot be considered upon the trial, either as part of the record or as admissions of the plaintiff, unless introduced in evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 736.]

2. CARRIERS — CARRIAGE OF PASSENGERS — PLEADING—RULES AND REGULATIONS.

Where the plaintiff sues a carrier of passengers for injuries alleged to have been received by him by the negligence of the carrier while riding on a baggage car, the carrier must plead its rules and regulations relating to passengers and where they may ride, and allege the violation thereof by the plaintiff, if it desires to avail itself of such a defense.

3. SAME—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

It is not, under our statutes, negligence per se for a passenger on a mixed railroad train to occupy a seat in a baggage car.

4. SAME—PERFORMANCE OF CONTRACT—ACCOMMODATIONS.

It is the duty of a carrier of passengers for reward to provide fit and suitable accommodations for all the passengers that it receives and attempts to transport, and "proper accommodations" means seats such as are usually provided and in use in a vehicle intended for the transportation of passengers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1054.]

5. SAME.

A carrier of passengers for hire is not allowed to overcrowd its vehicles or cars, and a passenger who goes upon a train for passage is not negligent in occupying a position in the baggage compartment of a combination car, where there are no unoccupied seats in the passenger compartments or coaches.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1375.]

6. SAME.

In order to absolve itself from liability for injuries to a passenger riding in its baggage car, the carrier must adopt and post in a conspicuous place in its passenger cars printed rules and regulations forbidding or warning passengers not to ride in such baggage car, and must, in addition to such notices, provide such passenger with proper accommodations in the passenger cars.

7. SAME—QUESTION FOR JURY.

Where a carrier is operating a mixed train, and a passenger goes upon such train with his ticket for passage, and finds no vacant seats in the passenger cars, or there are no printed rules posted in the passenger coaches in such train warning passengers not to ride in baggage cars, it is not negligence for such passenger to take a seat in a baggage car; and the questions of whether the train was overcrowded or the rules posted, if controverted, are questions for the jury, and not the court.

8. TRIAL—DIRECTION OF VERDICT.

Where there is a material controverted question of fact upon which reasonable minds might fairly come to different conclusions, it is error for the court to direct a verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Trial, § 171.]

(Syllabus by the Court.)

Error from District Court, Pottawatomie County; before Justice B. F. Burwell.

Action by Lewellen C. Lane against the Choctaw, Oklahoma & Gulf Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed, and new trial ordered.

The plaintiff in error, L. C. Lane, commenced his action in the district court of Pottawatomie county against the Choctaw, Oklahoma & Gulf Railroad Company for the purpose of recovering damages for injuries alleged to have been caused by the negligence of the defendant's servants in the operation of a railway train upon which he was a passenger in May, 1902. The Choctaw, Oklahoma & Gulf Railroad Company was at that time a common carrier of freight and passengers by steam railway between the stations of Tecumseh and Shawnee, in Pottawatomie county, Okla., as well as to other points, both north and south of said stations. On the day of the alleged accident the company was operating a mixed train, composed of different cars for passengers, baggage, and freight, and the plaintiff purchased a ticket at the railway station at Tecumseh, and at the proper time boarded the train with a number of other passengers, and, observing no unoccupied seat in the compartments intended for passengers, went into a compartment used for transporting baggage and took a seat upon a box therein located. The car in which he took passage was a combination car, one portion or end of which was regularly provided with seats for passengers, and the other portion or end was used for baggage. There was a door opening between the two compartments. The train started north from Tecumseh station towards Shawnee, and the plaintiff and several other passengers were occupying the baggage compartment of the combination car. Whether there was a separate passenger coach in the train, in addition to the combination coach, was a disputed question of fact on the trial; there being evidence both ways on the subject. The train ran about a quarter of a mile, and then stopped. The engine was detached from the train and ran onto a switch, where it picked up three or four freight cars, either flat or box, conveyed them onto the main line, and coupled them to the cars containing the passengers. When the engine backed up with the freight cars attached to make the coupling onto the passenger cars, it is claimed that they were struck with such speed and force as to pitch the plaintiff off the box upon which he was seated, thereby causing certain injuries to one of his limbs, which developed into such a

diseased condition as to require his leg to be amputated; and for his suffering, loss of limb, and expense of sickness and treatment, he brings this action, based upon the alleged negligence of the railway company in operating its train. The amended petition sets out the facts specifically and at length. The company answered by a general denial, coupled with an averment, in general terms, of contributory negligence on the part of the plaintiff. The plaintiff replied by general denial. The case was tried to a jury, and after all the evidence was introduced by both sides the court directed a verdict for the defendant and entered judgment of nonsuit. The plaintiff brings the cause here on petition in error.

Blakeney & Maxey and W. B. Crossan, for plaintiff in error. C. B. Stuart and Thos. R. Beman, for defendant in error.

BURFORD, C. J. (after stating the facts as above). We are advised that the trial court held, as a matter of law, that by going into the baggage compartment and riding there the plaintiff was guilty of such negligence per se as would prevent a recovery of damages. Preliminary to a discussion of this question, there are some questions of practice which arose upon the trial that should be settled.

The plaintiff filed an original, a first, and a second amended petition. In the original petition it is averred that the train upon which plaintiff took passage was a mixed train, composed of one passenger coach, one combination passenger and baggage coach, several box or freight cars, and a locomotive. In the amended petitions the averment is made that the train consisted of one combination passenger and baggage car, certain freight cars, and one locomotive. It is stated in the brief of plaintiff in error that the trial court, in deciding the case, held that the averment in the original petition that there was a passenger coach in the train was an admission by the plaintiff against his interest, and was conclusive against him and not subject to explanation or controversy. The original pleading was not introduced in evidence. The rule stated is one that applies to the pleadings upon which the case is submitted for trial. In the case of *Lane Implement Co. v. Lowder & Manning*, 11 Okl. 61, 65 Pac. 926, this court, in discussing a similar question, stated the law to be that "where a party to an action makes solemn admissions against his interest in a pleading, in the absence of mistakes on his part or on the part of his counsel who inserted them in such pleading, a court, in passing upon the sufficiency of a subsequent amended pleading filed by him, should take such admissions into consideration and treat them as admitted facts in the case." No authority is cited supporting this rule. It is probably stated too broadly, and is subject to some modification. The rule as stated *supra* is correct as applied to an amendment to a pleading; but the general

rule is that an original pleading is superseded, and its effect as a pleading destroyed, by filing an amended pleading which is complete in itself and does not adopt any of the former pleading by reference. 1 Enc. Pl. & Pr. 625. In any case a distinction should be made between an admission and an allegation. One is in the nature of a confession of a fact averred by the adverse pleader. The other is an averment against the adverse pleader, which must be supported by proof. The authorities are not at all harmonious as to the effect to be given upon the trial to superseded pleadings. A few courts, and principally California, seem to have adopted the rule that a pleading which has been withdrawn by an amended pleading cannot be considered for any purpose on the trial; it being considered unjust to hold a party bound by statements which may have been inserted by inadvertence or mistake, and which he has voluntarily abandoned by filing a new pleading. *Barber v. Reynolds*, 33 Cal. 497; *Kelly v. McKebben*, 54 Cal. 192; *Mecham v. McKay*, 37 Cal. 154; *Pence v. McElvy*, 51 Cal. 222; *Kentfield v. Hays*, 57 Cal. 409; *Pfister et al. v. Wade et al.*, 69 Cal. 133, 10 Pac. 369. But such superseded pleadings may be used for impeachment purposes, when relevant. In *re O'Conner's Estate*, 118 Cal. 69, 50 Pac. 4. In *Smith v. Pelott et al.*, 63 Hun, 632, 18 N. Y. Supp. 301, it was held that upon the trial the averments of the superseded pleadings could be considered, whether introduced in evidence or not; but this rule has but little support. The weight of authority and better-reasoned cases support the rule that a pleading, or an admission or allegation in a pleading, notwithstanding it may have been withdrawn, stricken out, or superseded by an amended pleading, is competent in evidence, and may be introduced against the party from whom it proceeded, like any other admission or declaration, subject, however, to explanation by the party who made it. This rule rests on the general principle that whatever a party has said about his case may be proved against him, and whatever writing he has signed or authorized may be, if relevant, introduced against him, the weight of such evidence to be left to the court or jury trying the case. *Abbott's Trial Brief* (2d Ed.) pp. 296, 297; *Solomon Ry. Co. v. Jones*, 30 Kan. 601, 2 Pac. 657; *Reibl v. Likowski*, 33 Kan. 515, 6 Pac. 886; *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625; *Brown v. Pickard*, 4 Utah, 292, 9 Pac. 573, 11 Pac. 512; *Kilpatrick D. G. Co. v. Box*, 13 Utah, 494, 45 Pac. 629; *Barton v. Laws*, 4 Colo. App. 212, 35 Pac. 284; *Schad v. Sharp*, 95 Mo. 573, 8 S. W. 549; *Stone v. Cook*, 79 Ill. 424; *Hall v. Woodward*, 30 S. C. 564, 9 S. E. 684; *B. & O. & C. R. R. Co. v. Evarts*, 112 Ind. 533, 14 N. E. 359; *Ludwig v. Blackshere*, 102 Iowa, 366, 71 N. W. 356; *Jeneau v. Stunkle*, 40 Kan. 756, 20 Pac. 473; *Walser v. Wear*, 141 Mo. 443, 42 S. W. 928; *Woodworth v. Thompson*, 44 Neb. 311, 62 N. W. 450; *Strong v. Dwight*,

11 Abb. Prac. N. S. (N. Y.) 319; *Willis v. Tozer*, 44 S. C. 1, 21 S. E. 617; *Goodbar Show Co. v. Sims* (Tex. Civ. App.) 43 S. W. 1065; *Or. R. R. & Nav. Co. v. Ducres*, 1 Wash. St. 195, 23 Pac. 415; *Lindner v. St. Paul F. & M. Ins. Co.*, 93 Wis. 526, 67 N. W. 1125; *Daub v. Engleback*, 109 Ill. 267; *Folger v. Boyington*, 67 Wis. 447, 30 N. W. 715; *Vogel v. Osborn*, 32 Minn. 167, 20 N. W. 129. In this case the superseded petition was not introduced in evidence, and its contents were not proper to be considered, either as admissions of record or as evidence in the case. The rights of the parties should have been determined upon the averments contained in the pleadings upon which the cause proceeded to trial, regardless of any former pleadings, unless properly offered and admitted in evidence.

Another question of practice relates to the question of pleading. The defendant, prior to the trial, asked for leave to file an amended answer, in which the company alleged compliance with the statutory regulations requiring rules and regulations to be posted in the passenger cars and the violation of such rules by the plaintiff. This plea was in the nature of confession and avoidance, or by way of justification. The court refused the request to file the amended answer, and the case went to trial upon the issues made by the defendant's general denial and plea of contributory negligence, which was denied by the plaintiff. Upon the trial the court, over the objection of the plaintiff, permitted the defendant to offer evidence tending to show that it had posted on the baggage room door a warning, and that the company had issued to its trainmen printed regulations, relating to the prevention of passengers riding upon the platform and in baggage cars. This evidence was not admissible under the issues formed, and it was error to admit it. It has been held that, in order to entitle the carrier to make the defense that it has adopted and promulgated rules and regulations which the passenger has violated, it must plead its rules and allege the facts which constitute the defense; and we think this a sound rule of practice. *Sherman v. Hannibal & St. Joe R. R. Co.*, 72 Mo. 62, 37 Am. Rep. 423; *Weymouth v. Broadway, etc., R. R. Co.*, 142 N. Y. 681, 37 N. E. 825; *Vail v. Broadway, etc., R. R. Co.*, 147 N. Y. 377, 42 N. E. 4, 30 L. R. A. 626.

The question as to whether the court rightfully took the case from the jury and decided as a matter of law that the plaintiff was guilty of such contributory negligence as would prevent a recovery is the controlling one in this case. It is uncontroverted that the plaintiff was a passenger upon the defendant's train. The train was a mixed train, carrying both freight and passenger cars. The plaintiff went into the baggage compartment of the combination coach, and there took a seat upon a box, and there remained until he was hurt, after which he got onto a flat

car and rode. No one in charge of the train either directed him into the baggage car or objected to his occupying the same. There were a number of other passengers occupying the baggage car at the time. It was the custom for passengers to occupy the baggage compartment between the stations of Tecumseh and Shawnee, and the conductor took fare from those in such car and made no objections to their riding there. The plaintiff had a ticket when he went upon the train to take passage to Shawnee, but his ticket was not taken up until after the accident. There was printed upon the door between the passenger and baggage car the words "No admittance." The door was standing open, and, when open, these words were not visible to one in the passenger compartment. The company had printed rules and regulations forbidding employes to allow passengers to ride in the baggage car. There was no proof of any rules or regulations being posted in the passenger coach or compartments for passengers in the train. It was a controverted question of fact as to the number of passengers on the train. It was a controverted question as to whether there was a passenger coach in the train in addition to the combination car. It was a disputed question as to whether the train was crowded, and whether there were any vacant seats in the passenger compartments, at the time of the accident. It was a disputed question as to whether the plaintiff could have found a seat, had he gone through the train. The combination car, in which plaintiff rode and was hurt, was the rear car in the train. There was nothing in the position occupied by plaintiff in the baggage car that could in any manner have contributed to his injury, except the fact that he was not sitting in a seat intended for occupancy by passengers. Upon the foregoing state of facts, what was the duty of the court?

Several of our state courts hold to the doctrine that a passenger is entitled to a seat in a passenger coach, and if he fails to occupy such seat, and occupies a place not intended for passengers, he is guilty of negligence per se, and is precluded from recovery, if injured while occupying such position; that he may demand a seat, and, if the carrier fails to provide him with one, he may retire from the train and maintain an action against the carrier for damages. This may be the safe and conservative rule; but it is not the practical one. Passengers arrange for their dates of travel, and arrange for their business at their destination. They arrange for train and business connections, and have a right to rely upon the business of the carrier, when they purchase a ticket or engage passage, to receive them at the proper time and place, to provide them with necessary and usual accommodations, to transport them upon usual and regular trains, and deliver them at the destination their ticket calls for; and if, upon entering the train as a passenger, they find it overcrowded and no seats unoccupied, they

have the right to seek the next most available place, the one that reasonably offers the place of greatest safety, and with proper caution occupy the same until the carrier shall provide them with better. Our Legislature, following the example of some of the older states, recognized this right at an early period of our territorial existence, and enacted statutory provisions which, in a great measure, control the determination of the question before us. These provisions are as follows:

Wilson's Rev. & Ann. St. 1903, § 657: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

Section 658: "A carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put, and is not excused for default in this respect by any degree of care."

Section 659: "A carrier of persons for reward must not overcrowd or overload his vehicle."

Section 660: "A carrier of persons for reward must give to passengers all such accommodations as are usual and reasonable, must treat them with civility, and give them a reasonable degree of attention."

Section 712: "A common carrier of persons must provide a sufficient number of vehicles to accommodate all the passengers who can be reasonably expected to require carriage at any one time."

Section 713: "A common carrier of persons must provide every passenger with a seat. He must not overload his vehicle by receiving and carrying more passengers than its rated capacity allows."

Section 714: "A common carrier of persons may make rules for the conduct of his business, and may require passengers to conform to them, if they are lawful, public, uniform in their application, and reasonable."

Section 1050: "In case any passenger on any railroad shall be injured while on the platform of a car while in motion, or in any baggage, wood or freight car, in violation of the printed regulations of the corporation, posted up at the time in a conspicuous place inside of its passenger cars, then in the train, such corporation shall not be liable for the injury; provided, it had furnished room inside its passenger cars sufficient for the accommodation of its passengers."

Section 1051: "When fare is taken by any railroad corporation for transporting passengers on any mixed train of passenger and freight cars, or on any baggage, wood, gravel or freight car, the same care must be taken and the same responsibility and duties are assumed by the corporation as for passengers on passenger cars."

When the plaintiff purchased his ticket and paid his fare to the station agent at Tecumseh, he was a passenger for reward, and entitled to transportation upon the defend-

ant's train from Tecumseh to Shawnee; and it was the duty of the railway company to provide him a suitable vehicle in which to ride, safe and fit for the use, to provide him with such accommodations as were usual and reasonable, to provide him with a seat and give him a reasonable degree of attention, and no degree of care would excuse any default in this respect. The railway company was a carrier of persons for hire or reward, and was operating a mixed train, consisting of passenger and freight cars, upon which it received the plaintiff as a passenger. In such case the law required of the carrier the "utmost degree of care and diligence for his safe carriage," and imposed upon it the same responsibility and duty as for carrying passengers upon passenger cars. It is true the carrier is permitted to make rules and regulations for the conduct of its business, and if such rules are lawful, are public, reasonable, and uniform in their application, may require the passengers to obey them. The manner of making such rules public, so as to charge passengers with notice thereof, is prescribed by the statute,—they must be "posted up at the time in a conspicuous place inside of its passenger cars then in the train." If such regulations are so posted, and the passenger is injured while violating such reasonable rules, then such passenger cannot recover, provided the carrier had furnished room inside its passenger cars sufficient for the accommodation of its passengers. The statute exempts the carrier from liability for injuries to a passenger, when injured on a platform or in a baggage car, when it has performed two conditions, viz.: Posted up in its passenger cars in a conspicuous place printed regulations forbidding the passenger to occupy such places, and provided him with sufficient accommodations in its passenger coaches. It necessarily follows that if the carrier has failed in either of these requirements, and the passenger is injured by the negligence of the carrier while riding upon the platform or in the baggage car, the carrier is liable for such injuries.

Whether the statute relating to the liability of carriers for injuries to passengers upon platforms or in baggage cars is an adopted one we are not advised, but an examination of the adjudicated cases discloses that the states of New York and Missouri each have statutes identical in language with ours. They have been in force in those states for more than half a century and have received uniform construction. It is held in both states that it is the duty of the carrier, if it has adopted rules and regulations respecting the carrying of persons upon the platforms of cars or upon baggage cars, that in order to charge the passenger with the observance of such rules they must be printed and must be posted up in the passenger cars in such conspicuous place as will be observable to passengers within the cars; that no mere words or warnings will fill the requirement

of this statute, but the printed rules or regulations must be actually posted; also, that the carrier must provide the passenger with a seat in its passenger cars, and that if any of the seats are occupied with luggage, or one passenger is occupying more than one seat, he is not bound to request such obstructions removed, but may seek some other unoccupied place. *Nolan v. Brooklyn, etc., R. R. Co.*, 87 N. Y. 63, 41 Am. Rep. 345; *Werle v. Long Island R. R. Co.*, 98 N. Y. 650; *Willis v. Railroad*, 34 N. Y. 670; *Weymouth v. Broadway, etc., Co.*, 2 Misc. Rep. 506, 22 N. Y. Supp. 1047; *Merwin v. Manhattan Ry. Co.*, 113 N. Y. 659, 21 N. E. 415; *Graham v. Manhattan Ry. Co.*, 149 N. Y. 336, 43 N. E. 917; *Morrison v. Erie R. R. Co.*, 56 N. Y. 307; *Schaefer v. Union Ry. Co.* (Sup.) 51 N. Y. Supp. 431; *Weymouth v. Broadway, etc., Co.*, 142 N. Y. 681, 37 N. E. 825; *Vail v. Broadway, etc., Co.*, 147 N. Y. 377, 42 N. E. 4, 30 L. R. A. 626; *Sherman v. Hannibal & St. Joe R. R. Co.*, 72 Mo. 62, 37 Am. Rep. 423; *Wagner v. Mo. Pac. Ry. Co.*, 97 Mo. 512, 10 S. W. 386, 3 L. R. A. 156; *Berry v. Mo. Pac. Ry. Co.*, 124 Mo. 223, 25 S. W. 229; *Gerstle v. U. P. Ry. Co.*, 23 Mo. App. 361; *Chaney v. L. & M. Ry. Co.*, 176 Mo. 598, 75 S. W. 595; *Higgins v. Han. & St. Joe R. R. Co.*, 36 Mo. 418; *Choate v. Mo. Pac. Ry. Co.*, 67 Mo. App. 105. The rule deduced from these cases, under statutory provisions like ours, is that it is not negligence per se for a passenger to ride upon a platform of a moving car, or in a compartment not intended for the use of passengers, where the trains are overcrowded, or he cannot without great danger or difficulty find a seat in a passenger coach, even though the carrier has provided coaches for its passengers and has posted notice of its rules and regulations; that in case of injury to a passenger while on a platform or in a baggage car the question of the passenger's negligence in occupying such place is one of fact to be determined by the jury.

But notwithstanding these statutory provisions, which are plain and controlling, we think the great weight of modern and well-considered cases supports the doctrine that, if the train is crowded, it is not negligence per se for the passenger to occupy the platform or baggage car, and the question as to whether he was justified in assuming such risk is one for the jury. It is said in *Hutchinson on Carriers* (3d Ed.) § 1198: "If, however, the railway company has permitted the car to be overcrowded, the passenger will not as a matter of law be chargeable with negligence in riding upon the platform, and the question whether in any particular case he was justified in doing so will ordinarily be one of fact for the jury. But when the car is overcrowded, and in consequence the passenger is obliged to ride upon the platform, he must exercise for his safety a degree of care commensurate with the increased danger usually incident to such an exposed place, and if he fails to do so, and

injury results, his conduct will preclude him from the right of recovery. While there are cases which hold that the passenger will be justified in riding upon the platform if he is unable to obtain a seat in the car, the better rule would seem to be that if there is standing room within the car he should stand inside, rather than expose himself to peril by riding upon the platform. He is not required, however, to disregard the usual courtesies of life in order to get an advantage over other passengers in securing a place within the car. If, therefore, the car should be so crowded that the passenger, in the exercise of reasonable prudence, would be justified in concluding that he could not get inside without unreasonably pushing or crowding his way, he would be under no duty to attempt to enter, and it would not be negligence for him, under such circumstances, to ride upon the platform." Our statute places the riding upon the platform and in a baggage car under the same rule.

Judge Thompson, in his masterful work on the *Law of Negligence* (2d Ed., vol. 3, § 2958), says: "Upon the question whether contributory negligence is to be ascribed to a passenger who is hurt while riding in the baggage or express car, under such circumstances that he would not have been hurt if he had remained in a passenger car, there is considerable conflict of judicial opinion. It is no doubt a reasonable regulation that passengers shall not ride in the baggage car. The safety of the passengers, the impeded discharge of duty by the company's servants, and the security of the property conveyed therein, are considerations in support of this rule. Moreover, all passengers are probably aware that the hazards of travel are increased by riding in this portion of the train. Prima facie, therefore, a passenger who, unless excused by special circumstances, elects to ride in the baggage car instead of remaining in one of the passenger coaches—assuming that there is room for him—commits an impropriety of such a character that, in case he is injured while so riding and the circumstances are such that he would not have been injured if he had remained in one of the passenger coaches, he will be precluded from recovering damages from the company, unless it appears that he is riding there by permission of the conductor for the benefit of the company." It will be observed that Judge Thompson holds that the passenger riding in the baggage car is guilty of indiscretion, and prima facie negligent, when he elects to ride in the baggage car, when there is room for him in the passenger coach, and, unless excused by special circumstances, such as riding there with the permission of the conductor for the benefit of the company, or where the regulations are habitually disregarded, or it is customary to convey and accept fare or tickets from passengers in the baggage car without objection by those having the management of the train.

The rule that the passenger will not be guilty of negligence per se by riding upon the platform or in the baggage car, when the platforms or passenger cars are crowded, or when he is unable to observe any vacant seats, but that the question as to whether he acted under all the circumstances as a reasonably prudent man would have acted, and whether the position he occupied at the time of the accident was one of increased risk, or in fact bore any causal relation to the injury, is supported by the following authorities, in addition to those cited supra: *Hardenbergh v. St. P. & M. R. R. Co.*, 39 Minn. 3, 38 N. W. 625, 12 Am. St. Rep. 610; *Thorpe v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 404, 32 Am. Rep. 325; *St. L. & I. M. Ry. v. Leigh*, 45 Ark. 368, 55 Am. Rep. 558; *Louisville, N. O. & Tex. Ry. v. Patterson*, 69 Miss. 421, 13 South. 697, 22 L. R. A. 259; *Jacobus v. St. Paul, etc., Ry.*, 20 Minn. 134 (Gil. 110), 18 Am. Rep. 360; *C. & O. Ry. v. Jordan* (Ky.) 76 S. W. 145; *Kentucky Central Ry. v. Thomas*, 79 Ky. 160, 42 Am. Rep. 208; *Morgan v. L. S. & M. S. Ry.*, 138 Mich. 626, 101 N. W. 836, 70 L. R. A. 609; *Lynn v. So. Pac. Ry.*, 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710; *McGuire v. Middlesex Ry. Co.*, 115 Mass. 239; *L. S. & M. S. Ry. Co. v. Kelsey*, 180 Ill. 530, 54 N. E. 608; *Chicago & Western Ind. Ry. v. Newell*, 212 Ill. 332, 72 N. E. 416; *Benedict v. Mil. & St. P. Ry.*, 86 Minn. 224, 90 N. W. 360, 57 L. R. A. 639, 91 Am. St. Rep. 345; *Lynn v. So. Pac. Ry. Co.*, 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710; *Bonner et al. v. Glenn*, 79 Tex. 531, 15 S. W. 572; *C. & A. Ry. v. Fisher*, 141 Ill. 614, 31 N. E. 406; *C. & O. Ry. v. Lang's Adm'r*, 100 Ky. 221, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271; *Graham v. Receiver*, 20 Wash. 466, 55 Pac. 631, 43 L. R. A. 300, 72 Am. St. Rep. 121; *Marquette v. C. & N. Ry. Co.*, 33 Iowa, 564; *Penn. Ry. Co. v. Paul*, 126 Fed. 157, 62 C. C. A. 135; *Dennis v. Pittsburgh, etc., Ry. Co.*, 165 Pa. 624, 31 Atl. 52; *G. H. & San A. Ry. Co. v. Morris*, 94 Tex. 505, 61 S. W. 709; *Trumbull, Rec., v. Erickson*, 97 Fed. 891, 33 C. C. A. 536; *Highland Av. & B. R. R. v. Donovan*, 94 Ala. 299, 10 South. 139; *Pray v. Omaha St. Ry.*, 44 Neb. 167, 62 N. W. 447, 48 Am. St. Rep. 717; *Blake v. Burlington, C. R. & N. Ry. Co.*, 89 Iowa, 8, 56 N. W. 405, 21 L. R. A. 559; *B. & O. Ry. v. State*, 72 Md. 36, 18 Atl. 1107, 6 L. R. A. 706, 20 Am. St. Rep. 454; *Cody v. N. Y. & N. E. R. R. Co.*, 151 Mass. 462, 24 N. E. 402, 7 L. R. A. 843; *Wagner v. Mo. Pac. Ry. Co.*, 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156; *Berry v. Mo. Pac. Ry. Co.*, 124 Mo. 223, 25 S. W. 229; *N. Y., L. E. & W. Ry. Co. v. Ball*, 53 N. J. Law, 283, 21 Atl. 1052; *Washburn v. Nashville, etc., R. R. Co.*, 40 Tenn. 638, 75 Am. Dec. 784; *International & G. N. Ry. v. Ormond*, 64 Tex. 485.

We think the court erred in taking this case from the jury. A number of witnesses testified that the train was so crowded when

the plaintiff went upon the train that no seats could be obtained, and some testified that it was even difficult to get to the door of the car. Upon the other side, evidence was submitted to the effect that there were several vacant seats in one of the passenger cars, and that there was no difficulty in getting into the passenger coaches. This was a material question in the case. It was also a material question whether the carrier had posted notice of its rules and regulations relating to passengers occupying the baggage car. We think, in view of the fact that the compartment occupied by the plaintiff was in the rear of the train, and he was sitting upon a box in an unexposed part of the car, that there is a debatable question as to whether the position he occupied was any more hazardous than a seat in the passenger coach, if there was such a car in the train. These questions were questions of fact, upon which reasonable minds might fairly come to different conclusions.

The judgment of the district court is reversed, and a new trial ordered, at the costs of the defendant in error. All the Justices concur, except BURWELL, J., who tried the case below, not sitting, and IRWIN and PANCOAST, JJ., absent.

CASSADY et al. v. MORRIS.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. JURY—RIGHT TO JURY TRIAL.

A motion to discharge exempt property from attachment is triable to the court or judge, and neither party is entitled to a jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 90.]

2. HOMESTEAD—EXEMPTIONS—TORT OF FATHER.

The homestead of the family is exempt to the family and cannot be taken on attachment for the tort of the husband and father.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 160.]

(Syllabus by the Court.)

Error from District Court, Kay County; before Justice Bayard T. Hainer.

Action by Tabitha Frances Cassady and others against William H. Morris. Judgment for defendant, and plaintiffs bring error. Affirmed.

Moss & Turner, for plaintiffs in error. Sam K. Sullivan and W. C. Tetrick, for defendant in error.

BURFORD, C. J. This cause presents for our interpretation the statutes providing for exemption of the homestead. The plaintiffs in error brought their action in the district court of Kay county against William H. Morris to recover damages for the felonious killing of the husband and father and son and brother of the plaintiffs. The action is one in tort to recover damages. The plaintiffs caused an attachment to issue and be levied upon a farm belonging to Morris in

Kay county. The defendant moved to discharge the property from the attachment and seizure upon the ground that it was the homestead of the family. The issue upon the motion to discharge was tried to the court, and the court found for the movant and ordered the property released from the levy. From this order the plaintiffs appealed, and present three alleged errors: First, that the court erred in refusing them a jury upon the trial of the motion to discharge the property; second, that the issue was prematurely heard and determined; third, that, suit being to recover damages in tort, no exemption is allowed.

As to the first proposition, we think there is not much room for contention. The Constitution of the United States guarantees the right of trial by jury in all suits at common law where the value exceeds \$20. This case does not come within this class. It is not a suit at common law, but a special proceeding governed by statute and is a substitute in a measure for the bill of discovery. Our Code of Civil Procedure (section 4453, Wilson's Rev. & Ann. St. 1903), upon the subject of trials, provides: "Issues of law must be tried by the court unless referred. Issues of fact arising in actions for the recovery of money or of specific real or personal property shall be tried by jury, unless a jury trial is waived, or, a reference be ordered as hereinafter provided." Section 4454: "All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by jury or referred as provided in this Code." Upon the subject of attachments, in section 4415, it is provided: "The defendant may, at any time before judgment, upon reasonable notice to the plaintiffs, move to discharge an attachment as to the whole or part of the property attached." Section 4416: "If the motion be made upon affidavits on the part of the defendants or papers and evidence in the case but not otherwise, the plaintiff may oppose the same by affidavits or other evidence in addition to that on which the order of attachment was made." By section 3, art. 2, c. 24, p. 194, Laws 1899, the judge at chambers is given authority to dissolve attachments. The issue is formed by a denial of the attachment affidavit, or upon the denial of facts set up in a motion to discharge. None of these affidavits or motions are, properly speaking, pleadings. The issues referred to in section 4453, supra, are the issues made by the pleadings in the case. Mere collateral issues that may arise upon motions are not included in the issues triable to a jury. It is evident, taking all the statutory provisions together, that the Legislature did not intend that the issue formed upon a motion to discharge an attachment, or to discharge exempt property from attachment, should be submitted to a jury. The purpose was to provide a speedy and summary mode of

disposing of such questions, and, indeed, we believe it has been the general practice in Kansas, from which state we have borrowed our procedure, as well as in this territory since its organization, to try such questions by the court. We think there was no error in refusing a jury in this case.

The second proposition contended for is that the attached property should not have been dismissed until the plaintiff had secured a judgment, and its status should be determined as of that time. We do not consider this question of much moment. Clearly, if the plaintiff was not entitled to the attachment at the time it was levied, the defendant was entitled to have the property discharged. The law would not require him to have his property incumbered with an apparent lien which had no validity, for the purpose of enabling the plaintiff to secure a valid lien at some future period. The plaintiffs were either entitled to the attachment when it was issued and levied, or they were not entitled to it at all; and the defendant had the right to have this question determined, and it was the duty of the court to hear it at the first available opportunity.

The third contention is that the suit is for a tort, and that there is no exemption from a judgment sounding in tort. Whatever the correct rule may have been prior to the amendment of our exemption laws in 1905, it does not seem that there can be any doubt as to its meaning now. It is provided (Laws 1905, p. 255, c. 18, § 1): "The following property shall be reserved to every family residing in the territory exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided: First, the homestead of the family, which shall consist of the home of the family, whether the title to the same shall be lodged in or owned by the husband or wife." The exemption is to the family. How can the family have the home exempt if it may be taken for the wrong of the husband and father? It seems but to ask this question suggests its own answer. In this case it is shown that the defendant has a family consisting of a wife and children; that this farm is the homestead and home of the family; that they leased it temporarily, with no purpose of abandoning it, but with the express purpose of returning to it; that they had no other home. If the home is exempt to the head of the family, then, as a general rule, it may be taken for his torts, but under our statute the Legislature has clearly indicated its purpose by the amendment of 1905 to exempt the home to the entire family from forced sale of any character, regardless of whether the title is in the husband or in the wife, or in both, and this purpose is so clearly apparent that we need not look to decisions of other courts to determine the proper interpretation to be given our statute. If the home of this family can be taken upon a

judgment against Morris for his felonious acts, then the law falls entirely of its purposes, and the family is no better situated than if the law had never been changed. Each member of the family residing upon the homestead and in good faith making it a home is equally protected by the statute, and has such an interest as will prevent its forcible seizure for the debts or liabilities of either.

We find no error in the record.

The judgment is affirmed, at the costs of the plaintiffs in error. All the Justices concur, except HAINER, J., who tried the cause below, not sitting, and IRWIN, J., absent.

(19 Okl. 374)

ANDERSON v. TERRITORY.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. APPEAL—REVIEW—EVIDENCE.

Where the question for review depends in any wise upon the evidence, such evidence must be presented in full to the appellate court, or the question will not be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2911.]

2. SAME—MOTION FOR NEW TRIAL.

Where a motion for a new trial presents material questions of fact necessary for determination, error cannot be predicated upon the overruling of said motion, where the record fails to show that it contains all the evidence introduced upon the hearing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2916, 2917.]

(Syllabus by the Court.)

Error from District Court, Comanche County; before Justice F. E. Gillette.

William Anderson was convicted of manslaughter, and brings error. Affirmed.

Ross & Anderson, for plaintiff in error. P. C. Simons, Atty. Gen., for the Territory.

GARBER, J. The plaintiff in error was convicted of the crime of manslaughter in the first degree at the February, 1905, term of the district court of Comanche county, and sentenced to eight years' imprisonment in the territorial prison at Lansing, Kan. At the September, 1905, term of the district court of said county, the same being the next term after the trial, he filed his motion for a new trial, setting up that the grand jury which returned the indictment against him was not drawn and impaneled as provided by law. The motion for a new trial being overruled, plaintiff in error prosecutes this appeal.

The only question raised in the motion for a new trial was the legality of the panel of the grand jury, and the only error assigned is the overruling of said motion. Section 5558, Wilson's Rev. & Ann. St. 1903, provides that a motion for a new trial based upon the ground that the grand jury was not properly drawn or impaneled must be filed not later than the next term after trial, and in this case the motion was filed in time. Section 5400 provides that, if a motion to set aside the in-

dictment is based upon the ground that the grand jury was not drawn and impaneled as provided by law, a showing must be made that those facts were not known to the defendant or his counsel until after the jury was sworn for the trial of the cause, and, under section 5557, the defendant must produce at the hearing in support of his motion affidavits of witnesses, or the same may be shown by the records of the courts, or he may take testimony in support thereof, as provided in section 5399, which provides for the compulsory attendance and testimony of witnesses to be used in support of the motion. The motion for a new trial in this case, verified by the affidavit of the defendant, presented numerous questions of fact relative to the regularity of the proceedings of the various election boards throughout the county at the general election of 1904 in signing and certifying to the lists of names of persons to serve as jurors in the several precincts. The apportionment of the number of persons to serve as jurors in the respective voting precincts by the county clerk was also challenged.

It will thus be seen that the issues of fact presented to the trial court on the hearing of the motion were: First. Were the facts relied upon to set aside the indictment known to the plaintiff in error or his counsel before the jury was sworn to try his cause? Second. Were the allegations of irregularity set out in the motion supported by sufficient evidence? The issues thus presented necessitated the investigation of a broad field of human activity. They would admit of the introduction of affidavits and oral and record testimony. The scope of the examination at the hearing of the motion might be much broader than the trial itself, and would certainly necessitate a full and complete record in this court of all the evidence introduced upon said hearing, before it could determine whether or not error had been committed. An examination of the record before us fails to disclose any recital that the case-made contains all or any of the evidence offered or admitted at the hearing of the motion for a new trial. The record fails to show whether or not any such evidence was offered or admitted. In fact, the only record of the proceedings relative to the hearing and overruling of the motion of which the plaintiff in error complains is set out in a journal entry which reads as follows: "Territory of Oklahoma v. William Anderson. And now at this time, November 1, 1905, this cause is called on motion of defendant for a new trial. Said motion is considered and overruled, to which defendant excepts, and exception allowed. Thereupon defendant is allowed to December 1, 1905, in which to make, serve, and file case-made in the Supreme Court." It will thus be seen that this court is not furnished with a sufficient record of evidence to determine whether or not error was committed in overruling the motion for a new trial. On the other hand, every jurisdictional requi-

site for the upholding of the judgment of the court below affirmatively appears, and from that time on all intendments must be taken in favor of the regularity and validity of the judgment and proceedings in the trial court. In this case, where a conviction has been had and judgment rendered, all the trial proceedings standing unchallenged, it clearly was incumbent upon the plaintiff in error to affirmatively show the error of which he complains, and, in the absence of a record showing what evidence was considered by the trial court on the hearing and overruling of the motion, can it be said that he has done so? Where the question raised for review depends largely upon the evidence, as in this case, such evidence must be incorporated in a bill of exceptions or case-made for the examination of the appellate court, and, in case of a failure to do so, the error complained of cannot be reviewed.

Counsel for plaintiff in error contends that, inasmuch as the facts set up and sworn to in their motion for a new trial were not contradicted, they should stand as admitted, and cite *Sharp v. U. S.*, 138 Fed. 878, 71 O. C. A. 258, which contains a statement in the opinion to that effect, based, however, upon the case of *Neal v. Delaware*, 103 U. S. 394. 26 L. Ed. 567. An examination of that case, however, will disclose that it is not an authority for the statement found in *Sharp v. U. S.* In the case of *Neal v. Delaware* the defendant filed a petition in the trial court asking that his case be transferred to the Circuit Court of the United States for the District of Delaware upon the grounds that in the state court he was being deprived of the equal civil rights of citizens of the United States guaranteed to him under the Constitution; and in his petition, which was duly verified by him, he set out the facts which he claimed amounted to a denial of his rights, and which consisted of the exclusion under the laws of Delaware from the juries of that state of all colored persons, contrary to the provisions of the Constitution of the United States. His petition to have the case removed was denied, and he then, before arraignment in the state court, moved to quash the indictment and the panel of the jury upon the same ground set out in the petition for the removal of the cause to the federal court. It was then agreed between the Attorney General, on behalf of the state of Delaware, and the defendant, through his counsel, with the consent of the court, that the statements and allegations of the defendant, in his petition for the removal of the indictment and its prosecution for trial to the Circuit Court, and their verification by his oath, should be taken and treated and given the same force and effect in the consideration and decision of the motion to quash the indict-

ment and the lists and panels of grand and petit juries as if the statements and allegations were made and verified by him in a separate and distinct affidavit. The court overruled the motion, and thereupon the defendant was arraigned under the indictment, and before he had pleaded thereto he asked the court to be permitted to produce witnesses in support of his motion to quash the indictment, which was also denied. On page 396 of 103 U. S. (26 L. Ed. 567) the Supreme Court of the United States says: "But, passing by this ruling of the court below as insufficient in itself to authorize a reversal of the judgment, we are of the opinion that the motions to quash, sustained by the affidavit of the accused, which appears to have been filed in support of the motions without objection to its competency as evidence, and was uncontradicted by counter affidavits, or even by a formal denial of the grounds assigned, should have been sustained. If, under the practice which obtains in the courts of the state, the affidavit of the prisoner could not, if objected to, be used as evidence in the support of a motion to quash, the state could waive that objection, either expressly or by not making it at the proper time. No such objection appears to have been made by its Attorney General. On the contrary, the agreement that the prisoner's verified petition should be treated as an affidavit in the consideration and decision of the motions implied, as we think, that the state was willing to risk their determination upon the case as made by that affidavit, in connection, of course, with any facts of which the court might take judicial notice."

The record in this case fails to show any agreement on the part of the territory and defendant whereby the facts set out in the motion for a new trial were to be taken as true. Under the statutes of this territory it was not incumbent upon the territory to file any adverse pleading negating the allegations set out in defendant's motion. The same could be disproved by competent evidence. In the absence of a record showing that the affidavit in support of the motion was not controverted, or that it constituted all the evidence offered at the hearing, we are unable to see wherein the case of *Neal v. Delaware* can be construed as an authority in support of the position, taken in this case, "that inasmuch as the facts set up and sworn to in the motion for a new trial were not contradicted they should stand as admitted."

There being no other assignment of error, the judgment of the district court of Comanche county in overruling the motion for a new trial will be affirmed.

GILLETTE, J., who presided in the court below, not sitting. All the other Justices concurring, except IRWIN, J., absent.

ALTON-DAWSON MERCANTILE CO. v. STATEN et al.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. APPEAL—REVIEW—HARMLESS ERRORS.

Although a petition fails to state a cause of action for affirmative relief in the first instance, still, where the defendant files an answer and cross-petition, and the facts pleaded in the petition constitute a defense to the cross-petition, and the parties go to trial on such pleadings, and the court, on the merits, finds against the cross-petitioner, mere irregularities will be ignored, and only those errors considered which may have affected the substantial rights of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4020.]

2. MORTGAGES — FORECLOSURE — DEFENSES — FRAUD AND MISREPRESENTATION.

Where a mortgage on real estate is executed without consideration, and by reason of fraudulent representations made by the mortgagee to the mortgagors, such fraud and want of consideration may be shown at any time by the mortgagors in an action by the mortgagee to foreclose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1212.]

3. APPEAL—REVIEW—EVIDENCE.

Where a judgment is reasonably supported by the evidence, it will not be disturbed on appeal to this court on the ground that it is against the weight of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3938-3943.]

(Syllabus by the Court.)

Error from District Court, Woods County; before Justice J. L. Pancoast.

Action by James M. Staten and Cora Staten against the Alton-Dawson Mercantile Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Shartel, Keaton & Wells and H. A. Noah, for plaintiff in error. Snoddy & Son, for defendants in error.

BURWELL, J. John W. Ashcroft and James M. Staten were partners in the mercantile business at Aline, Woods county, Okl. The firm's creditors were pressing them for payment, but the partners were unable to raise the money to meet their obligations. They were indebted at the time to the Alton-Dawson Mercantile Company in the sum of \$1,500. James M. Staten and Cora Staten, his wife, on January 9, 1902, executed to the appellant two notes for this debt, as follows: One note for \$800, and one note for \$700; and also executed to the appellant a mortgage to secure the payment of these notes on the N. E. ¼ of section 4, in township 23 N. of range 11 W., in Woods county, Okl., which tract of land was the homestead of the mortgagors. On June 10, 1903, the plaintiffs herein commenced this action in the district court of Woods county praying for a cancellation of the mortgage. The defendant filed an answer and cross-petition, praying for a foreclosure of the mortgage in question. Judgment was rendered for the plaintiffs, and the defendant appeals to this court.

The plaintiffs alleged in their petition, and offered evidence tending to prove, that the agent of the Alton-Dawson Mercantile Company, one C. B. Tuohy, promised the members of the firm of Ashcroft-Staten Mercantile Company that, if they would give his firm security for its claim, it and another firm (which was also given security under a similar promise) would protect them against bankruptcy and their other creditors and enable them to continue in business, which they wholly failed to do, and, as a result of such failure, the firm of Ashcroft-Staten Mercantile Company, although their assets were considerably in excess of their liabilities, were compelled to go through the bankruptcy court and their business sacrificed. The case was tried to the court and jury on special interrogatories. No general verdict was rendered. The jury found that C. J. Tuohy, the agent of the Alton-Dawson Mercantile Company, induced the plaintiffs to execute the mortgage in question by falsely and fraudulently representing to the plaintiffs that, if they would execute the notes and mortgage described above, his company would protect the firm of Ashcroft-Staten Mercantile Company against its other creditors; that Tuohy stated to the mortgagors that if it was necessary his firm would purchase the claims of certain other creditors who were threatening to bring bankruptcy proceedings against the Ashcroft-Staten Mercantile Company; that these representations were made by Tuohy for the purpose of inducing the mortgagors to execute the mortgage, but without any intention of keeping such promises; that these promises never were fulfilled in whole or in part by the Alton-Dawson Mercantile Company; and that the representations by Tuohy were the inducement which caused the plaintiffs to execute the notes and mortgage. A number of questions are argued by counsel on the respective sides; but, while we have considered them all, we have discussed only such of them as we deem necessary to a fair determination of this case.

First, it is insisted that the petition of the plaintiffs below failed to state a cause of action, and that the court erred in overruling the demurrer thereto. In our opinion this point is immaterial. Even if equity will not cancel a mortgage simply because it was obtained through fraud and constitutes a cloud upon the title to real estate (which point we do not here decide), there is a remedy pointed out in the statute where the mortgagor is in possession, as in this case. By section 4787, Wilson's Rev. & Ann. St. Okl. 1903, it is provided: "An action may be brought by any person in possession, by himself or tenant, of real property, against any person who claims an estate, or interest therein adverse to him, for the purpose of determining such adverse estate or interest." Although the petition failed to state a cause of action for cancellation, as contended by appellee, it does not necessarily follow that the judgment

of the court is erroneous. The defendant's cross-petition prayed for a foreclosure of the mortgage, and the evidence offered in behalf of the petitioners might have been introduced as a defense to the foreclosure, and the facts pleaded in the petition might have been pleaded in an answer as a defense. Therefore the error, if any were committed, related to mere matters of procedure which have not in the least affected the substantial rights of the parties. Such irregularities will be ignored by this court. *Willoughby, Rec., v. Ball* (Okla.) 90 Pac. 1017. And, again, if the defendant had commenced the action to foreclose its mortgage, the court could have entered a judgment canceling the mortgage, if it denied foreclosure. *First National Bank of Wellington v. Stewart*, 8 Kan. App. 22, 54 Pac. 16.

Another question urged by the appellant is that the appellees delayed an unreasonable time before commencing the action to cancel the mortgage; that, to rescind a contract on the ground of fraud, one must act promptly. We have just held that the petition did not state a cause of action for cancellation, and it is only because the appellant asked for a foreclosure of the mortgage that we consider the merits of the case at all. The statute of limitation has not run as against the mortgage, nor were the mortgagors precluded from urging any defense they might have against the same. Both parties litigated their rights as fully as they could have done if the answer and cross-petition had been the petition, and the petition of the mortgagors the answer thereto. The real issues were presented by the pleadings, although informally, and the merits of the controversy decided by the court; and the time has come when courts should adopt rules that will attain the ends of justice, rather than build up technical theories which defeat or unreasonably delay litigants of their rights. We do not wish to be understood as in any way indorsing the theory that litigants should be bound by the theory on which a case is tried, rather than the pleadings. The pleadings are the foundation of a lawsuit. From them courts must determine the issues involved; but in the case before us the irregularity, if any, did not even amount to a reversal of the order of proof, for, the execution of the mortgage being admitted, the burden was on the mortgagors to show some state of facts that would defeat foreclosure. The trial court found against the mortgagee. But we are not inclined to decide this case on the ground alone that the notes and mortgage were obtained by fraud. It is true that the trial court found in effect that they were obtained by fraud and false representations, but there is one other feature to be considered, and that is, the land embraced in the mortgage was the homestead of the mortgagors. It was not liable for the debts of the firm. It was exempt property. The consideration for executing the mortgage, at least as far as Mrs. Staten

was concerned, was the fulfillment of the promises made by Tuohy to the mortgagors and the firm, to the effect that the mortgagee would, if necessary, purchase the claims of certain creditors and aid them to continue in business. The trial court also found that these promises influenced Mr. Staten to execute the mortgage. The defendant (appellant) having wholly failed to keep those promises, or any of them, there was no consideration for the mortgage as far as Mrs. Staten was concerned, and failure of consideration can be urged at any time against the original mortgagee. There is sufficient evidence to support the findings of the trial court, and, those findings having determined the issues of fact against the appellant, we are bound thereby. The appellant received the same dividend in the bankrupt proceedings as was paid to the other creditors of the Ashcroft-Staten Mercantile Company; but, as to whether or not the receiving of such dividends estopped it from foreclosing this mortgage, it is unnecessary to decide.

No valid reason having been urged why the judgment should be reversed, the same will be affirmed, at the cost of appellant. All of the Justices concurring, except PAN-COAST, J., who presided at the trial below, not sitting, and IRWIN, J., absent.

(19 Okl. 360)

HOWELL v. BLESB et al.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. APPEAL—REVIEW—EVIDENCE.

Where the evidence reasonably supports the verdict, the finding of fact will not be disturbed by this court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3934.]

2. SAME—HARMLESS ERROR.

Errors committed by a trial court which do not affect the substantial rights of the party against whom it was committed will be ignored on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4033, 4063.]

3. HUSBAND AND WIFE—AGENCY.

Where a wife requests medical treatment for an infant, it will be presumed, in the absence of proof, that she is acting as the agent of her husband; but such presumption may be overcome by evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 146.]

4. PARENT AND CHILD—MEDICAL EXPENSES—LIABILITY OF PARENT.

A father is liable for medical or surgical services rendered his child at the request of his duly authorized agent; also, for hospital service received under similar circumstances.

(Syllabus by the Court.)

Error from District Court, Payne County; before Justice Bayard T. Hainer.

Action by A. L. Blesh and Horace Reed against Mode Howell. Judgment for plaintiffs, and defendant brings error. Affirmed.

Lowry & Lowry, for plaintiff in error. Chas. E. Bush and F. O. Hunt, for defendants in error.

BURWELL, J. The son of the appellant, Mode Howell, received an injury to his leg, caused by being thrown from a horse. One Dr. R. W. Holbrook, a physician, was called by Mr. Howell to attend his son. The injury continued to get worse, and other physicians were called in. Finally, there being no improvement in the boy's condition, Holbrook (so he testified) advised Howell that the boy should be taken to a hospital, and that Howell told him in that connection that he wanted Holbrook to do all for the boy that he could, and that he wanted the leg saved, if possible. Finally during the absence of Mr. Howell, the boy was taken to the hospital of the appellees at Guthrie, and an incision made in the leg, and the blood clots and pus removed therefrom. He remained in the hospital some 13 days, receiving the care of the plaintiffs as physicians, as well as the usual hospital service. The appellant insists that he instructed Dr. Holbrook that he did not want his son taken to the hospital at Guthrie. On this point, however, the evidence is conflicting; but the appellant arrived at the hospital the next morning, and, without complaint at what had been done, he let the boy remain in the hospital 12 more days without objection, and without advising the appellees that Holbrook had no authority to put his boy in the hospital. There is also evidence to the effect that Mrs. Howell, the wife of the appellant and mother of the boy, accompanied the boy and Dr. Holbrook to Guthrie, and that she told the appellees before the operation to do what they could for the boy, and, if found necessary, to amputate his leg. The real contention of the appellant is that his boy was put in the hospital without his authority and in violation of his express directions.

We have read the record, and believe that the judgment should be sustained. It is probably true that one of the instructions assumes a fact which was in controversy, viz., that the wife acted as the agent of her husband, if she authorized the operation. That she was acting as the agent of her husband was only a presumption, which might be overcome by evidence. We are satisfied, however, that the jury were not misled by this error. The appellant's own conduct after he went to the hospital and learned of the operation was sufficient to authorize the jury in finding that Dr. Holbrook and Mrs. Howell had authority to direct that the operation be performed. The issues involved were issues of fact, and there is ample evidence to sustain the verdict. Under the evidence, the boy would probably have died without the operation, and, while a physician cannot recover for professional services rendered in the face of objections of one who would be liable therefor, in this case the evidence, taking it altogether, is sufficient to uphold the finding that the services were rendered at the request of the appellant.

Therefore the judgment is hereby affirmed, at his costs. All of the Justices concurring, except HAINER, J., who presided at the trial below, not sitting, and IRWIN, J., absent.

RYAN v. BROWN.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

APPEAL—FAILURE TO BRIEF CASE.

The presumption is always in favor of the correctness of a judgment of a trial court, and, in case of an appeal therefrom, the burden is upon the appellant to affirmatively point out error, and where he fails to brief his case, as provided by the rules of this court, it may continue or dismiss the cause, or reverse or affirm the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3104-3107.]

(Syllabus by the Court.)

Error from District Court, Garfield County; before Justice J. L. Pancoast.

Action by Caroline C. Ryan against W. E. Brown. Judgment for defendant, and plaintiff brings error. Affirmed.

Manatt & Sturgis, for plaintiff in error.

BURWELL, J. This is an action for injunction commenced by the appellant in the district court of Garfield county against the appellee. Judgment was rendered denying the injunction and taxing the costs to the plaintiff below. He brings the case here on appeal, but, although the case was filed in this court on November 6, 1906, appellant has not filed any briefs with the clerk of the district court. Rule No. 6 of the rules of this court (82 Pac. xlii) requires an appellant to serve his brief upon the appellee within 40 days after his appeal is filed in this court, and at the same time to file with the Supreme Court clerk 15 copies of such brief; and the rule further provides that, for a failure to comply with the rule, the court may continue or dismiss the cause, or reverse or affirm the judgment.

No excuse is offered for failure on the part of the appellant to brief his case. No error has been pointed out to this court, and the presumption is that the judgment is correct.

Therefore it will be affirmed, at the cost of appellant. All of the Justices concurring, except IRWIN, J., absent, and PANCOAST, J., who tried the cause below, not sitting.

ANDERST v. ATCHISON, T. & S. F. RY. CO.
(Supreme Court of Oklahoma. Sept. 5, 1907.)

APPEAL—REVIEW—INSUFFICIENT RECORD.

When on the trial of a case in the district court the defendant interposes a demurrer to plaintiff's evidence, which is sustained by the court and the cause dismissed, such ruling will not be reviewed by this court on appeal, unless the case-made contains all of the evidence introduced upon such trial; and where the case-made contains a statement that all of the evidence in-

roduced upon the trial is contained therein, but the record upon its face shows that it does not, and that a material plat or chart was omitted therefrom, the record is the best evidence, and will prevail over such statement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2911.]

(Syllabus by the Court.)

Error from District Court, Woods County; before Justice J. L. Pancoast.

Action by Peter Anderst against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. S. Roark, A. C. Towne, and T. J. Womack, for plaintiff in error. Henry E. Asp, Charles H. Woods, George M. Green, and Jesse J. Dunn, for defendant in error.

BURWELL, J. This action was brought by the appellant for the death of his infant child, alleged to have been caused by the negligence of the defendant company. When the plaintiff rested his case, the defendant company interposed a demurrer to the evidence, which was sustained, and the cause dismissed at the cost of the plaintiff.

On the trial of the case, a certain plat or chart showing the location of the plaintiff's house from which the infant strayed, the fences, railway track, railway crossing, and the location of different important objects, and the conditions generally in the immediate place and vicinity of the accident, was admitted in evidence. This chart was used in examining the different witnesses, and, instead of detailing conditions, references were made to the objects on the chart, which were designated by letters, etc. This chart is omitted from the case-made, and, although the Supreme Court gave leave to amend the case-made, this omission of evidence was not supplied. The parties and the trial court were of the opinion that it was necessary to exhibit this chart or plat to the jury and have the witnesses testify in relation thereto, and this court should have the benefit of the same in reviewing the evidence. This omission is fatal to a consideration of the evidence. This identical question was decided in the case of *Pappe v. American Insurance Co.*, 8 Okl. 97, 56 Pac. 860. The court said: "When the case-made contains a statement that all of the evidence introduced upon the trial is contained therein, but the record itself shows upon its face that it does not, and that material written instruments were omitted therefrom, the record is the best evidence and will prevail over such statement." The same rule applies to photographs, plats, maps, or instruments of any kind, and where such exhibits are omitted from the evidence, it will not be considered. *Board v. Wagner*, 138 Ind. 609, 38 N. E. 171; *Marvin v. Seger*, 145 Ind. 261, 44 N. E. 310; *Saxon v. State*, 116 Ind. 6, 18 N. E. 268; *Cowger v. Land*, 112 Ind. 263, 12 N. E. 96; *Harris v. Tomlin-*

son, 130 Ind. 426, 30 N. E. 214; *Stout v. Turner*, 102 Ind. 418, 26 N. E. 85.

The ruling on the demurrer to the evidence cannot be reviewed because the case-made does not contain all of the evidence introduced upon the trial, and on which the ruling was based.

The judgment of the lower court is affirmed, at the cost of appellant. All of the Justices concurring, except *PANCOAST, J.*, who presided at the trial below, not sitting, and *IRWIN, J.*, absent.

CRUTCHER et ux. v. BLOCK.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. MECHANICS' LIENS—MATERIALMAN'S LIEN —GOVERNMENT LAND—LEASEHOLD ESTATE.

Where one causes to be erected a building on real estate in his possession, and material furnished for such purposes is not paid for, a materialman's lien may be had under the laws of Oklahoma, even though the person for whom such building was erected is not the owner of a perfect legal title. A leasehold estate, if the building is erected within the authority conveyed by such instrument, is a sufficient title of ownership to authorize such a lien; and, in default of payment, such lien may be foreclosed and the rights of the lessee in the land or to the occupancy thereof under his lease, as well as the building, may be sold to satisfy the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 21.]

2. COURTS—JURISDICTION.

Where a court has jurisdiction over the persons to an action, by legal service or voluntary appearance and the cause is the kind of a cause triable in such court it has jurisdiction of the subject of the action and power to render any rightful judgment therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 83.]

(Syllabus by the Court.)

Error from District Court, Comanche County; before Justice Frank E. Gillette.

Action by G. H. Block against S. O. Crutcher and wife. Judgment for plaintiff, and defendants bring error. Affirmed.

Hudson & Keys, for plaintiffs in error. Stevens & Myers, for defendant in error.

BURWELL, J. The board for leasing school, public building, and college lands of Oklahoma Territory leased to one O. P. M. Butler, for townsite purposes, the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 36, township 2 N., of range 12 W. of the Indian Meridian, in Comanche county. Butler platted the land into lots and blocks and streets and alleys, and it is known as Butler's addition to the city of Lawton. He subleased, as he had a right to under the law and the written condition of his lease, to S. O. Crutcher a certain lot in this addition. One L. H. Robinson, under contract with S. O. Crutcher, erected a house on this lot in question, and the plaintiff below, having furnished lumber for the erection of this building, and the same having been used in the building and not paid for, filed a materialman's lien for the lumber

so furnished. There is no controversy about the facts. Judgment having been rendered by the court below for the plaintiff for \$271.05, Crutcher appeals to this court and asks a reversal: First, because the lot on which the house was erected is school land, and the legal title is in the government; second, that the residence in question is personal property, and therefore not subject to a mechanic's or materialman's lien; and, third, that the trial court did not have jurisdiction of the subject of the action.

The third contention is manifestly without merit. The court had acquired jurisdiction over the persons to the action, and the cause was the kind of a cause which could be tried in the district court alone. It was therefore the duty of the court to determine the merits of the controversy and grant or deny relief as the facts and law of the case might justify. Section 4817, Wilson's Rev. & Ann. St. Okl. 1903, provides that: "Any person who shall, under contract with the owner of any tract or piece of land, or with the trustee, agent, husband or wife of such owner, furnish material for the erection, alteration or repair of any building, etc., * * * shall have a lien upon the whole of said piece or tract of land, the building and appurtenances, in the manner herein provided, for the amount due to him for said labor, material, fixtures or machinery." And section 4819 of the same statute provides that: "Any person who shall furnish any such material or perform such labor under a sub-contract with the contractor, or as an artisan or day laborer in the employ of such sub-contractor, may obtain a lien upon such land from the same time, in the same manner, and to the same extent, as the original contractor for the amount due him for such material and labor; and any artisan or day laborer in the employ of such sub-contractor may obtain a lien upon such land from the same time, in the same manner, and to the same extent, as the sub-contractor, for the amount due him for such material and labor, by filing with the clerk of the district court of the county in which the land is situated, within sixty days after the date upon which material was last furnished or labor last performed under such sub-contract, a statement, verified by affidavit, setting forth the amount due from the sub-contractor to the claimant, and the items thereof as nearly as practicable, the name of the owner, the name of the contractor, the name of the claimant, and a description of the property upon which a lien is claimed," etc. Now, it is insisted that, under these provisions of the statutes of Oklahoma, a lien cannot be had unless the person for whom the building is erected is the owner of the legal title to the land on which the building is located, citing, in support of this position, the case of Kellogg et al. v. Littell & Smithe Mfg. Co., 1 Wash. St. 407, 25 Pac. 461; Tracy v. Rogers, 69 Ill. 662; Babbitt v. Condon, 27 N. J.

Law, 154, and Coddington v. Dry Dock Co., 31 N. J. Law 477. We have examined all of these cases, and, with the exception of the first case just referred to, they do not support that contention. The statute of New Jersey provides that every building shall be liable for the payment of any debt contracted or owing for labor performed or materials furnished for the construction thereof, which debt shall be a lien on such building, and on the land on which it stands, including the lot or curtilage whereon the same is erected, and that, if any building be erected by a tenant or other person than the owner of the land, then only the building and the estate of such tenant or other person so erecting such building shall be subject to the lien, unless it be erected by the consent in writing of the owner of the land, duly acknowledged or proved and recorded.

It will be observed that the statute made a distinction between the owner and a tenant, or person other than the owner erecting a building. In the case of Babbitt v. Condon, supra, one Lowell Mason was the owner of the land. D. G. Mason made a contract with James Condon to build a house on this land; the consent of the owner of the land not having been obtained. A mechanic's lien was filed against the house and the land, which described James Condon as the contractor and D. G. Mason as the owner of the land. Lowell Mason, who owned the land, and who furnished the money to build the house, was not a party. D. G. Mason had no interest in either the house or land. The lien was denied. The court did not hold that a lien cannot be had unless the party for whom a building is erected is the owner of the legal title to the land on which it is erected. Such a decision would have been in violation of a positive statute. The case of Coddington et al. v. Dry Dock Co., supra, simply holds that the person for whom a building is erected must have some interest in the land, or else no lien can attach. The law is stated in the syllabus as follows: "In order to subject a building to the lien law, the owner of the building must have some estate in the land on which it stands; unless this is so, there can be no lien either on the land or the building." In the case of Tracy v. Rogers, supra, the court denied the position of appellant in the following language: "It is indispensable to a mechanic's lien that the party with whom the contract is made shall have some interest in the land upon which the building is to be erected or repaired, etc. This interest may be a fee simple, an estate for life, or it may be any estate less than a fee."

In the case under consideration, the record shows that Crutcher held a lease for the real estate on which the house was erected, and it is the general rule that it is not necessary that the person for whom a building is erected should own the fee-simple title, but the word "owner," as used in the statute, in-

cludes every character of title, whether legal or equitable, fee-simple or leasehold. In 20 Am. & Eng. Enc. of Law, p. 301, it is said: "It may be stated as a general rule that a mechanic's lien may attach to and can be supported by an estate in fee, or of an estate or interest less than a fee, such as an estate for life or years, a mortgagor's right of redemption, the interest of a person in possession claiming title, or, in short, any other interest which the owner of the building or improvement may have in the lot or land on which it is situated, provided such interest be such that it can be assigned or transferred, or sold under execution, or, it has been said, can pass by mortgage." And again, on page 303 of the same book: "It is well settled, as a general rule at the present time, that a mechanic's lien may attach to and be enforced against a leasehold estate for labor or materials furnished under a contract with the lessee, even though the tenancy is only from month to month, or, it has been held, though the tenant has the privilege of removing the machinery and fixtures on account of which the lien is claimed. The lien is, however, subject to all the conditions of the lease." The authorities are collated in this book under these different headings and fully support the text as quoted above. It should not be overlooked that the mechanic's lien law was enacted for the protection of those furnishing material for, or performing labor on, a building, and not for the benefit of him who has the building constructed; and the right to a lien upon the legal title includes the right to a lien on a lesser interest in the land. It is true that some courts have held that there must exist some estate in the land itself, but these same courts have also recognized that wherever one is in possession of real property, and has any estate therein, no matter how slight, if, under such title, he may lawfully erect a building thereon, such ownership will authorize a mechanic's or materialman's lien, and, under the law, that estate, whether it be the complete legal title or a lesser estate, may be sold. Such a lien, of course, would be subject to all of the conditions of the lease or conveyance under which the party held. Under the rule here adopted, it is immaterial that the legal title to the land in question is in the United States. The United States authorized the leasing of such land for townsite purposes, and by the terms of such a lease an estate is created. The territory and the general government are bound by their contracts the same as an individual, and it is only the estate held by the appellant that can be affected by this lien.

The authorities holding that a mechanic's lien cannot attach to land held as a government homestead, or to the buildings or improvements placed thereon, have no application in this case. In such circumstances they are absolutely prohibited by Congress; but,

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where the government leases land for a term of years, such lease must be measured by the general law applicable to such instruments, unless exceptions affirmatively are made by the law itself. The lease of the appellant expressly authorizes the removal of the building placed on the land under the lease. Neither the government nor the territory can in any way be affected to their detriment by the enforcement of this lien. As to whether or not a lien might have been had against a building alone under the law in force when the building was erected, where the party for whom it was erected had no interest in the land, it is not necessary to determine, as that point is not involved. However, the Legislature, since this cause of action accrued, by section 1 of article 1 of chapter 28 of the Session Laws of 1905, limited the lien to the building and improvements alone, when erected on land that is leased and unimproved. This statute is in some respects a limitation on the general law, and not an enlargement of its provisions, as contended by appellant.

Under the great weight of the adjudicated cases, this judgment should be affirmed, and it is so ordered. Costs taxed to appellant. All of the Justices concurring, except GILLETTE, J., who presided at the trial below, not sitting, and IRWIN, J., absent.

ARKANSAS VALLEY & W. RY. CO. v. WITT.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. APPEAL—EXCEPTIONS—NECESSITY OF SPECIFIC EXCEPTION—SCOPE OF GENERAL EXCEPTION.

A general exception to a refusal to submit to the jury a number of special interrogatories is insufficient if any one of them be improper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1622.]

2. APPEAL—EXCESSIVE VERDICT.

The verdict of a jury should not be set aside on the ground that it is excessive, unless it clearly appears that the jury have committed some gross and palpable error or have acted under some improper bias, influence, or prejudice, or have mistaken the rules of law stating the measure of damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3944-3947.]

3. EMINENT DOMAIN—DAMAGES—EVIDENCE.

In determining the damages to private property caused by the exercise of the right of eminent domain for a right of way for railroad purposes, testimony showing the excavations, embankments, and obstructions to the natural flow of surface water necessarily caused by the construction of the road is properly admitted for the purpose of showing in what way and to what extent the remaining portion of the uncondemned tract has been damaged by reason of the construction of the road.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 255.]

4. SAME—DAMAGES.

Under the statutes of Oklahoma, damages in condemnation proceedings for railroad right of way purposes are not limited to the real estate taken and injured, but may be such damages as the owner actually sustains to either his

real or personal property by the appropriation of his land and by reason of such railroad.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 239-244.]

(Syllabus by the Court.)

Error from District Court, Pawnee County; before Justice Bayard T. Hainer.

Condemnation proceedings by the Arkansas Valley & Western Railway Company against James D. Witt. From the judgment, the railway company brings error. Affirmed.

Biddison & Eagleton, for plaintiff in error. Wrightsman & Diggs, for defendant in error.

GARBER, J. Plaintiff in error is a railway corporation, and condemned for its right of way across defendant in error's land a strip containing 6.51 acres. The condemnation proceedings were in conformity with the requirements of the law, and the defendant in error properly appealed from the award made by the commissioners to the district court, where a trial by jury was had, and a verdict returned in favor of the defendant in the sum of \$1,450, and, judgment being rendered thereon for that amount, plaintiff appeals to this court, and asks for a reversal of this case upon the ground that the judgment is excessive. The questions involved in the trial of the case were: First, the reasonable market value of the land taken for right of way purposes; and, second, the injury or damage done to the remaining portions of the land by reason of the construction of the railroad and the appropriation of the tract.

An examination of the record discloses that numerous witnesses for the defendant testified that the reasonable market value of the farm immediately prior to the construction of the right of way across the land was \$4,000 to \$4,500, and that the reasonable market value immediately thereafter was from \$2,000 to \$2,500, from which we conclude that the lowest estimated damage by defendant's witnesses was \$1,500, or \$50 in excess of the amount found by the jury. These witnesses were farmers living in the neighborhood and well qualified by their long experience as farmers, and by their familiarity with the location of the farm and the road, as shown by maps thereof, to estimate the damages to the land caused by the railroad. The separation of pasture, improvements, and water facilities from their convenient connections, the inconvenience of crossing the railroad with farm machinery to farm separate tracts, the increased care and watchfulness necessary at all times while working in the immediate vicinity of the road with horses and farm machinery, the anxiety and uneasiness, the disturbance of that sense of safety and security to all members of the family while peacefully engaged in their different lines of production on different portions of the farm, were matters peculiarly within the knowledge of the

experienced farmers who testified relative to the reasonable market value of the land for farming purposes immediately before and after the construction of the road. And these questions of fact were peculiarly within the province of the jury to determine in the light of all the evidence introduced at the trial of the case. We are not in sympathy with the growing assumption of appellate courts to set aside a verdict on the ground that it is excessive, when it has been approved by the trial court, unless it clearly appears that the verdict has been the result of prejudice or passion or grossly overestimated damages. The jurors and the trial judge having the advantage of observing and hearing the witnesses on the stand in direct and cross-examination, receiving their information at first hand, as a rule are in a better position to determine the question of fact than the appellate court, receiving its information from the record. It clearly appearing that the evidence in this case is sufficient to support the verdict and judgment, and that the amount represents a reasonable assessment of damages sustained, this court will not set the judgment aside upon the ground that it is excessive.

The second and third assignments of error challenge the admission of testimony and the instructions of the court. Over the objections of the defendant, the trial court admitted testimony showing excavations made in securing material for fills—in railroad parlance called "borrow pits"—and in throwing up embankments upon the defendant's land uncondemned; also, the admission of testimony showing the overflow of several acres of defendant's land caused by said embankments obstructing the natural flow of surface water. It is insisted that these are elements of damage which could not be considered by the jury in this action, but are separate causes of action which cannot be merged in a condemnation proceeding. Plaintiff in error insists that in condemnation proceedings the true rule is "that a party exercising the right of eminent domain is liable for all such damages, and only such damages, as may accrue to the landowner by reason of the taking of the land, the same to be used in any way that the condemning party acquires the right to use it, and this whether the condemning party actually does so use the land or not." Numerous authorities are cited in support of plaintiff's position, based in many instances upon the statutes and Constitutions of other states, which are not controlling here. In the case of *Blincoe v. C. O. W. Ry. Co.*, 16 Okl. 286, 83 Pac. 903, Mr. Justice Gillette, in an able and exhaustive review of the authorities, many of which are cited here, in the opinion of the court, said: "From these cases it will appear that there is no general rule governing the manner in which damages to private property, when taken for public use, are to be measured. Such measurements must depend upon

the constitutional law authorizing the taking, and consequential damages will be allowed when justified by such provisions. Is the taking and damage to personal property under the law of eminent domain within the foregoing rule applicable to real estate? If so, the exercise of this power over or upon the property of a citizen should carry with it the right of the citizen to recover all the damages he has suffered by reason of its exercise, whether to his real or personal property." The damages for which a landowner may recover in condemnation proceedings, as expressed by statute, are not limited, as contended by plaintiff, to damages accruing from the mere taking of the land, but includes the damages sustained by reason of the appropriation of the land, and in determining such damages it is proper to consider the injury caused by reason of the railroad. The statute under which these condemnation proceedings were had reads as follows: "The commissioners shall be duly sworn to perform their duties impartially and justly and they shall inspect said real property and consider the injury which such owner may sustain by reason of such railroad; and they shall assess the damages which said owner will sustain by such appropriation of his land."

In *Blincoc v. C. O. W. Ry. Co.*, supra, condemnation proceedings were instituted condemning a strip of land across certain lots in the city of Guthrie, which had been used for the purpose of a lumber yard. The proceedings necessitated the removal of the lumber, and upon the trial in the district court evidence was offered to show the necessary expenses incurred thereby. The objection to the introduction of such evidence being sustained, exceptions were duly saved, and the ruling of the court and the instruction embodying that view of the law were presented on appeal to the Supreme Court. Passing upon those questions presented, Mr. Justice Gillette, in speaking for the court, said: "That the owner by reason of such railroad has been put to the expense of removing the stock of lumber then on hand is not disputed; neither can it be denied that the cost of such removal was made necessary by the condemnation of the real estate and is an injury and damage to the owner to the extent of the cost of such removal. In other words, this ruling would permit the railroad to take advantage of the owner of land, and thereby compel him to bear whatever expense may be consequent upon preserving his personal property, and yet be remediless therefor. If this shall be held to be the law, then the constitutional provision, 'nor shall private property to be taken for public use without just compensation,' becomes almost as much a sword as a shield to the private citizen, for the compulsory addition to the cost of personal property of the citizen is as much a taking as the absorption of the real estate itself." It was contended there, as here, that

the expenses incurred in removing the lumber were such damages as could not be recovered in condemnation proceedings, and that the defendant should be relegated to another action at law for the recovery thereof, but the court held: "Damages to be allowed are not limited to real estate taken and injured, but may be such damages as the owner actually sustains to either his real or personal property by such appropriation of his land." The admission of the testimony complained of was confined to the necessary incidentals in the construction of the road, and for the only purpose of showing in what way and to what extent, if any, they affected the reasonable market value of the remaining portion of defendant's tract of land. The fifth instruction complained of by the plaintiff clearly presents the limitations mentioned, and in our judgment correctly stated the law of the case: "In determining the elements of damage, you should take into consideration the manner in which the railroad passes through and across the land in controversy and the manner in which it was constructed, the inconvenience to the landowner, in passing through the tract, and anything that would affect the usable or salable value of the land. You are not permitted to allow any damages for injuries that the landowner might sustain either to his person or his property, nor for any loss occasioned by fire. Those are remote and speculative. But you may consider those matters as affecting the usable or salable value of the land. Neither can you allow for any injury by reason of floods occasioned by the construction of the railroad, but you may take into consideration the manner in which the railroad is constructed over the land for the purpose of determining whether or not the construction of the road affects the usable or salable value of the land. And as such you have a right to take into consideration the damages that the landowner has sustained. Likewise, if any dirt was thrown outside of the right of way, or what is known as 'barrow pits,' if any were excavated, outside of the right of way, you have a right to take into consideration how that affects the usable and salable value, and allow such damage as will in your judgment compensate the landowner." Thus it will be seen that the jury were instructed to consider the testimony in relation to embankments and excavations only in so far as they affected the usable and salable value of defendant's land, and were especially admonished not to allow any damages for injury caused by floods occasioned by the construction of the road.

In *Grand Rapids R. R. Co. v. Cheseboro*, 74 Mich. 466, 42 N. W. 69, the court, by Mr. Justice Campbell, say: "The damages in such a case must be such as to fully make good all the results directly or indirectly to the injury of the owner in the whole of the premises and interests affected, and not merely the strip taken"—citing a large number of cases,

among which was *G. R. I. & P. R. Co. v. Heisel*, 47 Mich. 393, 11 N. W. 215, in the opinion of which the said court said: "It need hardly be said that nothing can be fairly termed compensation which does not put the party injured in as good a condition as he would have been in if the injury had not occurred. Nothing short of this is adequate compensation." And in *Judd v. Hull Dock Co.*, 92 B. 443, it was held that: "Where the property taken was a brewery in operation, the damages included the necessary loss in finding another place of business." And they say: "The following are cases where the damage done was, as in this case, distinct from the actual taking of property from the party injured"—citing a number of English cases. In *Railway Company v. Teters*, 68 Ill. 144, the court say: "The design of the law is to fully compensate a party for all injury he may sustain by reason of the appropriation of his land to the use of the road and which shall grow out of or be occasioned by its location and use at that place." In *Omaha Southern Ry. Co. v. Todd*, 39 Neb. 818, 58 N. W. 289, in the opinion, the court said: "The damages to which a landowner is entitled by reason of the construction of a railroad across his farm are: First, the actual value of the land taken at the time of the taking without diminution on account of any benefit of offset whatever; second, the depreciation in value of the remainder of the farm by the appropriation of a part thereof for railway purposes and the construction and permanent operation and occupation of the railroad thereon, excluding general benefits. In an inquiry whether and how much the part of the farm not taken for railroad right of way is depreciated in value by the appropriation of a part, evidence as to the size of the farm, the purpose for which it was used, the improvements thereon, and how located, the direction of the road crossing the farm, the cuts and fills made or to be made in the construction of the road, the width of the right of way, the height of embankments, the depth of ditches, the inconvenience in crossing the tract from one part of the farm to the other, the liability of stock being killed, the danger from fires from passing trains, are all facts competent for the jury's consideration in determining the depreciation in the value of the remainder of the farm." "Just compensation for land taken consists in making the owner good by an equivalent in money for the loss he actually sustains in the value of his property by being deprived of a portion of it. It includes not only the value of the land taken, but also the diminution in the value of that from which it is severed." *Lafin v. Chicago W. & N. R. Co.* (C. C.) 33 Fed. 415; *Esch v. Chicago, M. & St. P. R. Co.*, 72 Wis. 229, 39 N. W. 129. In *Fremont E. & N. V. R. Co. v. Meeker*, 28 Neb. 94, 44 N. W. 79, the court say: "It is proper to consider, in estimating the damages for a right of way for a railway,

the manner in which the road cuts the land, the excavations and embankments, and the exposure of the property to particular injuries from the proximity of the road."

In this case the construction of the road was complete at the time of the trial in the district court, and evidence showing the actual existing condition was not subject to the objection of being uncertain, speculative, or remote, and was properly admitted by the court. In *Lewis on Eminent Domain*, § 482, it is said: "If the works are built before the assessment of damages is had, the damages should be assessed on the basis of the works as constructed, even if improperly constructed, for the condemner should not be allowed to assert its own wrong." And in section 496 the learned author says: "It would be difficult to enumerate the various elements of damages proper to be considered when a part of a tract is taken. The shape and size of the parcel or parcels which remain, the difficulty of access of communication between the different parts, inconvenience and disfigurement caused by the taking, and interference with the drainage of the land, or with the flow of surface water, or with the water supply, are recognized by all authorities as proper items to be taken into account in assessing the damages. Where a railroad is laid through a farm, it is proper to consider the expense in constructing necessary farm crossings, unless it is made the duty of the company to build such crossings; also, the danger to which the occupants of the farm and the stock thereon will be exposed so far as the same affects the value of the farm. Injury to grass from dirt washed from an embankment was held a proper item of damage." In *Hayes v. Ottawa, Oswego & Fox River Valley R. R. Co.*, 54 Ill. 373, the court say, in estimating the damages and benefits to result from the construction and use of a railroad over land which has been condemned for that purpose under an act of 1852, the jury are not confined to the consideration of the state of facts as they existed at the time the land was taken, but may consider the subject in the light of the facts as they exist at the time of the trial. In *St. Louis, O. H. & C. R. R. v. Fowler*, 142 Mo. 670, 44 S. W. 771, the Supreme Court of Missouri say: "The damages and benefits to the remaining land after an appropriation of a railroad right of way should be estimated according to the condition of things and the rights of the parties as they exist at the trial." In *Wichita & E. R. R. Co. v. Kuhn*, 38 Kan. 104, 16 Pac. 75, the Supreme Court of Kansas say: "On an appeal from an assessment of damages done to a farm by reason of the appropriation of a right of way through it by a railroad company, and where it is shown at the time of the trial that the railroad is completed across the farm, it is then competent and proper to assume that the railroad was constructed as

contemplated at the time of the condemnation proceedings, and all damage that is apparent which will result to the injury of the farm, such as stopping the flow of surface water, forming stagnant pools along the side of or along the right of way, and the like, are elements of damage proper to go to the jury." In *Springfield & Memphis Ry. Co. v. Rhea*, 44 Ark. 238, the court say: "Where an assessment of damages for right of way precedes the building of a railroad, the presumption is that it will be built with skill and proper precautions; but, if the road has been completed through the land at the date of the trial, the jury may consider the state of facts that existed, and from the light of the actual construction determine what the damage has been, embracing all past, present, and future damages which the location of the road may reasonably produce." In *Walker v. Old Colony & Newport R. R.*, 103 Mass. 10, 4 Am. Rep. 509, the court say: "The cuts and embankments and necessary gutters of the railroad through a tract will unavoidably modify the flow of surface water, and sometimes cause damage by keeping it back or projecting it in large quantities upon lands adjoining the road. Injury to land from such causes would seem clearly to fall within the class of effects which have been held to afford ground for the assessment of damages under the statute." The Supreme Court of Minnesota, in *Pfeager v. Hastings R. R. Co.*, 28 Minn. 510, 11 N. W. 72, say: "If the construction of a railroad across a farm lessens its value by preventing the flow of surface water from one part of the farm to another, this is a proper element to be taken into consideration in fixing the amount of compensation to which the owner is entitled. The rules of law governing the rights of adjacent owners as to the flow of surface water from the land of one on to the other have no application to such a case." "In determining the damages to a farm caused by the construction of a railroad, it is proper to take into consideration every element of damage that might be reasonably anticipated before the road is built, and what really does exist and is apparent after the road is constructed. This includes the inconvenience of crossing or raising of embankments or digging of ditches, pools of stagnant and the obstruction of surface water by throwing it into channels or damming it up." *Wichita & W. R. Co. v. Kuhn*, 38 Kan. 104, 16 Pac. 75; *Weyer v. Chicago W. & N. R. Co.*, 68 Wis. 180, 31 N. W. 710; *John J. Kersey v. Schuylkill River, East Side R. Co.*, 133 Pa. 234, 19 Atl. 553, 7 L. R. A. 409, 19 Am. St. Rep. 632.

Under our statute, it was proper to consider the injury which the owner sustained by reason of such railroad, and where the embankments and excavations were caused by reason of the construction of the road, as in this case, there certainly was no error committed by the trial court in admitting

the testimony in relation thereto for the purpose of showing in what way and to what extent it affected the usable or salable value of the remaining portion of defendant's farm. The above authorities, which might be multiplied many times based upon different statutes, it is true, show the growing tendency of the law to settle and adjust in one action all the rights of the parties thereto.

The fourth assignment of error challenges the ruling of the court in refusing to submit to the jury a number of special interrogatories upon the request of the plaintiff. The only statement in the record showing an exception to the ruling of the trial court in refusing to submit the interrogatories requested appears to be an indorsement upon the back of a paper containing the request, which reads as follows: "Refused and exception allowed. Bayard T. Hainer." This general exception only raises the question of whether or not all of the interrogatories were proper and should have been given. If any one of the requested interrogatories should be improper, error committed in refusing to submit the others is not properly presented by a general exception. A request for the submission of a number of questions is analogous to a request for the giving of several instructions. Each interrogatory must contain a separate and distinct inquiry of fact capable of a direct answer, and a general exception to a refusal to give a number of them is unavailable, unless all of them be proper. The Supreme Court of Kansas, in passing on a like exception taken to a number of interrogatories, in *Coffeyville Vitri-fied Brick & Tile Co. v. Shanks*, 69 Kan. 306, 76 Pac. 856, say: "The defendant also asked the court to submit to the jury 45 questions. The court struck out 17 of them and submitted the others. It is now insisted that five of the questions stricken out should have been answered. Three of these questions were wholly immaterial under the instructions given to the jury and the foregoing conclusions respecting the law of the case, and the other two violated the rule of *Foster v. Turner*, 31 Kan. 58, 1 Pac. 145, and *Mo. Pac. Ry. Co. v. Reynolds*, 31 Kan. 132, 1 Pac. 150, that the jury should only be required to answer particular questions of fact, and need not be required to elaborate details of facts under general questions." But the assignment of error concerning this matter is not founded upon an appropriate exception. It is beyond controversy that many of the rejected questions were improper. A general exception to the refusal to give the rejected list was taken. This was not sufficient. Each special interrogatory submitted to the jury must be so framed as to present distinctly a single material fact involved in the issues of the case. *Railroad Co. v. Aderhold*, 58 Kan. 293, 49 Pac. 83. A request for the submission of a number of questions is analogous to a request for the

giving of several instructions. Each one must contain a separate and independent proposition of law, and a general exception to a refusal to give a number of them is unavailable unless all of them are proper. *Sumner v. Blair*, 9 Kan. 521; *Bailey v. Dodge*, 28 Kan. 72; *State v. Wilgus*, 32 Kan. 126, 4 Pac. 218. All the reasons for this rule apply to the submission of particular questions of fact. A defeated party cannot be permitted to search through an array of proposed questions or instructions discovered to be in the record until he finds one or two sufficient to pass muster, and then to attach them to a general exception, and thereby secure the reversal of a judgment upon a point which the district court has had no reasonable opportunity to consider and decide.

There being no other assignment of error, the judgment of the district court of Pawnee county will be affirmed.

HAINER, J., who presided in the court below, not sitting. All the other Justices concurring, except IRWIN, J., absent.

METROPOLITAN RY. CO. v. FONVILLE. (Supreme Court of Oklahoma. Sept. 5, 1907.)

1. STREET RAILROADS—INJURY TO TRAVELER— CONTRIBUTORY NEGLIGENCE.

A driver of a vehicle who suddenly turns his team to cross a street railway track without looking and listening for an approaching car, and without taking the ordinary care and precautions imperatively required of all who place themselves in a similar position of danger, is guilty of contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 215.]

2. TRIAL—DIRECTING VERDICT.

While questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by the jury, yet, when the undisputed evidence is so conclusive that the court ought to set aside a verdict returned in opposition to it, it is the duty of the court to withdraw the case from the consideration of the jury and direct a verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 376.]

(Syllabus by the Court.)

Error from District Court, Oklahoma County; before Justice B. F. Burwell.

Action by E. P. Fonville against the Metropolitan Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Shartel, Keaton & Wells, for plaintiff in error. J. O. Davis, for defendant in error.

HAINER, J. This was an action for personal injuries, brought by the defendant in error, plaintiff in the court below, against the Metropolitan Railway Company, to recover damages sustained by her by reason of the alleged negligence of the defendant company. The defenses interposed by the defendant

were: First, a general denial; and, second, that the plaintiff was guilty of contributory negligence. From a verdict and judgment for the plaintiff, the defendant appeals.

The testimony of the plaintiff disclosed substantially the following facts: That she resided about 14 miles from Oklahoma City. That on the morning of April 23, 1903, she came to the city with her husband, arriving about 6 o'clock in the morning. That they were driving two horses to a hack. That on arriving in the city they first stopped at what is known as "Whetstone's Store," on the corner of First and Broadway streets. That before reaching Whetstone's store the plaintiff had gone down Broadway, on the east side of the double track for several blocks. At Whetstone's store the plaintiff and her husband stopped to deliver some vegetables which they were carrying in the hack. That when Mr. Fonville came out of the store he walked on down to what is known as "Brown's Store," and directed his wife to drive the team on down there. It appears that Brown's store is located on Main street, about the middle of the block west of Broadway; Main street being the next street south of First street, where Whetstone's store is located. It further appears that the plaintiff drove from the Whetstone store one block south along the east side of the street car tracks on Broadway. That at the corner of Main and Broadway she stopped near Laird's store, with her horses facing south. At this point she saw a car approaching from the north, and stopped and waited for this car to pass her, which it did by turning the corner at Main and Broadway, and going directly west on Main street. She testifies that she did not think of another car approaching, and did not look towards the south to see if any other car was approaching, but as soon as the car from the north passed her, or, rather, around the corner of Main and Broadway, she says that she thought she was safe, and "circled the horses around" across the track to go up Main street, and was then run into by a street car coming from the south, which car she says she did not see until it struck her. The petition alleges that the motorman could have seen her at a distance of more than 500 feet, and all the testimony tends to show that at a distance of from 300 to 400 feet she could have seen the car approaching her, had she looked to the south. The petition also alleges that the car was running at a very high rate of speed, to wit, 15 or 20 miles per hour, at the time of the collision, and that the defendant failed to sound any gong or give any other signal to warn the plaintiff of the approach of the car. But it appears that the plaintiff failed to offer any testimony as to the speed of the car at the time of the collision, or immediately prior thereto. Nor was there any testimony offered by the plaintiff as to the distance the car was away when it first became apparent to the motorman that the plaintiff was about

to turn or "circle" her team, which was facing south on the east side of the track, around to cross the track in a westerly direction. Nor was there any testimony offered that the motorman was not at his proper station at the time of the collision. The plaintiff testifies that she did not hear the gong sounded. The evidence further shows that the plaintiff was a married woman, 40 years of age, in good health, and in full possession of all her faculties. At the conclusion of the plaintiff's evidence, the defendant interposed a demurrer to the evidence on the ground that the plaintiff's testimony showed that she was guilty of contributory negligence, and that she had failed to establish a cause of action. The demurrer was overruled, and an exception noted.

The evidence on behalf of the defendant tended to show that the car that caused the accident was equipped with all the modern appliances, and was in good condition; that it had rained that morning, and the track was in a wet and slippery condition; that the car was 30 feet long, and weighed about 8 tons, and was being run on Grand avenue and Main street at the rate of from 4 to 5 miles per hour at the time the motorman first saw the team; that at this point the track was level, and entirely free from obstructions; and that going at the rate of speed mentioned it would require from 30 to 40 feet at least to stop the car. It further appears from the testimony that the motorman saw the team standing on the east side of the track, about 5 feet west of the curb, when he was about the middle of the block; that, when the motorman first saw the plaintiff with her team, he had no idea that she was going to turn on the track, until he saw her start in that direction, at which time the car was about 15 or 20 feet from the place of the accident; that the motorman did everything in his power to stop the car and avoid the collision. A number of witnesses testified on behalf of the defendant that the gong was sounded as the car was approaching from the south. At the conclusion of all the testimony, the defendant requested the court to submit to the jury a peremptory instruction to find the issues in favor of the defendant and against the plaintiff, which instruction was refused, and an exception saved. After filing a motion for a new trial, which was overruled, and an exception saved, the defendant brings the case here for review.

Three errors are relied upon for a reversal of the judgment. They are: (1) That there was no evidence fairly tending to show negligence on the part of the defendant; (2) that the plaintiff's own testimony shows that she was guilty of contributory negligence; and (3) that the court erred in giving instruction No. 6.

It was alleged in the petition that the defendant was guilty of negligence, in this: The car was moving at a high rate of speed at the time of the collision; (2) that no gong

was sounded; and (3) that the motorman saw the plaintiff in a position of danger in time to have avoided the accident, or, by the exercise of reasonable care and caution, should have seen her in such dangerous position in time to have avoided the collision. As heretofore stated, the plaintiff wholly failed to show that the car was traveling at a high rate of speed at the time of the collision or immediately prior thereto. On the other hand, the testimony of the witnesses for the defendant, as well as the physical facts, shows that the car was moving at a slow rate of speed, not to exceed 5 miles per hour, at the distance of from 300 to 400 feet from the place of collision. And on the question of whether the gong was sounded, there is little or no dispute in the testimony. The plaintiff testifies that she did not hear it, and she thinks that she would have heard it had it been sounded. On the other hand, the defendant's witnesses, who were eyewitnesses to the accident, testify positively that the gong was sounded, and that the motorman did everything in his power to prevent the collision. The above is substantially the testimony offered on behalf of the plaintiff, as well as the defendant, as we gather it from the record. Upon such a state of facts, then, what is the law?

In *Railroad Company v. Houston*, 95 U. S. 697, 24 L. Ed. 542, it was held that: "The neglect of the engineer of a locomotive of a railroad train to sound its whistle or ring its bell on nearing a street crossing does not relieve a traveler on the street from the necessity of taking ordinary precautions for his safety. Before attempting to cross the railroad track, he is bound to use his senses—to listen and to look—in order to avoid any possible accident from an approaching train. If he omits to use them, and walks thoughtlessly upon the track, or if, using them, he sees the train coming, and, instead of waiting for it to pass, undertakes to cross the track, and in either case receives any injury, he so far contributes to it as to deprive him of any right to complain. If one chooses in such a position to take risks, he must suffer the consequences. They cannot be visited upon the railroad company." And in the course of the opinion, Mr. Justice Field, speaking for the court said: "Negligence of the company's employes in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them,

she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure. Upon the facts disclosed by the undisputed evidence in the case, we cannot see any ground for a recovery by the plaintiff. Not even a plausible pretext for the verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation. Under these circumstances, the court would not have erred had it instructed the jury, as requested, to render a verdict for the defendant."

In *Elkott v. Chicago, Milwaukee & St. Paul Railway Company*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068, it was held that, though questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by a jury, yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict. In the course of the opinion, Mr. Justice Brewer, speaking for the court, said: "But one explanation of his conduct is possible, and that is that he went upon the track without looking to see whether any train was coming. Such omission has been again and again, both as to travelers on the highway and employees on the road, affirmed to be negligence. The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom. It may be, as is urged, that his motive was to assist in getting the hand car out of the way of the section moving on the siding. But, whatever his motive, the fact remains that he stepped on the track in front of an approaching train, without looking, or taking any precautions for his own safety. This is not a case in which one, placed in a position of danger through the negligence of the company, confused by his surroundings, makes perhaps a mistake in choice as to the way of escape, and is caught in an accident. For here the deceased was in no danger. He was standing in a place of safety on the south of the main track. He went into a place of danger from a place of safety, and went in without taking the ordinary precautions imperatively required of all who place themselves in a similar position of danger. The trial court was right in holding that he was guilty of contributory negligence."

And the courts uniformly hold that the same doctrine is applicable to electric street cars as to steam railroads. In *Everett v.*

Los Angeles Consol. Electric Ry. Co., 115 Cal. 124, 43 Pac. 209, 34 L. R. A. 350, the Supreme Court of California in passing upon this question, said: "Nor is there any distinction, in the application of this doctrine, between an electric or cable line operated upon the public streets of a city, and that of an ordinary steam railway operated upon the right of way of the corporation. While the deceased had the undoubted right to a reasonable use of the public street, notwithstanding its occupancy by defendant's tracks, he could not ignore or disregard the rights of the latter in the premises, nor neglect to take reasonable precautions for his own safety. If he chose to make use of the part of the street occupied by the tracks, it was his duty to look out for and endeavor to avoid the dangers incident to such use"—citing numerous authorities to the effect that it is the duty of the traveler to look and listen for approaching cars when about to drive across the tracks of a street railway company, and a failure to do so is such contributory negligence as will preclude a recovery for injuries received, in case of a collision. The same doctrine is announced by the Supreme Court of Colorado in *Davidson v. Denver Tramway Co.*, 4 Colo. App. 283, 35 Pac. 922. In *Young v. Citizens' St. R. Co.*, 148 Ind. 54, 44 N. E. 927, the Supreme Court of Indiana held that: "It is the duty of one walking close to, or about to cross, a street car track, to 'look and listen,' as in the case of like situation to a steam railroad." And in *Indianapolis St. Ry. Co. v. Marschke* (Ind. App.) 70 N. E. 495, it was said that: "It is unnecessary to discuss the relative rights of a street car company and a traveler to the use of the street occupied by street car tracks. The simple question here involved is this: Can a person, traveling upon a street, deliberately drive or walk in front of an approaching car, without looking or taking any precautions to avoid a collision, and recover for resulting injury? This question must be answered in the negative, for the authorities so hold." And in *Indianapolis St. Ry. Co. v. Zaring*, 33 Ind. App. 297, 71 N. E. 270, it is said: "Where, in an action against a street railway company for the death of one run into by a car, it appears that he could have seen if he had looked, and heard if he had listened, the approaching car in time to have avoided the collision, the facts show contributory negligence per se." In *Burns v. Metropolitan St. Ry. Co.*, 66 Kan. 188, 71 Pac. 244, the Supreme Court of Kansas held: "A traveler on a city street, who is about to cross the tracks of an electric street car company, must exercise his faculties of sight and hearing, and under special circumstances must use other careful and prudent means to ascertain whether a car is approaching. The prevailing rule respecting the care required of a traveler over steam railway tracks applied to one crossing a street rail-

way." And in *Metropolitlan St. Ry. Co. v. Ryan*, 69 Kan. 538, 77 Pac. 267, it was held by the Supreme Court of Kansas that: "Where, upon the trial, plaintiff testified she alighted from an east-bound street car, and passed back of it and to the northward upon a parallel track four feet distant, on which cars traveled in an opposite direction, without looking for an approaching car, and sustained injury, and, to have looked eastward along the space between the parallel tracks after passing by the end of the standing car, an approaching car could have been seen a distance of two blocks, held error to overrule a demurrer to plaintiff's evidence." In *Hurley v. West End St. Ry. Co.*, 180 Mass. 370, 62 N. E. 263, the Supreme Court of Massachusetts held that: "Where plaintiff, in the daytime, drove across the tracks of a street railway, on which he knew electric cars were running, without looking to see whether a car was coming or not, and knew nothing of its approach until it hit the hind wheels of his wagon, or until it was a rail off, it was proper, in an action for the injuries, to rule that plaintiff was not in the exercise of due care, and take the case from the jury." To the same effect are the following authorities: *McGee v. Consolidated St. Ry. Co.*, 102 Mich. 107, 60 N. W. 293, 28 L. R. A. 300, 47 Am. St. Rep. 507; *Henderson v. Detroit Cit. St. Ry. Co.*, 116 Mich. 368, 74 N. W. 525; *Doherty v. Detroit Cit. St. Ry. Co.*, 118 Mich. 209, 30 N. W. 36; *Deltring v. St. Louis Transit Co.*, 109 Mo. App. 524, 85 S. W. 140; *Riska v. Union Depot R. Co.*, 180 Mo. 168, 79 S. W. 445; *Markowitz v. Metro. St. Ry. Co.*, 186 Mo. 350, 85 S. W. 351, 69 L. R. A. 389.

In *Hannon v. No. Jersey St. Ry. Co. (N. J. Sup.)* 47 Atl. 803, the Supreme Court of New Jersey held that: "A driver of a vehicle is guilty of contributory negligence in suddenly, and without warning, turning his horses across a street railway track, directly in front of an approaching car." The Supreme Court of Oregon has held to the same rule in the following cases: *Smith v. City & Sub. Ry. Co.*, 29 Or. 539, 46 Pac. 136; *Wolf v. City & Sub. Ry. Co.*, 45 Or. 446, 72 Pac. 329. The same doctrine is announced by the Supreme Court of Wisconsin in the case of *Cawley v. La Crosse City Ry. Co.*, 101 Wis. 152, 77 N. W. 180, where Mr. Justice Marshall, speaking for the court, said: "The theory upon which the court sent this case to the jury on the subject of contributory negligence manifestly was that, conceding the rule of law requiring plaintiff to look and listen, her testimony that she did so was sufficient to require the jury to find where the trouble lay, as if it were permitted to them to say on such evidence that she did in fact look and listen, and yet did not see or hear the car that was unquestionably in plain sight and hearing. In that there was a failure to observe the limits beyond which a jury cannot go. They cannot go beyond

the boundary of reasonable probabilities in determining facts from evidence without going into the realms of conjecture or perversity. This court has often held that the rule of law that requires a person to look and listen before going upon a railway track requires him to see and hear an approaching car if it is so located as to be plainly within view and hearing; that evidence of a person so circumstanced that he looked, but did not see, or listened, yet did not hear, the car, if believed at all, is only to establish contributory negligence by showing that he knowingly placed himself in a place of danger. *Groesbeck v. Railway Co.*, 93 Wis. 505, 67 N. W. 1120; *Schneider v. Railway Co.*, 99 Wis. 378, 75 N. W. 169; *Steinhofel v. Railway Co.*, 92 Wis. 123, 65 N. W. 852; *Haetsch v. Railway Co.*, 87 Wis. 304, 58 N. W. 393."

The doctrine is well settled by the authorities that, when the evidence given at the trial, with all the inferences which the jury could justifiably draw therefrom, is insufficient to support a verdict, and that such verdict, if returned, ought to be set aside, the court should not submit the case to the jury, but ought to direct a verdict for the defendant. In *Pawling v. U. S.*, 4 Cranch (U. S.) 222, 2 L. Ed. 601, Chief Justice Marshall stated this rule as follows: "The general doctrine on a demurrer to evidence has been correctly stated at the bar. The party demurring admits the truth of the testimony to which he demurs, and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit; but the testimony is to be taken most strongly against him, and such conclusions as a jury might justifiably draw the court ought to draw." In *Pleasants v. Fant*, 22 Wall. (U. S.) 121, 22 L. Ed. 780, Mr. Justice Miller, speaking for the court, clearly and forcibly states the true doctrine as follows: "It is the duty of a court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try; by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied; and, finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law. In the discharge of this duty, it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor, not whether on all the evidence the preponderating weight is in his favor. That is the business of the jury. But, conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a

verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury." And in *Bowditch v. Boston*, 101 U. S. 18, 25 L. Ed. 980, the settled doctrine of the Supreme Court of the United States is stated as follows: "It is now a settled rule in the courts of the United States that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts, and promotes the ends of justice. *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604, 637, 19 L. Ed. 1008; *Improvement Company v. Munson*, 14 Wall. (U. S.) 442, 20 L. Ed. 867; *Pleasants v. Fant*, 22 Wall. (U. S.) 116, 22 L. Ed. 780."

In *Cawley v. LaCrosse City Ry. Co.*, 101 Wis. 154, 77 N. W. 181, the Supreme Court of Wisconsin states the rule as follows: "Candor compels us to say that in this case the learned trial court appears to have shifted a duty onto the jury which was plainly judicial, and, when they failed to discharge it properly, allowed the result to stand as the law of the case. The jury did not find the fact because there was no controversy in that regard. They said that the conduct on the part of defendant was actionable negligence, and conduct on the part of plaintiff was consistent with ordinary care, when the proper application of well-settled rules of law would have led to a contrary result. The peculiar circumstances of this case move us to reiterate, what has often before been said by this court, that though the rule that where there is any credible evidence which, under any reasonable view of it, will sustain a recovery, and there is opposing evidence, it is for the jury to say where the truth lies, should be firmly adhered to, where the evidence is clearly susceptible of only one reasonable inference, the motion for a nonsuit, or the direction of a verdict accordingly, should be granted as a matter of right, which implies a judicial duty to decide that way, and not to abrogate the judicial function and shift it onto the jury. *Finkelston v. Railway Co.*, 94

Wis. 270, 68 N. W. 1005. A proper administration of justice requires that such a situation should be met, and the duty involved be discharged as contemplated by our judicial system, just as much as that the province of the jury to decide the facts from the evidence, where there is any conflict in that regard, should not be invaded by the court. The scope of judicial duty, and of that of the jury as well, is clearly marked, and a failure to maintain the integrity and inviolability of either is subversive of the system itself, and tends to throw doubt upon its efficacy to secure the highest attainable degree of justice between individuals, and to promote the ends of good government."

Tested by these decisions, we think the undisputed testimony shows that the plaintiff was guilty of such contributory negligence as would preclude her from recovering in this case, and therefore the motion to direct a verdict for the defendant should have been sustained. This is not a case, as was stated by the Supreme Court of the United States in *Elliott v. Chicago, Milwaukee & St. Paul Railway Company*, *supra*, in which one, placed in a position of danger through the negligence of the company, confused by his surroundings, makes perhaps a mistake in choice as to the way of escape, and is caught in an accident. For in the case at bar the plaintiff was in no danger. She was at a place of absolute safety on the east side of the street car track. She suddenly, as she states, "circled around" from a place of safety and drove heedlessly and carelessly over the track, without looking for an approaching car from the south, and without taking the ordinary care and precautions that she was bound to exercise under the circumstances for her own safety. Hence she was clearly guilty of contributory negligence, as a matter of law.

The judgment of the district court is therefore reversed, and the cause remanded, with directions to award a new trial.

BURWELL, J., who presided in the court below, not sitting; all the other Justices concurring, except IRWIN, J., absent.

BUTTS et al. v. ANDERSON et al.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

NEW TRIAL.—GROUNDS.

The district court is only authorized to grant new trials for the causes, in the manner, and within the time set forth in the statute, and it is manifest and material error to grant a new trial for the reason the complaining party is unable to procure any one who can transcribe a deceased stenographer's shorthand notes of the proceedings on the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 189.]

(Syllabus by the Court.)

Error from District Court, Kingfisher County; before Justice C. F. Irwin.

Action by J. H. Butts and J. A. Butts

against Emma E. Anderson and H. H. Anderson. Verdict for plaintiffs. From an order granting a new trial, they bring error. Reversed.

P. S. Nagle and W. A. McCartney, for plaintiffs in error. D. K. Cunningham, for defendants in error.

BURFORD, C. J. The plaintiffs in error brought their action in the district court of Kingfisher county, Okl., to recover from the defendants in error upon a written contract for building material furnished by them to the defendants and for the enforcement of a mechanic's lien against the real estate upon which the building material had been used. The defendants in error answered, first, by a general denial, and, second, by alleging that the plaintiffs in error were dealers in lumber and building material at Kingfisher, Okl., and as such dealers were members of a pool or unlawful agreement with other lumber dealers, in restraint of trade, and for such reason were not entitled to recover in said action. To this answer the plaintiffs replied by general denial. On March 11, 1904, the cause was tried to the court; a jury having been waived by both parties. After hearing the evidence the court found for the plaintiffs and against the defendants, and rendered judgment in favor of the plaintiffs, Butts & Co., against H. H. and Emma E. Anderson, the defendants, for the sum of \$762.67, with interest at 6 per cent. from May 22, ———, and decreed the foreclosure of the lien filed by plaintiffs. It appears that the clerk failed to record this judgment upon the journals of the court until the 13th day of March, 1905. On March 14, 1904, the defendants filed their motion for new trial, which was by the court overruled, and time given to make and serve case for an appeal. The record occupied this status until March 13, 1905, at which time the defendants filed a second motion for new trial, in which it was alleged as grounds therefor that after the trial of the cause, and before the defendants had been able to procure a transcript of the evidence submitted on the trial, the court stenographer died, and no one had been found who was able to read his notes, and that defendants were, for this reason, entitled to a new trial. This motion was presented to the court on March 14, 1905, and by the court sustained, for the reason, as set forth in the order and judgment of the court, "that the defendants were unable to get a transcript of the evidence of the trial held on March 11, 1904, by reason of the death of the court stenographer, Thomas F. Millikan." To this order granting a new trial the plaintiffs excepted, and bring the cause here on appeal from such order.

This court in the case of *Weller v. Western State Bank* (No. 1917, decided Feb. 14, 1907) 90 Pac. 877, stated the rule to be that orders of the trial court granting new trials

should not be reversed unless it can be seen that the trial court has manifestly and materially erred with respect to some pure, simple, and unmixt question of law, without which error the ruling of the court granting the new trial would not have been made, yet where the question presented was one purely of law, and the reviewing court is satisfied that an error of law was committed by the trial court, the order granting the new trial will be reversed, and the judgment reinstated. Applying this rule to the case at bar, what is the result?

Our Code of Civil Procedure controls in such matters. Section 295, Civ. Code (Wilson's Rev. & Ann. St. 1903, § 4493), provides: "A new trial is a re-examination in the same court of an issue of fact, after a verdict by a jury, report of a referee, or a decision by the court. The former verdict, report or decision shall be vacated and a new trial granted on the application of the party aggrieved for any of the following causes affecting materially the substantial rights of such party: First. Irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial. Second. Misconduct of the jury or prevailing party. Third. Accident or surprise which ordinary prudence could not have guarded against. Fourth. Excessive damages, appearing to have been given under the influence of passion or prejudice. Fifth. Error in the assessment of the amount of recovery whether too large or too small, where the action is upon a contract, or for the injury or detention of property. Sixth. That the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law. Seventh. Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial. Eighth. Error of law occurring at the trial, and excepted to by the party making the application." By the provisions of section 4497, the maximum time in which any proceedings may be commenced for the granting of a new trial is one year from the date final judgment was rendered. The cause for which the court granted a new trial does not even remotely come within any of the causes set forth in section 4493 for which the trial court may grant a new trial.

The next statutory provision in relation to new trials is section 4760, Wilson's Rev. & Ann. St. 1903, which is as follows: "The district court shall have power to vacate or modify its own judgments or orders, at or after the term at which such judgment or order was made: First. By granting a new trial for the cause, within the time and in the manner prescribed in section two hundred and ninety-nine. Second. By a new trial granted in proceedings against defendants constructively summoned as provided in section seventy-eight. Third. For mistake,

neglect or omission of the clerk, or irregularity in obtaining a judgment or order. Fourth. For fraud practiced by the successful party in obtaining the judgment or order. Fifth. For erroneous proceedings against an infant, or a person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings. Sixth. For the death of one of the parties before the judgment in the action. Seventh. For unavoidable casualty or misfortune, preventing the party from prosecuting or defending. Eighth. For errors in a judgment shown by an infant in twelve months after arriving at full age, as prescribed in section four hundred and four. Ninth. For taking judgments upon warrants of attorney for more than was due to the plaintiff when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment." These several provisions embrace the causes for which the district court may set aside its judgments and grant new trials. The causes for which a court may grant new trials are for errors or omissions occurring prior to the rendition of judgment, except for newly discovered evidence after the trial, for which cause the judgment may be vacated and a new trial ordered.

In the case under consideration the cause was regularly tried and judgment rendered. The motion for new trial was filed long after judgment, and was based upon statutory grounds; but no statutory grounds were found to exist. It is true the clerk had failed to record the judgment; but this did not go to the merits of the controversy, or affect any substantial right of the defendants. The court had the power at any time to cause its clerk to make a record of the judgment it had rendered, and if the court had rendered a judgment, and it is conceded by both parties that the judgment was regularly rendered on the 11th day of March, 1904, and the clerk failed to record such judgment, it was the duty of the court to direct the clerk to properly record its proceedings, and this could be and was in fact done *nunc pro tunc*. The cause upon and for which the court set aside its judgment was that after the trial, and after the judgment had been rendered, the court stenographer who took the shorthand notes of the trial had died, and the defendants, desiring to appeal the case, could find no one who could transcribe the shorthand notes of the deceased stenographer. We know of no law, nor have we been advised of any, which empowers the court to grant a new trial because of the inability of the judgment debtor to procure his record or prosecute his appeal. The law provides that the party desiring to take an appeal will prepare a case, setting out substantially so much of the record as will make apparent the errors relied upon, and the service of his prepared case upon the adverse party, who may, if not satisfied with its contents, propose such amend-

ments as he may deem necessary, and upon proper notice by either party the court will settle the case. Upon such a case he may file his petition in error and have the judgment complained of reviewed by the appellate court. While the law contemplates that either party may have the stenographer to transcribe his shorthand notes, upon payment of the necessary fees therefor, it does not contemplate that such is the only method of preparing a record for a case made.

Ever since courts of record have been established and courts of appeals authorized to review the proceedings whereby judgments have been obtained, records have been prepared, the oral testimony of witnesses reproduced in writing, and the rulings of the court and exceptions thereto saved, and it is only within the past quarter of a century that shorthand reporters have been known to the courts. It is a manifest injustice to the plaintiff in this case to have his judgment vacated and a new trial ordered, not for any error in the proceedings or mistake of the parties or court officers, but because, long after the judgment was rendered, a condition arose by which the dissatisfied party was unable to perfect an appeal from a judgment which this court must presume was right and just. The district court erred upon a pure and simple question of law, and granted a new trial without cause, when it was in duty bound to overrule the motion.

The ruling and order of the court sustaining the motion and granting a new trial is reversed, set aside, and vacated, and the said motion for new trial is overruled, at the costs of the defendants in error; and said judgment is reinstated in full force and effect as originally rendered and entered. All the Justices concur, except IRWIN, J., who tried the case below, not sitting.

ALLEN DUDLEY & CO. v. CLEVINGER et al.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. SHERIFFS—FEES AND COSTS—RETURN—CONCLUSIVENESS.

The return of a sheriff on an order of replevin is conclusive and binding against him; and where he shows by his return that he delivered cattle seized by him under the writ to the defendant, with the consent of the plaintiff, within 10 days after taking such property under such writ, he cannot be allowed as a part of the costs of the case for feeding and caring for such cattle for a period of 70 days.

2. SAME—EXPENSES IN REPLEVIN.

Where a sheriff takes charge of property under an order of replevin, he can only be allowed for caring for the same during the time that he is in possession thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sheriffs and Constables, § 72.]

(Syllabus by the Court.)

Error from District Court, Canadian County; before Justice C. F. Irwin.

Action by Allen Dudley & Co. against O.

M. Clevenger and A. Baird. Judgment for defendants, and plaintiffs bring error. Reversed and remanded.

Blake, Blake & Low, for plaintiff in error. J. W. Clark, H. L. Fogg, and W. L. Baxter, for defendants in error.

BURWELL, J. The plaintiffs, Allen Dudley and S. L. Dudley, partners doing business as Allen Dudley & Co., on February 2, 1904, commenced an action against O. M. Clevenger and A. Baird for the possession of 63 head of cattle in the district court of Canadian county. On the 4th day of February, 1904, having filed the necessary affidavit and bond, the clerk of the court issued a writ of replevin for these cattle, which was placed in the hands of the sheriff, who duly served the same on February 5, 1904, by taking possession of the cattle. The sheriff retained possession of these cattle for 24 hours, and at the end of that time delivered them to the defendant O. M. Clevenger, with the consent of the plaintiffs' attorney. On November 21, 1904, the action was dismissed by plaintiffs at plaintiffs' cost. On November 26, 1904, the sheriff filed in the clerk's office a bill for feeding and caring for these cattle, which, omitting the caption, was as follows:

Sheriff's costs for feeding and pasturing cattle replevined in the above-entitled case:	
Feeding fifty-nine head for 70 days at 15¢ per head per day.....	\$619 50
Pasturing ditto for 3½ months at 50¢ per head per mo.....	103 25
	<hr/> \$822 75
J. C. Ozmun, Sheriff.	

This bill was taxed as costs by the court against the plaintiffs. A motion was filed to retax the costs, which was overruled, and the plaintiff appeals from such order; and the only question presented by the appeal is the allowance of this item of \$822.75 to the sheriff for caring for the cattle.

Section 4352, Wilson's Ann. St. Okl., provides for the filing of the affidavit of replevin and what such affidavit shall contain; and section 4353 fixes the conditions of the replevin bond; and then section 4354 refers to the order or writ of replevin. We here quote it, together with other sections of the statutes in relation thereto:

"Sec. 4354. The order for the delivery of the property to the plaintiff shall be addressed and delivered to the sheriff. It shall state the names of the parties, the court in which the action is brought, and command the sheriff to take the property, describing it, and deliver it to the plaintiff, and to make return of the order on a day to be named therein."

"Sec. 4356. The sheriff shall execute the order by taking the property therein mentioned. He shall also deliver a copy of the order to the person charged with the unlawful detainer of the property, or leave such copy at his usual place of residence.

"Sec. 4357. If within twenty-four hours after service of the copy of the order, there is executed by one or more sufficient sureties of the defendant, to be approved by the sheriff, an undertaking to the plaintiff, in not less than double the amount of the value of the property, as stated in the affidavit of the plaintiff, to the effect that the defendant will deliver the property to the plaintiff, if such delivery be adjudged, and will pay all costs and damages that may be awarded against him, the sheriff shall return the property to the defendant. If such undertaking be not given within twenty-four hours after service of the order, the sheriff shall deliver the property to the plaintiff.

"Sec. 4358. The plaintiff may, within twenty-four hours from the time the undertaking referred to in the preceding section is given by the defendant, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fail to do so, he must be deemed to have waived all objections to them. When the plaintiff excepts, the sureties must justify, upon notice, as bail on arrest. The sheriff or other officer shall be responsible for the sufficiency of the sureties until the objection to them is waived, as above provided, or until they justify."

From these sections of the statutes it will be observed that the law directs the sheriff to seize the property, and, if the defendant fails to execute a bond, within 24 hours after the service of the writ, conditioned for the delivery of the property to the plaintiff, if such delivery be adjudged, the sheriff shall deliver the property to the plaintiff; but, if the defendant executes such bond, then the plaintiff has 24 hours in which to except to the sureties. This makes 48 hours that the sheriff may hold the property replevined; and, if he desires, he may also hold it a reasonable length of time after this, to afford the sureties an opportunity to justify, and during all of this time he is entitled to charge up as costs in the case the expenses of caring for such property. But the law does not contemplate that the sheriff shall remain in possession of property seized by him in replevin actions for a long period of time, covering weeks and months. Under the statutes above quoted either the plaintiff or the defendant should be given possession of the property within a few days at most after its seizure by the sheriff. It is true that the parties to the suit might stipulate as to what may be done with the property, and such agreement would be binding. If the property is retained, or delivered to some one else, by virtue of an agreement, the return of the sheriff should show that fact. The sheriff's return should always show what he has done with the property.

Turning to the record in the case under consideration, we find that the sheriff states in his return to the order of replevin that he received the same on February 4, 1904, and served it by taking into his possession the

property in controversy, describing it, and then states that, "after keeping the same for the period of 24 hours, I delivered the above-described property to O. M. Clevenger, with consent of attorney for plaintiff." The return is duly signed by the sheriff, and was filed in the office of the clerk of the court on February 15, 1904, or 10 days after the order of replevin was received by him. This return shows that the sheriff returned the property to the defendant O. M. Clevenger, with the consent of the attorney for the plaintiff, and this delivery of the property to the defendant could not have been later than February 15, 1904, for that is the day on which the return was filed with the clerk of the court. If this return is true, the sheriff could not have had possession of the cattle for a period of 70 days, for which he put in his claim. The expense bill for caring for these cattle is not accompanied with any explanation or showing as to why it should be allowed. Under the return made by the sheriff, in no circumstances could he charge for caring for these cattle for a period of more than 10 days. He took charge of them on February 5, 1904, and delivered them to the defendant O. M. Clevenger before making his return on February 15, 1904. A fair interpretation of his return is that he delivered the cattle to the defendant immediately after the expiration of 24 hours.

Under the law the sheriff is bound by his return. In 18 Ency. of Pleading and Practice, p. 981, the law is stated as follows: "It is the general rule that, when an officer's return comes in question in a proceeding wherein rights may be based thereon as against the officer, he may not be heard to contradict it"—citing authorities. In the case of *Cox et al. v. Patten et al.* (Tex. Civ. App.) 66 S. W. 64, the Court of Civil Appeals for the state of Texas, in a case where a sheriff was sued for conversion, said: "In an action against a sheriff for conversion of cotton sold under execution, the sheriff's return indorsed on the execution, showing a levy upon the cotton, precludes him from denying the legality of such levy." The Supreme Court of Colorado, in the case of *People, to Use of Kenfield, v. Finch et al.*, 19 Colo. App. 512, 76 Pac. 1120, in discussing the effect of an officer's return, said: "Did the facts pleaded in the second, third, and fourth defenses constitute a defense to the cause of action alleged in the complaint? As to the second defense: *Bishop v. Poundstone*, 11 Colo. App. 73, 52 Pac. 222, was an action against a constable and his sureties upon his official bond for damages by reason of the unauthorized release by the constable of property levied upon under writs of attachment. The constable's return on the writs was that he had levied upon the property and afterwards released it. At the trial the constable was permitted to testify in contradiction of his return upon the attachment writs. The court said: 'The

officer was concluded by his returns, as were also the sureties on his bond, and the evidence was inadmissible. An incorrect return may be amended, so as to show the facts; but the amendment must be made in the cause in which the writ issued, and, when made, it becomes the return. Except upon application to vacate or amend in the court having jurisdiction of the writ, the incorrectness of the return cannot be shown by the officer, or by the parties or privies to the suit. *Freeman on Executions*, §§ 365, 366. If the return of an officer did not, as against himself and all parties connected with the litigation, import absolute verity, the records of the courts would be unreliable, and the administration of justice involved in uncertainty and confusion.'"

The authorities are practically uniform in holding that an officer is concluded by his return. The return may be amended; but, whatever the return, it is conclusive as against the officer making it. Therefore it necessarily follows that the trial court committed reversible error when it allowed the sheriff for feeding and caring for the cattle seized by him under the order of replevin for a period of 70 days, when the sheriff's return affirmatively shows that he could not have had the cattle in his possession for a period to exceed 10 days. If the return made by the sheriff was incorrect, he should have obtained leave of court and corrected it. Without such amendment, he is bound by the recitations therein. It is possible that the sheriff is entitled to compensation for keeping these cattle for the period that elapsed between the time he made the levy and the filing of the return. His return shows no expense therefor; but, desiring that full justice may be done, instead of entering judgment on the record as presented, the case will be reversed and remanded, with direction to disallow all of the item of \$822.75 for feeding and pasturing the cattle in question, unless the sheriff shows himself entitled thereto under the rules stated in this opinion.

It is so ordered. All the Justices concurring, except IRWIN, J., who presided at the trial below, not sitting.

MOORE et al. v. LINN et al.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. PUBLIC LANDS—HOMESTEAD ENTRY—RELINQUISHMENT—RIGHTS OF SUBSEQUENT ENTRYMAN.

Where one sows wheat on land embraced in a homestead entry under a contract that he is to have two-thirds of the crop and the entryman one-third, and before the maturity of the crop the entryman sells his improvements and growing crops to another and relinquishes his homestead entry, so that such other person may file on the land, and such other person files on the land, he acquires, not only the right of possession to the land itself, but also title to all improvements and growing crops thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 102.]

2. CROPS—CROPPER'S CONTRACT—RELATION CREATED.

A cropper's contract, whereby one agrees to cultivate the land of another and is to receive as compensation therefor a share of the crops grown, does not create the relation of landlord and tenant. Except where it is otherwise provided therein, such a contract grants possession of the land only as an incident to the work that is to be performed, and confers no general right of occupancy of and control over the land cultivated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Crops, §§ 6, 7.]

3. APPEAL—REVIEW—HARMLESS ERROR.

Error committed by a trial court in excluding a written instrument from evidence will not justify a reversal of the judgment, when secondary evidence is received in lieu thereof, and it is apparent that the party offering such instrument was not prejudiced by its exclusion; the facts sought to be established thereby and proven by parol evidence not being disputed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4161.]

(Syllabus by the Court.)

Error from District Court, Kiowa County; before Justice Frank E. Gillette.

Action by George W. Linn and W. J. Spice against C. E. Moore and A. H. Prough. Judgment for plaintiffs, and defendants bring error. Reversed.

Keys, Rummons & Cline, for plaintiffs in error. J. R. Hunter, for defendants in error.

BURWELL, J. One John T. Shaw, while in possession of a tract of land on which he had filed a homestead entry, which was still in force, entered into a contract with the plaintiffs below, George W. Linn and W. J. Spice, wherein they agreed to sow 36 acres of this land to wheat and to harvest the same; they to receive two-thirds of the wheat and Shaw was to receive one-third. The contract was in writing, but not filed or recorded in the office of the register of deeds. It is as follows: "Territory of Oklahoma, Kiowa County—ss.: This agreement, made and entered into this fifteenth day of October, 1902, by John T. Shaw, party of the first part, and W. J. Spice and G. W. Linn, parties of the second part, witnesseth: That parties of the second part are to prepare and sow into wheat all the plowed ground, located in a body on southeast quarter of southeast quarter of Sec. 34, Twp. 6 north, range 17 west I. M., making approximately 36 acres, more or less. That said second parties are to furnish the seed, cut the same when ready, and put into shock, or, if headed, to put into stack, all free of expense to first party. That second parties are to have $\frac{2}{3}$ (two-thirds) and first party $\frac{1}{3}$ (one-third), said wheat to be divided either in shock, stack, or when threshed, to be agreed upon by all parties hereafter; but it is especially understood and agreed by all parties hereto that said party of first part will bear his part of expense in threshing (which is one-third), and that when second parties are

ready to thresh said grain that the first party or his authorized agent will be on hand to care for his said share of grain. Dated at Blackwell, O. T., October 15, 1902. John T. Shaw, Party of First Part. W. J. Spice, Geo. W. Linn, Parties of Second Part. Witness to signature party of second part: L. A. Shaw." The wheat was sown, and on January 31, 1903, the appellant, Moore, filed a homestead entry on the land. The appellees, Linn and Spice, when harvest time came, offered to cut and care for the wheat under the contract, but Moore refused to let them go on the place, but cut the wheat, through his employé, A. H. Prough; and Linn and Spice commenced this action to replevin the wheat, and judgment was rendered in their favor for the delivery of the wheat, or, if the property be not returned, then that they have judgment for \$140 and costs, taxed at \$73.90.

The plaintiffs in this case should not have recovered. When the entryman, Shaw, relinquished back to the government, the government took the land free from any burdens of any kind. Shaw could not make a contract which would in any way prevent the government from conveying to any other person an absolute estate and full and complete possession. Linn and Spice could not acquire rights to occupy the land greater than the rights of Shaw. Under the law Shaw could voluntarily relinquish the land, or the government might cancel the entry for failure on his part to comply with the law. In either event the government would not only become reinvested with the absolute right of possession, but the legal title to the growing crops would revert to the government, because growing crops, in the absence of contract, pass with the conveyance of real estate; and it has been held that where the government sells land to one, or permits one to file a homestead entry on a piece of government land, the purchaser or entryman not only acquires the absolute right of possession, but also title to all improvements and growing crops thereon. *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374; *Razor v. Qualls*, 4 Blackf. (Ind.) 296, 30 Am. Dec. 658; *Boyer v. Williams*, 5 Mo. 335, 32 Am. Dec. 324; *Reservation State Bank v. Holst*, 17 S. D. 240, 95 N. W. 931, 70 L. R. A. 799; *Hiatt v. Brooks*, 17 Neb. 33, 22 N. W. 73. As between Shaw and the plaintiffs the contract could be enforced; but it could not be enforced as against the United States after the cancellation of Shaw's entry, or as against a subsequent entryman. When the appellees planted the wheat, they took chances on the entry of Shaw being canceled before the harvesting of the same. If this contract can be enforced, then one may make a valid lease for a term of years, whereby he may plant the entire tract embraced in a homestead entry to fruit trees, paying therefor one-third of the fruit, and hold the same

as against the United States or its grantees until the expiration of the lease, although the entryman fails to comply with the law and the entry is canceled shortly after the lease began to run. The difference between such a case and the one under consideration is of time only, and not in principle. When Shaw's entry was canceled, the rights of Linn and Spice in the growing crops were forfeited to the government, the same as those of Shaw.

There is one other reason why the appellees must fail to recover. The contract in question is not a lease of the land sowed to wheat. The contract nowhere provides that the possession of the land shall be in the appellees until the harvesting of the crop. The contract is simply an ordinary cropper's contract, which the courts have almost universally held does not create the relation of landlord and tenant. In volume 18 of the *Am. & Eng. Enc. of Law* (2d Ed.), at page 173, it is said: "The question whether an agreement constitutes a lease or an occupancy on shares has chiefly arisen in the case of agreements relating to farming lands, whereby one party agrees to cultivate the land and is to receive as compensation therefor a share of the crops grown. Under such an agreement the relation of the parties is not that of landlord and tenant"—citing a long list of cases from Alabama, Arizona, Arkansas, Connecticut, Delaware, Georgia, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, and other states. As to whether or not the

appellees could recover damages from Shaw we express no opinion; but they could not recover from Moore and Prough the value thereof. As far as Prough was concerned, he was only the employé of Moore. He received no part of the grain, and therefore neither legally nor equitably should pay for the same. Contracts to pay for improvements placed upon a tract of land by one entryman with another, in consideration of the former relinquishing in order that the latter might file on the same land, have been upheld; but that is not this case. Moore agreed to pay, and paid, the original entryman, Shaw, \$1,300 for his improvements, and the wheat in question was growing on the land at the time, and Moore had no knowledge that the appellees claimed any interest therein until he had filed his homestead entry on the land.

It is also contended that the trial court committed error in refusing to admit in evidence Moore's homestead filing receipt. We are of the opinion that the instrument should have been admitted; but the appellant suffered no injury by reason of the exclusion thereof, because the witnesses were permitted to testify fully regarding such entry, and the testimony in relation thereto was not disputed.

For the reasons stated, the judgment of the lower court is hereby reversed, and the appellees' cause of action dismissed, at their cost. All of the Justices concurring, except GILLETTE, J., who presided at the trial below, not sitting, and IRWIN, J., absent.

(76 Kan. 345)

BERRY v. CRAIG.

(Supreme Court of Kansas. July 5, 1907. Rehearing Denied Oct. 14, 1907.)

ACTION—JOINDER OF CAUSES OF ACTION—BROKERS—SUIT FOR COMMISSIONS.

In a suit for commission, a real estate broker may join a count for the reasonable value of his services with a count based upon an express contract to pay a stated commission.

(Syllabus by the Court.)

Error from District Court, Morris County; O. L. Moore, Judge.

Action by W. O. Craig against Carrie Berry. Judgment for plaintiff, and defendant brings error. Affirmed.

Thad B. Landon, L. B. Kellogg, and Frank P. Sebree, for plaintiff in error. E. H. Gamble, for defendant in error.

BURCH, J. Carrie Berry owned a stock ranch lying in Morris and Chase counties. H. S. Boice of Kansas City, Mo., was her general agent. As a result of negotiations with Boice, W. O. Craig, a real estate agent of Kansas City, Mo., undertook to find a purchaser for the ranch. He employed T. Morris of Alma to assist, agreeing to divide the commission with him. Morris enlisted the aid of Fred Miller and Henderson Bros., also of Alma. Miller brought the land to the attention of P. H. Dunn and Hercule Pessemier, of St. Marys. Miller and Dunn visited the land with the expectation of purchasing an interest in it with Pessemier, but they abandoned their purpose to buy, and Pessemier finally purchased direct from Boice. Craig sued Berry for his commission, and recovered. Numerous errors are assigned, but they may all be disposed of briefly.

The petition contained two counts. In the first it was alleged that the plaintiff was employed to find a purchaser, that he did so, and that his services were reasonably worth a stated sum. The second count alleged that the defendant's agent promised to pay the sum named as a commission for the services rendered. At the beginning of the trial, the defendant moved the court to require the plaintiff to elect between the two counts, but the motion was overruled, evidence was introduced in support of each, and the claim in each was submitted to the jury who found an express contract. The ruling was correct. The two counts were entirely consistent. Neither contradicted the other. The facts stated in the first might be true and the facts stated in the second also might be true. If an express contract existed, recovery could not be had upon an implied contract, but, to meet possible exigencies of the proof, the plaintiff had the right to go to the jury upon both sets of allegations. Take the case of a note given by a debtor's agent in settlement of an account. It would be manifestly unjust to oblige the creditor to stake his entire case upon his ability to prove authority to sign the note, and he ought to be allowed

91 P.—58

to join a count on the note with a count on the account. So here Boice might deny an express promise, Craig be unable to sustain the burden of proving it, and thus lose, although clearly entitled to recover the value of his services. This form of pleading has been recognized by this court (Edwards v. Hartshorn, 72 Kan. 19, 82 Pac. 520, 1 L. R. A. [N. S.] 1050. See, also, Campbell v. Fuller, 25 Kan. 723, 728), and conforms to the usual practice under the Codes. Cyc. 749; 5 Enc. Pl. & Pr. 321 et seq.; Bliss, Code Pl. (3d Ed.) § 120. The advertisement of the property by Craig was accompanied by evidence tending to show that Boice knew of it and asked what returns were obtained from it. Therefore it was relevant to prove authority. For the same reason, evidence relating to efforts to make a sale to Woods of Strong City was properly admitted.

Objections to evidence relating to the value of the plaintiff's services need not be canvassed, since the jury found an express contract.

Without discussing separately the various assignments of error raising the question, it is sufficient to say that Boice employed Craig, and that Craig was clearly the procuring cause of the sale. The fact that Miller and Dunn, who were not known to Craig, were at one time prospective purchasers, does not affect Craig's right to a commission. The special findings are not inconsistent with, but support, the general verdict, and the defendant is not entitled to judgment upon them.

The motion for a new trial was properly overruled; and the judgment of the district court is affirmed. All the Justices concurring.

(76 Kan. 247)

DAVIDSON et al. v. HUGHES et al.

(Supreme Court of Kansas. July 5, 1907. Rehearing Denied Oct. 14, 1907.)

1. PLEADING—AMENDMENT AFTER DEMURRES SUSTAINED—TIME FOR MOTION.

Where a demurrer to an answer is sustained, and the defendant stands upon his exception thereto, and judgment is rendered against him and he takes additional time to prepare a case for appeal to the Supreme Court, and when, after more than three days have elapsed and the term of court has expired, he files a motion to set aside the judgment and to be allowed to file an amended answer, such motion is out of time, and cannot be considered.

2. DAMAGES—LIQUIDATED DAMAGES.

When at the execution of an oil and gas lease only \$1 is paid to the grantors therefor, and the grantees agree, as the principal consideration, to complete three wells on the premises within 12 months from the execution of the contract, or to pay \$500 "as a forfeit," such agreement of payment on default will be regarded as a provision for liquidated damages, and not as a penalty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 164.]

(Syllabus by the Court.)

Error from District Court, Chautauqua County; G. P. Aikman, Judge.

Action by E. S. Hughes and others against J. E. Davidson and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Rossington & Smith, Samuel Barnum, and Gunnell & Chinn, for plaintiffs in error. Brooks & Spencer, for defendants in error.

SMITH, J. Hughes and wife, owners of certain lands, executed a so-called oil and gas lease thereof to Davidson and others, which lease contained the following provision: "The lessees agree to commence drilling a well on the land above described, one well in (3) months, 2 additional within one year from the above date. If said lessees fail to complete 3 wells within 12 months, as above provided, then and in that case said lessees agree to pay \$500.00 (as a forfeit) to said lessors at the expiration of that time." The plaintiffs in error failed to do anything under the lease for more than 12 months, and Hughes and wife commenced this action to recover \$500 under the provision. Thereafter an answer was filed which admitted the execution of the lease and substantially all the allegations of the petition, and set up the following defense thereto: "That although the contract of lease mentioned in and filed with the petition herein contains the provisions set out in clause 4 of the petition, and although defendants did not complete the three wells on the premises described in said lease within 12 months from and after its date, yet defendants say that said provisions and the failure of defendants to comply with its said terms do not give plaintiffs a right to recover of defendants the sum of \$500, or any other sum. Defendants, further answering, say that during the latter part of the year 1904, and long before the expiration of the time for drilling said wells under the lease, the price of oil greatly declined, the market thereof declining more than half, and there became and was no market for oil in the Kansas field; that by reason of the decline in the price of oil, and the failure of the Prairie Oil & Gas Company, it being the only purchaser thereof in the Kansas field, to buy the same, drilling and development for oil in the Kansas field became and was practically ceased, and not only was plaintiff not damaged by the failure of defendants to drill said wells as provided in said lease, but defendants allege that their failure so to drill was and is beneficial to plaintiffs, for the reason that the oil is more valuable in the ground than to be evaporating at the surface, by reason of there being no market for the same and the inability to sell the same at any reasonable price. Wherefore, plaintiffs having sustained no damages by reason of defendants' failure so to drill as aforesaid, the defendants pray that they may be permitted to go hence without delay, and recover their costs herein expended." To this answer a

demurrer was sustained October 7, 1905, and the defendants made no application for further pleading, but stood upon their exceptions to the ruling, and the court rendered judgment in favor of the plaintiffs in the sum of \$500 as prayed for. Time was given, presumably upon the application of defendants, to make a case for appeal to the Supreme Court. Thereafter, on November 17, 1905, the defendants, on notice, presented to the judge of the district court at chambers their motion to set aside the judgment of the court and for leave to file an amended answer. This application, filed 10 days after judgment and after the expiration of the term of court, was not made in time. See Code Civ. Proc. § 308 (Gen. St. 1903, § 5204). If the defendants considered themselves entitled to any relief, they should have filed a petition under the provisions of section 310 (Gen. St. 1903, § 5206).

We have, then, only to consider whether the petition stated a cause of action, and whether the answer stated any defense thereto. The petition is based on the provision of the lease above quoted without any special allegation of damages, and the answer states no defense except the affirmative allegation that the plaintiffs suffered no actual damages by reason of the failure of the defendants to complete the wells provided for in the contract within the prescribed 12 months. Is an allegation of actual damages essential to the sufficiency of the petition? Or, which is practically the same question, does the answer of "no resulting damage" constitute a defense to the agreement to pay, in default of performance, \$500? The language of the contract is that, upon default, the \$500 is to be paid as "a forfeit," and the question to be solved is whether under all the circumstances this "forfeit" was intended as a penalty, as rental, or as liquidated damages. The language of the contract is of itself not conclusive. The consideration for the contract at its inception was only \$1, and it is apparent that the real inducement which led the owners of the land to make the grant was the promise of the grantees to do the stipulated things within the stipulated time. Performance thereof might result in great profit to the grantees, and failure to perform and the exclusion of all other prospectors from the premises, who might desire to purchase the privileges, may, under the circumstances, be presumed to have resulted in damage. The extent of such damage could only be conjectural, and would be difficult, if not impossible, of specific pleading or specific proof. In view of these evident considerations, we think the parties agreed upon the payment of \$500 as liquidated damages in case of default by the grantees, and it seems not an unreasonable, but a very reasonable, provision under the circumstances. See 13 Cyc. 97 et seq; *Monmouth Park Ass'n v. Wallis Iron Works*, 55 N. J. Law, 132, 26 Atl. 140, 19 L. R. A.

456, 36 Am. St. Rep. 626; Woodland Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. 1093, 34 L. R. A. 67; Morse v. Rathburn, 42 Mo. 594, 97 Am. Dec. 359; Smith v. Smith, 4 Wend. (N. Y.) 468; Streeper v. Williams, 48 Pa. 450; Sutton v. Howard, 33 Ga. 536; Cheddick's Adm'r v. Marsh, 21 N. J. Law, 463; Gibson v. Oliver, 158 Pa. 277, 27 Atl. 961; Jaquith v. Hudson, 5 Mich. 123.

We conclude that the petition stated a cause of action, and that the demurrer thereto was properly overruled, that the answer stated no defense, and that the demurrer thereto was properly sustained.

The judgment is affirmed. All the Justices concurring.

(77 Kan. 842)

DAVIDSON et al. v. HUGHES et al.

(Supreme Court of Kansas. July 5, 1907. Rehearing Denied Oct. 14, 1907.)

Error from District Court, Chautauqua County; G. P. Alkman, Judge.

Action by O. E. Hughes and others against J. E. Davidson and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Rossington & Smith, Samuel Barnum, and Gunnell & Chinn, for plaintiffs in error. Brooks & Spencer, for defendants in error.

PER CURIAM. This case was briefed and submitted with No. 15,111, between the same parties as plaintiffs and defendants in error. 91 Pac. 913. In this case a larger consideration was paid by the grantees at the time of executing the contract, yet we are constrained to hold that the same considerations prevail, and the judgment herein is affirmed on the authority of that case.

INTERNATIONAL TRUST CO. v. KEEFE MFG. & INV. CO.

(Supreme Court of Colorado. July 1, 1907. Rehearing Denied Oct. 7, 1907.)

BONDS—PERFORMANCE.

Where a bond to secure a contract to build a public schoolhouse, providing that the contractor would pay for all material and labor and that no liens should be filed, stipulated that it should be annulled on acceptance of the building, and the building was accepted before one furnishing material to a subcontractor knew of the bond's existence or made any claim thereunder, and consequently before he relied thereon, the bond became functus officio, and the one so furnishing the material could not thereafter enforce it.

Error to Arapahoe County Court; Ben B. Lindsey, Judge.

Action by the Keefe Manufacturing & Investment Company on a bond against the International Trust Company. Judgment for plaintiff, and defendant brings error. Reversed.

Macbeth & May, Benedict & Phelps, and Doud & Fowler, for plaintiff in error. F. A. Williams, for defendant in error.

CAMPBELL, J. The board of education of school district No. 1 in Arapahoe county entered into a contract with W. E. Towers whereby he agreed to build a public school building for a named consideration according to certain plans and specifications, to pay all artisans, materialmen, and laborers doing work on or about the building, and that no liens should be filed thereon. At the same time Towers, as principal, and the International Trust Company, as surety, gave to the board a bond, the condition of which was that, if Towers performed all of his promises and agreements contained in the contract, the bond would be void; otherwise, it was to remain in force. Towers sublet the brickwork upon the building to Charles H. Smith, and Smith made a contract with the Keefe Manufacturing & Investment Company for furnishing the brick to him. Towers paid Smith all that was coming to him under the contract. Smith did not pay to the Keefe Company for all the brick which it furnished; the balance due being about \$1,600. The building was accepted by the board in December, 1901, and the board paid Towers the entire balance due him May 12, 1902. The bond expressly provided that it should be annulled on the acceptance of the building by the board. On the failure of Smith to pay to it the balance due, the Keefe Company, May 28, 1902, brought this action against the International Trust Company, as surety on the bond, to recover the same, and alleged in its complaint, in addition to the foregoing facts, that, relying upon this bond, the plaintiff furnished and delivered the brick to Smith. The answer of the surety company denied that plaintiff relied upon this bond in furnishing brick, and as a separate defense alleged that, prior to the assertion of any claim or demand by plaintiff against Towers, or the board, or the defendant surety company, the board accepted the school building in December, 1901, and then canceled and annulled the bond given to it by the defendant, and thereby released and discharged the defendant from all liability.

It will be observed that this action was instituted after the annulment and cancellation of the bond, and after the final payment by the board of the balance due Towers under his contract. There was no evidence by plaintiff that it furnished the brick in reliance upon the bond. Its allegation to that effect in the complaint was denied by the answer, and, so far as the record discloses, plaintiff made no claim whatever against the defendant under this bond until this action was begun. The argument of counsel is largely devoted to the meaning of the bond—the plaintiff maintaining that the contract therein was made directly and primarily for its benefit, and was

so intended by the parties, and, therefore, it might sue upon it; the defendant insisting that the bond was given primarily and directly for the benefit of the school board, and, while its performance may have incidentally been of benefit to the plaintiff, such was not its primary object according to the intention of the parties. The rule in this state, as laid down in *Lehow v. Simonton*, 3 Colo. 346, *Green v. Richardson*, 4 Colo. 584, and *Green v. Morrison*, 5 Colo. 18, is that a third party, for whose benefit a simple contract has been entered into for a valuable consideration moving from the promisee, may maintain an action upon it in his own name. The authorities are not entirely in accord as to whether a bond like this is made for the benefit of third parties, in the sense that they might maintain an action upon it. We are, however, under the facts of this case, relieved of the necessity of determining this important question. We are bound to assume the fact to be, as defendant asserts, that the plaintiff did not rely upon this bond in furnishing the brick to Smith, that it did not know of its existence until it brought this action, and that it never accepted the same while the bond was binding between the parties thereto. It is also true that, while we have approved of the acts of public corporations in thus attempting to protect those who do work upon and furnish materials for a public building (*Denver v. Hindry* [Colo. Sup.] 90 Pac. 1028), yet they are not under any legal obligation so to do. Neither is there a claim here that the board was under any legal liability to plaintiff when this bond was executed.

The general rule seems to be that, under such a state of facts, a third person for whose benefit a contract has been made cannot maintain an action upon it if, before he accepts the same, the parties thereto have rescinded, annulled, or canceled it. 9 Cyc. 386, and authorities cited. A leading case is *Gilbert v. Sanderson*, 56 Iowa, 349, 9 N. W. 293, 41 Am. Rep. 103. Seevers, J., after observing that under the contract there before the court the plaintiff may have been entitled to its benefits, said: "Now, before he had knowledge any such contract was in existence, the parties who made it agreed upon a valuable consideration to release the obligation thereby assumed. Having the power to enter into such contract, it would seem to follow they could enter into another whereby the former ceased to be of any force or effect, unless in the meantime the person for whose benefit it was made in some manner has indicated he accepts the contract, or it can be implied he did so. By so doing he acquires the rights and assumes the burdens incident thereto." In *Simson v. Brown*, 68 N. Y. 355, it was held that a bond and guaranty were discharged by the obligee releasing the same and consenting to a cancellation before the person whom it was intended to secure had

acquired rights thereunder. In *Jones v. Higgins*, 80 Ky. 409, the court said that the parties to such an instrument had the undoubted right to change or abandon the contract before its acceptance by the third party for whose benefit it was made. In *Trimble v. Strother*, 25 Ohio St. 378, the court held that where the intention is to benefit a third party by a contract, "if he has not been induced to alter his position by relying in good faith on the promise made in his favor," the promisor thereunder is not estopped from setting up against the beneficiary any defense which he could have set up against the enforcement of the promise by the other contracting party. *Davis v. Calloway*, 30 Ind. 112, 95 Am. Dec. 671, held that, until acceptance by the party intended to be benefited, the parties to the contract might rescind it. See, also, *Jefferson v. Asch*, 53 Minn. 446, 55 N. W. 604, 39 Am. St. Rep. 618, 25 L. R. A. 257 (notes 10, 11, 12, 13, pp. 265, 266, of 25 L. R. A.).

In the case at bar, not only is there no evidence that the plaintiff relied upon this bond or accepted it, or in good faith acted as he did because it was given, but we know from the records of this court (*Keefe Mfg. & Inv. Co. v. School District*, 33 Colo. 513, 81 Pac. 257) that it unsuccessfully tried to get a judgment against the school district for the balance which Smith owed to plaintiff under this contract. Our conclusion in this case, however, is not based upon this attempt by plaintiff to secure his claim from the district. Applying the principle of the foregoing authorities to this case, we say that, if the bond on which the defendant was surety was given for plaintiff's benefit, the plaintiff, in acquiring rights thereunder, assumed its burdens and restrictions. This bond expressly provided that it should be annulled upon the acceptance of the building by the school board. The board was not legally or equitably liable to plaintiff for this or any other claim. In good faith it accepted the building before the plaintiff knew of the existence of the bond, or made any claim thereunder, or relied upon it. Thereby the bond became functus officio as to the obligee. Plaintiff, not having then in any way indicated its acceptance of the bond, could not thereafter enforce it.

The judgment of the county court in favor of the plaintiff must therefore be reversed. Reversed.

STEELE, C. J., and GABBERT, J., concur.

MACKENZIE v. PORTER (two cases).
(Supreme Court of Colorado. July 1, 1907.
Rehearing Denied Oct. 7, 1907.)

1. ACTION—JOINDER OF CAUSES OF ACTION—RENT AND UNLAWFUL DETAINER.

The action of unlawful detainer is not a common-law action, and, in the absence of statutory provisions therefor, a demand for damages

or rent cannot be joined in an action for possession of the premises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 469-479.]

2. JUDGMENT—RES JUDICATA.

Mills' Ann. St. § 1973, provides that any person shall be deemed guilty of an unlawful detention of real property (paragraph 3) when any tenant shall hold over after the expiration of the term, etc. Section 1984 provides for the recovery of rent in an action under paragraph 4 of section 1973, but in no other class of cases. Section 1995 provides for the recovery in a separate action of treble damages for any injuries sustained by the plaintiff while deprived of possession. Section 2644 provides that in all suits before a justice each party shall bring forward all demands existing at the commencement of the suit which can be consolidated into one action or defense, and, on neglecting so to do, shall be debarred from suing for any debt or demand. *Held*, that the failure of a landlord to join in a suit for possession of the premises a demand for the rent did not debar him from recovering for rent accruing prior to the commencement of the suit for possession.

3. JUSTICES OF THE PEACE—ACTIONS—UNITING DIFFERENT CAUSES.

An action by a landlord against a tenant to recover rent accruing from the termination of the tenancy to the time of the commencement of an action for possession of the premises cannot be united in a justice or county court with an action against the tenant and his sureties on an undertaking on appeal to the county court from the judgment of possession to recover damages for withholding possession of the premises pending the appeal.

Appeal from County Court, City and County of Denver; Ben B. Lindsey, Judge.

Two separate actions by Henry M. Porter against A. MacKenzie consolidated by consent, and, from judgment for plaintiff in each case, defendant appeals. Affirmed.

John T. Bottom, for appellant. Benedict & Phelps, for appellee.

MAXWELL, J. By stipulation two causes have been consolidated in this court. Appellant and appellee sustained the relation of tenant and landlord, respectively. The tenant held over after service of statutory notice terminating the tenancy. The landlord had judgment for possession of the premises, in a justice court, in an action brought under paragraph 3, § 1973, Mills' Ann. St., which is: "Any person shall be deemed and held guilty of an unlawful detention of real property in the following cases. * * * (3) When any lessee, or tenant, at will, or by sufferance or for any part of a year, or for one or more years, of any real property, including a specific or undivided portion of a building, or dwelling, shall hold over, and continue in possession of, the demised premises, or any portion thereof, after the expiration of the term for which the same were leased, or after such tenancy, at will or sufferance, has been terminated by either party." An attempt was made by the tenant to perfect an appeal from this judgment to the county court, which proved unsuccessful by reason of a defect in the statutory additional undertaking required. The appeal was dismissed in

the county court on the motion of the landlord, and the tenant vacated the premises. Thereafter the landlord commenced two suits in a justice court, one against the tenant to recover three months' rent of the premises covering the period from the date of the termination of the tenancy to the date when the action for possession was commenced, the other against the tenant and his sureties on the additional undertaking on appeal to the county court to recover damages for withholding possession of the premises pending the appeal to the county court from the judgment for possession. In the first case judgment went for the landlord against the tenant for the amount of the demand. In the second the justice dismissed as to the sureties, and gave judgment against the tenant for 1½ months' rent, the period of time which elapsed between the rendition of the judgment for possession in the justice court and the dismissal of the appeal in the county court. From these judgments the tenant appealed to the county court, where the appeals were consolidated, and a trial to the court without a jury, upon an agreed statement of facts, resulted in judgments against the tenant, to reverse which these appeals were prosecuted to the Court of Appeals.

The tenant insists that the landlord is barred from recovering any judgment against him for rent which had accrued prior to the commencement of the original suit for possession, as he did not join in such suit a demand for the rent, by reason of section 2644, Mills' Ann. St., which provides: "In all suits which shall be commenced before a justice of the peace, each party shall bring forward all his or her demands against the other, existing at the time of commencing the suit, which are of such a nature as to be consolidated into one action or defense, and on refusing or neglecting to do the same, shall forever be debarred from the privilege of suing for any debt or demand." The action of unlawful detainer is not a common-law action, but is purely statutory, and, in the absence of statutory provisions therefor, a demand for damages or rent cannot be joined in an action for possession of the premises. *Shunick v. Thompson*, 25 Ill. App. 619; *Ow v. Wickham*, 38 Kan. 225, 16 Pac. 335. Under our statute (section 1984, Mills' Ann. St.) provision is made for the recovery of rent in an action commenced under paragraph 4 of section 1973, but in no other class of cases. The action here involved was under paragraph 3 of section 1973. Section 1995, Mills' Ann. St., provides for the recovery, in a separate action, of treble damages for any damages or injuries sustained by the plaintiff during the time he shall have been deprived of the possession of the premises. Under the above provisions of the statute the position of the tenant upon this proposition is untenable.

The tenant also contends that, as to the judgment rendered against him on the defective appeal bond, the landlord is estopped to maintain suit thereon for the reason that he, the landlord, brought about a decision to the effect that the bond was void. An inspection of the bond upon which the judgment was rendered leads to the conclusion that the court erred in dismissing as to the sureties thereon. The landlord is not complaining of this error, and the tenant is in no position to do so. If we assume that the bond was defective as a statutory bond to effect the purpose for which it was intended, to wit, to perfect an appeal from the judgment for possession, it certainly was valid as against both principal and sureties as a voluntary common-law bond entered into for a sufficient consideration. *Smith v. Stubbs*, 16 Colo. App. 130, 63 Pac. 955; *Swofford Bros. D. G. Co. v. Livingstone*, 16 Colo. App. 257, 65 Pac. 413. This contention of appellant is also without merit. The two causes of action upon which judgments were rendered below, here consolidated, were separate and distinct and against different parties in different interests. They could not have been united in a justice court nor in the county court.

There is no error of which appellant can complain in the record of either cause, for which reason the two judgments will be affirmed.

Affirmed.

The CHIEF JUSTICE and CASWELL, J., concurring.

CITY OF DENVER v. DENVER UNION WATER CO.

(Supreme Court of Colorado. July 1, 1907.
Rehearing Denied Oct. 7, 1907.)

1. WRIT OF ERROR—REVIEW—RULINGS ON PLEADINGS—DISCRETION.

Rulings on motions directed to the pleadings in the trial court are largely within the court's judicial discretion, and will not be interfered with on a writ of error, unless it clearly appears from the record that such discretion has been abused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3825.]

2. SAME—RECORD—PREPARATION—BRIEFS.

Where rulings on motions with reference to pleadings are relied on for reversal, the precise language to which the motions are addressed should be called to the attention of the Supreme Court by quoting the same in the briefs.

3. SAME—FINDINGS OF FACT—REVIEW.

Where findings of fact and a decree are based on either conflicting or undisputed evidence, and there is substantial evidence to support them, they will not be disturbed by the Supreme Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

4. WATERS—MUNICIPAL SUPPLY—RATES—DECREE.

Where an original water company's franchises, to which defendant had succeeded, pro-

vided that after five years the city council might require the company to fix schedule rates for private consumers equivalent to an average rate prevailing in certain other cities for the same service, and in a suit to establish such rate it was found impossible to determine the average rate prevailing in such cities for the same service, because the charges in each were fixed on an entirely different basis, a decree attempting to fix a schedule according to such average, in which more than two-thirds of the rates established were not based on any mathematical computation with reference to the rates charged in such cities, but were the same as previously charged by the water company in 1895, was erroneous.

5. SAME—ISSUES.

Where a suit was brought against a water company to establish a new schedule of rates under a franchise authorizing the city council to require the company to fix schedule rates for private consumers equivalent to the average rate prevailing in certain cities for the same service, and it was charged that the schedule fixed by the company was not the average rate prevailing for the same service in such cities, on which issue was joined, a determination of rates, not based on the average rate charged in the cities in question, "to determine a fair, just, and reasonable rate," was erroneous, as not within the issues.

6. SAME—FRANCHISE PROVISIONS—ENFORCEMENT.

Where the schedule of water rates prevailing in certain cities was based on such radically different classification and methods of computation and such a diversity of uses and services, etc., that it was practically impossible to ascertain an average schedule of rates in the three cities for the same service, the provision in a water company's franchise authorizing the city to require the company to fix schedule rates for private consumers equivalent to the average charge prevailing in such cities for the same service was invalid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 292.]

7. SAME—CONTRACT FOR SERVICE—OUTLYING DISTRICTS—INCORPORATION IN CITY.

Where a water company's franchise fixed the rates for service, and an ordinance conferred on the company the privilege of laying mains in the streets, avenues, alleys, and public places of the city "and additions thereto," independent contracts to furnish water to consumers in districts outside the city at different rates were neither abrogated nor affected by the subsequent incorporation of such districts within the city limits.

8. SAME—PRESSURE.

A water company's franchise required a pressure of 115 pounds at a specified hydrant. With the city's consent the system was changed from a pumping to a gravity system, which resulted in largely increasing the water supply, but reduced the pressure at the ruling hydrant to 85 pounds. It was proved that the present system furnished abundant and much greater water supply, which would be equivalent to a pressure of 115 pounds at the ruling hydrant in cases of fire, and that the city's officers had declined to permit a return to the pumping system. *Held*, that the company had not violated its franchise by permitting the pressure to decrease at the ruling hydrant.

En Banc. Error to District Court, Arapahoe County; Owen E. Le Fevre, Judge.

Suit by the city of Denver against the Denver Union Water Company. From a decree in favor of defendant, plaintiff brings error. Affirmed in part, and reversed in part.

James M. Ellis, H. M. Orahood, and Henry A. Lindsley (Wm. Henry Smith, special counsel), for plaintiff in error. Thomas B. Stuart, *amicus curiæ*. C. J. Hughes, for defendant in error.

MAXWELL, J. April 10, 1890, the city council of the city of Denver passed an ordinance, known as "Ordinance No. 44, Series of 1890," the title of which is: "A bill for an ordinance continuing and extending the franchise and privileges of the Denver Water Company and making a contract with such company for the supply of water for public and private purposes." It is not necessary to set out this ordinance at length in this opinion. It is sufficient to say that in its general provisions it is similar to ordinances of like character granting to the company, its successors and assigns, the right to lay and maintain its pipes in the streets, avenues, alleys, and public places of the city for the purpose of supplying the city and its inhabitants with water for municipal and domestic uses for the term of 20 years from its date. The sections of the ordinance pertinent to the matters involved in this controversy are as follows:

"Sec. 5. The rate to private consumers for water shall not be greater than now charged by the said the Denver Water Company, a schedule of which rates is hereto annexed, marked 'Schedule A,' and the said the Denver Water Company may require any consumer to furnish a meter and pay for water by meter measurement; provided, however, that at any time after five years from date the city council may require said company to fix schedule rates for private consumers equivalent to the average rate prevailing in the cities of Chicago, St. Louis and Cincinnati, for the same service.

"Sec. 6. The said the Denver Water Company shall at all times furnish water to the city and to private consumers of a quality as good and fit for private consumption as that shown by the analysis made by order of the city of Denver by Prof. Joseph A. Sewall, in the month of August, 1889."

"Sec. 8. The said company shall at all times until the 1st day of May, 1891, keep and supply the said hydrants with an abundant supply of water for fire purposes under such pressure as it now gives; and after said 1st day of May, 1891, shall supply all of said hydrants and any hydrant which may be ordered to be set upon additional mains, as hereinafter in this ordinance mentioned, with a pressure equivalent, taking the elevation of the surface of the ground into account, to one hundred and fifteen pounds at the hydrant in front of the Union Depot in said city; provided, the city shall not be in default with the company upon any of its agreements, and provided, further, that if, owing to the extension and growth of the city, hydrants shall be ordered upon locations where,

owing to the difference in elevation, there shall be less than forty-five pounds pressure, with a pressure of one hundred and fifteen pounds at the hydrant in front of the Union Depot, to the number of fifty or more, the said company shall put such hydrants upon a separate high service, and keep and maintain on each of said hydrants a water pressure of not less than fifty pounds."

Attached to this ordinance is a schedule of water rates, designated as "Schedule A." This ordinance was accepted by the company in writing, and thereby became a contract between the city of Denver and the water company, its successors and assigns. The Denver Union Water Company, defendant in error here, became the owner of the property and franchises of the Denver Water Company some time during the year 1894, and is the successor of the Denver Water Company under the terms of the ordinance, charged with all of the duties and liabilities imposed by the ordinance, and entitled to all the rights and benefits thereby granted.

October 2, 1895, the city council of the city of Denver passed a resolution requiring the Denver Union Water Company to fix a schedule of rates for private consumers of water in the city of Denver equivalent to the average rate prevailing in the cities of Chicago, St. Louis, and Cincinnati for the same service, in accordance with the provisions of section 5 of the ordinance hereinbefore quoted. Intervening the last above date and November 1, 1895, the date upon which the semi-annual water rates for the ensuing six months became due, the water company issued a schedule of rates which was entitled: "The Denver Union Water Company's Schedule of Semiannual Rates, Payable in Advance on the First Days of May and November for Each Year at the Office of the Company, 501 17th Street, Corner of Glenarm Street. To Take Effect November 1, 1895." This schedule of rates will be hereafter referred to as the "leaflet schedule." April 29, 1897, the city council of the city of Denver passed an ordinance in which it was declared that the rates charged by the Denver Union Water Company to private consumers of water are not, and had not been since October 2, 1895, nor since April 10, 1895, equivalent to the average rates prevailing in the cities of Chicago, St. Louis, and Cincinnati to private consumers of water for the same service, and required the company, on or before 10 days after the date of the passage of the ordinance and the service of a copy thereof upon the company, to comply with the terms of the resolution of the city council passed October 2, 1895. A certified copy of this ordinance was served upon the company shortly after the passage thereof and before the commencement of this suit.

May 21, 1897, a complaint was filed in the district court of Arapahoe county by the city of Denver as plaintiff against the Den-

ver Union Water Company as defendant. This complaint in effect alleged that the water company had failed and refused to comply with the requirements of section 5 of the ordinance above quoted, relating to the fixing of a schedule of rates as therein specified. It further alleged that the defendant had violated section 6 of the ordinance, in that the water which it had furnished was impure and unwholesome for domestic uses, and also that there had been a failure upon the part of defendant to supply the pressure required by the provisions of section 8 of the ordinance. The prayer of this complaint was for an order of the court directing the defendant to establish a schedule of rates equivalent to the average rate prevailing in the cities of Chicago, St. Louis, and Cincinnati for the same service, and that such schedule of rates, when so prepared by the defendant, should be submitted to the court and by its decree made the schedule of rates for private consumers of the city; that the court should fix a schedule of rates for private consumers equivalent to the average rate prevailing in the cities of Chicago, St. Louis, and Cincinnati for the same service; that the defendant by order of the court be required to furnish the quality of water and the pressure required by the ordinance; for a preliminary injunction restraining the defendant from collecting any water rates from private consumers of water until the rates had been fixed and determined by the court, pursuant to section 5 of the ordinance of 1890; for an order compelling the defendant to allow a rebate on all rates by it collected since April 10, 1895, in excess of the rates allowed by section 5 of the ordinance of 1890; and for general relief. This statement of the relief prayed by the plaintiff is here made upon the theory that the prayer of the complaint or bill in equity, in general, indicates the nature of the bill and the character of the relief sought by the pleader, and for the purpose of indicating at the outset of this discussion the objects which were sought to be attained by the plaintiff by and through this proceeding.

After the service of summons, but before the appearance of the defendant, an amended complaint was filed by the plaintiff June 19, 1897. The substance of this amended complaint was in effect the same as the original complaint, with much elaboration, however. The amended complaint embodied in detail Schedule A, which was the schedule of water rates attached to the original ordinance of 1890, and referred to in section 5 of said ordinance, and in a parallel column set forth a schedule of water rates which was alleged to be the equivalent of the average rate prevailing in the three cities named in the ordinance for about three-fourths of the items contained in Schedule A, or such items as it at that time seemed possible for plaintiff to give the average of. The allegations of this amended complaint as to the failure of de-

fendant to comply with the requirements of sections 6 and 8 of the ordinance were much elaborated, but in effect the same as those of the complaint. The prayer of this amended complaint was substantially that of the original complaint. A motion to strike certain allegations of the amended complaint and a motion to make the same more specific were interposed by defendant to the amended complaint. In the main these motions were ruled by the court in favor of the defendant. The rulings of the court upon these motions adverse to the plaintiff have been assigned as errors, and will be hereafter considered and disposed of.

As a result of the ruling of the court upon the motion to make more specific, plaintiff filed a second amended complaint October 15, 1897, which in substance was the same as the original and amended complaints, differing, however, from those pleadings, *inter alia*, in this: that pursuant to the order of the court there was embodied in this complaint a table of rates in parallel columns, alleged by plaintiff to contain the schedules of rates prevailing in the cities of Chicago, St. Louis, and Cincinnati for private consumers for the same service or character of service, provided for by Schedule A, an average of the three cities named, "Schedule A," and the schedule of rates promulgated by the company previous to November 1, 1895, known as the leaflet rates." This table of rates, comprising the six schedules above enumerated, was denominated a "comparative table." It is noticeable that the average rate of the three cities as given in this comparative table differs very materially from the average rate of the three cities set forth in the complaint and the amended complaint. The prayer of this second amended complaint was substantially the same as that contained in the complaint and amended complaint. Upon motion of defendant, and pursuant to an order of court, plaintiff was required to plead in their entirety the ordinances of the cities of Chicago, St. Louis, and Cincinnati which established water rates for private consumers in those three cities. This was done by filing an amendment to the second amended complaint.

At this stage of the proceedings counsel for the defendant took the position that the second amended complaint stated three causes of action, based upon alleged violations of the contract by the defendant, relating to its failure to establish a schedule of rates as required by section 5, its failure to provide the quality of water required by section 6, and its failure to supply the city with the pressure required by section 8. This view of the controversy seems to have been concurred in by the court below. The order of the court upon this motion of defendant is not set forth in the abstract of the record, but the result contended for by defendant seems to have been accomplished by an order October 18, 1897, requiring defendant to an-

swer, on or before October 24, 1897, that portion of the second amended complaint which applies to the schedule of water rates, with leave to plead as it shall be advised within 10 days from date as to the other parts of the second amended complaint. From the date of this order the trial proceeded upon the theory that there were three causes of action stated in the complaint, involving, respectively, the causes of action above set forth, to wit, price, purity, and pressure.

The defendant filed its answer October 23, 1897, to the second amended complaint relating to water rates, by which answer the material allegations of the second amended complaint as to water rates were put in issue, except such allegations as might be denominated formal. In passing, it might be well to state that the allegations of the second amended complaint relating to the failure of defendant to comply with the requirements of section 5 of the ordinance were to the effect that the defendant had wantonly failed to fix a schedule or rates for private consumers equivalent to the average rate prevailing in the cities of Chicago, St. Louis, and Cincinnati, as required by the terms of section 5 of the ordinance and the action of the city council of the city of Denver, and that the defendant had broken its obligations, duties, and promises assumed by it under said section of the ordinance. In response to the allegations of the second amended complaint that the defendant had failed and refused to comply with the requirements of section 5, while the answer denied that it had failed or refused to comply with the requirements of said section, nowhere does it affirmatively appear in the answer by any allegation that it had complied with the requirements of said section. On the contrary, it affirmatively appears from the answer that the defendant had not complied with such requirements, as a careful reading of the answer will disclose, and as is shown by the last paragraph of defendant's answer, which is as follows: "Defendant alleges, upon information and belief, that it is now collecting and receiving less, and that the schedule of November 1, 1895, fixes and provides for lower rates and charges than the said defendant is entitled to fix and collect under the terms and provisions of section 5 of the contract of April 10, 1890, and that it will be found, upon an inspection of the schedule of rates alleged by the plaintiff to prevail in the said cities of Chicago, Cincinnati, and St. Louis, that an exact average of item by item therein contained, or of the items contained in Schedule A, attached to the contract of April 10, 1890, or of the rates contained in the semiannual schedule of rates of November 1, 1895, cannot be determined or ascertained, but that the said defendant is charging and collecting, and in its said November 1st schedule of rates provided for the collection of, rates less than the equivalent of the average of the rates prevailing in said three cities for the same service, and

that it has been moved and induced to make such rates, reduced far below that which it could be required to make or charge, because it has desired to escape criticism and attack of a public and political nature, and that it might be left to conduct its business, to the end of discharging all its obligations to the public and its consumers, without being embarrassed and harassed by false and unjust costs, charges, and denunciations, and that it believes and alleges that this honorable court will ascertain and determine that it has done more in the way of reducing rates for private consumers in the city of Denver than it can or should be required to do, in view of the character and nature of the service rendered by it to said private consumers, and the nature and character of the service rendered in each of the said cities of Chicago, Cincinnati, and St. Louis to the private consumers therein. And defendant further alleges that the rates charged and demanded by it are reasonable rates to be charged and demanded for the services rendered by it in supplying water to private consumers."

October 27, 1897, plaintiff filed its replication to the answer of defendant, which was a general denial of the new matter contained in the answer. In the foregoing statement no attempt has been made to embody in this opinion anything more than the briefest possible statement of the issue presented by the pleadings upon the alleged failure of defendant to comply with the requirements of section 5 of the ordinance. Up to this point the pleadings, motions, demurrers, etc., with the court's ruling thereon, occupy 179 pages of the printed abstract. If the issue presented by the pleadings has been clearly stated, no necessity exists for embodying an abstract of the pleadings herein, and no beneficial result would be gained.

As to the errors assigned by plaintiff upon the rulings of the court upon the motions of defendant to make more specific, definite, and certain the allegations of the amended complaint, and the motion to strike therefrom certain portions thereof for the reason that they were immaterial and irrelevant, it is sufficient to say that, under the well-settled rule of this jurisdiction, rulings of the court upon such motions are very largely within the judicial discretion of the trial court, and that, unless it clearly appears from the record that the court below abused such judicial discretion, this court will not interfere with the same. From a careful consideration of the record in this case, this court is unable to say that there was any such abuse by the court below of the judicial discretion vested in it in its rulings upon these various motions as resulted in prejudicial error to the plaintiff. In this connection it might be well to state that it has been a laborious task to connect the motions as they appear in the printed abstract of the record with the pleadings to which such motions are addressed, for the reason that the motions as they ap-

pear in the record are in the usual form of such motions, referring to the pleadings by page and line as they were filed in the court below, whereas, in the printed abstract furnished this court, the paging is entirely different. We would suggest that, where counsel seriously rely upon the errors alleged to have been committed by the court in such rulings, they call the attention of this court to the precise language to which the motions are addressed, by quoting the same in their briefs, thereby relieving the court of much unnecessary labor. These remarks are especially pertinent to the record proper in this case, which occupies 228 pages of the printed abstract.

We have examined the argument of counsel for plaintiff with a great deal of care, and are of the opinion that he has failed to call the court's attention to any ruling made by the court below which in any wise appears to us to be an unwarranted exercise of the court's authority in matters of this nature. On the contrary, we believe that the orders of the court were warranted, and tended to simplify the issues, expedite the trial, and did not deprive the plaintiff of any of its rights. After the issues had been framed as hereinbefore stated, the hearing of testimony proceeded before the court without a jury through several months, and on the 9th day of February, 1898, the court rendered its opinion and made its findings upon what we shall designate the first cause of action. The opinion and findings of the court occupy 44 pages of the printed supplemental abstract of defendant. It will be unnecessary to set forth the opinion of the court in this opinion. Such portions, however, as serve to indicate the process of reasoning, based upon the evidence in the case, adopted by the court below in arriving at its conclusions, will be from time to time quoted herein as this opinion proceeds.

The court in its opinion promulgated a schedule of rates to be adopted by the defendant for water furnished by it to the private consumers of the city of Denver. This schedule, so far as the items therein are concerned, was based upon "Schedule A," which was a part of the ordinance of 1890. We find from the record that the items of service included within "Schedule A," exclusive of irrigation rates and meter rates, were 107, that the leaflet schedule of rates contained 142 items, and that the schedule of rates promulgated by the court contained 135 items. This increase of items in the court schedule over the items contained in "Schedule A" seems to have been warranted in the opinion of the court by the fact, which appeared in evidence, that other and different uses of water in the city of Denver had grown up since the adoption of the ordinance of 1890. The above statement is made for the purpose of showing the number of items of service concerning which testimony was introduced at the trial, and upon which,

under the issues framed, the court was required to fix and establish a schedule of rates. It also indicates to some extent the voluminous character of the evidence introduced at the trial.

The findings of the court were as follows: "(1) That the schedule of annual water rates established this 9th day of February, A. D. 1898, shall be payable semiannually in advance on the 1st day of May and November, respectively, A. D. 1898, and on the same days of each year thereafter. (2) That this schedule of rates for private consumers of water in Denver has been obtained by adding together the prevailing minimum rates in Chicago, St. Louis, and Cincinnati, and dividing the sum thus obtained by three, the number of cities contributing; but whenever either of the said three cities have no prevailing rates, and thereby fail to contribute a price or rate, then we have allowed as the rate to be hereafter charged whatever the rate was for such service in Denver on the 1st day of November, A. D. 1895. (3) That the prevailing rates referred to in Ordinance No. 44 of the Series of 1890, in section 5, and which have been taken in determining the rate to be charged in Denver, mean and are held to be the present existing minimum rates charged in Chicago, St. Louis, and Cincinnati for any specific service. (4) Minimum rate means the lowest price given or calculated in each of the three cities for a specified thing, being, in Chicago, a frontage of 12 feet; in St. Louis, the least desirable location for any kind of business; and, in Cincinnati, the lowest charge for area space, 500 square feet or less, accompanied by the minimum use of water. (5) That the question of discount is a matter of private regulation, a rule of the water departments in Chicago and Cincinnati, and is not found in St. Louis. Nowhere is a discount a part of the price, as appears from and is set forth in the water rates of either of these cities. (6) That the rules and regulations of the defendant company, of which complaint has been entered, are not harsh, oppressive, nor unreasonable to that degree or extent as would warrant a court in entering an order decreeing that such rules and regulations be changed, modified, or annulled. We find the same rules, of like severity, in each of the three cities, and abundant legal authorities in different states upholding their enforcement. (7) That the prevailing rates at this date in Chicago, St. Louis, and Cincinnati are not the rates which prevailed in these cities in October, 1895, when a demand was made by the city council, nor on November 1, 1895, when the defendant company fixed its schedule of rates as set forth in its leaflet. (8) That the evidence fails to show that the defendant wholly, or at all, wantonly or otherwise, failed, in October, A. D. 1895, to make a schedule of rates which was not the equivalent of the average prevailing rate then in force in the three cities. (9)

That the defendant company will be entitled to collect from all private consumers of water such amounts as were due and payable on the 1st days of May and November, A. D. 1897, in accordance and compliance with the rates as set forth and fixed by the defendant company on the 1st day of November, A. D. 1895. (10) That the rates provided to be fixed in and by section 5 of the contract of April 10, 1890, are not by the terms of the said contract, and cannot be by plaintiff, made to apply to towns which have been, since the making of said contract of April 10, 1890, annexed to the city of Denver by a vote of the inhabitants thereof, and that the respective rights of the defendant company, and of the inhabitants of the territory embraced in said independent towns which have been annexed, remain as though there had been no annexation thereof, and are to be controlled only by the contracts existing between the said defendant company and said independent towns or cities, and that the plaintiff has only the rights in the premises as against the said defendant that were had or might be asserted by the said independent towns and municipalities against the defendant company, had there been no annexation, and that the rights and obligations, respectively, of the plaintiff and defendant, are the same as the rights and obligations of the said defendant and the said towns and municipalities were prior to the said annexation, and that this finding applies, respectively, to the inhabitants or territory embraced within the former towns and cities of Highlands, Colfax, Barnum, South Denver, and Harman, being the only towns and cities concerning which, and the annexation of which to the city of Denver, any evidence has been introduced in this cause, and that the same rule is applicable to all other towns that may hereafter be annexed to said city in the same manner as the towns herein enumerated. (11) That the same service designated as irrigation of lots in 'Schedule A,' which is attached to and made a part of the contract of April 10, 1890, does not exist in either of the cities of Chicago, St. Louis, or Cincinnati. (12) That the defendant is entitled to collect and receive rates for and on account of any uses not enumerated and set forth in the schedule in this decree fixed and established at a rate not higher than is fixed and determined in and by the schedule herein fixed and established for the same service; that is to say, for the same quantity and use of water under like conditions and circumstances: provided that such uses be not the same which are now covered by and included in the items and rates charged and collected for under the items contained in said schedule of rates herein fixed and determined."

The position of defendant in this court is that the findings and decree of the trial court upon the issues of fact are conclusive, because they were findings and a decree upon

questions of fact either upon conflicting evidence or upon undisputed evidence sustaining and tending to sustain the findings of the court. The rule in this state is well settled that where the findings of fact and decree are based upon either conflicting or undisputed evidence, and there is substantial evidence to support them, taken before the court below, which sustains or tends to sustain such findings and decree, this court is precluded by such findings and decree, and will not disturb the same. Citation of authorities is not necessary in support of the above rule, as the Reports of this state are full of such authorities. In view of the above rule, it is important to always keep in mind the issue presented by the pleadings upon the question now under consideration. Without question the original complaint, the amended complaint, and the second amended complaint intended to present to the court a claim upon the part of the city of Denver that the defendant had failed to comply with section 5 of the ordinance, relating to the fixing of a schedule of rates for private consumers which should be equivalent to the average rate prevailing in the three cities mentioned for the same service. This is manifest from the fact that the resolution adopted by the city council October 2, 1895, and the ordinance adopted April 29, 1897, which are alleged to be authority for the commencement and prosecution of this action, make no mention of the failure upon the part of the company to comply with section 6 or section 8 of said ordinance, relating to the purity and pressure of the water furnished by the defendant. This being the case, our inquiry is limited to the one question, namely: Is there competent evidence in the record sustaining or tending to sustain the schedule of rates promulgated by the court below, as being a schedule for private consumers which is the equivalent of the average rate prevailing in the three cities mentioned for the same service?

After an exhaustive examination of the evidence in this case we are forced to the conclusion that the evidence does not sustain or tend to sustain the schedule of rates promulgated by the court, for reasons which will now be stated. The defendant at the trial introduced no testimony as to the schedules of rates prevailing in the three cities mentioned, relying upon its cross-examination of the witnesses introduced by the plaintiff. The plaintiff introduced certified copies of the schedule of water rates existing in the three cities at the date of the trial, the testimony of an accountant whose experience in that line of work consisted of three or four months' labor, previous to testifying in this case, in an effort to arrive at an average of the rates charged in the three cities mentioned to their private consumers for the same service rendered by the defendant to its private consumers. Plaintiff also introduced one witness from each of the three cities mentioned, who

were in some capacity connected with the water departments of those cities, who testified in support of the testimony which had been adduced from the plaintiff's accountant, and also as to the manner and method of arriving at the rates charged to private consumers by the water departments of the several cities. At the very outset of the investigation it was developed that there existed in each of the three cities mentioned a system of determining rates charged private consumers, based upon the schedule of rates found in the ordinances, which differed from the system prevailing in the other cities, and also differed from the system prevailing in the city of Denver. To illustrate: The testimony shows that in the city of Chicago the system prevails of charging what is known as a "frontage rate" against every building which fronts upon a street through which, or along which, a water main has been laid. This "frontage rate" is in addition to the charges made for instruments of service which may be used in the building. It is based upon the minimum of 12 feet front of a one-story building, and increases as the frontage increases and the number of stories in the building increases. In St. Louis the rate for water is determined by the location of the water consumers; the least desirable location being charged the lowest rate, and the most desirable location being charged the highest rate. In Cincinnati the charge is regulated by the space occupied by the consumer, upon a basis of 500 square feet for the minimum charge. From the above statement it will be readily seen that owing to the radically different manner in which charges are made under the ordinances and schedules of the three cities, it is absolutely impossible to arrive at an average rate for the three cities, for the reason that it is absolutely impossible to average frontage, locality, and space.

As the taking of testimony progressed, it developed that in one or more of the three cities there was no charge whatever for a large number of items of service included in "Schedule A." The court in finding 2 said: "That this schedule of rates for private consumers of water in Denver has been obtained by adding together the prevailing minimum rates in Chicago, St. Louis, and Cincinnati, and dividing the sum thus obtained by three, the number of cities contributing; but whenever either of the said three cities have no prevailing rates, and thereby fail to contribute a price or rate, then we have allowed as the rate to be hereafter charged whatever the rate was for such service in Denver on the 1st day of November, A. D. 1895." If the court, in arriving at the schedule of rates which it promulgated, had strictly adhered to the rule announced in the above finding, no rate could have been arrived at for more than two-thirds of the items in the schedule adopted by the court, for the reason that in one or more of the schedules of the three cities mentioned no rate was fixed for more than two-

thirds of the items of service covered by the schedule promulgated by the court. It is possible that, if the testimony had disclosed that no rate was fixed in one or more of the cities for a few only of the items included within the court's schedule, the rule adopted by the court above stated might have been unobjectionable upon the theory that a substantial compliance with the terms of a contract is all which the law requires. If the court had adhered to the rule announced, it would have resulted in leaving the schedule of rates adopted by the company in 1895 in full force and effect as to more than two-thirds of the rates fixed by such schedule, and in our opinion must have resulted in the court arriving at the conclusion that it was absolutely impossible to determine the average rate prevailing in the three cities mentioned for the same service, and therefore impossible to enforce the provisions of the contract existing between the city and the company, in so far as the requirements of section 5 of the ordinance are concerned.

To escape this conclusion, however, over the objection of defendant, testimony was introduced which was an attempt to establish a rate in one or more of the three cities mentioned where no such rate prevailed. In other words, the court allowed testimony to be introduced, over the objection of defendant, for the purpose of establishing rates for items of service in the three cities where no rate prevailed, and therefrom computed an average, which average appears in the schedule promulgated by the court in more than two-thirds of the items therein contained. If, under the testimony, it had been possible to thus supply the missing rates in one or more of the three cities with definiteness and certainty, such method of computation might not have been objectionable; but the witnesses who testified upon this point, from the necessities of the case, were compelled to assume the existence of certain facts in many instances which were not supported by the evidence. When this method of computation was called in question by the defendant, by objections to the testimony and upon cross-examination, the witnesses testified that the above assumptions were made because they were fair, just, and reasonable, thereby introducing into the case questions which were not in any manner presented by the issue. The court was not called upon, by any issue presented by the pleadings, to determine a fair, just, or reasonable rate for the private consumers of the city of Denver. It was its duty, and its duty only, under the issue presented, to determine, if possible, the average rate prevailing for the same service in the three cities mentioned. Anything beyond this was outside of and beyond any issue in the case. The admission of such testimony was without justification upon any principle with which we are familiar. Without such testimony it would have been, and was, absolutely impossible for the court to arrive at a schedule of rates for the

private consumers of the city of Denver required by section 5 of the ordinance.

This sort of testimony pervades the record, and, as above stated, more than two-thirds of the rates established by the court in the schedule promulgated by it are based upon such testimony, and such testimony only. The cross-examination of plaintiff's witnesses by defendant's counsel emphasized in a marked degree the incompetency of the evidence upon which the decree of the court was largely based. That this method of computation and calculation was adopted by the court is manifest from finding 4: "Minimum rate means the lowest price given or calculated in each of the three cities for specified things," etc. In the schedule of rates promulgated by the court the minimum and the maximum rate is established for 36 items. In every instance the maximum rate thus established is identically the same as that set forth in the schedule adopted by the company in October, 1895, and known as the "leaflet schedule." The testimony in the case has been examined with the utmost care, and we fail to find any testimony whatever in support of any maximum rate promulgated by the court in its schedule. That the court adopted the maximum rate of the leaflet schedule, without any evidence to justify such action, is conclusively shown by the following extract from the court's opinion: "The following table will therefore be held to be the schedule of minimum and maximum rates fixed for private consumers of water in the city of Denver, which rates we find to be equivalent to the average minimum rate prevailing in the cities of Chicago, St. Louis, and Cincinnati for the same service. The maximum rate, where a maximum is given, is based upon that found in Schedule A, with the reduction therefor found in the leaflet." In our view, the maximum rate which the water company may charge is of more importance to the consumer than the minimum rate, for the reason that under the findings of the court (paragraph 4) the minimum rate established "means the lowest price given or calculated in each of the three cities for a specified thing, being, in Chicago, a frontage of 12 feet; in St. Louis, the least desirable location for any kind of business; and, in Cincinnati, the lowest charge for area space, 500 square feet or less, accompanied by the minimum use of water." In the opinion of the court it is said: "There can be no fixed rule in determining a maximum or intermediate charge. Much must depend on the integrity of the party applicant as to the uses for which he says he desires the water; and likewise much must depend on the fairness of the company supplying the water as to its charges." If, as the court found in paragraph 4 above quoted, the minimum rate is based upon the frontage, locality, and space, accompanied by the minimum use, all or either of those elements may be applied by the company in determin-

ing when the service rendered should be paid for at the minimum rate, and the maximum or intermediary rate is left entirely to the discretion and fairness of the company. In other words, the company may not go below the minimum rate established by the court's schedule; but, in fixing a maximum rate for any service to a private consumer, it may go to the limit allowed by the court, thus consigning the private consumers to the mercy and fairness of the company.

We do not wish to be understood as intimating that the company would abuse the privilege granted it by the court, but simply announce the belief that, if the testimony warranted the above findings of the court, then the testimony was insufficient to enable the court to establish a schedule of rates, both minimum and maximum, which would be a compliance with the requirements of section 5 of the ordinance. The brief of counsel for defendant is replete with statements to the effect that plaintiff failed to prove its case. To quote: "It cannot be claimed that any evidence has been offered, or that any allegation has been made, to fix a schedule of rates. All that, as we were frequently admonished, which was attempted to be done, was to fix a minimum rate for certain items, leaving the remainder of the schedule untouched in every particular whatever. Was that making a case? Was that following the allegations of the complaint? Was that showing a right to equitable relief, or to any kind of relief? And yet the court was legally compelled to broadly state: 'These are the matters which were necessary to have been fully established by evidence, and these are the matters concerning which there has been an utter and absolute failure by the plaintiff.'" Many other quotations from defendant's brief of like import might be made. In fact, the whole burden of defendant's brief and argument is to the effect that the company, having adopted a schedule of rates which was less than the contract called for, had kept, not only the letter, but the spirit, of the contract. We believe that this contention of defendant is amply sustained by the evidence in this case, as a comparison of the two schedules shows that the rates established by the court for nearly one-half of the items in its schedule are higher than the rates established by the company; but under the issue presented by the pleadings such contention cannot avail, for the reason that there was no question of the justice or fairness or reasonableness of the schedule of rates adopted by the company in 1895 presented to the court below. The sole question was a determination of a schedule of rates which should be equivalent to the average rate prevailing in the three cities mentioned for the same service. The theory upon which defendant tried the case seems to have been that, unless it could be shown that the schedule adopted by it in 1895 was wrong, such schedule should stand.

No such issue was presented by the pleadings, and in our opinion no such theory is justified by the terms of the contract.

From our examination of the testimony in this case we are of the opinion that section 5 of the ordinance is unenforceable, in that it is utterly impossible to arrive at an equivalent of the average rate prevailing in the three cities mentioned for the same service, due to the fact that the schedules of rates prevailing in the three cities are based upon such radically different classifications and methods of computation, such a diversity of uses and services, and are so largely determined by the judgment and discretion of employes of the water departments, whose duty it is from time to time to inspect, survey, and assess the premises to which water is furnished, and upon the reports of these employes the rates to be paid by the consumers are calculated by the employes of the office upon the schedules of rates prevailing. In this conclusion we are abundantly supported by the position taken by counsel for defendant in his brief: "We spent a number of weeks in the trial court—many people spent weeks elsewhere, so we are told—in attempting to arrive at an average. We said that it could not be made. We say to-day that it cannot be done. What better proof or demonstration of that fact is required than that schedule after schedule, no two ever agreeing, are tendered by the same plaintiff, under the oath of the same man, and figured by the same accountant. If it could be done, if it was a mathematical proposition, no two men should differ upon it, and certainly one man should not differ from himself. There is an inherent difficulty in the question, not put there by the intention of anybody, perhaps, but existing, it cannot be avoided or escaped; and that is that the three cities are so diverse in their methods and their classifications that you cannot put the three together and make the comparison Mr. Scobey told us of, and in his report he reported to the city council, and we called his attention to it when upon the stand, that anybody would say it was an easy matter to add three figures together, and divide by three, and get an average; but, as he then reported, that is not what is to be done. We find in St. Louis the room as largely the basis of the charge; we find in Chicago the front as largely the basis of the charge; we find in Cincinnati either rooms in residences or floor space in stores and offices; and how they get these together, or to unite them so we can say this is the charge in Cincinnati, or the thing covered by a specific charge in St. Louis or Chicago, is a difficulty with which they had wrought, with the result they could not come to a conclusion." To quote again: "Having tested, just as we tested in the courtroom throughout the many weeks of the trial, the inability of any accountant, however fair and unprejudiced and accomplished he might be, to go through

these four schedules and arrive at an exact average in all these matters, the utter futility of the effort is no longer susceptible of doubt." Again: "The plaintiff did not give the court material out of which to make a schedule; that is, there was no evidence going other than to a contention with regard to the minimum charge. How could the court, on such evidence, make anything else, apply any doctrine or principle to the minimum after it was obtained, under the evidence thus presented?" And also: "The appellant only attempted to present evidence as to a minimum rate. Taking the evidence before the court, nothing else has been attempted by the appellant, either in pleading, evidence or tables. That is not making a schedule."

As to irrigation rates, there was no effort whatever made by the plaintiff to introduce any evidence which showed or tended to show that rates for irrigation existed in any one of the three cities mentioned. The only effort in this direction was to prove the rates established in the three cities for sprinkling sidewalks and streets and washing windows by means of a hose. The witnesses who testified for plaintiff from the three cities mentioned candidly admitted that irrigation, as understood and practiced in this country, was unknown in either Chicago, St. Louis, or Cincinnati; so that it appears by the only testimony introduced by plaintiff that no schedule of rates existed in either one of the three cities for this service. And the court so found. Finding 11: "That the same service designated as irrigation of lots in Schedule A, which is attached to and made a part of the contract of April 10, 1890, does not exist in either the cities of Chicago, St. Louis, or Cincinnati." The court, in closing its discussion of "irrigation rates" in its opinion, says: "We would therefore, in view of what appears to us sufficient in the evidence, pleadings, and contract, decide that the classification as to irrigation is not subject to change, and while the evidence would justify us in raising the rate for irrigation, if such classification were found in the other three cities, we are led to conclude that the rate charged in the leaflet since November 1, 1895, is just, fair, and reasonable, and the rate will remain at 22 cents per foot front." As before stated, the question of reasonableness, fairness, or justice of the schedule of rates adopted by the defendant was not in issue, and cannot be made a basis of determination of what such rates shall be, under the express terms of the contract set out in section 5 of the ordinance of 1890; and such section does not except from its operation "irrigation rates," so that the court, as shown by its opinion, departed the issue presented, and promulgated a schedule of rates for irrigation, without any competent evidence whatever sustaining or tending to sustain such schedule.

From an exhaustive and laborious ex-

amination of the evidence in this case we arrive at the conclusion that the schedule of rates, with the exception of "meter rates," promulgated by the court in its decree, is not sustained by the evidence in the record, and that with reference to more than two-thirds of the items in the schedule there is no competent evidence in the record even tending to support the schedule of rates decreed by the court, and that from the evidence in this case it is absolutely impossible to determine a schedule of rates which shall be the average of rates promulgated in the cities of Chicago, St. Louis, and Cincinnati for the same service, using the words "for the same service" as meaning the items of service provided for and set out in "Schedule A," which is a part of the contract of 1890 existing between plaintiff and defendant in this case. The schedule of meter rates promulgated by the court seems to be based upon sufficient competent evidence to justify the conclusion that it should be sustained, and we believe that a fair construction of the terms of section 5 of the ordinance of 1890, above quoted, would permit any customer of the water company to install a meter, and pay for the water consumed according to the schedule of meter rates promulgated by the court.

The amended complaint alleged that the rules adopted by the water company for the assessment and collection of its water rates were arbitrary and unreasonable. The answer denied that its rules and regulations were arbitrary or unreasonable, alleged that they were such as had been in force and effect under its predecessor and prevailed at the time of the adoption of the ordinance, or had been adopted by it subsequent to its acquisition of the property, pursuant to the rights conferred upon it by the ordinance. Section 4 of the ordinance provided, in effect, that the water company should at all times furnish water from its mains to premises abutting upon the streets in which mains have been laid, "under such rules as now prevail and such further reasonable rules as it may prescribe." Finding 6, above set forth, is to the effect that the rules and regulations of the water company were not harsh, oppressive, or unreasonable. The testimony in the record abundantly supports this finding of the court.

The amended complaint further alleged that the obligations of the defendant company, under the ordinance, applied to the additions of Colfax, Highlands, South Denver, and Barnum, and that the company was bound, under the terms of the ordinance, to furnish water to private consumers in the above towns under the requirements of the ordinance. Section 1 of the ordinance granted the water company the right and privilege of laying its mains in the streets, avenues, alleys, and public places of the city of Denver "and additions thereto." In answer to this the defendant denied that the obliga-

tions of the contract applied or related to the additions, Colfax, Highlands, South Denver, and Barnum, and alleged that those additions, or cities, at the time of their annexation to the city of Denver, and the private consumers thereof, were supplied with water under separate and independent contracts, and not under the contract of April 10, 1890; that the annexation or addition of the said cities or towns to the city of Denver could not abrogate the contracts or change or alter the same in any respect or particular whatever. The evidence in the record abundantly supports the defense pleaded by the defendant company, and for this reason finding 10 hereinbefore set forth is sustained.

Our conclusion is that the findings of the court fixing the schedule of yearly water rates, except meter rates, to be charged by the defendant company to its private consumers of water, and all other findings relating to the same subject, are not sustained by the evidence as found in the record, for the reasons herein stated, and that the decree of the court upon what is known as the first cause of action must be reversed, except as to meter rates.

The basis of the second cause of action alleged in the second amended complaint is the failure upon the part of the defendant to keep, observe, and perform its duties, undertakings, and agreements imposed upon it by section 6 of the ordinance, which is as follows: "Sec. 6. The said the Denver Water Company shall at all times furnish water to the city and to private consumers of a quality as good and fit for private consumption as that shown by the analysis made by order of the city of Denver by Prof. Joseph A. Sewall, in the month of August, 1889." In support of this contention it was further alleged that the deaths in Denver, due to typhoid fever, very largely increased in 1896 over 1895, and were very much larger than the death rate from the same cause in other cities named, and that this increased death rate was directly traceable to the use of impure water supplied by the defendant. The different sources of supply utilized by the defendant in its water system were specified, and it was alleged that the water taken from what was known as "Marston Lake" and from the Platte river and turned into the Mississippi street galleries was the contaminated, impure, and unwholesome water introduced by the defendant into its waterworks system, and that such contaminated water, by reason of the fact that it was introduced into all parts of the system, rendered all of the water supplied by the defendant to the city of Denver and its private consumers impure, unwholesome, and unfit for domestic use. Thus the issue was limited to two sources of supply, viz., Marston Lake and the Platte river above the Mississippi street galleries. The defendant's answer was a general and specific denial of all the allegations of the complaint, and also allegations to the effect that

the city had failed and refused to keep its part of the contract, by failing and refusing to pay the defendant hydrant rentals as provided for by the ordinance. In the view which we take of this case, the latter allegations are immaterial, and will not be considered. The plaintiff's reply denied all of the material allegations of new matter contained in the answer.

The taking of testimony upon the issue presented by the pleadings upon the second cause of action continued through several months and occupies about 1,400 pages of the supplemental abstract filed by the defendant in error. July 8, 1898, the court made its findings upon the second cause of action in favor of defendant, and rendered its decree thereon dismissing the second cause of action, at the costs of plaintiff. It is impracticable to review the testimony taken upon this cause of action, and we cannot conceive that it would accomplish any good purpose to make an attempt to do so. The testimony has been considered with great care, and it seems to us that the findings of the court and the decree based thereon are amply warranted by the testimony preserved in the record. A mass of expert testimony was introduced, which was conflicting, as all such testimony is; but we are justified in saying that the plaintiff utterly failed to sustain the allegations of its complaint as to the impurity and unwholesomeness of the water which was being supplied by the defendant to the city of Denver and its citizens for the period of time alleged in the complaint and for the period of time which the testimony covers.

As to the third cause of action, it was alleged that the defendant had not kept or performed the duties imposed upon it by section 8 of the ordinance, which is as follows: "Sec. 8. The said company shall at all times until the 1st day of May, 1891, keep and supply the said hydrants with an abundant supply of water for fire purposes under such pressure as it now gives, and after said 1st day of May, 1891, shall supply all of said hydrants and any hydrant which may be ordered to be set upon additional mains, as hereinafter in this ordinance mentioned, with a pressure equivalent, taking the elevation of the surface of the ground into account, to one hundred and fifteen pounds at the hydrant in front of the Union Depot in said city; provided, the city shall not be in default with the company upon any of its agreements; and provided, further, that if, owing to the extension and growth of the city, hydrants shall be ordered upon locations where, owing to the difference in elevation, there shall be less than forty-five pounds pressure, with a pressure of one hundred and fifteen pounds at the hydrant in front of the Union Depot, to the number of fifty or more, the said company shall put such hydrants upon a separate high service, and keep and maintain on each of said hydrants a water pressure of not less than fifty

pounds." The defendant denied the material allegations of the complaint as to this cause of action, and further alleged that plaintiff had failed and refused to keep the obligations imposed upon it by the ordinance, in that it failed and refused to pay the hydrant rentals provided for by the ordinance, and that plaintiff, at the time of the suit, was indebted to the defendant on account of such rentals in the sum of over \$145,000, and that the plaintiff had failed to comply with other provisions of the ordinance by it to be kept and performed, which are unnecessary to be stated or considered, in the view taken of the disposition to be made of the main issue presented by this cause of action. The answer also alleged that at the date of the execution of the contract of April 10, 1890, its predecessor, the Denver Water Company, was pumping water by steam pumps and plants into and through its lowest mains to the higher points in the system; that the hydrant in front of the Union Depot was at or near the lowest point in its system; that during the year 1894 the system was changed from a pumping system to a gravity system, by which latter system the water was introduced into the mains at the highest point in the system, by mains connected with its elevated reservoirs, standpipes, and storage basins, thereby maintaining a constant, abundant, and inexhaustible supply of water throughout the whole system; that the diameter of its mains under the gravity system had been largely increased; that the quantities stored by defendant in its various reservoirs, after the adoption of the gravity system, had been largely increased, thereby insuring to the city of Denver a much larger and a more uniform and steady supply of water throughout its whole system; that the change from the pumping system to the gravity system was with the knowledge, consent, and approval of the plaintiff; that at the time the contract was entered into by the predecessor of defendant the quantity of water supplied the city of Denver was about 14,000,000 gallons per day; that the quantity of water supplied by the defendant at the time of the trial was from 25,000,000 to 45,000,000 gallons of water per day. The reply of plaintiff put in issue the allegations of new matter in the answer.

The evidence in the case clearly established the fact that the pressure at the Union Depot was not 115 pounds per square inch, as required by section 6 of the ordinance, and that such pressure had not been maintained since the change was made from the pumping system to the gravity system. It also appeared by the evidence that the city and its officers were fully advised of the change which had been made by the defendant in its system, that they consented to such change, and that, when it was suggested by the defendant that a change should be made back to the pumping system, such proposed change was violently opposed by the then mayor

of the city, who said that he never would consent to such change if he could prevent it. The evidence also clearly showed that by the change from the pumping system to the gravity system, by the enlargement of the mains of the water company, and by the increased supply of water stored in its various reservoirs, a very much larger supply of water was furnished the city for use in case of fires and conflagrations than was furnished at the date of the adoption of the ordinance. The testimony of an expert witness as to the relative efficiency of the two systems, set forth in the abstract, is: "Under the old system the hydrant at the Union Depot was supplied by a 6-inch pipe 260 feet long, which was fed by a 10-inch pipe, and under 115 pounds pressure the supply under this pumping system would be 2,820 gallons per minute. To-day the hydrant is supplied by 60 feet of 6-inch pipe, fed by an 18-inch pipe, and that under 85 pounds pressure would give 5,163 gallons per minute. Practically 2,800 gallons more furnished on the pressure of the present system than the 115 pounds of the former system." This testimony, taken in connection with that of a former chief of the fire department, which was to the effect that recent large fires had demonstrated that an abundance of water was furnished, and that fires of any consequence could not be successfully handled without steamers to give the pressure, which cannot be obtained by any other means, not even if the pressure at the Union Depot amounted to 140 or 150 pounds, which testimony was uncontradicted, justifies the conclusion, arrived at by the court below, that the defendant had complied with that provision of the contract which required it to furnish an abundant supply of water which should be the equivalent of a pressure of 115 pounds to the square inch at the hydrant in front of the Union Depot. It abundantly appears from the testimony that the water supply of defendant, stored in its reservoirs at the time of the suit, was many times the supply maintained by the Denver Water Company at the time the contract was entered into, and that the company had kept pace with the growth of the city, so far as its supply of water was concerned. The findings of the court below were to the effect that from the evidence it appeared that the defendant company had not failed to comply with the requirements of section 8 of the ordinance, and its decree based upon such findings, as to the third cause of action, dismissed the complaint at the costs of plaintiff.

The findings of the court upon the second and third causes of action were sustained by the evidence introduced at the trial, and its decrees, based thereon, will be affirmed. For the reasons stated, the findings of the court below as to the first cause of action, so far as the same relate to a schedule of rates, except meter rates, to be charged private con-

sumers by the defendant, the Denver Union Water Company, and the decree based thereon, are not sustained by the evidence introduced at the trial, for which reason the decree as to the first cause of action, except as to meter rates, must be reversed.

Affirmed in part. Reversed in part.

STEELE, C. J., concurs in the foregoing opinion, except that he is of the opinion that the provisions of section 5 of the ordinance of 1890 are enforceable. CAMPBELL, J., not participating.

(40 Colo. 332)

In re HOBSON'S ESTATE.

HOBSON v. HOBSON'S EX'R et al.

(Supreme Court of Colorado. July 1, 1907.

Rehearing Denied Oct. 7, 1907.)

I. WILLS—REVOCATION—AFTER-BORN CHILDREN—STATUTORY ELECTION BY WIDOW—EFFECT.

The will of a testator leaving a widow made no provision for her nor for a child born after his death, nor manifested an intent to disinherit the child. The widow elected to take under the statute. *Held*, that the will was not revoked, but its provisions were nugatory, and the wife and child were each entitled to a half of the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 468.]

2. EXECUTORS AND ADMINISTRATORS—CLAIMS—PRESENTMENT FOR ALLOWANCE.

The manner of exhibiting claims against estates of decedents, prescribed by Mills' Ann. St. § 4787, requiring the filing in court of the instrument whereon a claim is founded, is exclusive, and the original note on which a claim is founded, and not a copy, must be filed, and, unless that is done within a year from the granting of letters testamentary, the claim is barred under the express provisions of section 4780.

3. SAME—AUTHORITY OF EXECUTOR.

An executor, being a representative of the estate, cannot act as the agent of a claimant in presenting a claim for adjustment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 820.]

4. SAME—FAILURE TO PRESENT CLAIM—EXCUSE.

The failure of an executor to comply with the request of a claimant to present a claim founded on a note delivered to the executor is no excuse for the claimant's failure to file his claim as prescribed by Mills' Ann. St. § 4787.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 830.]

5. SAME—OBJECTIONS.

Under the statute authorizing the heirs and beneficiaries of a decedent to object to the allowance of a claim, and providing that a contested claim shall be determined in the same manner as in actions before justices of the peace, a general objection by the widow in her own behalf, and as guardian of an infant child, to the allowance of a claim founded on a note, a copy of which was filed, was sufficient, and the defenses of limitations, and of the failure to file the note itself, were available.

6. LIMITATION OF ACTIONS—FAILURE TO SUE—EFFECT.

Where a note was not exhibited as a claim against the estate of decedent, and more than six years had elapsed since it became due, the claim was barred by limitations.

Appeal from District Court, Pueblo County; N. Walter Dixon, Judge.

Proceedings by E. B. Hobson for the allowance of a claim against the estate of George H. Hobson, deceased, in which the widow in her own behalf, and as guardian of a minor child of decedent, filed objections. From a judgment disallowing the claim, claimant appeals. Affirmed.

W. E. So Relle, Guy Le R. Stevick, and L. A. Crane, for appellant. J. H. McCorkle, for appellee.

CAMPBELL, J. George H. Hobson died testate October 2, 1900, leaving a widow. A child was born after his death. The will did not make any provision for either, or manifest an intention to disinherit the child. It was admitted to probate in the county court of Pueblo county November 19, 1900. On the same day A. W. Hobson, a brother of the testator, so designated in the will, was duly appointed executor, and letters testamentary were granted to him, and he thereupon qualified. Three days later the widow renounced under the will, and elected to take under the statute, the effect of which and the birth of testator's child after the making of the will, though not revoking that instrument, rendered its devises and legacies nugatory, and the wife and child became entitled each to one-half of the property of the estate under our statute. The executor gave the statutory notice to persons having claims against the estate to present them for adjustment on the 4th day of February, 1901. On that day Edward B. Hobson, a brother of testator, filed in the county court an affidavit stating that he owned a promissory note executed and delivered by George H. Hobson during his lifetime to the claimant, and that the same was a just claim against his estate; the affidavit setting forth a copy of the note, which purported to have been executed February 2, 1895, for \$13,000, payable on demand after date, without interest until paid. From an offer of proof made by the claimant at the trial—concerning the time at which it was made there is some dispute, but which, for our present purpose, we shall assume was seasonably made—it appears that the claimant, Edward B. Hobson, several days before the day fixed for adjustment, sent the original note upon which the claim is founded to the executor, with a request that the latter should take such action as was necessary to have the claim properly filed and allowed in the court and paid out of the estate's assets; that the executor agreed to take such action, and thereupon sent to the claimant, who resided in California, a copy of the form which had been used by holders of other promissory notes against the estate, and which had been filed in, and allowed by, the county court. Employing this form, the claimant prepared and swore to the claim, and forwarded the writing to the executor, and the executor, on

the return day, presented the affidavit and filed it in the county court. The executor then, and for more than two years thereafter, had in his possession the original note. When the affidavit was filed on adjustment day, the attorney for the widow, acting in her own behalf and as guardian for the minor child, objected to the allowance. It was a general objection; nothing being said as to the manner of presenting the claim, or that a copy of the note was filed instead of the note itself. The county court retained jurisdiction over the estate until August 28, 1902, when an order was made transferring all papers and all matters connected therewith to the district court, because the judge of the county court had been an attorney for one of the devisees. During the entire time the county court had jurisdiction the claimant took no steps whatever toward securing action upon his claim, further than filing a copy of the note, and the record does not show that any order of continuance from term to term was made in the matter of its adjustment. Nearly eight months after the venue was changed to the district court, April 22, 1903, the claim came on for hearing on the written objections of the widow, guardian, and one of the devisees, filed April 8th, in which the executor orally joined on the day of the hearing. The record does not show that the hearing was the result of notice given to the executor by the claimant, as the statute prescribes, but the claimant and the objectors were present in court either in person or by counsel.

Only two of the objections interposed will be discussed, as they are the ones upon which the court rightly, as we think, disallowed the claim: (1) The claim has never been exhibited against the estate by filing the written instrument upon which the same is founded in the county court or the district court, to which the administration proceedings were transferred, and, at the time of the hearing, more than one year had elapsed from the granting of letters testamentary. Hence the claim is barred by the statute of nonclaims (section 4780, Mills' Ann. St.), unless the claimant shall find other estate of the testator, not inventoried or accounted for by the executor. (2) That, since more than six years have elapsed since the accrual of the cause of action upon the alleged promissory note before the commencement of proceedings for its allowance, the claim is barred by the general six-year statute of limitations.

Section 4780, Mills' Ann. St., declares that demands against an estate of this character shall be exhibited within one year from the granting of letters testamentary or of administration, and, if not exhibited within that time, shall be forever barred, except as to property of the decedent not inventoried or accounted for by the executor or administrator. Section 4787 reads: "The manner of exhibiting claims against estates shall be by filing in the county court the account, or instrument of writing, • • • whereon

such claim is founded. Formal pleadings shall in no case be required; but the issue shall be formed, heard and determined in the same manner as in actions before justices of the peace." There is no room here for construction. The language is clear, explicit, and unambiguous. The manner of exhibiting a claim founded upon a promissory note is by filing the note itself in the county court. The Illinois statute, from which much of our law concerning probate matters is taken, contains no provision whatever as to the manner of exhibiting claims, and the courts there hold that the filing of a copy of a note is a sufficient exhibiting of a claim based thereon. *Wallace, Ex'r, v. Gatchell*, 106 Ill. 315. But our statute is otherwise; and we hold that the manner, and exclusive manner, of exhibiting a claim of this character, is by filing in the county court the written instrument on which the claim is founded. Counsel for claimant do not seriously question this interpretation of the statute; but say that the requirement can be, and was, waived by the executor by reason of the facts which he offered to prove, and which are embodied in the rejected offer of proof to which we have already adverted. We cannot agree with this contention, under the facts, even if it were within the power of an executor to waive such an essential statutory direction. The claimant is supposed to know the law, and that it provides specifically how claims must be exhibited. The executor is the representative of the estate, and he could not properly accept employment from, or act as the agent of, the claimant, in presenting a claim against the estate for adjustment. If it be true that the executor knew of the existence of the note, or had it in his possession, and that the holder asserted it as a claim against the estate, or if the executor neglected to comply with the request of the claimant properly to present the claim and have it allowed, this furnishes no excuse for the claimant's failure to file his claim in the county court as the statute directs. *Morse v. Pacific Ry. Co.*, 191 Ill. 356, 61 N. E. 104. If claimant has been injured by the executor's failure to carry out a supposed promise, the estate is not answerable therefor.

Under our statute not only may an executor or administrator object to the allowance of a claim, but the heirs at law, devisees or legatees, or creditors or others interested in the estate, may do so. The widow, in her own behalf, and as guardian for her minor child, objected generally to the allowance of this claim when the affidavit containing a copy of the note was filed in the county court. The statute expressly provides that formal pleadings shall not be required, and, in case of a contested claim, the issues shall be formed, heard, and determined in the same

manner as in actions before justices of the peace. It was not necessary, therefore, for the widow and guardian to specify the objections which she had to the allowance of this claim. Under this procedure, a plea of the statute of limitations, or that a copy, and not the note itself, was filed, could be orally interposed any time before, or at, the hearing. There was no waiver, therefore, by the widow and guardian of the filing of the note itself. If any hardship results to the claimant, it is due to his own negligence.

His contention that he was represented by the executor, and the executor did not make the objection, is no excuse whatever. If in allowing claims an executor can act in a dual capacity, when objection to its allowance was here made by the widow or guardian, he ought to have filed the note itself, because the general objection is broad enough to cover the particular objection that filing a copy is not the manner of exhibiting a claim which the statute demands. It follows that this claim was not exhibited, as our statute requires, within one year from the granting of letters testamentary, and therefore it is barred by our statute of nonclaims, except as to property that may be subsequently discovered or inventoried by the executor. There is no claim that there is any such property of the estate.

The resolution of the first question, upon which the district court decided the case adversely to the claimant, is necessarily conclusive as to the second; for the contention that the claim is not barred by the general limitation statute rests entirely on the assumption that it was properly exhibited in the county court by the filing of the note before the expiration of six years from its maturity. Since we hold that the note has never been exhibited at any time, not even at the hearing below, the claim founded thereon is barred by the general statute, as much more than six years have elapsed since the note became due.

Other questions, such as days of grace on demand notes, delivery of the note after its date, the alleged necessity for the formal continuance from term to term where a claim is not allowed or disallowed on the adjustment day, and for a claim to be both properly exhibited and allowed within the period prescribed by the statute of nonclaims, not being material to our decision affirming the judgment, are not considered.

Being of opinion that the statute of nonclaims, as well as the general statute, operates as a bar of this claim, the judgment of the district court, which was in accord therewith, is affirmed.

Affirmed.

STEELE, C. J., and GABBERT, J., concur.

STATE v. CARSON & COLORADO RY. CO.
et al. (No. 1,720.)

(Supreme Court of Nevada. Oct. 11, 1907.)

1. TAXATION—INCREASING VALUATION—STATUTES CONSTRUED.

Act March 16, 1901, p. 61, c. 50, § 1, as amended by St. 1903, p. 95, c. 69, requires the state board of county assessors to establish a valuation of railroads, etc., every January, and provides that the county boards of equalization may only equalize taxes where a valuation has not been fixed by the state board. Under Comp. Laws, § 1084, between the date of levy of taxes and September 1st the county assessor must ascertain the value, etc., of, and list and assess all taxable property. Under section 1081 all property in the state is taxable except, etc. Section 1079 makes every tax a lien against the property assessed, and provides a lien shall attach upon land for personal taxes upon the day taxes are levied in each year, on all property then in the state, and all other property whenever it reaches the state. *Held*, that all property must be assessed which comes into existence either as additions or otherwise between the first Mondays in March and September of each year, if it has not been taxed for that year; that, if property assessed by the state board in January enhances in value because of betterments before the first Monday in September, the assessor should assess the property as assessed by the board plus the increased valuation, and, if he fails to do so, the county board may equalize the property at its full cash value, the inhibition upon that board equalizing the valuation of property fixed by the state board applying only when such property remains in substantially the same condition, and so a county board could increase the valuation of railroad property, where between the date when the state board fixed the valuation and the date of the county board's meeting in September part of the road was changed from narrow to broad gauge.

2. SAME—DEFENSES.

If, in a suit to recover disputed taxes, defendant desires to raise an issue of excessive valuation, he should prepare his answer under Comp. Laws, § 1124, providing what defenses may be set up in tax suits.

3. SAME—NOTICE—DIRECTORY PROVISION.

Comp. Laws, § 1098, providing for the publication of notice of the increased valuation of taxable property by a board of equalization, is merely directory.

4. APPEAL — REVIEW — CONCLUSIVENESS OF FINDING.

Under the rule that a finding supported by evidence will not be disturbed, the trial court's findings in a tax suit that the property taxed was defendant's and that proper notices were given a railroad company of an increased valuation of its property is conclusive.

5. TAXATION—DEFENSES—PLEADING.

Since Comp. Laws, § 1124, in defining what defenses may be made in tax suits, when title to the property is denied, provides that defendant must deny all interest at the time of assessment, a defense that the property belonged to another when the county board of equalization increased the valuation was not available where defendant failed to allege that at the time of assessment the property was not its property.

6. SAME.

Though Act Feb. 25, 1893 (Laws 1893, p. 48, c. 48, § 26), providing that the clerks of boards of equalization shall enter upon the assessment rolls all changes made by the boards, is seemingly in conflict with the statute directing the auditors to place the changes on the rolls, the act, being the latest expression of the legislative will, it is proper for the clerks to enter the changes.

Appeal from District Court, Esmeralda County.

Action for disputed taxes by the state of Nevada against the Carson & Colorado Railway Company and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. *Affirmed*.

Geo. D. Pyne, for appellant. J. F. Douglas, W. J. Henley, and C. E. Mack, for respondent.

SWEENEY, J. This is an action brought by the state of Nevada, plaintiff, against the Carson & Colorado Railway Company et al., defendants, for disputed taxes alleged to be due to plaintiff on the property of said defendants for the year 1905. In January, 1905, the state board of county assessors met with the state board of revenue in Carson City, Nev., in accordance with an act of the Legislature of the state of Nevada (St. 1901, p. 61, c. 50, and as amended by St. 1903, p. 95, c. 69), and fixed the valuation for the purpose of taxation upon the main line of the Carson & Colorado Railway Company at \$3,500 a mile, and the side track at \$1,250 a mile. Thereafter, when the county assessor of Esmeralda county came to assess the railroad property of defendants, he placed the same valuation thereon as fixed by the state board of county assessors. When the county board of equalization of Esmeralda county met as required by law in September, it raised the valuation on the 88 miles of the 146 odd miles of said railroad property of said defendants in Esmeralda county, which had been broad gauged, to \$8,500 a mile on the main track and \$2,500 a mile on the side track, making a total raise in the valuation as fixed and assessed by the state board of county assessors and county assessor of \$489,150. This raise in valuation by the county board of equalization on the property of defendants gave rise to the present cause of action, which said action was duly tried before the district court of the First judicial district in and for the county of Esmeralda, and resulted in a judgment in favor of the state of Nevada against the defendants for the sum of \$36,335.43, taxes and penalties, together with costs of suit. From an order of the lower court denying a motion for a new trial, and from said judgment rendered in this case, defendants appeal, alleging that said judgment is erroneous for the following reasons:

First. That because the state board of county assessors fixed the valuation upon said railroad of defendants at \$3,500 a mile for the main line and \$1,250 a mile for the side line, and that the county assessor had assessed the property at the same figure, the county board of equalization had no authority to add to the valuation as fixed by the state board of county assessors and as assessed by the county assessor.

Second. That no legal notice was given to the Carson & Colorado Railway Company by

the county board of equalization before the increased valuation was added to its lines, nor were they given an opportunity to appear before said board and show cause why such raise should not be made.

Third. That the changes and additions made in the assessment roll were not made by the person legally authorized to make them, but were made by the clerk of the board of equalization, when, as alleged, the statute requires the auditor to make any additions to said assessment roll after they have been made by the county board of equalization.

Fourth. That at the time said increase in the valuation of the property assessed to the Carson & Colorado Railway Company was made by the county board of equalization the property did not belong to the Carson & Colorado Railway Company; the same having been sold to the Nevada & California Railway Company.

Fifth. That after the lien attaches upon property in this state, which is on the first Monday in March, as alleged by counsel for appellants, the enhanced value of property cannot be assessed; that whatever property is subject to taxation must be in existence on or before the first Monday in March.

Sixth. That the assessment of property in this state fixes on the first Monday in March at the time of the levy of the tax, and that property must be assessed at the valuation of this date, and, further, that no property coming into existence or into the state after this date can be placed on the assessment roll for that year.

Seventh. That the defendants paid to the county treasurer of Esmeralda county the sum of \$14,886.94, the amount due on said valuation of said road as fixed by the state board of county assessors and county assessor, which said sum was refused by the county treasurer as payment in full for all taxes due to said plaintiff from said defendants.

It is seriously and urgently contended by counsel for the respondent on this appeal that the act of our Legislature to provide for a more uniform valuation and assessment of property in this state as approved March 16, 1901 (St. 1901, p. 61, c. 50), and as amended by the Legislature of 1903 in the statutes of that year (page 95, c. 69), which said acts created the state board of county assessors and which limit the powers of the county boards of equalization, are, for many reasons assigned, unconstitutional, and which contention, if true, asserts respondent's counsel, would thoroughly justify said board of equalization in adding the increased valuation in question to the assessment roll. After very careful consideration and study of the law involved in this case, we have concluded that it will be unnecessary, for reasons hereafter disclosed, to pass upon or consider the constitutionality of the acts in question.

It appears from the record in this case that the state board of county assessors convened in January in accordance with law, and placed a valuation on the main track of defendants at \$3,500 a mile and on the side line at \$1,250 a mile. At this time of the year, be it remembered, said Carson & Colorado Railroad was narrow gauged; that thereafter the county assessor assessed the said railroad property at the same figure as fixed by the state board of county assessors. In September, when the county board of equalization convened, they raised the valuation on the 88 miles of broad-gauged road of defendant to \$8,500 on the main track and \$2,500 on the side track. During the intervening period, between the date of the fixing of the valuation by the state board of county assessors and the date of the convening of the county board of equalization, 88 miles of the 146 odd miles of the railroad of said defendant in Esmeralda county was changed into a standard, broad-gauged road, which materially enhanced the value of said property of said defendant; this necessarily being so because of the fact that in broad gauging a narrow-gauge road new rails of a heavier weight, new ties, new culverts, and, in fact, all materials used in the replacing of the narrow gauge material are of a heavier and superior value. Section 1 of an act of our Legislature entitled "An act to amend an act entitled 'An act to provide for a more uniform valuation and assessment of property in this state,' approved March 16, 1901," which is the section in question, which is urged by appellant as inhibiting the county board of equalization from equalizing any property upon which a valuation has been placed by the state board of county assessors, and which section, among others, is alleged to be unconstitutional by the respondent, reads as follows: "The county assessors of the several counties of this state shall meet for a period not exceeding ten days in the office of the Governor at Carson City, Nevada, on the second Monday in January of each year, and shall at such meetings establish a valuation through the state of all railroads and rolling stock of such railroads, of all telegraph and telephone lines, of all electric light and power lines, of all cattle and sheep, and upon all other kinds of property which in the judgment of said assessors can be valued and assessed more uniformly by said assessors, acting collectively, than by the several county assessors, acting separately; provided, that in fixing such valuation the location and situation of such property shall be considered; and, provided further, that nothing herein shall be considered as to impair the right of the board of equalization of any county to equalize taxes on all property, the valuation of which has not been fixed at the annual meeting of the county assessors as provided in this section; but the said county board of equalization shall not have the power to equalize any property upon which a valuation has been

placed by the said board of county assessors; provided, any taxpayer under the provisions of this act shall not be deprived of any remedy or redress in a court of law relating to the payment of taxes." St. 1903, p. 95, c. 69. Section 1084 of the Compiled Laws, pertaining to the assessment of property in Nevada, provides, among other things, that "between the date of the levy of taxes and the first Monday of September in each year, the county assessor, except when otherwise required by special enactment, shall ascertain, by diligent inquiry and examination, all property in his county, real or personal, subject to taxation, and also the names of all persons, corporations, associations, companies, or firms, owning the same; and he shall then determine the true cash value of all such property, and he shall then list and assess the same to the person, firm, corporation, association, or company owning it." Section 1081 of the Compiled Laws of Nevada provides that "all property of every kind and nature whatsoever, within this state, shall be subject to taxation," excepting certain property of widows, cemeteries, lodges, churches, and certain lands belonging to the United States, and other state and municipal authorities, mines and mining claims, under certain conditions. Section 1079 of the Compiled Laws reads as follows: "Every tax levied, under the provisions or authority of this act, is hereby made a lien against the property assessed, and a lien shall attach upon the real property for the tax levied upon the personal property, of the owner of such real estate, which lien shall attach upon the day on which the taxes are levied in each year, on all property then in this state, and on all other property whenever it reaches the state, and shall not be satisfied or removed until all the taxes are paid, or the property has absolutely vested in the purchaser under a sale for taxes." It is the theory of the law of taxation and revenue in this state that all tangible real and personal property shall be assessed each year once at its full cash value. We have found no authority in this state in conflict with the doctrine laid down in the case of *State of Nevada v. Earl et al.*, 1 Nev. 397, wherein this court in referring to this theory said: "The true theory of the statute is that each piece of tangible real or personal property within the state between the first Monday of May and the first Monday of November, each inclusive, should be taxed once at its true value, and only once." Viewing these various provisions of our statutes bearing on taxation and the manner of assessment, we are of the opinion that there is no material conflict, and that all of these statutes can readily be reconciled. The railroad property of appellant when assessed by the state board of county assessors was a narrow-gauge road. The assessor of Esmeralda county at the time he made the assessment of this property assessed said property at the same val-

uation placed on it by the state board of county assessors, and in consequence his assessment, as far as it went, is valid. If the road had been changed from a narrow-gauge to a broad-gauge road at the time he made the assessment, it, or so much of it as had been broad gauged, under our construction of the law, should have been assessed, and it would have been his duty to have assessed the increased valuation in said road, or, in the event it was not broad gauged at the time he made his assessment, if the road was broad gauged any time before he completed his tax list or assessment roll on or before the second Monday in September and turned same over to the clerk of the board of county commissioners, he should have added this increased valuation to his assessment roll. Having failed to do this, as in the present case, the county board of equalization had the full authority under the law to add to the assessment as made by the state board of county assessors and the county assessor the increased valuation due to improvements, betterments, and additions which occurred since the date of the assessment, and under these circumstances it became the duty of the board of equalization to equalize any property which had been assessed at an undervaluation of its full cash value. *State v. Meyers*, 23 Nev. 274, 46 Pac. 51. We think it is a reasonable construction to place upon the amendment of 1903 above quoted that the inhibition upon the county board of equalization, equalizing the valuation of property which has been fixed by the state board of county assessors, only applies when such property remains in substantially the same condition, and that it does not apply to property which has materially changed in form and value since the meeting of the state board. Any other construction does violence to the general policy of our revenue laws. The valuation as placed by the county board of equalization on the said road is not pleaded in the answer of defendant as excessive, nor is it shown anywhere in the record to be excessive. If appellant had desired to raise the issue of excessive valuation, it should have prepared its answer in accordance with section 1124 of our Compiled Laws, which section provides just what defenses may be set up in tax suits. Neither is it claimed by the defendant that this increased valuation made in the property of the railroad was ever subjected to taxation before during the year 1905, nor that said increased valuation was ever assessed by the state board of county assessors, and it could not have been because at said date of assessment by said state board of county assessors it was a narrow-gauge road. We are of the opinion that all property must be assessed which comes into existence in the state of Nevada either in the nature of additions, betterments, or improvements, or being new property coming into the state during the time intervening between the

first Monday in March and the first Monday in September, inclusive, of each year so long as said property has not before been subjected to taxation for said year; that if property which is assessed in January by the state board of county assessors enhances in value because of betterments or improvements, as is the case in the present instance, before the first Monday in September, the assessor should assess the valuation on said property as assessed by the state board of county assessors plus any additional or increased valuation which accrues to said property, and that, if he fails to do so, the county board of equalization are authorized to equalize the property at its full cash value, to the end that no property in the estate may escape taxation once during the year.

Many, if not the majority, of the states have constitutional or statutory provisions fixing a day certain in each year with reference to which the valuation of real and personal property shall be fixed, as, for example, the statute of the state of California, following a similar constitutional provision of said state, provides: "The assessor must, between the first Mondays of March and July of each year, ascertain the names of all taxable inhabitants and all property in this county subject to taxation, except such as is required to be assessed by the state board of equalization, and must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was at 12 o'clock m. of the first Monday of March, next preceding." Many authorities are cited by counsel for appellant, based upon such constitutional or statutory provisions, holding that property which is not within the state upon the day fixed, or improvements made upon the property subsequent to such day, is not liable to assessment for that year. But, as there is no such constitutional or statutory provision in this state, these authorities are inapplicable. *State v. Earl*, 1 Nev. 397. All property in the state of Nevada not exempt from taxation which is in this state on the first Monday in March, and all property coming into the state not exempt from taxation after the first Monday in March to and including the first Monday in September, is subject to taxation for that year, and a lien attaches to all taxable property which is in the state on the first Monday in March, and also attaches immediately to all taxable property coming into the state after the first Monday in March to and including the first Monday in September. *Comp. Laws*, § 1079.

It is contended by appellant that they did not receive any notice of the intended raise to be made on the property of appellant, and were given no opportunity to be heard before said board of equalization in the consideration of the additional valuation added to its property. The record discloses the following

testimony given by Mr. Atchison, clerk of the county board of equalization: "Mr. John G. Atchison continued in direct examination (By Judge Mack): Q. As deputy county clerk and acting for the clerk, at the time the board of equalization was in session, did you give the defendant any notice of the intended raise by the board of equalization in the assessment of the defendant? A. Yes, sir. Q. How did you give that notice? A. There was a printed form which is used for that purpose, and I sent one to the secretary of the Carson & Colorado Railway Company, at Carson City, and another notice to San Francisco. Mr. Pyne has showed me a copy of a notice since he has been in town, and it might be possible we notified the San Francisco office in the name of the Carson & Colorado Railway Company; but the other notice was sent to the Carson & Colorado Railway Company, Carson City, to Mr. Yerington. Q. Have you a copy of that notice? A. No, sir. Q. Can you give, from memory, the substance of the notice? A. I can, except the printed form. Q. Did you see the printed notice? A. Yes, sir. Q. Did you affix the seal to it? A. Yes, sir; affixed the seal. Q. To whom did you send the notice? A. I sent the one to Carson City to E. B. Yerington, secretary of the Carson & Colorado Railway Company. The second was sent to E. B. Ryan, San Francisco. It is nearly a year ago, and it seems to me I asked Mr. Henley, at that time, the course to pursue, knowing it was an important case. Q. In the notices was the fact set forth that the board of equalization was going to make the raise? A. Yes, sir. Q. Was a time fixed for them to appear and show cause? A. Yes, sir. Q. Was any notice published in the paper relative to it? A. Not that I know of." It also appears from the transcript, pages 24, 46, 47, that notice of the added valuation was published in the *Walker Lake Bulletin* in accordance with section 1098 of Nevada Compiled Laws, which said section is merely directory. *State v. Washoe County*, 14 Nev. 140; *State v. Northern Belle*, 15 Nev. 385. While there may be some conflict in the testimony as to whether or not proper and regular notices were duly given the defendant, yet we deem the finding of fact by the court upon this question conclusive, and this in accordance with a well defined line of authorities holding that a finding of fact will not be disturbed where there is substantial evidence to support it.

And, for the same reasons that the previous error is not reversible and an additional legal reason hereafter given, appellant's contention that at the time of the action of the county board of equalization when it added the increased valuation complained of the property in question belonged to the Nevada & California Railroad Company, we deem the finding of fact of the lower court against appellant's contention conclusive, and it will

not be disturbed. Appellant failed to allege in its answer that at the time of the assessment by the state board of county assessors or county assessor the property in controversy was not the property of the Carson & Colorado Railway Company. Section 1124 of our Compiled Laws, in defining what defenses may be interposed in tax suits when denying title of property, expressly states that the defendant must deny "all claim, title, or interest in the property, assessed at the time of the assessment, and in consequence this assignment of error cannot avail it anything on this appeal." The county board of equalization has no assessorial powers, but equalizes the assessment by adding to or deducting from the assessment as made by the assessor.

The error assigned by appellant that the changes and corrections made in the assessment roll by the county board of equalization must be done by the auditor, instead of the clerk of the board of equalization, is not well taken. Section 26 of an act entitled "An act to amend an act to provide revenue for the support of the government of the state of Nevada and to repeal certain acts relating thereto," etc., approved February 25, 1893 (Laws 1893, p. 48, c. 48), reads: "During the session, or within five days after the adjournment of the board of equalization, its clerk shall enter upon the assessment roll all the changes and corrections made by the board, and shall immediately deliver said corrected roll, with his certificate attached, to the county auditor." As this is the latest expression of the legislative will upon this point, though seemingly in conflict with the statute directing the auditor to place the changes and alterations on the assessment roll, it was not error for the clerk to have made the changes and alterations as made by the county board of equalization on said assessment roll. As it is not claimed that the alterations and corrections by the clerk of said board were erroneously made, and it affirmatively appearing that they truly represent the alterations and corrections as made by the county board of equalization, even conceding that the auditor should have made the alterations and changes, no material harm to appellant could arise, nor is any claimed to have arisen, from this particular assigned error, and would therefore not be so serious an error as to warrant a reversal of the judgment on this score.

The assessment and added valuation of said property having been legally made, the county treasurer was right in refusing to accept \$14,886.94 tendered in full payment for the taxes due on the property of the defendant for the year 1905.

For the foregoing reasons, the judgment of the lower court is affirmed.

TALBOT, C. J., and NORCROSS, J., concur.

MCGINNIS v. STATE.

(Supreme Court of Wyoming. Oct. 7, 1907.)

1. INFORMATION — DEFECTS — OBJECTIONS — MANNER OF RAISING.

The objection that an information was filed without a preliminary examination, as required by Rev. St. 1899, § 5273, must be raised by motion to quash, where the ground appears on the face of the record; otherwise, by plea in abatement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 470.]

2. SAME—WAIVER.

Under Rev. St. 1899, § 5323, declaring that accused shall be deemed to have waived defects which may have been excepted to by motion to quash or plea in abatement, etc., the objection that an information was filed without a preliminary examination, as required by section 5273, not raised by motion to quash or plea in abatement, is waived by plea of not guilty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 623, 629.]

3. ROBBERY — ELEMENTS OF OFFENSE — STATUTES.

The statute defining robbery as the forcible and felonious taking from the person of another any article of value by violence or by putting in fear restates the offense at common law defined as the felonious and forcible taking from the person of another of goods by violence or by putting in fear.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Robbery, § 1.]

4. SAME — INFORMATION — REQUISITES — ALLEGATION OF OWNERSHIP.

An information for robbery must allege the ownership of the property taken.

5. SAME—SUFFICIENCY.

An information for robbery, which alleges that accused "feloniously" took from a person named by violence a specified sum, is fatally bad for failing to allege the ownership of the property; the word "feloniously" characterizing the act as being done with a criminal intent, and not being a substitute for an allegation of ownership.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Robbery, § 21.]

6. INFORMATION—REQUISITES—STATUTORY OFFENSES.

An information charging an offense in the language of the statute is sufficient only when the words thereof directly set forth the elements necessary to constitute the offense and state the facts thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 292, 293.]

7. SAME — DEFECTS — MANNER OF RAISING — WAIVER.

One failing to demur, as authorized by the Code of Criminal Procedure, to an information on the ground that the facts therein stated do not constitute an offense, does not waive the objection, but may raise it by motion in arrest, as authorized by Rev. St. 1899, § 5418.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 633.]

8. SAME—MOTION TO QUASH.

Under the Code of Criminal Procedure, authorizing a demurrer to an information when the facts therein stated do not constitute an offense, and Rev. St. 1899, § 5418, authorizing a motion in arrest because the facts stated in an information do not constitute an offense, the objection that the facts stated in an information do not constitute an offense cannot be reached by

motion to quash, which reaches defects in form only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 470.]

Potter, C. J., dissenting.

Error to District Court, Converse County; Roderick N. Matson, Judge.

William McGinnis was convicted of robbery, and he brings error. Reversed and remanded.

Allen G. Fisher, for plaintiff in error. W. E. Mullen, Atty. Gen., for the State.

BEARD, J. An information was filed by the county and prosecuting attorney of Converse county against the plaintiff in error, William McGinnis, for the crime of robbery; the charge contained in the information being as follows: "That William McGinnis, late of the county aforesaid, on the 12th day of December, A. D. 1905, at and in the county aforesaid, the said William McGinnis did then and there unlawfully, forcibly, and feloniously take from the person of Norvil Lawrence by violence the sum of fifty dollars, and more, lawful money of the United States, and of the value of fifty dollars, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Wyoming." To this information the defendant, McGinnis, pleaded "not guilty." On the trial the jury returned a verdict of guilty against him, and he moved in arrest of judgment on two grounds: First, because the defendant had not been given a preliminary examination by an examining magistrate before the information was filed in the district court; and, second, because the facts stated in the information are not sufficient to constitute an offense. The motion was denied by the court, and the defendant sentenced to a term in the penitentiary, and he brings error.

The objection that the defendant had not been given a preliminary examination, if such was the fact, and if the case was one requiring it under the provisions of section 5273, Rev. St. 1899, should have been presented by a motion to quash if the grounds appeared upon the face of the record, otherwise by plea in abatement, and, not having been so taken, was waived by the plea of not guilty, by the express terms of the statute. Section 5326, Rev. St. 1899.

The other objection, that the facts stated in the information do not constitute an offense, is one of the grounds upon which a motion in arrest of judgment may be granted (section 5418, Rev. St. 1899), and presents the question of the sufficiency of the information. Robbery is defined by our statute as follows: "Whoever forcibly and feloniously takes from the person of another any article of value, by violence or by putting in fear, is guilty of robbery, and shall be imprisoned in the penitentiary not more than fourteen years." This is but a restatement of the of-

fense at common law, and embraces all of the elements of robbery at common law. Blackstone defines robbery to be "the felonious and forcible taking, from the person of another, of goods or money to any value, by violence or by putting him in fear." 2 Cooley's Blackstone (4th Ed.) bk. 4, p. 242. It is an aggravated form of larceny, and there can be no robbery without larceny. Bishop states that the elements of the offense to be averred and proved are: (1) A larceny, (2) wherein the asportation is from the person, and is (3) effected by force or by putting in fear. 2 Bishop's New Crim. Procedure, § 1001. "The indictment should contain the allegations of simple larceny, with the added matter that makes the larceny robbery." Id. § 1002. "Ownership must be alleged and proved precisely as in larceny." Id. § 1006; 4 Cur. Law, 1317. That the ownership of the property alleged to have been taken must be stated in an indictment or information for robbery has been generally held by the courts of last resort in those states where the question has arisen. In a recent case in the Supreme Court of Iowa, under a statute which provides: "If any person, with force or violence, or by putting in fear, steal and take from the person of another any property that is the subject of larceny, he is guilty of robbery"—it was held that the offense thus created by the statute embraces all of the elements of the crime under the common law, and that robbery is but an aggravated form of larceny, both at common law and under the statute, and, as larceny is defined to be the felonious taking of the property of another, an allegation of ownership is necessary in an indictment for robbery. The indictment in that case charged that the defendant assaulted Thomas Malone, "and, with force and violence, willfully and feloniously did steal, take, and carry away from the person" of said Malone the sum of \$75. The ownership of the property was not otherwise alleged in the indictment. It was contended that the indictment was good, because it charged that the defendant did "steal from the person of Malone." But the court said: "It is true we have held that the word 'steal,' used in an indictment, means a felonious taking. State v. Griffin, 79 Iowa, 508, 44 N. W. 813. But we have never gone beyond this, and cannot, because of the statute already referred to." It was held that under the common law it is necessary to allege and prove ownership precisely as in larceny, and that such is the rule where it is a statutory crime. State v. Wasson, 126 Iowa, 320, 101 N. W. 1125. In People v. Vice, 21 Cal. 344, the indictment was for robbery, and charged that the defendant "did violently and feloniously take money of the following description * * * from the person of another, to wit, from the person of Jesse A. Brandy by force, threats," etc. The indictment was not demurred to, but after a verdict of guilty defendant mov-

ed in arrest of judgment on the ground that the ownership of the property was not stated in the indictment, which motion was denied. On appeal the Supreme Court held the indictment fatally defective for the want of such allegation, and reversed the judgment. And in *People v. Jones*, 53 Cal. 58, it was held that an indictment for robbery must aver every fact necessary to constitute larceny, and more. And in *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15, the defendant was informed against for robbery and pleaded former acquittal, once in jeopardy, and not guilty. The opinion recites that "an information against the defendant for the crime of robbery involving the same transaction had previously been filed, and under it defendant was arraigned and pleaded not guilty. A jury was impaneled, the information was read, and the plea stated. After the jury was sworn, and before any evidence was offered, upon motion of the district attorney the information was dismissed and the defendant discharged. The ground for the motion was that the information did not allege the ownership of the property stolen, which was in fact true." It was held that the first information was invalid, because it failed to allege the ownership of the property taken, and there was no jeopardy, and that the court did not err in instructing the jury to find for the people upon the plea of former acquittal and once in jeopardy. The California cases on the question are cited and reviewed in a later case by the Court of Appeal of California (*People v. Cleary*, 1 Cal. App. 50, 81 Pac. 753), and it was again held that an information for robbery, which failed to allege the ownership of the property, did not charge an offense. We find nothing in the case of *In re Myrtle* (Cal. App.) 84 Pac. 335, in conflict with the rule as stated in the other California cases. It is there said: "In the *Ammerman* Case the taking of the property might have been for some other purpose, for the language of the information does not intimate that the object was to steal it, any more than the mere naming the crime 'robbery' might tend to indicate a theft; and there being no allegation of ownership, and no words used by which any inference could be drawn of ownership in one other than the defendant, except the mere possession Richard Johnson had of the money taken by Ammerman at the time. We think the decision in that case was correct." Further on in the opinion, in commenting on the case of *People v. Cleary*, supra, it is said: "We reiterate all that was said in this opinion of *People v. Cleary* as applied to the facts in that case and in all cases of like character, where there is a plea of not guilty and a motion in arrest of judgment, and we still maintain that in all cases of robbery it must appear, either from the language of the information or the plea of the defendant, that the property taken is not the property of the defendant." If the in-

formation charged no offense, it could not be pleaded in bar of a subsequent prosecution. *State v. Brown*, 47 Ohio St. 102, 23 N. E. 747, 21 Am St. Rep. 790. The statute of Arkansas is in substantially the same language as ours, and the Supreme Court of that state held an indictment for robbery insufficient in failing to allege the ownership of the money charged to have been taken. The court said: "That allegation is found in all the common-law precedents of indictments for robbery, and we have been unable to find any adjudged case in which it has been dispensed with under a statute similar to ours." *Boles v. State*, 58 Ark. 35, 22 S. W. 887, and cases cited in the opinion. It is stated in 18 Enc. P. & P. 1233: "It is very generally held that a conviction for larceny may be had upon an indictment for robbery"—and authorities from many states are cited in support of the text. Without extending this opinion by further quotations from decisions, we deem it sufficient to cite the following cases, in each of which it is directly held that an indictment or information for robbery is fatally defective which fails to allege the ownership of the property alleged to have been taken: *State v. Dengal*, 24 Wash. 49, 63 Pac. 1104; *State v. Morgan*, 31 Wash. 226, 71 Pac. 723; *Smedly v. State*, 30 Tex. 214; *State v. Lawler*, 130 Mo. 366, 32 S. W. 979, 51 Am. St. Rep. 575; *Commonwealth v. Clifford*, 8 Cush. (62 Mass.) 215. We have found the contrary held in but two states (Oregon and Tennessee). In *State v. Dille*, 15 Or. 70, 3 Pac. 648, the indictment followed the form prescribed by statute for an indictment for robbery, and the court said that the statute provided in express terms what should be a sufficient statement in an indictment for robbery, being armed with a dangerous weapon, and it was upon that ground alone that the indictment was held to be sufficient, while admitting that, but for the statute, it would have been defective. In *Clemons v. State*, 92 Tenn. 282, 21 S. W. 525, the indictment was held sufficient, being in the language of the statute, and citing *State v. Swafford*, 3 Lea (Tenn.) 162, but no other authority, in support of the decision. In the latter case the ownership of the property was alleged to be in the person robbed.

It is contended that, as the information in the case at bar charges a felonious taking, that implies a taking of the property of another than the defendant, and for that reason the information should be held sufficient. We think this contention cannot be sustained. The crime of robbery under the statute is a felony, and it is proper, if not necessary, to so charge it; and the word "feloniously," as used in the information, characterizes the acts charged in the information as being done with a criminal intent, but cannot be taken as a substitute for or to supply the place of an allegation of a fact which is an essential element to constitute the offense. Indeed, in most of the cases above

cited the indictment or information contained the word "feloniously." Substantially the same question was presented in *State v. Wasson*, supra. And in *State v. Morgan*, supra, it is said: "The words 'did feloniously steal and take' are no more effective to charge ownership of property than the words 'did feloniously take.'" Nor is it sufficient in all cases to charge the offense in the language of the statute. To be sufficient "the words of the statute must fully, directly, and expressly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense intended to be punished, and must state all the material facts and circumstances embraced in the definition of the offense. Ingredients which do not enter into the statutory definition must be added." 22 Cyc. 340, and authorities cited in notes.

We need notice but one other point contended for by counsel for defendant in error, viz., that this objection to the information was waived by a failure to move to quash. This contention can only be based upon the fact that the information is defective; for if, as contended, it is sufficient to charge the offense in the language of the statute, which includes the word "feloniously," then there is no defect in the information, either in substance, form, or in the manner in which the offense is charged, and nothing upon which a motion to quash could be based. But, as we think the information is fatally defective in substance and that the facts therein stated do not constitute an offense, the objection could be made and the question raised by motion in arrest of judgment. Section 5418, Rev. St. 1899. In *United States v. McNemara*, Fed. Cas. No. 15,701, an indictment for forcibly taking bank notes from another, the court on motion arrested the judgment because it was not stated in the indictment whose property the bank notes were. And in *State ex rel. Conway v. Blake*, 5 Wyo. 107, 123, 38 Pac. 354, 359, this court said: "The only matter which has not been passed upon herein, raised on the motion for arrest of judgment, is the sufficiency of the indictment. No claim was made upon the argument or in the brief that the indictment does not charge an offense, and an examination of it convinces us that it is good and would support a conviction of murder in any degree"—thus clearly indicating that the sufficiency of the indictment to charge an offense may be raised by a motion in arrest. See, also, *Benjamin v. State*, 121 Ala. 26, 25 South. 917; *United States v. Harmon* (D. C.) 45 Fed. 414; *Strickland v. State*, 19 Tex. App. 518. Under our Code of Criminal Procedure the defendant may demur to the information when the facts therein stated do not constitute an offense; but he does not waive that objection by a failure to do so, and may raise that question for the first time by motion in arrest. That is not, however, one of the grounds for a motion to

quash, and we think it was not intended that a defect, which the statute says may be taken advantage of by demurrer or motion in arrest, may also be taken by motion to quash. The motion to quash reaches defects in the form of the information, and in the manner in which the offense is charged, but does not reach the substance. If the facts stated constitute an offense, but are imperfectly stated, a motion to quash is the proper remedy; but, if the facts stated do not constitute an offense, it should be challenged by demurrer, or it may be done by motion in arrest. Otherwise the provision of the statute authorizing a demurrer or motion in arrest on that ground would be superfluous. If a general demurrer to the information in this case should have been sustained, then it seems clear that the motion in arrest on the ground that the facts stated in the information do not constitute an offense should have been sustained. In *McCarthy v. Territory*, 1 Wyo. 313, a general demurrer was interposed to an indictment, which was overruled, and the defendant was tried and convicted, and, after motions for a new trial and in arrest of judgment, the defendant was sentenced. On appeal the indictment was held bad for uncertainty and indefiniteness in not setting out the facts constituting the offense. It is there stated (page 315) that "the general rule relating to indictments is that they should set out affirmatively sufficient to constitute in themselves allegations to make out the offense charged, and leave nothing to be supplied by inference or proof." In the case at bar there is no direct allegation of the ownership of the property alleged to have been taken, but that fact—an essential element to constitute the offense—is left entirely to inference, or to be supplied by proof. An examination of the statutes under which the decision in the *McCarthy* Case was rendered discloses that the grounds for a motion to quash, plea in abatement, and demurrer were the same as at present, and also provided, as does our present statute, that "the accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or plea in abatement, by demurring to an indictment, or by pleading in bar or not guilty." Sections 100-103, 105, p. 484, Laws Wyo. 1869. That case appears to be decisive of the question now under consideration. The statute, having provided for what causes a demurrer or motion in arrest will lie, excludes the idea that such objections should be otherwise raised. *State v. Baugham*, 111 Iowa, 71, 82 N. W. 452; *State v. Tough*, 12 N. D. 425, 96 N. W. 1025. The present case differs from *Wilbur v. Territory*, 3 Wyo. 268, 21 Pac. 698. There the charge was larceny as bailee, and it was alleged that the defendant was the bailee of the goods; but the facts constituting the bailment were not stated.

The effect of sustaining a motion in arrest of judgment is clearly defined in the statute. Section 5420, Rev. St. 1899. It does not

necessarily discharge the defendant; but if, from the evidence on the trial, there shall be sufficient reason to believe him guilty of an offense, the court shall order him to enter into a recognizance to appear at the first day of the next term of the court. The information, being fatally defective in failing to allege the ownership of the money alleged to have been taken, did not state facts constituting an offense. The district court, therefore, erred in denying the motion in arrest of judgment; and for that error the judgment is reversed, and the case remanded to the district court, with directions to set aside and vacate the judgment heretofore entered, to sustain the motion in arrest of judgment, and for further proceedings according to law.

Reversed and remanded.

SCOTT, J., concurs.

POTTER, C. J. (dissenting). I am unable to agree with the other members of the court in this case. In my opinion the plaintiff in error is not in a position to question the sufficiency of the information for its failure to specifically allege the ownership of the property taken. As against the motion in arrest, as well as the objection to the introduction of evidence, the information is in my judgment clearly sufficient. Though it may follow as a mere legal conclusion, the allegations of the information unquestionably, I think, negative ownership of the property on the part of the defendant, and the defect in failing to make the allegation in that respect more specific is one of uncertainty or indefiniteness, which should have been objected to by a motion to quash, under our statute, and, no such motion having been made, the objection was waived by the plea of not guilty. It is true that an allegation of ownership of the property taken is essential at common law in an indictment for robbery, and I am willing to concede that such an allegation, to render the information good as against a motion to quash, ought to be made under our statute, whereby the crime of robbery is defined substantially as it is defined by the rule of the common law. An allegation of ownership, however, in an indictment for robbery, was not required because of any supposed materiality of the fact of ownership by any particular person; for the ownership could be laid in the person robbed, or in some third person. The object of the requirement was that it should appear by the indictment that the property was not that of the defendant, since the crime of robbery would not be committed if one took his own property from another, though by force or violence, or by putting in fear. The essential fact, therefore, embraced in the allegation of ownership in a robbery charge, was and always has been the absence of ownership or right to the property on the part of the defendant.

It is true that at common law, if owner-

ship was not proved as alleged, it might constitute a fatal variance; but the effect of variance, in that as well as other particulars, has been greatly modified by our statute, as well as by the statutes of many of the states. All respect is due and conceded to the approved language of the common law in alleging ownership; but, apart from its virtue of particularity, it has no greater value than other appropriate words having the same effect and which clearly preclude any right to the property on the part of the defendant. At common law, and, no doubt, by express statute in several of our states, a criminal indictment or information is required to state all the material facts and circumstances comprised in the definition of the offense sought to be charged positively and with clearness and certainty, and in charging the offense all the essential facts must be stated with particularity, and not by way of legal conclusion. Prior to the enactment of statutes limiting the same, a demurrer and a motion in arrest at common law might be made for want of sufficiency in the indictment respecting the time, place, or offense material to support the charge, as well as on the ground that no offense was charged. Subsequent legislation in England, as well as in many, if not most, of the states of this Union, have restricted the application, especially of a motion in arrest, and, in some respects in many of the states, of a demurrer; but it is apparent that the statutes of the various states on this subject differ widely. No state, I apprehend, has gone further, and few seem to have gone so far, than our own state in confining the objections for which a demurrer and motion in arrest may be presented. In considering the question in this case, therefore, decisions from other states may not be controlling, or even persuasive, as to the character of the allegation of ownership in an indictment for robbery, or the effect of a lack of certainty therein, by reason of the substantial difference between the statutes of such other states and our own governing the manner of raising objections to an indictment or information. In several states a motion to quash seems to be unknown, or, if allowed at all, goes merely to some defect in the proceedings outside of the indictment; and in others it seems to be provided that even formal defects may be objected to either by a motion to quash or a demurrer. Hence, though it may be held in another state under a different statute that the absence of a specific allegation of ownership constitutes a fatal defect, it does not follow that it was intended to be held that the allegation was so much one of substance that without it a crime would not be alleged, but rather, and I think generally in most of the cases that the defect has been held to be a fatal one because assailed by a demurrer, or perhaps by a motion in arrest, under a statute authorizing such a pleading or motion for less

important causes than are made ground for the same by our statute.

It should be remembered that the precise technicalities of the common law in respect to the framing of a criminal indictment were adopted and required at a period when a defendant was not given as a right the benefit of counsel and was not permitted to testify in his own behalf. The object intended to be attained by the certainty required in the allegation of an indictment was, first, that the accused should be furnished with a description of the charge sufficiently particular as to the essential facts to enable him to make his defense, and to furnish him, in case of his conviction or acquittal, protection against a further prosecution for the same act; and, second, that the court might be informed of the facts alleged, so that it might decide whether they were sufficient in law to support the conviction if one should be had. Therefore it was held that facts, and not conclusions of law, and the intent, when necessary, should be set forth with particularity as to time, place, and circumstances. But statutes have been enacted, not only in England, but generally in our own country, rendering either unnecessary or unimportant many of the technical requirements of the common law in respect to criminal pleadings, which have been found to serve no useful purpose, and the only apparent benefit whereof was the prevention of the conviction of the guilty without offering any reciprocal protection to the innocent. In discussing the principle that every material fact entering into an offense must be alleged with reasonable clearness, directness, and precision, to the end that the indictment shall fully inform the accused of the exact charge against him, it was said by the court in Maine: "It is plain, however, that much of the usual tautology and wearisome prolixity which characterized indictments in the early period of criminal procedure can be safely avoided without any infringement of this sacred right of the citizen. It is the policy of our modern courts to encourage a more rational system of pleading, with greater directness and simplicity, with less verbiage and needless repetition." *State v. Perly*, 86 Me. 427, 30 Atl. 74, 41 Am. St. Rep. 564. In considering a demurrer to an indictment in a recent case in the federal court of Georgia, the learned district judge said: "It is not impossible that at certain stages in the evolution of our criminal law the arguments so ably advanced by the prisoner's counsel would have been regarded as controlling on the construction of an ordinary criminal indictment. There has, however, been a great advance, not only in criminal pleading, but in the interpretation placed on criminal statutes. This has been accomplished with the beneficial purpose on the part of government to bring persons accused of crime to trial on the merits before a jury of their peers." *United States v. Greene* (D. C.) 146

Fed. 778. In 1 Bishop on Criminal Procedure (2d Ed.) § 322, the author states: "There has been considerable modern legislation intended to remove old technical absurdities in the indictment, yet aside from these there is really no great change, though the courts do not now give so attentive an ear as they once did to objections resting in no substantial reason." And even at common law the verdict was held to cure some defects, the same as in civil cases, and the rule is stated in Bishop's New Criminal Procedure as follows: "It is that, though a matter either of form or of substance is omitted from the allegation or alleged imperfectly, yet if under the pleadings the proof of it was essential to the finding, it must be presumed after verdict to have been proved, and the party cannot now for the first time object to what has wrought him no harm." *Bish. Cr. Pr.* § 707a. In a recent case decided by the United States Circuit Court of Appeals, Eighth Circuit, the court said: "Learned counsel for defendant, in arguing the legal sufficiency of the present indictment, urges us to recognize and apply the criterion of the hornbooks of the law that certainty to a common intent is not sufficient, but that a high degree of certainty in every particular is required. This was anciently the fixed rule of criminal pleading, but of late years its rigidity has been somewhat relaxed. The well-known canons of construction employed to ascertain the meaning of written instruments should not be ignored to secure mere technical accuracy, when that is unnecessary for the legitimate protection of the accused. Language should not be strained either to convict or to acquit. It should receive a reasonable and fair interpretation, to accomplish, on the one hand, the indispensable purpose of fairly apprising the accused of the charge against him, so that he may intelligently prepare to meet it, and be enabled to make use of an acquittal or conviction to protect himself against another charge for the same offense, and, on the other hand, to enable the government without unnecessary embarrassment to effectually enforce its laws and bring the guilty to punishment. We must, so far as possible consistently with insuring an accused person a fair and impartial trial, guaranteed to him by the Constitution and laws, disregard form, imperfection of statement, and unimportant defects, which do not reasonably tend to the prejudice of the accused. This we are commanded to do by positive law (section 1025, Rev. St. [U. S. Comp. St. 1901, p. 702]) as well as by repeated admonitions of the Supreme Court." *Clement v. United States*, 149 Fed. 305, 79 C. C. A. 243. The statute referred to in the above quotation is not different in substance or effect from the statute of our own state with reference to imperfections in an indictment or an information. In *Rosen v. United States*, 161 U. S. 30, 16 Sup. Ct. 435, 40 L. Ed. 606,

Mr. Justice Harlan, delivering the opinion of the court, said: "The defendant is informed of the nature and cause of the accusation against him if the indictment contains such description of the offense charged as will enable him to make his defense and to plead the judgment in bar of any further prosecution for the same offense."

With these introductory observations, intended to show the modern tendency, in a general way, in the interpretation of criminal pleadings, and bearing in mind the object to be attained by the rules affecting the allegations of an indictment, we may the more intelligently approach a consideration of our statutory provisions upon the subject. In the first place there is a general declaration that no indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings be stayed, arrested, or in any manner affected, "first, by the omission of the words 'with force and arms' or any words of similar import; or, second, by omitting to charge any offense to have been committed contrary to a statute or statutes; or, third, for the omission of the words, 'as appears by the record'; nor for omitting to state the time at which the offense was committed, in any case where the time is not of the essence of the offense; nor for stating the time imperfectly; nor for the want of a statement of the value or price of any matter or thing or the amount of damage or injury in any case where the value or price or injury is not of the essence of the offense; nor for the want of an allegation of the time and place of any material fact, when time and place have once been stated in the indictment; nor that dates and numbers are represented by figures; * * * nor for any surplusage or repugnant allegation where there is sufficient matter alleged to indicate the crime or person charged; nor for the want of the averment of any matter not necessary to be proved; nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Rev. St. 1899, § 5301. Section 5302 provides, as to variance, as follows: "Whenever, on the trial of any indictment for any offense, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof in the Christian name or surname, or both the Christian name and surname, or other description whatever of any person whomsoever, therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, such variance shall not be deemed ground for an acquittal of the defendant, unless the court before which the trial shall be had, shall find that such variance is material to the merits of the case or may be prejudicial to the defendant." By section 5307 it is declared that, where it is necessary to allege an intent to defraud, it shall be sufficient to allege such intent gen-

erally, without alleging an intent to defraud any particular person, and that the proof need only show the doing of the act charged with the intent to defraud. In several other particulars, unnecessary to specify, the technicalities of the common law have been removed. These statutes, in their application to this case, are important as revealing the legislative purpose to avoid the mistrial of a cause, or an acquittal merely because of some matter, more or less technical, not affecting the substantial rights of the accused. All provisions of law relating to indictments are expressly made to apply to informations and prosecutions and proceedings thereon. Rev. St. 1899, § 5317.

While discarding many of the technical refinements of the early criminal procedure, the Legislature has not been unmindful of the rights of an accused, but has granted him certain privileges not allowed at common law, which furnish a much more substantial protection to one charged with crime than many of the requirements formerly, but not now, regarded as essential. Among such substantial benefits now conferred upon an accused may be mentioned the right to be represented by counsel, and, if unable to employ counsel, to have counsel appointed to defend him at public expense; the right to testify under oath in his own behalf, or, at his own election, to make a statement without being sworn; and the right to have witnesses summoned to testify in his defense at public expense. Under our criminal procedure a copy of the indictment or information for felony must be delivered to the defendant, if in jail, or, if on bail, to him or his attorney, and without his consent he cannot be required to answer an indictment or information charging felony until at least one day shall have elapsed after the service of a copy thereof upon him as aforesaid. Before arraignment it is also required that he shall be assigned counsel at his request, if he has not been able to engage any; and thereupon it is required that he be allowed a reasonable time to examine the indictment or information and prepare exceptions thereto. Rev. St. 1899, §§ 5318-5320. Thus reasonable opportunity is afforded by the statute to a defendant before being required to plead to the information, to know the nature and character of the charge against him as therein set forth. The statute then proceeds to prescribe the various methods for raising objections to an indictment or information. The three methods so prescribed are: First, a motion to quash; second, a plea in abatement; third, a demurrer. Id. § 5321. "A motion to quash may be made in all cases where there is a defect apparent upon the face of the record, including defects in form of the indictment, or in the manner in which the offense is charged." Id. § 5322. "A plea in abatement may be made when there is a defect in the record, which is shown by facts extrinsic thereto." Id. § 5323. "The accus-

ed may demur when the facts stated in the indictment do not constitute an offense punishable by the laws of this state, or when the intent is not alleged, when proof of it is necessary to make out the offense charged." *Id.* § 5324. It is then provided: "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash or a plea in abatement, by demurring to an indictment or information, or by pleading in bar, or not guilty." *Id.* § 5326. A motion in arrest of judgment, after verdict, may be granted only for either of the following causes: (1) That the court had no jurisdiction to try the case; (2) that the facts stated in the indictment or information do not constitute an offense. *Id.* § 5418. Section 5419 expressly provides that no judgment can be arrested for a defect in form.

From the provisions above mentioned it is clear that the statutes of this state have made material changes in criminal procedure in respect to the manner of excepting to an indictment. At common law, and that is the rule under the statutes of a majority of the states, perhaps, a motion to quash is addressed to the sound discretion of the court, and, if refused, is not a proper subject of exception. Such a motion, in other words, was not regarded as one of right, but was an appeal to judicial discretion. Originally, therefore, and, as stated by Mr. Bishop, in accord with the general practice in a large part of the states, the decision of the presiding judge on such a motion is not open for reversal by a higher court. 1 Archbold's Crim. Pr. & Pl. (Waterman's Notes) 386, 337, note 1; 1 Bish. New Crim. Pr. § 761. It is said, however, by Mr. Bishop, in the section above cited, that "in some states, in some circumstances, and in some conditions of the statutory law," a decision upon such a motion is subject to exception and reversal for error. On the other hand, at common law, and apparently in a majority of the states, a demurrer to an indictment reaches every defect in the structure thereof, whether in matter of form or substance, especially the form and substance of the part of the indictment stating the accusation. I suppose there can be no question but that under our statute an erroneous refusal to sustain a motion to quash is reviewable on error; but no doubt, where the objection is merely to some matter of form in no way affecting the substantial rights of the defendant, a decision upon the motion would be held to rest largely in the sound discretion of the court, and the judgment would not be reversed on error in that regard, unless it was apparent that there had been an abuse of discretion, and that thereby the defendant had suffered some substantial prejudice in making his defense. Our statute, however, in prescribing the grounds for a motion to quash, has gone much further than the statutes of most of the states, judging them by judicial decisions. Such grounds are not re-

stricted to defects in the record outside of the indictment, nor to defects in the form of the indictment, but the motion may be made for any defect in the manner of charging the offense, while a demurrer is only permissible when the facts stated in the indictment do not constitute an offense punishable by the laws of the state. I am of the opinion that in thus adding to the causes for a motion to quash, and in restricting the common-law grounds for a demurrer, it was intended that mere uncertainty, indefiniteness, or imperfection of statement in charging the offense should be objected to by a motion to quash and should not be subject to demurrer, and that the statute in this respect tends to explain what is meant in stating as a ground for a motion in arrest that it should be granted when the facts stated do not constitute an offense. As the ground so stated is in practically the same language as the statement of the cause for a demurrer, and as a failure to make a motion to quash is declared to waive all defects which may be excepted to by such a motion by demurring or by a plea of not guilty, or by pleading in bar, it is manifest to my mind that a motion in arrest under our statute will not lie for any cause nor for any objection to an information or an indictment which may be reached by a motion to quash, and therefore uncertainty in stating the offense, or any material fact essential to the charge, such, for instance, as a statement of a fact by way of a legal conclusion, are not grounds for a motion in arrest. The purpose of the statute is more clearly shown by the provisions of section 5325, which provides that, when a motion to quash or plea in abatement is sustained, the accused may be committed, or held to bail, for his appearance at the next term of court, unless the grounds on which the indictment was quashed are such that a new indictment cannot cure the defect.

Coming, now, to the information in this case, we find that it is charged that the defendant did "unlawfully, forcibly, and feloniously take from the person of Norvil Lawrence by violence the sum of fifty dollars and more, lawful money of the United States, and of the value of fifty dollars, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Wyoming." The section of our statute defining robbery is embraced in the chapter entitled "Crimes Against the Person," while the sections defining larceny and burglary and the like are found in another chapter entitled "Crimes Against Property." This follows the arrangement of the original act of 1890 (Acts 1890, p. 131, c. 73) defining crimes. By the statute robbery is defined as follows: "Whoever forcibly and feloniously takes from the person of another any article of value, by violence or by putting in fear, is guilty of robbery, and shall be imprisoned in the pen-

lentiary not more than fourteen years." It it to be observed that the information charges the crime in the precise language of the statute. It will not be contended, I apprehend, that the statute does not state an offense punishable under the laws of the state. If it is robbery to "forcibly and feloniously take from the person of another any article of value, by violence, or by putting in fear" (and the statute so declares), then it is impossible, in my mind, to say with much show of reason that the offense is not charged in this information, which says that the defendant did "feloniously, forcibly, and unlawfully take from the person" of the person named "by violence, the sum of fifty dollars, lawful money," etc.

It is insisted, and I willingly concede, that the statute does not intend by its definition of the crime to make one guilty of robbery who takes by violence from the person of another his own property. But that conclusion arises from the use in the statute of the word "feloniously." Bearing in mind that such an act would not constitute robbery at common law, we observe that it was never deemed necessary in the common-law definition to say that one who takes the property of another by violence shall be guilty of robbery; but it was deemed sufficient, in defining the crime by the rule of the common law, to use the word "feloniously" in describing the act of taking, in addition to the words embracing violence or the putting in fear. In other words, the common-law definition was deemed sufficient to exclude the idea that the property taken belonged to the one who committed the act. By the same construction applied to our own statute the definition of the crime excludes ownership by the defendant of the property taken. The same sensible and reasonable construction applied to the information in this case just as thoroughly and conclusively excludes the ownership of the property by the defendant. If it be true that the defendant "unlawfully and feloniously" took the property, then it cannot be true that the property belonged to him, and it is entirely immaterial whether the property belonged to the person robbed or to some third person; and it is very doubtful, to say the least, whether, had ownership been alleged in the person robbed, the proof of ownership by another would be a sufficient variance to have affected the substantial rights of the defendant. In my opinion, therefore, there is not in this information a total omission of an allegation that the property did not belong to the defendant. It may be a legal conclusion, or the charge may be said to be uncertain as to ownership, or the defect may be one of indefiniteness; but by no reasonable construction of the information is it possible to say that, notwithstanding its allegations, the defendant may have owned the property. If he owned the property taken, then he did not commit the act feloniously or unlawfully, and, conversely, if he committed the act unlawfully and feloniously, as alleged, then he did not own the property. I am aware that statements may be found in some judicial decisions to the effect that under an indictment making a similar allegation the defendant might have committed every act charged, and yet not be guilty of robbery. I notice such a remark in the opinion in *State v. Dengel*, 24 Wash. 49, 63 Pac. 1104. The information in that case followed substantially the language of the statute defining the crime. I cannot agree with the statement that, "literally, the defendant may have committed every act charged in the information, and yet not be guilty of robbery." If the defendant feloniously took the property under the circumstances alleged, then that act constituted robbery, and, though defendant might have had the right to seasonably object to the information in the proper statutory manner for the absence of a specific allegation of ownership, it is going too far to say that he could have done the act charged, and yet be guiltless of the crime of robbery. Such a statement under the common-law procedure would no doubt have been substantially, though even then not literally, true. Since at common law the indictment was required to contain the allegation of ownership, it might be said that an indictment not embracing the allegation would not show defendant's guilt; but I seriously doubt that it would have been correct to say that defendant could have committed every act charged, and yet not be guilty. It would be equivalent to saying that at common law robbery is the forcible and felonious taking of personal property of value from the person of another, and yet, if one did forcibly and feloniously take such property from the person of another, he would not be guilty of robbery. The statement clearly involves an absurdity on its face.

The statute of Washington requires an information to be "direct and certain" as it regards (1) the party charged; (2) the crime charged; (3) the particular circumstances of the crime charged—when they are necessary to constitute a complete crime. A motion to quash is not one of the pleadings allowed. The only method of objecting to the structure of an indictment is by demurrer, and it lies, among other grounds, when the indictment does not substantially conform to the requirements of the Code. It lies, therefore, in that state, for uncertainty, and when the charge as to any particular circumstance is not "direct and certain." Very different from our statute. The general rule is that as to a purely statutory offense it is sufficient to charge it substantially in the language of the statute. But it is also generally held that that rule has no application as to a common-law crime, where the statute has defined it in generic terms, but that in such case the information or indictment would

be insufficient in merely following the statute. Where, however, the statute, in defining a common-law crime, defines it by stating all the material facts which go to make up the crime, then it is generally held sufficient, at least as against a motion in arrest, to charge the crime in the language of the statute. Where the crime of robbery was defined as follows: "Every person who shall be convicted of feloniously taking the property of another from his person or in his presence, and against his will, by violence to his person or by putting him in fear of some immediate injury to his person, shall be adjudged guilty of robbery in the first degree"—it was held in Kansas that the statute defined the offense, not in its generic terms, but by specifically stating the facts which constitute the offense. *State v. Seely*, 65 Kan. 185, 60 Pac. 163.

So far I have discussed the question from the viewpoint that, since the statute states that the facts alleged in the information shall constitute robbery, it must be held that the information itself charges that crime as against a motion in arrest. I am willing, however, to concede that in the interest of good pleading the information ought to be more direct and certain as to the ownership of the property; but I maintain that the defect in that particular could only be reached by a motion to quash, and, no such motion having been made, the defect was waived. Is it possible to maintain that the defendant, upon an inspection of this information, was not thereby informed of the nature and cause of the accusation against him, so as to enable him to prepare his defense? Or is it possible to maintain that it would not furnish him a sufficient protection against a subsequent prosecution for the same offense? Or can it be reasonably maintained that the court would not be able, upon reading the allegations, to determine whether or not a crime, and what crime, is charged? To each of these inquiries I think the answer must be in each case that no such position can be maintained.

Let us now examine the meaning and effect, as determined by judicial authority, of the word "felonious." While that is a technical word, it has always been held to imply a criminal intent, and, as descriptive of the act charged, that it was done with intent to commit a crime, or, as said in a Montana case: "It means that the act was done with the mind bent on that which is wrong, or with a guilty mind." *State v. Rechnitz*, 20 Mont. 488, 52 Pac. 264. Mr. Circuit Justice Grier, in the federal court of Pennsylvania, said: "The epithet 'felonious' has reference to the intention, which must be animus furandi for the purpose of stealing or appropriating the thing taken." That language was used in charging a jury in a robbery case, after giving the definition of robbery at common law. *United States v. Smith*, Fed. Cas. No. 16,318. In *Bise v. United*

States, 144 Fed. 374, 74 C. C. A. 1, Judge Van Devanter in delivering the opinion of the Circuit Court of Appeals, Eighth Circuit, said, with reference to an indictment charging the receiving of stolen goods, that "though the statute did not in terms make it an element of the crime that the stolen property should be received without the consent of the owner, or with intent to deprive him of its use and benefit, yet the statute was not designed to punish one who with lawful intent received stolen property, or where he receives it with the consent of the owner." But he further said that "the words 'unlawfully, feloniously,' as used in the indictment, mean that the act which they characterize proceeded from a criminal intent and evil purpose, and thus exclude all color of right and excuse for the act." In Indiana, in a robbery case, it was contended that the information was insufficient because it did not allege that the defendant had the present ability to commit a violent injury on the person of the prosecuting witness, and therefore that the allegation as to an assault was not sufficient. The court said that the allegation as to assault was unnecessary, and might be rejected without impairing the pleading, and that the offense of robbery is so described in the criminal code that it may be sufficiently charged in the language of the statute, or in equivalent terms, and, further, "It consists in forcibly and feloniously taking from the person of another an article of value by violence, or by putting in fear." The court, it is true, also said that a charge that a defendant forcibly and feloniously took from the person of another an article of value, describing it and stating its value and the name of its owner, by violence, would in these respects be sufficient, without any mention of an assault. Though the court thus included "the name of its owner," it was not intended, I think, to hold that that statement would be necessary. That question was not involved. Clearly the court was right in stating that the charge as set forth would be sufficient. *Craig v. State*, 157 Ind. 574, 62 N. E. 5. The words "feloniously, purposely, and with premeditated malice," with which assault and battery was alleged to have been committed, were held sufficient to show that the offense charged was committed in a rude, insolent, and angry manner, and therefore to constitute the offense as defined by statute. *Hays v. State*, 77 Ind. 450; *Knight v. State*, 84 Ind. 73.

In Indiana many objections must be taken advantage of by motion to quash and if not, they are deemed waived. The Supreme Court of that state has said that "on a motion in arrest, if the indictment is found to contain all the essential elements of a public offense, even though to some extent defectively stated, it will be held sufficient." And again: "In criminal pleading, for uncertainty in the statement of the facts constituting the offense intended or attempted to be

charged, an indictment or information can only be assailed or quashed by a motion to quash, and never by a motion in arrest, or by an assignment here, for the first time, that the facts stated in the pleading are not sufficient to constitute a public offense." And the court again comes to the same conclusion as to the effect of the words "unlawfully, feloniously, purposely, and with premeditated malice," descriptive of the manner in which an alleged assault and battery was perpetrated, and the court says: "If it was done unlawfully, and also feloniously, purposely, and with premeditated malice, it was done in an angry manner, and more." *Chandler v. State*, 141 Ind. 106, 39 N. E. 444. In *Hamilton v. State*, 142 Ind. 276, 41 N. E. 588, the word "feloniously" was held to be used in the statute defining the offense of larceny to supply that element of the ordinary definition of larceny implying criminal intent, and that its use in the information was, for the same purpose, entirely sufficient, and therefore that the indictment was not insufficient for a failure to charge that the money had been taken with the intent to deprive the owner of it. And so I say here that the word "feloniously," as used in our statute defining robbery, was intended, as at common law, to supply the element of criminal intent, and to exclude the idea that the defendant took his own property, and that the same word in the information ought to be given the same effect as against a demurrer or a motion in arrest.

In *State v. Halpin*, 16 S. D. 170, 91 N. W. 605, it is held that the word "feloniously," when applied to an act, means that it was done with intent to commit the crime named in the information. In *State v. Fordham*, 13 N. D. 494, 101 N. W. 888, a robbery case, it was held that an allegation that the property was wrongfully and feloniously taken covered the intent to steal, and that it was not necessary to further allege that the property was taken with intent to steal it. In *Keeton v. State*, 70 Ark. 163, 66 S. W. 645, an indictment for robbery which alleged that the accused did feloniously and violently take certain property from the person of the prosecuting witness, by putting him in fear and against his will, is sufficient, without alleging that he "did steal, take, and carry away" such property. The ground of the decision was that the words "feloniously did take from the person," as used in the indictment, imported a stealing and an asportation with intent to deprive the person of the lawful possession of the property in the goods. It is true that in that same state it had previously been held that an indictment for robbery was insufficient which failed to specifically allege the ownership of the property. *Boles v. State*, 58 Ark. 35, 22 S. W. 887. But in that case the indictment did not have the word "steal" or "feloniously take," and therefore it may be said that it did not have words charging in substance, or by legal

conclusion or otherwise, that there was an intent to steal the property.

In *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 40 L. Ed. 606, it is said, in the opinion delivered by Mr. Justice Harlan, that the words "unlawfully, wrongfully, and knowingly," as applied to an act or thing done, imported knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing. It was therefore held that the defect in the information there being considered was not one of the total omission of an essential averment, but, at most, an inaccurate or imperfect statement of the fact; "and such statement, after verdict, may be taken in the broadest sense authorized by the words used, even if it be adverse to the accused."

As in *Arkansas*, so in *Washington*, notwithstanding that it had been held that the omission of an allegation of ownership rendered an indictment insufficient, it has been held that to charge the asportation or taking in the language of the statute defining robbery is sufficient, and an information charging that the defendant "did forcibly and feloniously take from the person" of the prosecuting witness certain property sufficiently alleged the asportation, without the use of the words "carried away." And the court cites the *Arkansas* case, among others, and also refers to a previous case in *Washington* and one in *California* (*State v. Johnson*, 19 Wash. 410, 53 Pac. 667; *People v. Walbridge*, 123 Cal. 273, 55 Pac. 902), where an information was held sufficient which did not allege the asportation otherwise than in the language of the statute. *State v. Smith*, 40 Wash. 615, 82 Pac. 918.

If the charge that a defendant did forcibly and feloniously take certain property from the person of a named prosecuting witness sufficiently charges the asportation and the stealing thereof, and I think the courts have rightly held such to be the case, then I must confess that I find it difficult to regard otherwise than as extremely technical and without any substantial reason the holding that in addition to those words the ownership of the property must be alleged, as against a motion in arrest on the ground that a public offense is not charged. If, as the authorities all state, the object of alleging ownership is to negative defendant's right to the property and the fact that he might have taken the property with a good intent, then clearly an allegation charging that he stole it or that he feloniously took it, thus implying that he stole it, clearly, in my opinion, negatives his ownership or the fact of a proper intent on his part. And in such case the defect in specifically alleging ownership cannot be other than one of uncertainty or indefiniteness; for the essential fact that defendant stole the property is included in the allegation, and that fact would be rendered more certain or more specific by a precise allegation of ownership. Such allegation would not in-

roduce a new element into the information, but would merely render more specific an element already there. And, under our statute, I think it entirely clear that the defect is waived, if not objected to by motion to quash.

From a careful examination of the authorities upon this subject I am more than ever clearly convinced that statements in cases from other states to the effect that the absence of an allegation of ownership renders the indictment fatally defective are not even to be accepted as persuasive authority in this state, unless the decisions were rendered under statutes like our own. It is evident that a statement that a failure to make such allegation constitutes a "fatal defect" may be used by a court, and I think has generally been used in the more recent cases, to indicate that it is a "fatal defect" as against an objection thereto properly raised under the statute of the particular state. To illustrate: It may no doubt be reasonably held a fatal defect in our state as against a motion to quash, but, as against a motion in arrest or a demurrer, that it would be waived without a motion to quash. To say that the allegation is one of substance does not meet the question, because it is evident that under our statute there may be a defect in alleging a matter of substance, which would be waived if not objected to by a motion to quash. The cause for such a motion, "the manner in which the offense is charged," applies to something more than a matter of mere form in the information. In *Wilbur v. Territory*, 3 Wyo. 268, 21 Pac. 698, the defect was one of substance; that is to say, it was a defect in the manner of alleging the offense. And it was held to have been waived because the substantive element was alleged in the indictment, although by a legal conclusion only. Likewise, in *Tway v. State*, 7 Wyo. 74, 50 Pac. 188, it was held, Mr. Justice Corn delivering the opinion, that the omission of the word "ravish" in an information for rape was waived, even if required in such an information by a failure to move to quash; and the word "ravish" at common law was an indispensable word in charging the crime of rape.

California cases have been referred to as holding necessary an allegation of ownership in charging robbery. However, by a recent case decided in that state by one of the appellate courts, which was concurred in by the judge who wrote the opinion in the *Ammerman Case*, it is evident that the defect was held to be fatal in the other cases under statutes altogether dissimilar from our own, and that it was not intended to hold that without the allegation the essential elements would not be substantially charged. In the case of *In re Myrtle*, 2 Cal. App. 383, 84 Pac. 335, a habeas corpus case, which had been instituted by one sentenced upon a plea of guilty of robbery upon an information which did not contain an allegation of ownership,

but which did allege a felonious taking from the person, it was said: "It is doubtless true that a complete description of the crime of robbery includes an allegation of ownership of the property taken, or words which will at once indicate that such property is not the property of the robber; but in our opinion, * * * where the complaint and information charge that the defendant 'did willfully, unlawfully, and feloniously steal, take, and carry away' from the person and immediate presence of the person robbed certain personal property, describing it," etc., "substantially describes the crime of robbery in the language of the Code defining it, and, no objection being made by either demurrer or motion in arrest of judgment, the defendant cannot, after sentence and on a writ of habeas corpus, be heard to say that no offense is charged." And it was held, in concluding the opinion, that the allegations of the information, upon defendant's plea of guilty, established a case of robbery as completely as if there had been a specific allegation of ownership. Under the California Code a motion in arrest may be founded on any defect in the indictment or information for which a demurrer may be filed, unless waived by a failure to demur; and a demurrer may be filed on several grounds, one ground being that the information does not substantially conform to the requirements of the statute as to the contents of an indictment or information. And the statute prescribing what an indictment or information shall contain says, among other things, that it must be direct and certain as regards (1) the party charged, (2) the offense charged, and (3) the particular circumstances of the offense charged, when they are necessary to constitute a complete offense. Pen. Code Cal. §§ 952, 1004, 1185. The Code of Iowa, from which state a case has been referred to, provides that a motion in arrest of judgment may be made for any ground which would have been a ground for demurrer, and a demurrer may be filed on the ground, among others, that the indictment does not substantially conform to the requirements of the Code; and the Code requires that the indictment must be direct and certain in the same respects exactly as stated in the California Code. It would seem, however, in Iowa, that a failure to demur does not necessarily waive the right to move in arrest. Code Iowa 1897, §§ 5282, 5328, 5426.

The proposition is further illustrated by the California case of *People v. Mead*, 145 Cal. 500, 78 Pac. 1047, which was a prosecution under the statute charging the defendant with the crime of conniving at, consenting to, and permitting his wife to be placed in a house of prostitution. On a motion in arrest it was contended that the statute was not to be construed literally as forbidding a husband to permit his wife to be placed in a house of prostitution for an innocent purpose, such as a cook or seamstress, and that the

crime would not be complete without allegation and proof that the wife was left in such a house with the intent on the part of the husband that she should herself act as a prostitute. The court conceded for the purposes of the case that, if the objection had been raised by demurrer for uncertainty, the information would be fatally defective. But as there was no demurrer, and therefore a motion in arrest was waived for a mere insufficiency in the indictment which did not go to the idea that no offense was at all charged, it was held that the words "willfully, unlawfully, and feloniously," which described the act of defendant in placing his wife in a house of prostitution, were to be given some effect in construing the language of the information, and that they excluded an act which was by law innocent; and it was remarked that the most that can be said in criticism of the information is that it may not be direct and certain as to the particular circumstances of the offense, and that such an objection is waived by failure to demur. In California it is also held that a person imprisoned under an indictment which does not charge a public offense may obtain his discharge on a writ of habeas corpus. *Ex parte Goldman* (Cal. App.) 88 Pac. 819. In connection with the *Myrtle Case*, this goes to show that the defect in failing to allege ownership did not render the information insufficient as failing to state a public offense, because, if it did, then there must have been a discharge of the prisoner in the *Myrtle Case*; but the only defect, it is plain, was one of uncertainty in stating the particular circumstances of the offense.

The Criminal Code of Ohio is like our own as to a motion to quash. And there are several cases in that state to the effect that any defect short of one which renders the information entirely insufficient to charge a public offense must be raised by motion to quash. *Carper v. State*, 27 Ohio St. 572. It was said in *State v. Messenger*, 63 Ohio St. 398, 400, 59 N. E. 105: "A motion to quash is, under our Code of Criminal Procedure, the proper method of raising an objection to the indefiniteness of the averments of an indictment, and is waived by demurring to it." The court further says, as giving a reason for the statute: "Where a motion to quash is sustained, the party may be held to plead to a new indictment, in which the error in the former one has been corrected. But, on the sustaining the demurrer, the defendant is entitled to his discharge; for a court cannot assume that he is guilty of an offense not charged." And in Indiana, where a motion to quash may be made for many defects, it is settled that for mere defects or uncertainties a motion in arrest will not be sustained, although such defects or uncertainties might be fatal on a motion to quash. *Campton v. State*, 140 Ind. 442, 39 N. E. 916; *Woodworth v. State*, 145 Ind. 276, 43 N. E. 933. These cases serve also to illustrate what I

have said that, though a case may be found holding a certain "defect" to be "fatal," that does not necessarily mean that it renders the information insufficient to state an offense; but it may, and I think in most cases does, mean only that it is a fatal defect as against the particular objection raised, such as a motion to quash or a demurrer, although in most cases the defect may be one merely of uncertainty, lack of precision, or failure to make the charge specific as to some particular element.

I am thoroughly convinced that our statute was intended to make a demurrer and motion in arrest proper in only two cases: (1) Where the offense charged, though sufficiently charged, is not an offense under our laws, either because the act creating it is unconstitutional and void, or because there is no statute or other law making the act a crime; and (2) where some necessary element of the offense is not contained in the information in any way, either by specific allegation, legal conclusion, or by necessary implication of the words used. Where the allegations of the information, taken in their ordinary technical significance, necessarily include every element of the offense, and the only objection is that some particular element is not made sufficiently specific, then, in my opinion, the defect must be reached by a motion to quash, and, if not objected to in that manner, it must be held waived by a demurrer or a plea of not guilty. The evil of any other rule or any other construction of our statute is well exemplified by the case at bar. I cannot imagine for one moment that the defendant was unaware of the nature and cause of the accusation against him, or that by the information he was rendered unable to properly prepare his defense. It is very clear to my mind that he went into the trial with astute counsel fully equipped to present his defense as completely as the facts would warrant, without any deprivation of right in that respect by reason of the alleged imperfection of the information. Had he felt that his rights would have been better protected by an allegation of ownership of the property taken, he could have made a motion to quash on the ground that such allegation was omitted from the specific allegations, and in my opinion he ought to have raised the objection in that manner. The court could then have quashed it, a new information could have been filed, perhaps immediately, and, unless the defendant desired himself to delay a trial, a trial could probably have had the same term of court upon a new information. It may be that now, caused by lapse of time, it will be impossible to obtain the necessary witnesses, and the defendant, by reason of the technical objection made for the first time after the swearing of the jury, may be allowed to go free without a proper punishment for a crime of which the jury found him to be guilty. I am most seriously impressed with the necessity of taking a broad view of these statutes, and of

giving effect to the intention of the Legislature, which I believe has been reasonably and clearly expressed, and which unquestionably depart very far from the common-law method of criminal procedure, rendering the decisions under the old method, and under statutes dissimilar to our own, either misleading when applied to our own procedure or of very little, if any, authority.

In my opinion the judgment should be affirmed.

STATE v. JOHNSON.

(Supreme Court of Washington. Sept. 28, 1907.)

1. CRIMINAL LAW—APPEAL—INSUFFICIENT PRESENTATION OF ERROR.

Where an assignment of error is indefinite, no reference being made to any particular ruling and no argument is made upon it, it will not be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2937.]

2. SAME—INAPPLICABLE INSTRUCTIONS.

Inapplicable instructions are properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1980.]

3. SAME—MATTER COVERED BY INSTRUCTION GIVEN.

Instructions fully and properly covered by the court's instructions are properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

4. HOMICIDE—JUSTIFICATION—QUESTION FOR JURY.

Under the evidence, held a question for the jury whether there was justification for defendant stabbing decedent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 566.]

5. CRIMINAL LAW—APPEAL—CONCLUSIVENESS OF FINDING.

The question whether defendant was justified having been submitted upon competent evidence, and under proper instructions, and the court having denied a new trial, the conviction will not be disturbed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074, 3084.]

Appeal from Superior Court, Spokane County; Mitchell Gilliam, Judge.

Thomas C. Johnson was convicted of manslaughter, and he appeals. Affirmed.

A. C. Shaw, for appellant. Richard M. Barnhart, Fred C. Pugh, and A. J. Laughon, for the State.

ROOT, J. On the night of June 7, 1906, in his room at the Rainier Hotel, in Spokane, the defendant stabbed one Tuttle with a knife, inflicting injuries from which the latter died a few days thereafter. Defendant was tried upon an information charging murder in the second degree, and convicted of manslaughter. From a judgment and sentence thereupon, he appeals to this court.

There appears to have been no witness to the altercation between defendant and decedent other than the parties themselves. No statement of the decedent was used upon the trial. The defendant's account of the

occurrence is about as follows: He says: That he had gone to bed early, suffering from neuralgia. That on four occasions he had been aroused from his sleep by the noise of people walking or talking in the hall of the hotel. That about 11:30, having been awakened by the voices of a man and woman laughing and talking in the hallway, and believing the woman to be a chambermaid named "Lizzie," he went to the door of his room with the intention of calling to her to stop the noise in the hallway, and also with the idea of requesting her to go to her mother's room and bring some liniment such as he had theretofore used. Upon reaching the door, he looked in the hallway, but could not see the chambermaid or any other woman, but saw the decedent standing some distance away near the stairway, and apparently looking toward some one on the stairs or in the hallway below. This was upon the fourth floor of the hotel. He said he asked the decedent, "Where is Lizzie?" and that decedent, with an oath, asked him what he wanted of Lizzie, to which he replied: "I want to see her to tell her not to make so much noise, or stop the noise that was being made in the hall." To this the decedent answered, "If you have any kick coming, go jump on Lizzie, not on me," to which defendant says he replied: "My dear sir, you need not get hot about it." That thereupon the decedent said, with a vile oath, "I will fix you," and that he then came over where defendant was and struck him in the face, and followed it up by repeatedly striking and beating him. That defendant withdrew into the room to get a chair with which to defend himself. That he was then in his nightclothes. That he procured from the pocket of his pants, which were lying on the chair, a knife, which he opened and used against the decedent to drive him away. That he followed the decedent to the door, pushing him with one hand and striking him with his knife in the other, and in this manner ejected him from the room. That he was angry, but did not intend to kill decedent. There was some evidence that decedent had been drinking, although no showing as to what extent, and it appeared that he was inclined to be cross and irritable when under the influence of liquor. The cross-examination and the statements theretofore made by defendant upon the preliminary examination tended to show that the defendant was irritated and angry either at being disturbed or at the attentions being paid by the decedent to the chambermaid, or by both. That defendant could have shut the door and kept the decedent from coming in. That the latter was a much smaller man physically than the defendant, and was entirely unarmed and in his stocking feet. That defendant had no fear for his life. That he did not make proper effort to avoid the difficulty. That the use of the knife was unnecessary.

The appellant assigns seven errors. The first, second, third, and seventh have to do with the sufficiency of the evidence. The fourth and fifth refer to the matter of instructions. The sixth alleges error in the admission of evidence. We will consider these in the inverse order. The sixth assignment is indefinite and uncertain. No reference is made to any particular ruling of the court, and no argument is made upon this assignment. Neither is there any argument made as to the fourth and fifth assignments, and we do not think they are well taken. The instructions given by the trial court appear to have been fully as favorable as defendant was entitled to. The instructions numbered 5 and 12, requested by the defendant and refused by the court, are in themselves faulty, inapplicable, or have to do with subject-matters which are fully and properly covered by the instructions given by the court.

We come, now, to the main question in the case, which is as to the sufficiency of the evidence to sustain the verdict and judgment. It was admitted on the part of defendant in the opening statement of his counsel in the trial, and again in his brief here, that the defendant used a knife upon the person of the decedent at the time alleged, and that from the effects of the wounds thus inflicted the decedent died, and that this admission was sufficient to establish a prima facie case on the part of the state. This being true, it was then for the jury to say, under proper instructions, whether or not the evidence showed a legal justification or excuse for the stabbing. The jury were told that the reasonableness of the apprehension of danger must be judged from the defendant's standpoint at the time of the alleged cutting; that they must take into consideration all the circumstances surrounding and existing there at that time. They were also told that it was not necessary that the assault made by the deceased upon defendant should have been made with a deadly weapon; that "an assault with a fist alone, if there was an apparent purpose to inflict death or serious bodily injury by the deceased upon the defendant, is sufficient to justify the killing in self-defense, if the defendant at the time had reason to believe, and did believe, that he was in imminent danger of death or great bodily harm at the hands of the deceased, supposing that the defendant acted reasonably as a reasonable man under the circumstances." The jury had a right to take into consideration the size of the men, respectively, the fact and manner of defendant first accosting decedent, the fact that the decedent was unarmed, the opportunity of defendant to close and lock his door, his apparent ability to have resisted the assault of decedent without the use of a knife, the character of the conversation between the two men, the credibility of defendant's testi-

mony, the question of his good faith in using the knife, the character of the assault upon and threatened danger to defendant, the reasonableness under all the circumstances of defendant's apprehension of serious bodily injury, and from all of these things, and all other matters shown by the evidence and the conditions and circumstances surrounding the parties, they were to decide whether or not the defendant was justified in using a knife upon decedent in the manner shown. We think the evidence of the defendant clearly presented this question of fact for the determination of the jury. This question having been by the trial court, upon sufficient competent evidence, submitted to the jury under instructions well calculated to fully protect all of his rights, and that court having denied a motion for a new trial, we think the verdict must be held conclusive.

The judgment is affirmed.

HADLEY, C. J., and DUNBAR, RUDKIN, CROW, FULLERTON, and MOUNT, JJ., concur.

DAVIE v. DAVIE.

(Supreme Court of Washington. Sept. 28, 1907.)

1. GIFTS—CAUSA MORTIS—INTENTION—SUFFICIENCY.

Evidence held to show decedent intended to make a gift causa mortis to his widow of the proceeds of land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, §§ 154, 155.]

2. SAME—SUFFICIENCY OF DELIVERY.

Where decedent and his wife had contracted to sell land and executed a deed to be held in escrow until full payment, and decedent a few days before his death stated that the papers were to be given to his wife, that she would place them in escrow in her name, and that, "if anything should happen," it would leave her in "pretty good shape," etc., and she placed them in escrow, there was sufficient delivery to establish a gift causa mortis.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, § 124.]

3. SAME—PROPERTY SUBJECT TO GIFT.

There was a valid gift causa mortis where decedent delivered to his wife a contract to sell land and a deed to be placed in escrow, evincing an intent that she receive the proceeds; the transaction being not ineffective as an attempted oral gift of land.

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Petition by John T. Davie, guardian, to require Rhodia E. Davie, administratrix, to show cause why land should not be included in an inventory. From a decree for the administratrix, the guardian appeals. Affirmed.

Munter & Lovejoy, for appellant. W. D. Scott, for respondent.

ROOT, J. One William Davie died intestate in the city of Spokane, leaving a widow, respondent, Rhodia E. Davie, whom he had married about a year previously, and a minor

son by a former wife, Everett Davie. The widow was appointed administratrix, and the appellant, John T. Davie, was appointed guardian of the minor. The administratrix filed her inventory, but failed to include therein certain real estate which it is claimed by appellant the decedent owned at the time of his death. Upon appellant's petition, citation was issued requiring respondent to show cause why said real estate should not be included in the inventory. To this an answer was made, whereupon a hearing was had, which resulted in findings and conclusions and a decree in favor of the widow. From said decree this appeal is prosecuted.

The evidence shows that, after a protracted illness and some four or five days before his death, said William Davie and his wife executed a contract for the sale of said real estate to one Tipton, and at the same time executed a deed of conveyance of said real estate to said Tipton, which deed was to be held in escrow until the payments called for by the contract should be made. Negotiations leading up to the sale had been pending several months. The contract and deed appear to have been prepared by one Boyd, who was a partner in the real estate business with Tipton, and who was present when the papers were signed and acknowledged. In regard to the transaction, Mr. Boyd, among other things, testified: "After the contract and deed were executed, I asked Mr. Davie what was to be done with the papers, to which Mr. Davie replied: 'It is hers. I will give them to her. She will come down and place them in escrow in her name, so that she can handle it.' In the course of the conversation he stated: 'If anything happens to me, it will leave the widow in pretty good shape. It will leave her a home.'" It appears that Mrs. Davie placed the papers in escrow in accordance with said suggestions of Mr. Davie. The latter had signed the papers while in bed and quite sick; and lived but four or five days thereafter. Another witness, one Johnson, a notary public, who was present when Mr. Davie signed these papers, and who took the acknowledgment of Davie and wife, testified, among other things, as follows: "He made the remark that if anything should happen to him—he said: 'My widow' or 'my wife will have a home.'" Mrs. Davie was upon the witness stand and testified to the papers being signed, and was asked: "At that time what was done with the papers? Answer: They were handed to me at that time, that day. It was on the afternoon of the 28th of March, and the next day I took them up and had them put in escrow, as I was told to do." She was asked as to what was said at the time, but, objection being made, she was not permitted to state.

It is urged by the appellant that the evidence is not sufficient to establish a gift; that there is no sufficient evidence of a delivery; that the attempt to make a gift was

the result of undue influence; and that it was an attempt to make a gift of real estate, which could not be done orally. We think, under all the circumstances of this case, that the evidence shows an intention of the decedent to make a gift *causa mortis*. No creditor is complaining. No one appears to be interested except this minor child. Other property was left by the decedent. There are no circumstances shown in connection with the case to cast thereupon any suspicion of undue influence, fraud, or misrepresentation. It would seem to be but a natural thing for a man in the expectation of near approaching death to make a gift of this kind to his wife. In *Phinney v. State*, 36 Wash. 236, 241, 78 Pac. 928, 68 L. R. A. 119, this court said: "It is now conceded by all modern authority that every species of personal property capable of delivery, either constructive or actual, may be the subject of gift *mortis causa*." In the same case, it was said, touching the question of delivery: "But, in the very nature of business transactions of this kind, this delivery must frequently be constructive. The nature and circumstances surrounding this case necessitated a constructive delivery. The subject of the gift was not available. * * * So that, in justice and common sense, it seems to us that the delivery was complete, and that the will of the deceased ought not to be thwarted by any technical construction or definition of delivery." This language is applicable here. Decedent was giving the proceeds from the sale of the land to be paid upon, and according to the terms of, the contract. There was no way of making a delivery except by placing in her possession the written contract and escrow deed, which was done. We think this was sufficient.

With the contention that this was real estate, and could not be legally made the subject of an oral gift, we cannot agree. Decedent and his wife had made a contract to sell this property. They had executed a deed to be held in escrow, to be delivered when the purchaser should complete his payments as called for in said contract. Having done this, the interest in the real estate became such as is ordinarily treated as personal property in matters of administration. He was virtually giving her the proceeds coming from the sale. In the case of *Griggs Land Co. v. Smith* (Wash.) 89 Pac. 477, this court said: "But in the case at bar the owner of the land had made a contract to convey, and he could leave to his heirs only the interest then owned which was virtually but the right to the proceeds; the holder of the contract being entitled to have the land conveyed to him upon paying the purchase price. In such cases the courts have treated the property for purposes of administration, as personal rather than real. A recognition of this doctrine may be found in *Hyde v. Heller*, 10 Wash. 586, 39 Pac. 249." See, also, *Gibson v. Slater*, 42 Wash. 347, 84 Pac.

648; *Noble v. Whitten*, 38 Wash. 202, 80 Pac. 451; *Guinan's Appeal*, 70 Conn. 342, 39 Atl. 482; 26 Am. & Eng. Enc. of Law (2d Ed.) 721-726; 14 Am. & Eng. Enc. of Law (2d Ed.) 1063, 1068; 7 Am. & Eng. Enc. of Law (2d Ed.) p. 471; 9 Cyc. 826; 7 Current Law, p. 1881.

We think the decree of the trial court should be affirmed; and it is so ordered.

HADLEY, C. J., and RUDKIN, DUNBAR, CROW, FULLERTON, and MOUNT, JJ., concur.

CITY OF SEATTLE v. MacDONALD.

(Supreme Court of Washington. Oct. 10, 1907.)

1. MUNICIPAL CORPORATIONS—ORDINANCES—EXERCISE OF POWER BY STATE AND MUNICIPALITY.

A city ordinance making the doing of an act an offense is not superseded by a general state law fixing and defining a punishment for the same act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1311-1314.]

2. GAMING — ORDINANCES — CONSTRUCTION — DESCRIPTION OF GAME—SUFFICIENCY.

A city ordinance, general in its terms, and prohibiting playing at any game of chance played with dice for money or representatives of money, was broad enough to include a dice gambling game called "Twenty-six," for the purpose of winning money, cigars, and articles representative of money by chance, although the game was not enumerated in the ordinance.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Ray MacDonald was convicted by the police judge of the city of Seattle of violating an ordinance against gaming, and appealed to the superior court. From a judgment of the latter court quashing the conviction, the city appeals. Reversed.

Ellis De Bruler, for appellant. Morris, Southard & Shipley, for respondent.

FULLERTON, J. On November 17, 1899, the city of Seattle passed an ordinance relating to misdemeanors, section 10 of which reads as follows: "Whoever deals, plays at, wagers anything of value on, or in any manner takes part in, or whoever carries on or causes to be opened, or who conducts, sets up, keeps or exhibits any game of faro, monte, roulette, lans-quetette, rouge et noir, rondo, poker, draw-poker, keno or E. O. or roulette table or shuffle board, or fantan, or any gaming table or game whatever, for the purpose of gambling or any game of chance for the purpose of winning or securing money by chance, played with cards, dice or any device whatever, kind or nature, whether or not of the kind, character or nature herein mentioned, for money, checks, credit or any representative of value whatever, or whoever shall have in his possession to be used for the purpose of gambling or winning money by chance any gaming device whatever, shall be punished by a fine of not more than five

hundred dollars, or by imprisonment not exceeding six months, or by both." On March 7, 1903, the Legislature made it felony to maintain a gambling resort; the act consisting of one section, which reads as follows: "Section 1. Any person who shall conduct, carry on, open, or cause to be opened, either as owner, proprietor, employé, or assistant, or in any manner whatever, whether for hire or not, any game of faro, monte, roulette, rouge et noir, lans-quetette, rondo, vingt-un (or twenty-one), poker, draw-poker, brag, bluff, thaw, tan, or any banking or other game played with cards, dice or any other device, or any slot machine, or other gambling device, whether the same be played or operated for money, checks, credits, or any other representative or thing of value, in any house, room, shop, or other building whatsoever, boat, booth, garden or other place, where persons resort for the purpose of playing, dealing or operating any such game, machine or device, shall be guilty of a felony, and upon conviction thereof shall be imprisoned in the penitentiary for the period of not less than one nor more than three years." Laws 1903, p. 63, c. 51. On October 17, 1906, one W. I. Peer made complaint before the police judge of the city of Seattle, charging the respondent with violating the ordinance above quoted by playing at a dice gambling game called "Twenty-six," for the purpose of winning money, cigars, and articles representative of money by chance. The respondent pleaded not guilty to the charge before the police judge, and was tried and convicted and sentenced to pay a fine. The respondent appealed from the judgment of conviction to the superior court. In that court he filed a demurrer to the complaint on the ground, among others, that the facts charged did not constitute a crime. The superior court sustained the demurrer, and entered a judgment quashing the conviction and dismissing the proceeding. The city appeals.

The learned judge of the superior court sustained the demurrer on the ground that the city ordinance on which the complaint was predicated had been superseded by the statute above quoted. He rested his decision on the principle that a municipality, in the absence of express authority conferred upon it by its charter, is without power to enact an ordinance making punishable an act which is made punishable as a criminal offense by the general laws of the state; and held, as a necessary corollary to that rule, that an ordinance making the doing of an act an offense, enacted by virtue of the municipality's general power, is superseded by a general law of the state Legislature fixing and defining a punishment for the same act. There are many cases, representing perhaps the weight of authority, which support the rule followed by the trial judge. This court, however, has adopted the contrary rule. In *Seattle v. Chin Lee*, 19 Wash. 38, 52 Pac. 324, we held that the city of Seattle by virtue of certain

provisions contained in its then charter, which have been continued in its present one, authorized it to enact ordinances for the punishment of offenses already made punishable by state laws. This rule is not without well-considered cases in its support, and, as we think it more in consonance with the principles of good government than is the rule followed by the trial judge, we do not feel that it ought to be overruled or modified. We hold, therefore, that the ordinance was not superseded by the general statute quoted.

It is further contended that the judgment must be sustained on the ground that the game the defendant played at is not one prohibited by the ordinance. It is true the game known as "Twenty-six" is not enumerated in the ordinance, but the ordinance is general in its terms, and prohibits a person from playing at any game of chance played with dice for money, or representatives of money, and is broad enough to include the game played at by the respondent.

The judgment appealed from is reversed, and the cause remanded, with instructions to reinstate the case and overrule the demurrer.

HADLEY, C. J., and RUDKIN, CROW, ROOT, DUNBAR, and MOUNT, JJ., concur.

(47 Wash. 235)

STATE ex rel. ATKINSON, Atty. Gen., v. CO-OPERATIVE HOME BUILDERS.

(Supreme Court of Washington. Oct. 7, 1907.)

1. APPEAL—REVIEW—QUESTIONS CONSIDERED—MATTERS NOT AFFECTING RESULT.

The denial of a motion to strike certain interrogatories and the answers thereto will not be considered on appeal where the granting of the motion could not have affected the result.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4033.]

2. BUILDING AND LOAN ASSOCIATIONS—STATUTES—LIABILITY.

A foreign corporation issuing contracts which provide for small monthly payments by contract holders, which produce the home maturity fund from which loans are made to these contributors for the purpose of building homes, making improvements and discharging incumbrances on real estate, is a building, loan, and saving association, within the meaning of Laws 1890, p. 62, c. 4, § 22, which declares that the name "building and loan association" shall include all corporations doing a saving and loan or investment business on the building society plan, whether neutral or otherwise, and whether issuing certificates of stock which mature at a time fixed in advance or not, though the persons with whom it contracts and to whom loans are made are not members of the corporation; the statute imposing no penalty for noncompliance therewith, and Laws 1903, p. 219, c. 116, § 5, permitting building and loan associations to loan to nonmembers.

3. SAME.

A foreign corporation which is a building, loan, and saving association, within the meaning of Laws 1890, p. 56, c. 4, requiring such associations to perform certain acts, must comply with the provisions of the act or cease operations in the state.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by the state of Washington, on the relation of John D. Atkinson, Atty. Gen., against the Co-Operative Home Builders, a corporation, to enjoin the defendant from transacting a saving, loan, and investment business on the building society plan within the state. From a judgment according to the prayer of the complaint, defendant appeals. Affirmed.

Harold Preston and F. R. Burch, for appellants. John D. Atkinson, J. B. Alexander, and F. C. Kapp, for respondent.

RUDKIN, J. This action was instituted by the state, on the relation of the Attorney General, to enjoin the defendant from transacting a saving, loan, and investment business on the building society plan within the state, and for other purposes. Judgment was given below according to the prayer of the complaint, and the defendant has appealed therefrom.

A motion was interposed to strike certain interrogatories propounded to the appellant, and the ruling of the court denying this motion is the first error assigned. The appellant contends that the action was instituted to enforce a penalty or forfeiture, and that in such cases a party will not be compelled to make discovery. The principal question in the case was the nature of the business transacted by the appellant in this state, and, inasmuch as that sufficiently appeared from other competent evidence, the striking of the interrogatories and the answers thereto would not change the result. We therefore deem it unnecessary to discuss the nature of the proceedings or the ruling of the court on the motion to strike. It is admitted that the appellant is a foreign corporation organized and existing under the general laws of the state of California, and that it has not complied with the provisions of the act of March 28, 1890, entitled, "An act relating to building, loan and saving associations doing a general business." Laws 1890, p. 56, c. 4. If the appellant is a corporation, society, organization, or association, doing a saving, loan, or investment business on the building society plan, whether neutral or otherwise, and whether issuing certificates of stock which mature at a fixed time or not, as defined by section 22 of the building and loan association act, the judgment should be affirmed, but otherwise it must be reversed. The generally accepted definition of a building and loan association is the following: "Sec. 2. Definition of Building Association. The building association as now existing is a private corporation, designed for the accumulation by the members of their money by periodical payments into its treasury, to be invested from time to time in loans to the members upon real estate for home purposes, the borrowing members paying interest and a premium as a preference in securing loans over other members, and continuing their fixed

periodical installments in addition, all of which payments, together with the non-borrower's payments, including fines for failure to pay such fixed installments, forfeitures for such continued failure of such payments, fees for transferring stock, membership fees required upon the entrance of the member into the society, and such other revenues, go into the common fund until such time as that the installment, payments, and profits aggregate the face value of all the shares in the association, when the assets, after payment of expenses and losses are prorated among all members, which in legal effect, cancels the borrower's debt, and gives the nonborrower the amount of his stock." Thompson on Building Associations, p. 2. The nature of the business transacted by the appellant in this state appears from the following provisions of the contract entered into with its patrons or subscribers: "The California, Oregon & Washington Home Builders' Association, a corporation of the state of California, party of the first part, and ———, party of second part, agree, the one with the other, and with all others executing similar mutual co-operative contracts, as follows: The object of this agreement is the acquisition of a home or farm or the discharge of a mortgage by the holder of this contract, he making small monthly payments and co-operating with others, executing similar contracts and to the same purpose. In consideration of the mutual benefits to be derived from the faithful performance of the mutual covenants herein mentioned, by the parties hereto, and the monthly installments to be paid by one to the other, it is agreed by them as follows: (1) The party of the first part shall number, date, and register each contract in this series in numerical order as applications for same are received at its home office, and all benefits accruing under this contract shall be in accordance with said numerical order of registration, provided, however, the party of the first part reserves the right to consolidate one or more series with this one by interpolating half numbers or maturing the same numbers, or set of numbers, in each series, alternately, thereby augmenting the home maturity fund as well as the numbers. (2) The party of the second part shall at the signing of his contract have paid thereon as a registration fee, to the party of the first part, the sum of five dollars (\$5.00), and shall also pay thereon a further sum of two dollars and fifty cents (\$2.50) each month, on or before the 20th day thereof, two dollars (\$2.00) of which sum shall be placed to the credit of the second party, in what shall be hereafter known as the 'Home Maturity Fund,' and said sum of two dollars (\$2.00) shall be applied on the installment purchases of homes or to the discharge of mortgages according to the co-operative plan aforesaid; and fifty cents (\$0.50) shall be placed to what is herein termed the 'Expense Fund,' and shall go to the party of the first part for the

expenses of said association. (3) This contract, if it is the lowest number not then matured, shall be deemed to have matured when, from the continued monthly payments into the home maturity fund on this and like contracts in this series, there shall on the first day of any calendar month have accumulated in the home maturity fund of said association the sum of seventy-five dollars (\$75.00), the association having discharged all obligations then due on outstanding matured contracts. As soon as this contract shall have matured, then the holder thereof shall be entitled to an installment sum of seventy-five dollars (\$75.00) per month to be applied toward the payment of a home or the discharge of a mortgage for such contract owner, until the sum of one thousand dollars (\$1,000.00) shall in this manner be paid, which process shall continue in like manner with each maturing contract. When the sum of one thousand dollars (\$1,000.00) shall have been paid for the benefit of the party of the second part, then this contract on the part of the party of the first part shall be performed. When this contract matures as aforesaid, and until the party of the second part shall select and arrange for the purchase of real estate, or to build a house or to discharge a mortgage on a lot, owned by him, the said sum of seventy-five dollars (\$75.00) per month shall be kept and accumulated by the party of the first part, and paid out only on a home or mortgage for the said party of the second part. (4) Upon the maturity of this contract, and annually thereafter, the party of the second part shall pay to the party of the first part, the sum of six dollars (\$6.00) over and above all other payments herein provided for, which shall go into what shall be hereafter known as the 'Equalization Fund.' (5) The said party of the second part shall obtain a complete abstract of title to the property to be purchased, or upon which a building is to be erected, or a mortgage is to be discharged, to be examined by the party of the first part, at the expense of the party of the second part, and if the property, title, and contract of purchase be approved by the party of the first part and the same be ordered purchased by the party of the second part, or the mortgage discharged, the contract of purchase or conveyance shall be made by the party of the first part with the owner of the property, and the party of the first part shall pay on said contract or purchase or conveyance or mortgage for the benefit of said party of the second part the sum of seventy-five dollars (\$75.00) per month, as aforesaid, and the party of the second part shall execute a deed of trust or mortgage or a contract giving the party of the first part, or someone they may designate, a lien on said land in such way and kind as the attorney of the party of the first part may determine to be necessary; and, upon maturity of this contract, the party of the second part shall pay to the party of the first part on or before the 20th day of each month,

an additional sum of two dollars and fifty cents (\$2.50) a month over and above the two dollars and fifty cents (\$2.50) heretofore provided for, or the sum of five dollars (\$5.00), fifty cents (\$0.50) of which sum shall be paid to said party of the first part for the expense of conducting its business, and the sum of four dollars and fifty cents (\$4.50) shall be placed to the credit of the party of the second part in the home maturity fund aforesaid, and shall go to pay off obligations of the party of the first part, for homes purchased or mortgages discharged, by the provisions of this and similar contracts. (6) When the monthly payments of four dollars and fifty cents (\$4.50) into the home maturity fund shall aggregate the sum of one thousand dollars (\$1,000.00), less the amount the second party has to his credit in the home maturity fund before maturity, and all other conditions of this contract shall have been complied with, then the first party shall convey to said second party, or contract holder, all its interest in said property. (7) This contract may be assigned, upon payment of two dollars (\$2.00) to said first party, the consent of said first party having first been obtained in writing."

From the foregoing provisions, it is quite apparent that the general purpose of the appellant and the ordinary building and loan association is identical, viz., the creation of a fund by small periodic payments from which loans may be made to those who are otherwise unable to obtain them because of their inability to give security. Building associations exist in one form or another in nearly all the states. In some they are organized under the general incorporation laws, in others there are a few general statutory provisions in reference to them, while in still others the statutes contain elaborate provisions relating to their formation and the conduct of their business. For these reasons, while the general plan and purpose of all such associations is the same, their methods of transacting business are by no means uniform. Thus some loan to members only, others to nonmembers, some loan for a specific purpose, others for any purpose, some loan to the highest bidder at auction, others at a fixed premium, in some the stock matures at a fixed time in advance, others contra, some are on the terminating plan, while others are permanent, and diverse other features we need not mention. If the general plan and purpose of the appellant is similar to that of the ordinary building and loan association, why does it not fall within the definition of our statute? One reason assigned is that the persons with whom these contracts are entered into and to whom loans are made are not members of the corporation or association. In support of this view *Attorney General v. Pitcher*, 183 Mass. 513, 67 N. E. 606, is cited. It was there held that a statute forbidding any person, association, or corporation, except certain licensed ones, to transact the business of accumulating the

savings of its members and loaning to them such accumulations, in the manner of a co-operative bank, unless incorporated within the commonwealth for that purpose, was not violated by a corporation whose *modus operandi* was much the same as that of the appellant. Two reasons were assigned for the decision: First, because the statute was penal and should be strictly construed; and, second, because "the purchasers of these contracts are not members of the association, and their savings are not savings of members, but of holders of individual contracts from the association. They have no voice in the management of the affairs of the association. No money of members of the association is lent to any of its members. The savings of these contractors are not accumulated and lent to them in the manner of a co-operative bank, but the course of dealing is very different from that of any bank." The court added significantly, however: "It may well be said that all the reasons for the enactment of this statute apply with great force to an association transacting business like that of these defendants." We do not consider this case controlling for two reasons: First. The Massachusetts statute imposed a penalty of not more than \$1,000 for its violation, and the rule of strict construction obtained, while our statute imposes no penalty on the corporation itself, and this court has uniformly given a liberal construction, in favor of the public, to statutes relating to the formation of domestic corporations, or to the right of foreign corporations to transact business within the state. *State ex rel. Osborne, Tremper & Co. v. Nichols*, 38 Wash. 309, 80 Pac. 462; *State ex rel. Gorman v. Nichols*, 40 Wash. 437, 82 Pac. 741; *State ex rel. Amalgamated Republic Mines Company v. Nichols* (decided September 6, 1907), 91 Pac. 632. Second. Our statute permits building and loan associations to loan to nonmembers. Laws 1903, p. 219, § 5. Another line of cases arising under the usury laws is relied on. Our statute provides that "no premium taken for loans, nor amounts charged for expenses, as allowed in this act nor any payments on account of installments of stock made by a borrowing member shall be considered as a repayment on his loan, or shall render such association amenable to the laws relating to usury." Laws 1903, p. 219, § 4. And other states have similar enactments. It has frequently been held under such statutes that associations transacting a business similar to that of appellant are not exempt from usury laws. The reason for the rule is thus stated in *Skinner v. Southern Home Builders' & Loan Association*, 46 Fla. 547, 35 South. 67: "By the use of the term 'building society plan,' the Legislature must have had reference to some definite plan, and not to whatever scheme under a like name might be devised in the various states or foreign countries, and hence it is not improper to assume the legislators, in the use

of such term, must have had in mind the plan with which they were familiar; that is, the auction plan." In a similar case the Supreme Court of Illinois said: "It has been well said by the Supreme Court of Maryland that 'every device and shift which the wit of man could suggest have been invoked to exempt contracts for illegal interest from the operation of the law, but courts should look under the mask to discover the true nature of the transaction.'" *Rhodes v. Missouri Savings & Loan Co.*, 173 Ill. 621, 50 N. E. 998, 42 L. R. A. 93. We think a different rule should obtain in this class of cases. Our Legislature no doubt had in mind the schemes and devices that might be resorted to by associations from other states and from foreign countries to evade our laws, and doubtless intended that the general and comprehensive definition given should apply to and exclude all such associations from our borders. It is the duty of the court to look at the substance rather than the mere form, and we are convinced that public policy and our statute fairly construed demand that the appellant should comply with our laws or cease operations here.

There is no error in the record, and the judgment is affirmed.

HADLEY, C. J., and FULLERTON, CROW, DUNBAR, and ROOT, JJ., concur.

CURTIN v. CLEAR LAKE LUMBER CO.
(Supreme Court of Washington. Oct. 8, 1907.)

1. TRIAL—WAIVER OF ERROR—RULING AS TO SUFFICIENCY OF EVIDENCE—NONSUIT.

Error, if any, in denying a nonsuit is waived where defendant thereafter introduces evidence in his own behalf.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 982.]

2. SAME—QUESTIONS FOR JURY—CREDIBILITY OF WITNESSES.

The weight to be attached to the testimony of witnesses is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 334.]

3. MASTER AND SERVANT—INJURIES TO SERVANT—ACTS CONSTITUTING NEGLIGENCE.

Where the superintendent in charge of cutting trees having directed plaintiff and another employé to cut certain trees, himself cut a tree a short distance from them, and failed to warn them of its fall, and plaintiff was struck by a flying limb broken by the falling tree from another, such failure to give warning was negligence proximately resulting in plaintiff's injury, and rendered the employer liable.

4. APPEAL—REVIEW—HARMLESS ERROR—ERRONEOUS INSTRUCTION.

Where, in an action for personal injuries, it did not appear that absent witnesses were under the control of one party more than the other, or that their whereabouts were any better known to one than to the other, and, for aught that appeared, it was as much in the power of plaintiff as of defendant to produce them, an instruction that the jury were not to draw any inferences from the absence of witnesses, unless they should find that their whereabouts were known to the parties, and their presence

could have been obtained, did not constitute prejudicial error as to defendant.

Rudkin and Crow, JJ., dissenting in part.

Appeal from Superior Court, Skagit County; George A. Joiner, Judge.

Action by Frank B. Curtin against the Clear Lake Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Kerr & McCord, for appellant. Smith & Cole and Robert H. Lindsay, for respondent.

HADLEY, C. J. This is an action to recover damages for personal injuries. The plaintiff was at the time of the accident in the employ of the defendant, and the latter, in the prosecution of its business, was then clearing a right of way, and had its employés engaged at the place of the accident in cutting trees. The plaintiff was severely injured through being struck by a flying limb from a falling tree. He charges that the defendant was negligent in not giving him warning of the falling of the tree, so that he might have sought a place of safety, and thus have protected himself. Negligence was denied by the defendant, and it alleged contributory negligence on the part of the plaintiff. The answer also alleged that the dangers were open and apparent, and that plaintiff assumed the risk of the danger. It was further averred that the injuries were due to the negligence of a fellow servant. The cause was tried before a jury, and a verdict was returned in the plaintiff's favor for the sum of \$1,500. Judgment was entered upon the verdict, a new trial having been denied, and the defendant has appealed.

It is first assigned that the court erred in denying appellant's motion for nonsuit; but, as we have repeatedly held, any error in the denial of this motion was waived by appellant when it proceeded to introduce testimony upon its own behalf, and thereby elected not to stand upon its said motion. Thereafter the sufficiency of all the evidence to sustain a verdict for respondent must be considered, and not that offered by the respondent alone.

The next assigned error, however, raises the sufficiency of all the evidence; it being contended that the court should have granted a new trial for lack of evidence sufficient to sustain the verdict. The evidence showed that appellant's representative, who was especially delegated by it to superintend its work at that time and place, directed the respondent and another to proceed to cut down certain of the larger trees with a saw. While they were thus engaged, this foreman went to a place a short distance from them, and began cutting a smaller tree with an ax. While respondent and his companion were still sawing upon their tree, the foreman's tree fell, and, in its descent, it struck another tree, thereby causing a limb to be thrown, which injured the respondent. The evidence is all in practical accord as to the foregoing, and

it is therefore evident that, if the foreman was negligent in such a manner as to proximately cause the injury, his neglect became that of his principal, the appellant. It was also practically conceded by all the witnesses that it is a general custom among woodsmen to shout "Falling tree!" or other equivalent words, when a tree is to fall, as a warning to others in the vicinity to look out for their safety, and that woodsmen in general expect to be protected by such warning. The respondent testified that no warning whatever was given, and that he had no notice of the falling of the tree until it struck the other tree, when it was too late for him to reach a place of safety. Two witnesses, one the superintendent of appellant and the other an employé, testified that respondent stated in their presence just after the surgeon had dressed his wounds that the foreman did shout a warning. The respondent flatly denied that he made any such statement. There was thus a sharp conflict in the testimony upon this material point, and neither the trial court nor this court should undertake to say under the evidence in the record what testimony the jury should have credited. The weight to be attached to the testimony of the several witnesses was for the jury to determine. Under the instructions of the court, the jury by the verdict must have found that respondent's testimony was true, and that no warning was given. Such being an established fact in the case, it follows that appellant's negligence is also established, and that the verdict is thereby sustained.

A number of errors are assigned upon the court's refusal to give instructions in the form requested by appellant. We believe the instructions which the court gave covered fully and fairly every proper legal phase of the case, and that no prejudicial error was committed in the refusal to instruct in the language requested. It is urged that the court erred in giving the following instruction: "I instruct you, gentlemen of the jury, that you are not to draw any inferences from the absence of witnesses in this case, unless you should further find that the whereabouts of such witnesses were known to the parties in the case, and that their presence could have been obtained or their evidence could have been obtained." The appellant requested an instruction that no inferences could be drawn against appellant itself by reason of the absence of witnesses, but the instruction was modified by the court so as to apply to either party, and, in addition thereto, such words were used as may have left the jury to imply that, if they found as a fact that the whereabouts of witnesses were known to the parties and that their presence or evidence could have been obtained, then they might draw inferences from the absence of such witnesses. The statement of the court was made to apply as fully to one party as to the other. Nothing in the evidence showed that the absent witnesses were under the

control of one party more than the other, or that their whereabouts were any better known to one than to the other. For aught that appeared, it was as much within the power of respondent as of appellant to produce the witnesses or their testimony. We think, under any view of the law in this matter, that the instruction did not become prejudicial in its effect, as there was no evidence upon which the jury could predicate a finding that one party was more neglectful in this regard than the other, and the jury could not, therefore, draw inferences more strongly against one than the other. No authorities are cited by either party upon this point; but we are satisfied that, if there was any technical error in the instruction when considered as a whole, it was harmless for the reasons above stated.

The judgment is affirmed.

MOUNT and FULLERTON, JJ., concur.

ROOT and DUNBAR, JJ. We think the instruction complained of erroneous, but not prejudicial under the evidence and facts of this case. We concur in the result.

RUDKIN, J. I dissent. As stated in the majority opinion, "nothing in the evidence showed that the absent witnesses were under the control of one party more than the other, or that their whereabouts were any better known to one than to the other," and in such case there is no inference or presumption one way or the other. In *Scovill v. Baldwin*, 27 Conn. 316, the court said: "The circumstance that a particular person, who is equally within the control of both parties, is not called as a witness, is too often made the subject of comment before the jury. Such a fact lays no ground for any presumption against either party. If the witness could aid either party, such party would probably produce him. As he was not produced, the jury have no right to presume anything in respect to his knowledge of any facts in the case, because they are to try the case upon the facts shown in evidence, and upon them alone, without attempting to guess at what might be shown if particular persons were produced by the parties." To the same effect, see *Haynes v. McRae*, 101 Ala. 318, 13 South. 270; *Crawford v. State*, 112 Ala. 1, 21 South. 214; *Nelms v. Steiner*, 113 Ala. 562, 22 South. 435; *Farmers' Bank v. Worthington*, 145 Mo. 91, 46 S. W. 745; *Diel v. Mo. Pac. R. Co.*, 37 Mo. App. 455; *Wood v. Agostines*, 72 Vt. 51, 47 Atl. 108; *Daggett v. Champlain Mfg. Co.*, 72 Vt. 332, 47 Atl. 1081; 22 Amer. & Eng. Ency. of Law (2d Ed.) 1262. It surely cannot be said as a matter of law that a litigant must produce every witness who may know anything about his cause, or incur the risk of having the court charge the jury that they may indulge in presumption against him for his failure in that regard. If the instruction complained of is erroneous, it calls for a reversal, unless this court can say beyond

peradventure that no prejudice resulted therefrom; and the mere fact that the instruction was made applicable to both parties is not decisive on that question. The court below evidently concluded that one or other of the parties failed to produce witnesses, else the instruction would not have been given; and, if the court so concluded, why not the jury? Can it be said to a moral certainty that the jury did not conclude that the obligation to produce these witnesses rested upon the appellant, in whose employ they were at the time of the accident complained of? I am far from satisfied that such was not the case, and I therefore dissent.

CROW, J., concurs in the foregoing dissent.

(47 Wash. 266)

STEELE et al. v. LAWYER et al.

(Supreme Court of Washington. Oct. 8, 1907.)

1. BROKERS — COMMISSIONS — INTEREST OF BROKER IN PURCHASE—EFFECT.

One procuring a corporation in which he is a stockholder to purchase real estate of another is not entitled to commission from the latter because of his interest in the purchase.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 49.]

2. SAME—EMPLOYMENT.

A company sought employment as agent for a commission to procure a purchaser. It was not recognized as such, and was informed that a part of the premises had been sold, and that an option contract had been given for the balance. Subsequently it wrote the owner that it had a party in view whom it might interest in the property, "provided we could get an option." The owner refused to give an option, fixed the price per acre and the terms, and added: "If you can do anything for me on these terms, I shall be glad to hear from you." The company wrote: "Our people will pay \$25,000 net." The owner agreed to sell, and the company in transmitting the opinion of its attorney on the abstract referred to unpaid taxes, the cost of the abstract, and a claim on account of the deficiency in acreage, without making any reference to a commission. *Held*, that the company was not the owner's agent to procure a purchaser, though it accepted a commission to which it was not entitled.

3. PRINCIPAL AND AGENT—NATURE OF RELATION.

Agency is a relation founded on contract, express or implied, or created by law, by virtue of which one is authorized to represent and act for another in business dealings with third persons.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 1.]

4. CANCELLATION OF INSTRUMENTS—GROUNDS—SUFFICIENCY.

An owner conveyed to a purchaser, a corporation, procured by a third person. The owner, though not knowing that the third person was interested in the purchase as a stockholder, had his suspicions aroused, but he made no inquiry. The owner and the third person dealt with each other at arms' length, and the latter represented the purchaser, if anybody. *Held*, that the owner was not entitled to a cancellation of the conveyance on the ground that the third person was his agent in procuring a purchaser, and was interested in the purchase.

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by Isabelle R. Steele and another against Jay Lawyer and another, partners as the Western Trust & Investment Company, and others. From a judgment for certain defendants, plaintiffs appeal. Affirmed.

Danson & Williams and Fred H. Moore, for appellants. Graves, Kizer & Graves, for respondents.

RUDKIN, J. Some years ago the plaintiffs, who are residents of the state of Maryland, acquired by mortgage foreclosure a large tract of wild unplatted land in the northern part of the city of Spokane. The land thus acquired was rough and gravelly, covered with a growth of scrub pine, and fit only for townsite purposes. In the month of February, 1905, this land was sold to the defendant Lawyer Land Company. At the time of the sale the streets in the vicinity of the land were ungraded, and the land itself was without water, light, or street car service. Immediately after the sale the land was platted into lots and blocks, the streets graded, a water supply secured, and light and street car facilities obtained at a considerable cost to the purchaser. The lots were extensively advertised, and at the time of the commencement of this action, some 18 months after the sale, the greater part of the property had been sold, and the purchaser was in a fair way to make a good profit on its investment. The present action was brought to rescind the sale above referred to, to recover the property unsold, and for an accounting of all sums received on account of sales made. This relief was sought upon the sole ground that the defendants Lawyer and Dalke, partners as the Western Trust & Investment Company, were the agents of the plaintiffs in negotiating the sale to the defendant Lawyer Land Company, and were also interested in the purchase as stockholders in the purchasing company, which latter fact was unknown to the plaintiffs at the time of the sale, or until a few days prior to the commencement of the action. The court below denied the relief prayed for, and the plaintiffs have appealed.

If the relation of principal and agent did not exist between the appellants and the respondents Western Trust & Investment Company at or prior to the time of the sale which the appellants are now attempting to rescind, the judgment must of necessity be affirmed; and we will first address ourselves to a consideration of that question. If such relationship existed, it was created by or resulted from the written correspondence between the parties, as they never met or had other or further dealings. The negotiations leading up to the sale were conducted by the appellant Margaret A. Steele on the part of the appellants, and largely by the respondent Lawyer on the part of the Western Trust & Investment Company; but, for convenience, we will hereafter refer to the parties to the

correspondence as the appellants and the Western Trust & Investment Company.

The first communication between the parties was the following letter from the Western Trust & Investment Company under date of September 30, 1903: "We note that you are paying taxes on N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 6 T 25 R 43. * * * We have a party that desires to purchase 5 or 10 acres in that vicinity, and hence we write you to ascertain your best cash price. * * * P. S. Make price including a 5 per cent. com." The answer of appellants, under date of October 6th, was as follows: "In reply to your letter of inquiry of the 30th ultimo, I will say that it is not our desire to sell off the best part of our land * * * in such small parcels, but we are offering the whole of the east forty in one lot. Messrs. H. Bolster & Co. of your city have the matter in charge at present, and will be glad to answer inquiries." Under date of May 12, 1904, the appellants wrote: "Last October I received a letter of inquiry from your firm in regard to some land my sister and I own north of Spokane. At that time a client of yours wished to buy 5 or 10 acres. * * * I write to say that the land is now for sale, but not in quite such small portions as you asked for last year. * * * If at present you have a client wanting such land, I shall be glad to hear from you." This letter was answered under date of September 26th as follows: "On May 12th, you wrote us regarding the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of Sec. 6. * * * We have been doing some work on this proposition, and now have a party interested in the proposition, and think we can make a sale. Before going more fully into the matter with our client, we would like to have a letter from you giving us the exclusive sale for, say sixty days, and stating that a commission of 5 per cent. will be allowed us for making the sale. If you will give this matter your prompt attention, we have every reason to believe that we can make the deal for you in a very short time." On October 1st the appellant replied as follows: "Your letter of the 26th ultimo is at hand, and, in reply, say that I have already sold the east 40 acres of the tract to which you refer, * * * and have given an option on the remainder. If the present option should fail of results, and if another party who seems anxious to buy in case the remainder of the land is again on the market should fail to purchase, I will let you know." On November 23d the Western Trust & Investment Company again wrote: "You wrote us on Oct. 1st that you would soon know whether or not you would be in a position to place vacant property north of the city in Sec. 6-25-43. We have a party whom we think we could interest providing we could get an option." The above was answered by the appellants under date of November 30th, as follows: "In reply to your letter of the 23d inst., I will say that 110 acres of our land in section 6 remain on the mar-

ket. The price is \$245 per acre. * * * I am not in a position to give an option to any one now, and do not expect to give one at all unless it be for a very short time to close a deal that has been previously arranged. If you can do anything for me on these terms, I shall be glad to hear from you. * * * The price I now quoted (\$245 per acre) is for all cash or half cash, and the rest first mortgage on the land." On December 5th the Western Trust & Investment Company again wrote: "In reply to yours of the third [should be thirtieth] ult., will say that we have parties who will buy your 110 acres in Sec. 6, provided you will make some small concessions from terms as stated in your letter. You offered us the entire 150 acres in May last at \$200 per acre since then you have sold the best 40 acres, and now ask \$245 for the remainder. This is more of an advance than conditions will warrant, but to cut it short our people will pay you \$25,000 net for the property, but will require a little time to get the money together. * * * We can assure you that this is a very liberal offer for the property, and feel sure that you cannot do better. * * * To which the appellants replied under date of December 12th: " * * * The figures I have given you are the best we can do on the land. In regard to the sixty days for payment, we could not give so much unless a considerable sum was paid down as an evidence of good faith. Otherwise your proposition would amount to option of sixty days, which we are not prepared to give. I shall be glad to hear further from you if your clients can agree to our terms." On December 28th the Western Trust & Investment Company wired: "Will you give us to Jan'y twentieth to close land deal at your price. Wire answer." On December 30th the appellants answered by wire: "I will give until Jan'y twentieth to close deal." The following day the appellants wrote: "If you have prospect of completing your deal by the time set, January 20th, the deed should be placed in escrow without delay. If you will send me a blank form for deed immediately on receipt of this and will tell in whose name to draw it, * * * I presume that you intend to pay the whole in cash." This letter was answered by the Western Trust & Investment Company under date of January 6, 1905, as follows: "In reply to yours of Dec. 31st., will say that we will have the money in the bank to close deal on or before the 20th, but cannot yet advise you how to make the deed for the reason that our clients have not yet decided whether they will hold title to the property as a corporation or have it deeded to some one person. * * * There is no doubt about our people taking the property. * * * On January the 13th the appellants wrote: "Yours of the 6th inst. at hand. I have just written Messrs. Crow & Williams, giving them directions about drawing of the mortgage in case you make half payment in

that way. * * * Your clients will soon have to make up their minds on the points you mentioned if they want the deed in bank by the 20th instant." On January the 20th the Western Trust & Investment Company applied for an extension of time in the following letter: "We regret very much to have to inform you that we have not been able to close deal on your land. We have put in a lot of hard work on this proposition, and have \$18,000 on hand to put into the deal, but other parties interested have been slow in reaching a decision and in getting their money. However, we feel certain that, if we have a little more time, we can close the deal for cash. Our Mr. Lawyer has just had a full discussion of the matter with Messrs. Crow & Williams, and they are writing to you to-day. We trust that you will understand our position, and give us an extension of two or three weeks. * * * Upon receipt of this letter, please wire at our expense the best you are willing to do for us, and, unless there is some good reason for your not doing so, we trust you will grant us the full three weeks. We will, in turn, guarantee to do our best to close the sale in that time, and hope to do it before." This was accompanied by a letter from the appellants' attorneys recommending the extension, if it did not interfere with other plans. On January 26th the appellants granted the extension by the following telegram: "Extend option three weeks from January twentieth. Afterward higher price." On February 6th a deed was forwarded to the appellants for execution by their attorneys, with the name of the grantee in blank; the attorneys informing them in the letter of transmittal that the grantee was a corporation to be formed for the purpose of handling the property. A postscript was later added to the letter, saying that the name of the grantee corporation was Lawyer Land Company, and that the name had been inserted in the deed. On February 7th the Western Trust & Investment Company wired: "Have closed deal. Williams sending deed to you to-day." And the next day wrote as follows: "We are pleased to inform you that we have at last concluded arrangements for the purchase of your property, and deed was forwarded to you yesterday by Mr. Williams of Crow & Williams. We hand you herewith the opinion of our attorney on the title, which shows the taxes for 1904 unpaid; also some old city taxes, both of which you can arrange to have paid out of the purchase price. Also in your instructions to the bank please mention that the cost of the abstract, \$18.00, is to be allowed. * * * The remainder of the letter relates to a deficiency in the acreage, and is not material. This letter and telegram the appellants answered under date of February 14th, as follows: "Your letter of the 8th inst. inclosing the opinion of your attorneys reached me this morning. Last night I received a letter from Mr. Williams inclosing the deed

for our signatures. You doubtless remember that, when I offered you the land at \$245 per acre, the year was still 1904, and so the taxes were not due. They will not become delinquent, as you are aware, until the 31st of May next. * * * In offering the land to you, I figured 110 acres at \$245, or \$26,950 as you have stated in the deed, allowing you 5 per cent. commission, and no deductions except the amount of the abstract. If you are willing to give this amount, the deed will be forwarded to the Traders' National Bank. If you do not wish to pay so much, there is no compulsion upon you to take it. I am willing to risk holding it for a higher price. * * * The instructions to the appellants' bankers relating to the delivery of the deed were as follows: " * * * The inclosed deed is to be delivered to Mr. Jay Lawyer of the Western Trust & Investment Co., Jamison Bldg., Spokane, on the following conditions: He is to pay \$26,950 (as mentioned in deed) less 5 per cent. commission and less also \$18 for abstract. That is he is to pay a net sum of \$25,584.50. Besides, he is to show you tax receipts for 1904 taxes. * * * Mr. Lawyer understood that this is the condition, we having refused to reduce our purchase price by these amounts. * * * Other brief communications between the parties have no bearing on the question under consideration. Did the foregoing correspondence create an agency between the appellants and the Western Trust & Investment Company? It may be that the application to extend the time for consummating the sale was made in bad faith, to permit the lien for 1904 taxes to attach. The Western Trust & Investment Company may have accepted and retained a commission they were not entitled to either as a matter of contract or as a matter of law, and the subsequent attempt to recover back a part of the purchase price on account of a deficiency on the acreage may have been unwarranted; but the question here is one of agency, not of honesty or fair dealing. In the first letters that passed between the parties the Western Trust & Investment Company undoubtedly sought employment as agents for the appellants, and expressly referred to their commission of 5 per cent., but they never were appointed or recognized as agents, and on October 1, 1904, were informed that 40 acres of the land had already been sold, and that an option had been given for the remainder. The negotiations which culminated in the sale to the Lawyer Land Company commenced with the letter of November 23, 1904, wherein the Western Trust & Investment Company wrote that they had a party in view whom they thought they could interest in the property, "providing we could get an option." Whether the option was to run to the Western Trust & Investment Company or to the intending purchaser is a matter open to conjecture. The appellants replied to this, fixing their price at \$245 per acre, refusing the option, and add-

ing: "If you can do anything for me on these terms, I shall be glad to hear from you." This expression, and the subsequent acceptance of a commission by the Western Trust & Investment Company, are the only facts or circumstances in the record tending in the remotest way to substantiate the claim of agency. The matter of the commission we will refer to later. In their letter of December 5th the Western Trust & Investment Company said: "To cut it short, our people will pay you \$25,000 net for the property." This offer would seem to preclude a claim for commission or a claim of agency, and the reply of the appellants that \$245 per acre already fixed was the best they could do should also be construed as a net offer. In fact, the entire correspondence shows that the appellants and the Western Trust & Investment Company were dealing at arms' length, and that the latter represented the purchase, if anybody. Thus, in their letter of February 14, 1905, the appellants say to the respondent Lawyer: "If you do not wish to pay so much, there is no compulsion upon you to take it. We are willing to risk holding it for a higher price." In their letter to their bankers they say: "The inclosed deed is to be delivered to Mr. Jay Lawyer of the Western Trust & Investment Co., Jamison Blk., Spokane, on the following conditions: He is to pay \$26,950 (as mentioned in deed) less 5 per cent. commission and less also \$18.00 for abstract. That he is to pay a net sum of \$25,584.50. Besides, he is to show you tax receipt for 1904 taxes. Mr. Lawyer understood that this is the condition, we having refused to reduce our purchase price by these amounts."

Now, as to the acceptance of the commission on the sale by the Western Trust & Investment Company. In the first place, they were clearly not entitled to a commission as a matter of law, because of their interest in the purchase. In the second place, in our opinion they were not entitled to a commission as a matter of contract; and, while their subsequent conduct in accepting a commission is in a measure inconsistent with their statement that they expected none, yet we think that statement is fully borne out by the testimony. In their letter transmitting the opinion of their attorney on the abstract, they referred to the taxes of 1904, the old city taxes, the cost of the abstract, and the claim on account of a deficiency in acreage, but made no reference to a commission, and no provision whatever was made for its payment. From all the circumstances, therefore, we are constrained to hold that the Western Trust & Investment Company were not entitled to a commission as a matter of law or contract and expected none. Its subsequent acceptance is a circumstance against them; but an agency existed or did not exist pending the negotiations for the sale, and could neither be created nor abrogated by what subsequently transpired.

"Agency is a legal relation, founded upon the express or implied contract of the parties, or created by law, by virtue of which one party—the agent—is employed and authorized to represent and act for the other—the principal—in business dealings with third persons. The distinguishing features of the agent are his representative character and his derivative authority." *Mechem on Agency*, § 1. We fail to see a single element of such relationship in the record before us. The Western Trust & Investment Company may not have informed the appellants in so many words that they were interested in the purchase, and the appellants may not have known of such interest to a moral certainty; but their suspicions were aroused, and they made no inquiry, for the all-sufficient reason that at that time they did not care. The appellants concede that loose expressions in the correspondence militate against their present claims, and we can find nothing but loose expressions in their favor. Ordinarily a court of equity will not seize upon mere loose expressions for the sole purpose of enabling parties to reap where they have not sown.

There is no error in the record, and the judgment is affirmed.

HADLEY, C. J., and FULLERTON, DUNBAR, and ROOT, JJ., concur. CROW, J., took no part.

COLUMBIA CANAL CO. v. BENHAM.

(Supreme Court of Washington. Oct. 7, 1907.)

COURTS—STATE COURTS—JURISDICTION—PUBLIC LANDS.

A state court has no jurisdiction to enjoin defendant from proceeding to obtain title to public lands, for which he has filed an entry in the proper land office, and to require him to file a relinquishment of his claims thereto and to appoint a commissioner to file a relinquishment on defendant's failure to do so; the court being powerless to grant relief until the title passes from the government.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1333.]

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by the Columbia Canal Company against W. L. Benham. From a decree for plaintiff, defendant appeals. Reversed and remanded.

Jesse A. Fryc, for appellant. Shank & Smith, for respondent.

RUDKIN, J. This is an appeal by the defendant from the following decree entered against him in the court below: "It is hereby ordered, adjudged, and decreed that the defendant be, and he hereby is, restrained and enjoined from proceeding further in any manner whatever, in person or by agent or attorney, to obtain title to the northwest quarter (N. W. ¼) of section ten (10), in township seven (7) north, range thirty-one

(31) east, in Walla Walla county, Washington, whether under his entry of the said land as desert land, filed in the United States Land Office, at Walla Walla, Washington, on, to wit, August 2, 1906, or otherwise, and that defendant, his agents, or attorneys and each of them be, and they hereby are, forbidden and enjoined from taking any steps in the matter of the said entry or any other proceedings in the land office of the United States in connection with the said land, save and except only as hereinafter directed. And it is further ordered and decreed that the defendant do forthwith file, or cause to be filed, in the United States Land Office at Walla Walla, Washington, a relinquishment of all claims to said land and the whole thereof, and that, in the event of his failure so to do within twenty (20) days from this date, Heber M. Hoyt, Esquire, a member of the bar of this court, who is hereby appointed commissioner for the purpose, shall forthwith, in the name and as the act of said defendant, execute such relinquishment in due and proper form, and cause the same to be filed in said land office, with certified copies of findings, conclusions, and decree. But such relinquishment by the commissioner shall not of itself relieve the defendant from making relinquishment in person as hereinabove ordered."

In view of the conclusion we have reached on the question of the court's authority to enter such a decree, we deem it unnecessary to make a further statement of the case, except to say that the lands described in the decree are public lands of the United States, and the appellant has made entry thereof under the provisions of the desert land act in the proper land office. Notwithstanding the innumerable attempts that have been made through the courts to control the action of the land department in disposing of the public domain, the respondent has been unable to cite a single precedent for such a decree; and, after an exhaustive examination of the authorities, this court has been equally unsuccessful. We are satisfied, however, that the authority to enter the decree has been repeatedly denied by the Supreme Court of the United States in analogous cases. In *Marquez v. Frisbie*, 101 U. S. 473, 25 L. Ed. 800, the court, speaking through Mr. Justice Miller, said: "It plainly appears from this, first, that defendants had not the legal title; second, that it was in the United States; and, third, that the matter was still in fieri, and under the control of the land officers. Nothing in record of the case before us gives evidence that any further steps in that department have been taken in the case. We have repeatedly held that the courts will not interfere with the officers of the government while in the discharge of their duty in disposing of the public lands, either by injunction or mandamus. *Litchfield v. Register and Receiver*, 9 Wall. (U. S.) 575, 19 L. Ed. 681; *Gaines v. Thompson*, 7 Wall. (U.

S.) 347, 19 L. Ed. 62; *Secretary v. McGarran*, 9 Wall. (U. S.) 298, 19 L. Ed. 579. And we think it would be quite as objectionable to permit a state court, while such a question was under the consideration and within the control of the executive departments, to take jurisdiction of the case by reason of their control of the parties concerned, and render decree in advance of the action of the government, which would render its patents a nullity when issued. After the United States has parted with its title, and the individual has become vested with it, the equity subject to which he holds it may be enforced, but not before. *Johnson v. Towsley*, 13 Wall. (U. S.) 72, 20 L. Ed. 485; *Shepley v. Cowan*, 91 U. S. 330, 23 L. Ed. 424. The doctrine of this case has been reaffirmed in many subsequent cases in the same court. *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167; *Carrick v. Lamar*, 116 U. S. 423, 6 Sup. Ct. 424, 29 L. Ed. 677; *Cruikshank v. Bidwell*, 176 U. S. 73, 20 Sup. Ct. 280, 44 L. Ed. 377; *Kirwin v. Murphy*, 189 U. S. 35, 23 Sup. Ct. 599, 47 L. Ed. 698; *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 23 Sup. Ct. 692, 24 Sup. Ct. 860, 47 L. Ed. 1064; *Humbird v. Avery*, 195 U. S. 480, 25 Sup. Ct. 123, 49 L. Ed. 286; *Oregon v. Hitchcock*, 202 U. S. 60, 26 Sup. Ct. 568, 50 L. Ed. 935. To the same effect, see *Casey v. Vassor* (C. C.) 50 Fed. 258; *Forbes v. Driscoll*, 4 Dak. 336, 31 N. W. 633; *Vantongerren v. Heffernan*, 5 Dak. 180, 38 N. W. 52; *Hays v. Parker*, 2 Wash. Ter. 198, 3 Pac. 901. In *McCord v. Hill*, 104 Wis. 457, 80 N. W. 735, the court said: "It is only after the United States has parted with its title and the individual has become vested with it that the equities on which he holds it may be enforced, and not before. * * * Such being the law, a complaint which seeks to have the court adjust equities between rival claimants to government land is fatally defective if it fails to show that the title has become vested in the individual against whom it is sought to enforce supposed equities."

In *Sims v. Morrison*, 92 Minn. 341, 100 N. W. 88, the court said: "The rule applies with greater force to the case at bar, for here the legal title to the land is in the general government, with no certainty that it will ever become vested in defendants, and the rights of both are purely equitable. The government has the paramount and sole authority to dispose of its lands, and, until it parts with and conveys its title, the courts are powerless to aid litigants in controversies affecting or involving individual claims thereto." So far as we have been able to discover, there is no dissent from these views. The right of the respondent to maintain this action must rest upon some equity it has or claims in the land sought to be entered, which is now public land of the United States. If it has such an equity—and upon that question we express no opinion—the courts are powerless to grant relief

until the title passes from the general government. The respondent cites the case of *Rader v. Stubblefield* from this court, reported in 86 Pac. 560, in support of its contention. The difference between enjoining the prosecution of an action inter partes in another court, and enjoining the prosecution of a claim for public land before the special tribunal charged with the administration of the public land laws, is apparent. The judgment appealed from was in excess of the jurisdiction of the court, and is without warrant or authority in law.

Reversed and remanded.

HADLEY, C. J., and FULLERTON, CROW, DUNBAR, and ROOT, JJ., concur.

SPENCER v. KEES, Superintendent State Penitentiary.

(Supreme Court of Washington. Oct. 8, 1907.)

1. PARDON — STATUTES — AUTHORITY OF GOVERNOR.

Const. art. 3, § 9, vests the pardoning power in the Governor under such restrictions as may be prescribed by law. Ballinger's Ann. Codes & St. § 6997, authorizes the granting of a pardon under such conditions and with such restrictions and limitations as the Governor may think proper, and provides that he may issue his warrant to all proper officers to carry into effect such pardon or commutation, which warrant shall be obeyed and executed instead of the sentence, if any, originally given. No other regulations or restrictions have been prescribed by law, nor any other method provided for determining when the conditions of a pardon have been broken. *Held*, that the provision that the Governor may issue his warrant to carry the pardon into effect provides a method for the revocation of the pardon for breach of conditions, and is not limited to affording a method of release of the person pardoned.

2. SAME — CONDITIONS.

Under Const. art. 3, § 9, vesting the pardoning power in the Governor under such restrictions as may be prescribed by law, the Governor has power to grant pardons on any conditions capable of performance which are neither illegal nor immoral.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Pardon, §§ 4, 6¼, 8.]

3. SAME — BREACH OF CONDITIONS — REVOCATION.

Where the Governor issued a conditional pardon to petitioner, the Governor was authorized to enforce the performance of the conditions, and to issue his warrant revoking the pardon, according to its terms, on a breach of conditions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Pardon, § 31.]

4. HABEAS CORPUS — BURDEN OF PROOF.

Where a conditional pardon was revoked by the Governor for alleged breach of the conditions, the court was authorized in a habeas corpus proceeding to place the burden on the state of showing the violation of such conditions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 78.]

5. SAME — APPEAL — MODE OF TRIAL.

A habeas corpus proceeding being triable de novo on appeal, the order will not be reversed because of the improper admission of evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 114.]

6. SAME — PARDON — CONDITIONS — BREACH — EVIDENCE.

Petitioner was pardoned because of his invalid condition, on condition that he be cared for and supported by his relatives so long as he lived, and that he be placed in the care and surveillance of a certain doctor. He remained with his relatives not more than two or three days after release, and they did not provide for or support him. He supported himself, and was married shortly before his rearrest. On revocation of the pardon, it was also shown that he frequented houses of prostitution and saloons, and often became intoxicated. *Held* sufficient to show a breach of the conditions of the pardon.

Rudkin, Dunbar, and Fullerton, JJ., dissenting in part.

Appeal from Superior Court, Walla Walla County; Thos. H. Brents, Judge.

Habeas corpus on petition of Edward Spencer against A. Frank Kees, superintendent of the state penitentiary. From an order remanding petitioner to custody, he appeals. Affirmed.

John H. Pedigo and Garrecht & Dunphy, for appellant. John D. Atkinson, E. C. MacDonald, Otto W. Rupp, and Lester S. Wilson, for respondent.

MOUNT, J. This appeal is from an order in habeas corpus refusing to discharge the appellant from prison. On June 4, 1903, the appellant, having been convicted of murder in the second degree, was sentenced by the superior court for Spokane county to imprisonment in the penitentiary for the term of 13 years. He was thereupon incarcerated in the penitentiary. On May 8, 1905, the Governor granted a conditional pardon which, after reciting the facts above stated, is as follows: "Whereas, it has been represented to me by Dr. Yancy C. Blalock, physician at the said penitentiary, that the said Edward Spencer is an invalid, is failing in health, and cannot live, which statement is indorsed by Hon. Jesse T. Mills, chairman of the state board of control, who also recommends the granting of executive clemency to the said Edward Spencer, now, therefore, I, Albert E. Mead, Governor of the state of Washington, by virtue of the authority in me vested, do hereby pardon the said Edward Spencer, on the condition and understanding that he be placed immediately under the care and surveillance of Dr. Yancy C. Blalock, who shall report immediately to the governor any violation of the conditions on which this pardon is granted, and on further condition that the relatives of the said Edward Spencer provide for and support him so long as he shall live, and that failure on their part so to do, or on the part of the said Edward Spencer to remain with them and under the surveillance of the said Dr. Yancy C. Blalock shall cause the revocation of this pardon and the recommitment of the said Edward Spencer to the penitentiary to serve out the remainder of his term according to the sentence imposed on him by the court hereinbefore mentioned. And I hereby authorize the superintendent of the penitentiary to liberate the said Ed-

ward Spencer on the conditions named herein." The terms and conditions of this pardon were accepted by Spencer, and, in pursuance thereof, he was released from the penitentiary on May 14, 1905. Thereafter, on May 16, 1906, the Governor revoked the conditional pardon by issuing under his hand and the seal of state his declaration as follows: "To all of whom these presents shall come, greeting: Whereas, on the eighth day of May, 1905, a conditional pardon was granted to Edward Spencer, a prisoner in the state penitentiary, on representations made to the Governor that the said Edward Spencer was an invalid in an advanced stage of consumption, who could live but a short time, that his friends and relatives living in the county of Walla Walla stood ready to receive and care for him, and that his condition was such that it would be but an act of common humanity to permit him to leave the prison so that he might die outside of its walls. And, whereas, the conditions of the said conditional pardon as set forth therein were as follows, to wit: 'That he (the said Edward Spencer) be placed immediately under the care and surveillance of Dr. Yancy C. Blalock, who shall report immediately to the Governor any violation of the conditions on which this pardon is granted, and on the further condition that the relatives of the said Edward Spencer provide for and support him so long as he shall live, and that failure on their part so to do, or on the part of the said Edward Spencer to remain with them and under the surveillance of the said Dr. Yancy C. Blalock, shall cause the revocation of this pardon and the commitment of the said Edward Spencer to the penitentiary to serve out the remainder of his term according to the sentence imposed on him by the court hereinbefore mentioned.' And, whereas, the said Edward Spencer has violated each and every one of the above-mentioned conditions, thereby rendering the conditional pardon null and void: Now, therefore, I, Albert E. Mead, Governor of the state of Washington, by virtue of the authority in me vested, do hereby revoke and cancel the conditional pardon granted to the said Edward Spencer, and by these presents do order and direct the superintendent of the state penitentiary to apprehend the said Edward Spencer, and return him forthwith to the state penitentiary to serve out the remainder of his term according to the sentence imposed on him by the judge of the superior court of the state of Washington in and for the county of Spokane on the 4th day of June, 1903." In pursuance of this revocation of pardon, the superintendent of the penitentiary apprehended the appellant and imprisoned him in the penitentiary. Appellant thereupon applied to the superior court for Walla Walla county for a writ of habeas corpus, alleging his original conviction and sentence and the conditional pardon as above stated, and his release thereunder, that he had complied with all the terms thereof, and

that the respondent wrongfully and without authority detains the appellant in custody. The writ was issued, and, for a return thereto, the respondent alleged the revocation of the conditional pardon, for the reason that all the conditions thereof had been violated, and also alleged that the pardon was void because it was obtained by fraudulent representations. Appellant moved to strike out of the return the allegations relating to the violation of the conditions of the pardon and the allegations of fraud. This motion was overruled by the court. Appellant then denied the allegations of the return, and, upon these issues, the cause was tried to the court without a jury, appellant's demand for a jury being denied. The court ruled that the burden of proof was upon the state to show that appellant had violated the terms of the pardon. After hearing the evidence the court, without making any findings of fact, denied the application for discharge, and remanded the appellant to the custody of the superintendent of the penitentiary to serve out his original sentence. This appeal is prosecuted from that order.

It is argued by counsel for appellant that the court erred in refusing to strike out the allegations in the return to the writ, to the effect that the conditions of the pardon had been violated and that the pardon was procured by fraud, for the reason that questions of this character cannot be tried on an application for habeas corpus. This raises the question whether the Governor was authorized to issue his warrant declaring the conditional pardon void and ordering the appellant to be again taken into custody without giving the appellant an opportunity to be heard. The Constitution, at section 9, art. 3, vests the pardoning power in the Governor "under such regulations and restrictions as may be prescribed by law." Section 6907, Ballinger's Ann. Codes & St., provides that, in all cases in which the Governor is authorized to grant pardons, he may grant a pardon under such conditions and with such restrictions and under such limitations as he may think proper, "and he may issue his warrant to all proper officers to carry into effect such pardon or commutation, which warrant shall be obeyed and executed instead of the sentence, if any, which was originally given." No other regulations or restrictions have been prescribed by law, and no other method has been provided for determining when the conditions of a pardon have been broken. The appellant insists that the provision that the Governor may issue his warrant to carry such pardon into effect refers only to the manner of release, and was not intended to provide a method of revocation. There would be much force in this contention if other provisions had been made for determining when conditional pardons have been violated, but there are none. We are of the opinion, therefore, that the provision above stated reposes power in the Governor, not only to effect the

release, but to make conditional pardons effective. There can be no doubt that the Governor was authorized to grant the pardon upon the conditions named, or any others which were capable of being performed and which were not illegal or immoral, and, when the appellant accepted the conditional pardon as given, he was bound by all its provisions. If the pardon had been unconditional, the release under it would have been final, and the Governor and the courts would have been without power to again enforce imprisonment under the original sentence. But this was a conditional pardon, such as the Governor had power to impose. He granted it as a matter of grace, and not of duty. He did not intend to completely exonerate the appellant or to release him from the force and effect of the sentence, but expressly provided that a failure to comply with the conditions "shall cause the revocation of this pardon and the recommitment of the said Edward Spencer to the penitentiary to serve out the remainder of his term according to the sentence." This language manifests a plain intention on the part of the Governor to himself maintain control over the pardon, and to revoke the same upon failure of the conditions. If the provision that the Governor may issue his warrant to carry the pardon into effect refers only to the release of the convict, as contended by the appellant, then the control of a conditional pardon passes from the Governor immediately upon release of the prisoner. We think such result was not intended by the language used. This result, of course, follows from unconditional pardons, because in such case the release is conclusive. There is no more to be done. But in case of a conditional pardon the enforcement of the conditions is carrying the pardon into effect, as much so as the release. We are therefore of the opinion that the Governor had power to enforce the performance of the conditions, and, when he became satisfied that the conditions of the pardon were being violated, he was authorized to issue his warrant revoking the pardon under the express terms of the pardon and under the statute. In *Woodward v. Murdock*, 124 Ind. 439, 24 N. E. 1047, the court said: "As we have already said, the Governor had authority to grant the parole, but, as he did it as a matter of grace and not as a duty it was his right to impose such conditions as he saw proper, and when the appellant accepted it he, by implication, as well as express agreement, did so subject to all of its terms and conditions. We have examined the following authorities cited by the Attorney General, and find them pertinent. *Ex parte Wells*, 18 How. (U. S.) 314, 15 L. Ed. 421; *United States v. Wilson*, 7 Pet. (U. S.) 149, 8 L. Ed. 640; cases cited on page 481 of 6 Crim. Law Mag.; *State v. Smith*, 1 Bailey. Law (S. C.) 283, 19 Am. Dec. 679; *Ex parte Lockhart*, 1 Disney (Ohio) 105;

State v. Fuller, 1 McCord (S. C.) 178; *Flavell's Case*, 8 Watts & S. (Pa.) 197; *Arthur v. Craig*, 48 Iowa, 264, 30 Am. Rep. 395. Under the circumstances the appellant was at large merely at the will of the Governor. The Governor had it in his power to order the appellant to prison at any time." See, also, *Turner v. Wilson*, 49 Ind. 581; *Kennedy's Case*, 135 Mass. 48; *State v. Smith*, 1 Bailey, Law (S. C.) 283, 19 Am. Dec. 679; *Ex parte Marks*, 64 Cal. 29, 28 Pac. 109, 49 Am. Rep. 684; *Ex parte Hawkins*, 61 Ark. 321, 33 S. W. 106, 30 L. R. A. 736, 54 Am. St. Rep. 209; *Commonwealth v. Halloway*, 44 Pa. 210, 84 Am. Dec. 481. If the appellant was entitled to a trial upon the allegation that he had violated the conditions of the pardon, the court granted that right to him in this proceeding and placed the burden upon the state to show that appellant had violated the terms of the pardon. It has been held that this may be done in cases of this kind. *Ex parte Brady*, 70 Ark. 376, 68 S. W. 34; *Ex parte Alvarez*, 50 Fla. 24, 39 So. 481; 6 Current Law, p. 876.

Appellant also alleges that the court erred in receiving certain evidence. The cause is heard de novo here upon the facts, and we shall therefore not consider evidence which we think is not proper. We find no evidence that the pardon was obtained by fraud; but we are satisfied that the judgment of the court is supported by reason of the breach of the conditions of the pardon. The conditions were that the appellant should be placed under the care and surveillance of Dr. Blalock, that his relatives should provide for and support him so long as he should live, and that appellant should remain with his relatives. The evidence conclusively shows that appellant did not remain with his relatives more than two or three days, and that appellant's relatives neither provided for him nor supported him, but that appellant was permitted to support and provide for himself, and was married shortly before his arrest by order of the Governor. The evidence also shows that he frequented houses of prostitution and saloons and often became intoxicated. It is true the evidence of these last-named facts was objected to, but we think they served to show that appellant was not under the surveillance of Dr. Blalock. We think the trial court upon these facts properly found that the conditions of the pardon had been violated.

The order refusing a discharge was therefore correct, and is affirmed.

HADLEY, C. J., and CROW and ROOT, JJ., concur. RUDKIN, DUNBAR, and FULLERTON, JJ., are of opinion that the respondent failed to show any violation of the conditions upon which the pardon was granted, and therefore dissent.

CHLOPECK v. CHLOPECK et al.

(Supreme Court of Washington. Oct. 8, 1907.)

1. APPEAL—HARMLESS ERROR—REFUSAL OF LEAVE TO AMEND.

In an action for an accounting between alleged partners, error in refusing leave to amend the prayer of the complaint by asking for the dissolution of the partnership was harmless, where the court was justified in finding there was no partnership.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4107.]

2. WITNESSES—PERSONS INTERESTED AGAINST INSANE PERSON.

Under Ballinger's Ann. Codes & St. § 5991, disqualifying persons in interest from testifying concerning transactions with insane persons, in an action for an accounting between alleged partners, it was proper to exclude a question asked plaintiff as to who composed the partnership; the defendant alleged to be a partner being insane.

3. APPEAL—INSUFFICIENT PRESENTATION OF ERROR.

The Supreme Court will not review a ruling in excluding testimony, unless the party offering it informed the court what he expected to prove, and made the offer a part of the record, so that the court might judge of its materiality.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2905-2909.]

4. SAME—CASE TRIED TO COURT—IMPROPER TESTIMONY ADMITTED—EFFECT.

The admission of improper testimony is not cause for reversing an equity case or any case tried to the court.

5. PARTNERSHIP—EXISTENCE OF RELATION—EVIDENCE—SUFFICIENCY.

In an action between alleged partners for an accounting, evidence held to show no partnership existed.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by Francis Chlopeck against Edward Chlopeck and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

Charles R. Crouch, Wm. H. Brinker, and Morris, Southard & Shipley, for appellant. Ira Bronson, D. B. Trefethen, and Ira A. Campbell, for respondents.

RUDKIN, J. This is an action for an accounting between partners. The court below found, among other things, that there was no partnership, and entered a judgment of dismissal, from which the plaintiff has appealed.

At the commencement of the trial the appellant asked leave to amend the prayer of her complaint by adding thereto a prayer for the dissolution of the copartnership. The court denied the application, and this ruling is assigned as error. If the court was justified in its finding of no partnership, the ruling complained of could not be prejudicial, even though erroneous. The appellant, while on the witness stand in her own behalf, was asked the following question: "Q. Who composed the firm of Chlopeck Bros?" To this question the respondents objected, on the ground that the respondent Turner was defending as the guardian of an insane per-

son, and the appellant was not competent to testify in her own behalf to any transaction had with such insane person under section 5991, Ballinger's Ann. Codes & St. This objection was properly sustained. The partnership relation could only be created through some contract or transaction with the respondent Edward Chlopeck, and, he being insane, testimony in relation to such contract or transaction by the appellant in her own behalf was properly excluded. Objections were also sustained to the following questions propounded to the same witness: "Q. What wages did you draw for such services? [Referring to services performed by the witness in superintending the smoking of fish.] Q. Did any of the employes of Chlopeck Bros. down there board with you? Q. Did you have any knowledge of money due her from Chlopeck Bros.? Q. Then, after that, Mrs. Chlopeck, when you wanted money to pay any expenses, where did you get it?" The materiality of the testimony sought to be elicited by these questions does not appear from the questions themselves, and in *Norman v. Hopper*, 38 Wash. 415, 80 Pac. 551, we held that in such cases we will not review the action of the trial court in excluding testimony, unless the party offering it informed the court what he expected to prove and made the offer a part of the record so that the court might judge of its materiality. For these reasons, we cannot review the rulings of the court in the matters complained of.

The next assignment relates to the admission of testimony over the objection of the appellant. The statements objected to were clearly hearsay and self-serving, but we have repeatedly held that the admission of improper testimony does not call for a reversal in an equity case, or in any case tried to the court. This court will simply disregard it.

The only remaining question is the sufficiency of the testimony to justify the court's finding. Briefly stated the material facts are these: The appellant and the respondent Edward Chlopeck, mother and son, resided together in Portland, Or., in the year 1884. In the fall of that year a fish and poultry business was purchased from one Wolfstein, and the business was thereafter conducted until 1896 under the name of Chlopeck Bros. In 1896 the mother and son removed to Seattle, where the same business was thereafter conducted under the same name until 1900. In the latter year the business was transferred to the Chlopeck Fish Company, a corporation, the son making the transfer, and, as a consideration therefor, 448 shares of the capital stock of the corporation of the par value of \$100 each were issued to him. In 1902 the son and the respondent, Jennie Chlopeck, intermarried, and the son thereupon removed from the home of the appellant, where he had theretofore at all times resided. In 1903 the son was adjudged insane by the su-

perior court of King county, and committed to the asylum for the insane, where he still remains, and thereafter respondent Turner was appointed guardian of his estate. The present action was commenced on May 15, 1906, some three years after the son was adjudged insane. Although this copartnership existed for a period of about 20 years before the son became insane, if it existed at all, yet there is not a particle of direct testimony tending to show the formation or existence of such a partnership. There is testimony tending to show that the mother advanced money for the original purchase of the business; that she took a general interest in the conduct of the business and superintended the smoking of fish; that she received no salary or wages for her services; that she drew considerable sums from the business for household expenses, and was authorized so to do; and that after the formation of the corporation such sums were charged to the personal account of the son. But all these facts are just as consistent with the relation of mother and son as with that of copartnership, or even more so. The general statements of witnesses to the effect that the appellant had an interest in the business, or at least appeared to have, are entitled to but little weight, in view of all the circumstances and the admitted relationship of the parties. Had this partnership existed for a period of 20 years, we cannot escape the conclusion that some more definite trace of its existence could be found than is disclosed by this record.

The findings of the court below are in accordance with our own views of the testimony, and the judgment is therefore affirmed.

HADLEY, C. J., and FULLERTON, CROW, DUNBAR, and ROOT, JJ., concur.

IN RE MILLER'S ESTATE.

(Supreme Court of Washington. Oct. 8, 1907.)

1. WILLS—PROBATE—AMENDMENT.

The court need not dismiss a petition for probate of a will on its appearing that the entire will of testator is not in form and substance as reduced to writing and set forth in the petition, but in its sound discretion may allow the will and its records to be amended to conform to the facts proved.

2. SAME — NUNCUPATIVE WILL — "TIME OF LAST SICKNESS."

A nuncupative will is made "at the time of the last sickness," as required by Ballinger's Ann. Codes & St. § 4605, though not made when testator is in extremis, or overtaken by sudden and violent sickness, and has not time or opportunity to make a written will, where made when the last sickness has so progressed that testator expects death, and is liable to die at any time, and in view of, and as preparatory to, such result, which followed, he made the verbal will, and this without regard to his opportunity then or afterwards to make a written will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 352.]

Appeal from Superior Court, Columbia County; Chester F. Miller, Judge.

In the matter of the estate of William A. Miller, deceased. From an order, an appeal is taken. Affirmed.

Will H. Fouts and G. W. Jewett, for appellant. M. M. Godman, for respondents.

RUDKIN, J. This is an appeal from an order establishing a nuncupative will and admitting the same to probate. Upon the hearing of the petition for probate, the court found "that the instrument filed herein and alleged to be the will of said Miller is not the entire or all the will made by him as shown from the evidence taken herein," and granted "leave to reduce or have reduced to writing and file herein the nuncupative will of said William A. Miller, as shown from the evidence to have been made by him, and upon the filing of the same such proceedings be had as the law may warrant in the premises." Thereafter the will, "as shown from the evidence to have been made," was reduced to writing and filed with the clerk, whereupon the court entered an order establishing the will and admitting the same to probate.

The appellant seems to contend that, as soon as it appeared that the entire will of the testator was not in form and substance as reduced to writing and set forth in the petition for probate, the court had no alternative but to dismiss the petition. This contention is unsound. In the exercise of a sound discretion, the court might well permit the alleged will and its records to be amended to conform to the facts proved, and such discretion was properly exercised in this case. Again, it is contended that the evidence failed to show either the animus testandi or the animus nuncupandi, or that the testator called upon any person present to bear witness that such was his will. Without discussing the testimony in detail, we think it clearly appears that the testator was strongly impressed with the probability of impending death; that he intended to make a will, and that his word should stand as his will; and that he called upon those present to bear witness that such was his will, or to that effect, as our statute provides.

It is next contended that the will was not made "at the time of the last sickness" of the testator. Ballinger's Ann. Codes & St. § 465. This presents the most serious question in the case. In the leading American case construing the term "last sickness," in statutes of wills, the opinion was written by Chancellor Kent. *Prince v. Hazelton*, 20 Johns. (N. Y.) 502, 11 Am. Dec. 307. It was there held by a divided court that the term "last sickness" means where the testator is in extremis, or overtaken by sudden and violent sickness, and has not time or opportunity to make a written will. This construction of the statute has been adopted and followed in Georgia, Maryland, Mississippi,

New Jersey, New York, Pennsylvania, Texas, and Virginia. 30 Amer. & Eng. Ency. of Law (2d Ed.) p. 568. A different rule prevails in Alabama, Illinois, Kansas, Nebraska, and Tennessee. In *Johnson v. Glasscock*, 2 Ala. 218, the court said: "If a person in his last illness—the sickness of which he subsequently dies—impressed with the probability of approaching death, deliberately makes his will conforming to the statute, we do not feel authorized to say that it will be invalid because in point of fact he had time and opportunity to reduce it to writing." In *Harrington v. Stees*, 82 Ill. 50, 25 Am. Rep. 290, the court said: "At common law it was not essential to the validity of a nuncupative will that the testator should have been ill at all. The statute is, in this regard, a limitation of the common-law powers. The words 'in the time of the last sickness' had no technical signification at the time of the passage of the statute. These words must be taken in their ordinary signification. The courts have no power to take from or to add to the statute. It is their duty to carry out the will of the Legislature as found in the words of the statute, and the necessary and reasonable implications arising from these words. The statute requires it to be proven that the will was made 'in the last sickness.' It is a reasonable and necessary implication that it must also appear that the testator, at the time of making the will, supposed that his then sickness would prove his last sickness. In other words, that he should be impressed with the probability that he would never recover." To the same effect, see *Nolan v. Gardner*, 7 Heisk. (Tenn.) 215. In *Baird v. Baird*, 70 Kan. 564, 79 Pac. 163, 68 L. R. A. 627, after referring to the two extreme views that might be adopted, the court said: "We cannot believe that either of these extreme claims are founded in reason, but rather prefer to hold that the proper interpretation of the statute is that, where the 'last sickness' of one has progressed to such a point that the deceased expects death at any time and is liable to die at any time, and in view of its occurrence, and as preparatory thereto, a verbal will is made, and he does thereafter die of such disease, such will is valid, and is 'made in the last sickness'; that neither prior preparation to make such verbal will, nor opportunity to make a written will at the time or thereafter, would necessarily be determinative against the validity of the nuncupation." This rule is approved and followed in *Godfrey v. Smith* (Neb.) 103 N. W. 450. The proof clearly shows that the will in question was made "at the time of the last sickness," as that term is construed in these decisions, and we feel constrained to follow them. Nuncupative wills are not favored in law, but it seems to us that the earlier cases not only place a strict construction upon statutes authorizing them, but go further, and add very materially to the stat-

utes themselves. We think the construction given in the later cases is more in harmony with the language and purpose of the statute, and the requirement that such wills must be strictly proved is a sufficient guaranty against fraud, at least until the Legislature otherwise provides.

It is lastly contended that the testator lacked testamentary capacity, and was unduly influenced in the making of the will. These charges find no support in the evidence.

We find no error in the record; and the judgment is affirmed.

HADLEY, C. J., and FULLERTON, CROW, DUNBAR, and ROOT, JJ., concur.

STATE ex rel. LIBERTY LAKE IRR. CO.
et al. v. SUPERIOR COURT FOR
SPOKANE COUNTY.

(Supreme Court of Washington. Oct. 10, 1907.)

1. EMINENT DOMAIN—WATER RIGHTS—CONDEMNATION PROCEEDINGS—PETITION.

Where a petition for the condemnation of water rights disclosed that petitioner's purpose was to make a perpetual use of the water sought to be appropriated, the petition was not fatally defective for failure to allege in terms the extent of the time that the water was intended to be used, as provided by Ballinger's Ann. Codes & St. § 4143.

2. SAME—NECESSITY OF CONDEMNATION.

Where an irrigation company sought to condemn a way for a ditch and the riparian or littoral rights of relators to the waters of a nonnavigable arm of a lake, it was no defense that the water company appropriated and was capable of using a large supply of water through another source.

3. WATERS AND WATER COURSES—STATE STATUTES—CONFLICT WITH FEDERAL STATUTE.

Ballinger's Ann. Codes & St. § 4156, providing that a portion of the water of non-navigable streams and bodies of water shall be reserved to that part of the public using or needing the water on abutting property, was not inconsistent with Act Cong. March 3, 1877, c. 107, 19 Stat. 377 (1 Rev. St. Supp. U. S. 137 [U. S. Comp. St. 1901, p. 1548]), reserving such water to the appropriation and use of the public.

4. EMINENT DOMAIN—PROPERTY SUBJECT—IRRIGATION—APPROPRIATION OF WATER.

Ballinger's Ann. Codes & St. § 4156, declares that the right given to condemn the use of water shall not extend further than to the riparian rights of persons to the natural flow of water through lands on or abutting on streams or lakes as the same exists at common law, and is not intended to allow the taking of water from any person that is used by the person himself for irrigation or that is needed for that purpose. *Held*, that the word "needed" as so used meant water necessary to irrigate the land of a littoral or riparian owner which he has under irrigation at the time his rights are sought to be condemned, or which he intends to and will place under irrigation within a reasonable time, and that, as to such water, no condemnation could be had.

Writ of review by the state, on relation of the Liberty Lake Irrigation Company and another, against superior court of Spokane county. Order reversed. Case remanded.

Gallagher & Thayer, for relators. Happy & Hindman and Allen & Allen, for respondent.

ROOT, J. This is a proceeding to review an order of condemnation made in the case of Spokane Valley Land & Water Company v. Liberty Lake Irrigation Company and Arthur D. Jones & Co. The order was for the condemnation of a way for a ditch and the riparian or littoral rights of relators to the waters of a nonnavigable arm of Liberty Lake. In the years 1904-05 the water company built a dam across an arm of the lake, which prevented the water thereof from reaching relators' premises. An action was brought to enjoin the company, and the court granted an injunction against further interference with the water until the water company should condemn the use of the water in the arm of the lake. Thereupon the present proceeding was had, and, from the order of condemnation made, this appeal is prosecuted.

The relators contend (1) "that the courts have never been granted power to condemn water which is 'needed' by the owner for irrigation purposes (Ballinger's Ann. Codes & St. § 4156); (2) the water company does not need this water because it owns an ample supply in the Spokane river; (3) no proof was made as to the extent of time the water sought to be condemned is intended to be used." We will notice these contentions in the inverse order.

Section 4143, Ballinger's Ann. Codes & St., provides that the petition for condemnation shall set forth the extent of time that said water is intended to be used. We think that ordinarily the petition should set forth a statement to this effect, but do not believe that the omission so to do is fatal to a judgment or decree in the proceeding, where the other facts set forth in the petition are such as to show, as they do in this case, that the purpose was doubtless to make a perpetual use of the water so condemned and appropriated.

As to the second contention, it appears from the record that the water company had appropriated, and was capable of using, a large supply of water from the Spokane river. We do not think, however, that this fact in itself is sufficient to defeat the order of condemnation made herein.

As to the first contention, the parties here-to are at variance touching the meaning of the word "needed," as used in section 4156, Ballinger's Ann. Codes & St., which is as follows: "The right herein given to condemn the use of water shall not extend any further than to the riparian rights of persons to the natural flow of water through lands upon or abutting said streams or lakes, as the same exists at common law, and is not intended in any manner to allow water to be taken from any person that is used by said person himself for irrigation, or that is needed for that purpose by any such person." Relators contend

that the statute authorizes and requires an exception from the condemnation order of all the water that is used by such owner or that may be hereafter needed to irrigate the lands abutting upon said stream or lake. The trial court, however, held that the meaning of the statute was that the riparian owner could reserve so much of the water as was "used and needed." It was contended by respondent that, under Act Cong. March 3, 1877, c. 107, 19 Stat. 377 (1 Rev. St. Supp. U. S. 137 [U. S. Comp. St. 1901, p. 1548]), relators had no riparian or littoral rights, inasmuch as their land was not patented by the government until after the date of the passage of this act. Assuming, but not deciding, that this is correct, we think the effect of section 4156, Ballinger's Ann. Codes & St., justifies relators in objecting to the condemnation by the water company of so much of the water as is used or needed for irrigation by them upon their abutting lands. If, under this act of Congress, the owner of land abutting upon a nonnavigable stream or body of water has no littoral or riparian rights therein, nevertheless it would seem that, after the issue of patent for such land by the United States, the duty would devolve upon the state to provide how "the appropriation and use of the public," mentioned in the statute, should be exercised. By section 4156, Ballinger's Ann. Codes & St., it is provided that a portion of this water shall be reserved to that part of the public using or needing the water upon abutting property. We perceive nothing in this requirement of the statute inconsistent with the act of Congress. In the recent case of State ex rel. Kettle Falls, etc., Co. v. Superior Court (Wash.) 90 Pac. 650, this court said: "Under section 4156, Ballinger's Ann. Codes & St., the ordinary abutting owner must submit to the condemnation of his riparian rights to the natural flow of the water as at common law, with the limitation, however, that water that is used by said person himself for irrigation, or that is needed for that purpose by any such person may not be condemned." See, also, Nesalhou v. Walker (Wash.) 88 Pac. 1032.

The question, then, turns upon the meaning and intention of the Legislature by the expression "needed," as employed in section 4156, Ballinger's Ann. Codes & St. We think it means the water necessary to irrigate the land of the littoral or riparian owner which he now has under irrigation, and also that which he intends to, and will, place under irrigation within a reasonable time. It cannot be supposed that the Legislature intended that a riparian owner could prevent an irrigating company from appropriating water not then in use, but which the riparian owner might need and use upon his land at some distant, indefinite time in the future. Such a construction would be in the interest of the speculator, rather than for the encouragement of the land improver and home builder.

The statute gives the riparian owner a preference right, upon the theory that he needs and will avail himself of the privilege thus given him. If he is not using the water, and does not purpose to use it as soon as practicable in the ordinary and reasonable development or cultivation of his lands, then there is no reason why the water should be withheld from others who need and will promptly use it if permitted. Irrigation is an important means of developing the country and making its arid lands productive and valuable. Hence the state has made provision therefor. It is not to the state's interest that the water of a nonnavigable stream should be idle or going to waste because one of its citizens, having a preference right to its use, unjustifiably neglects to avail himself thereof, while others stand ready and willing, if permitted, to apply it to the irrigation of their arid lands. On the other hand, the preference accorded an abutting property owner should not be limited to his immediate present use of the water. Circumstances justifying some delay might be such as to prevent him from constructing the ditches, flumes, dams, piping, and other equipment necessary to place all of his irrigable land under irrigation at once. We think it comports with the general policy of the state to hold that this statute contemplated the use by the abutting owner of the water necessary for his present needs and for those that accrue as he in good faith proceeds with reasonable dispatch to construct the means for applying the water to his adjacent arid land.

The order of condemnation made by the honorable superior court herein is reversed, and the case remanded, with the following instructions: The trial court shall ascertain how much of appellant's land is ready for water at this time, and how much of its land (owned at the time this action was commenced) it intends to and will within a reasonable time—say two or three years—place under irrigation from the waters sought to be condemned. Upon ascertaining the facts as to these matters, the order of appropriation shall except from its operation a sufficient amount of water to meet the present needs of relators and the needs that will accrue within a reasonable period of the immediate future, so far as the court can determine by the preparations made and from all the facts and circumstances shown, and the expressed intentions and purposes of relators and their evident good faith relative to promptly placing said lands under irrigation. If the relators fail to use promptness and good faith in appropriating and using the water reserved to irrigate their abutting lands, and at the end of the period fixed by the court, as hereinbefore indicated, it shall appear that they have not under irrigation a sufficient amount of land to make necessary the use of all the water reserved to them in the decree now to be entered, said

decree shall not be a bar to another application for condemnation of such of the reserved water as is not then needed and used.

HADLEY, C. J., and CROW and DUNBAR, JJ., concur.

IN re JACKSON ST., etc., IN CITY OF SEATTLE.

(Supreme Court of Washington. Oct. 7, 1907.)

1. EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—VIEW BY JURY—STATUTES.

Ballinger's Ann. Codes & St. § 4998, provides that, whenever in the opinion of the court it is proper that a jury should have a view of real property which is the subject of litigation, it may order the jury to be conducted in a body, in custody of a proper officer, to the place which shall be shown to them by the judge or by a person appointed by the court for that purpose. *Held*, that such section was sufficiently broad to cover condemnation proceedings.

2. TRIAL—VIEW BY JURY—PERSONS ACCOMPANYING JURY.

Ballinger's Ann. Codes & St. § 4998, authorizing the court generally to appoint a person other than a bailiff to point out the place or property to the jury.

3. EMINENT DOMAIN—PROCEEDINGS—VIEW—STATUTES.

Ballinger's Ann. Codes & St. § 4998, authorizing the court generally to appoint a person other than a bailiff to point out property in controversy to a jury during a view, was not limited by section 783, authorizing the court on motion of the petitioner in such a proceeding or of any person claiming compensation to direct that the jury (under the charge of an officer of the court) should view the premises which it was claimed by any party to the proceedings would be taken or damaged by the improvement.

4. NEW TRIAL—OBJECTION—TIME.

Where the court appoints a person to point out property in controversy to a jury during a view, objections to the personnel of the person appointed or that he was not sworn must be taken at the time of the appointment, and cannot be first urged on motion for a new trial.

5. EMINENT DOMAIN—DAMAGES—EVIDENCE.

Where, in a proceeding to assess damages for land taken for the regrading of a street, the buildings on the property in controversy were not taken, evidence that some of the buildings might be lowered or moved off the premises and moved back after the lots were cut down to the new grade was admissible.

6. SAME—INSTRUCTIONS.

In a proceeding to assess damages to abutting property by a change of street grade, the court properly refused to charge that the city could not grant any person an exclusive franchise for the use of any street, or part of a street, for the purpose of showing that the city could not permit the use of the street by buildings while the lots were being cut down to the new grade.

7. SAME—STATUTES—FINDINGS.

Ballinger's Ann. Codes & St. § 775 et seq., relating to condemnation of land for municipal purposes, makes a clear distinction between the taking and damaging of property, and section 784 provides that, if there are buildings standing in whole or in part on any land to be taken, the jury shall add to the damage to the land the damage to the building or part necessary to be taken, if it be the property of the owner of the land, and when owned by any other person the damages to the building shall

be found separately, and that the building of the owner to be moved or the part thereof necessary to be taken shall also be found by the jury. *Held*, that such provision was inapplicable where the land and buildings thereon were damaged only by a change of street grade, and did not require separate findings on the damages to the buildings and the value thereof to the owners to remove.

8. SAME—TRIAL—RECEPTION OF EVIDENCE.

Where certain documentary evidence was offered by a city to show its right to institute proceedings for the assessment of damages to abutting property owners by the regrade of a street, such evidence was in the case for all purposes, and it was not necessary to reoffer it each time the court took up the claim for damage to a particular tract.

Appeal from Superior Court, King County; Miles Poindexter, Judge.

Proceeding by the city of Seattle for the regrading of Jackson street, etc., in said city. From a judgment assessing damages for injuries to abutting property, certain property owners appeal. Affirmed.

G. Ward Kemp, for appellant. Scott Calhoun and O. B. Thorgrimson, for respondent.

RUDKIN, J. This is an appeal by property owners from a judgment entered on the verdict of a jury in a condemnation proceeding instituted by the city of Seattle.

The appellants were the owners of lots 5 and 6 of block 48 of D. S. Maynard's plat, situated on the corner of King street and Seventh avenue. The plan adopted for the regrade of Jackson and other adjacent streets of the city called for a cut of approximately 45 feet in the streets abutting on the appellants' premises. This cut was to be made with one to one slopes, so that the top of the cut would extend approximately 45 feet back on the adjacent lots, and would destroy in whole or in part the foundations of some four or five buildings situated on the appellants' lots and owned by them. During the progress of the trial the court directed that the jury view the premises, in charge of Mr. Alexander, one of the bailiffs of the court, and that a Mr. Jeffrey, the same person who pointed out the King street property to them, should also point out this particular tract. At the time this order was made the appellants interposed a general objection "to the court allowing Mr. Jeffrey or any person to go with the jury except the bailiff," and excepted to the court's ruling. In an affidavit filed in support of a motion for a new trial the further objection was raised that Mr. Jeffrey was an officer of the city and a witness on the trial, and was not sworn to perform any duty except as such witness. For reasons hereinafter stated, the specific objections raised by the motion for a new trial cannot be urged at this time. The general statutes of the state provide that "whenever in the opinion of the court it is proper that the jury should have a view of real property which is the subject of litigation, or of the place in which any material

fact occurred, it may order the jury to be conducted in a body, in the custody of a proper officer to the place which shall be shown to them by the judge, or by a person appointed by the court for that purpose." Ballinger's Ann. Codes & St. § 4908. This section is broad enough to cover condemnation proceedings, and expressly authorizes the court to appoint a person other than a bailiff to point out the place or property to the jury. Nor in our opinion is the scope of this section limited by the provision of the act under which this proceeding was instituted, authorizing the court upon motion of the city, or of any person claiming compensation, to "direct that said jury (under the charge of an officer of the court) shall view the premises which it is claimed by any party to said proceeding will be taken or damaged by said improvement." Ballinger's Ann. Codes & St. § 783. A view in many cases would be futile unless the judge or some person by him appointed were authorized to point out the particular place or premises to the jury, and we are satisfied that such a power exists in the courts of this state. Objections to the personnel of the person appointed or that he was not sworn should be taken at the time of the appointment, and cannot be urged for the first time on motion for new trial. In *People v. Johnson*, 110 N. Y. 134, 17 N. E. 684, the court said: "The omission of the trial court to cause the officer in charge of the jury, while taking a view, to take the oath prescribed by section 412, is an irregularity merely, which could be waived by the defendant, and was, we think, by the consent of his counsel that such view should be taken, and by his omission to object or call the attention of the court to the want of such oath." The court further added: "However that may be, it was, upon the facts in this case, a question for the court to determine whether any substantial right of the defendant had been prejudiced by the conduct complained of, and we do not think there is any sufficient reason for us to interfere with the conclusion reached by it in respect thereto." Here, also, there is an utter failure to show that any substantial right of the appellants was prejudiced by the conduct complained of. Testimony was admitted tending to show that some of the buildings might be lowered, or moved off the premises and moved back, after the lots were cut down to the regrade. The admission of such testimony is assigned as error. The testimony was so slight and general in its character that it would be difficult to predicate any prejudice upon its admission, but in any event the buildings were not taken, and the question whether they were a total loss to the owners or could be lowered or moved back onto the lots after the regrade would seem to be material. The question whether this could be done, or whether there was any place to put the

buildings in the meantime, would go to the weight rather than to the competency of the testimony.

Error is next assigned in the refusal of the court to give the following instruction: "The jury are instructed that the city of Seattle is prohibited by its charter from granting to any person an exclusive franchise for the use of any of the city streets or any part of the street"—and other instructions of like import. These instructions were offered in answer to the contention of the city that the buildings might be moved into the streets while the lots were being cut down. It is a well-known fact that cities daily license persons to occupy portions of the streets while the streets or abutting property are undergoing improvements, and their right to do so is seldom questioned. The charge was properly refused.

The failure of the court to require the jury to make separate findings on the damages to the buildings, and the value of the buildings to the owners to remove, is also assigned as error. No request for such a direction was made, and no exception was taken to the failure of the court to so charge. Under such circumstances, it may well be doubted whether the question of the court's failure in that regard can be raised for the first time on motion for a new trial. But, without resting our decision upon that ground, the contention of the appellant cannot be sustained. The statute under which these proceedings were instituted (Ballinger's Ann. Codes & St. § 775 et seq.) makes a clear distinction between the taking and damaging of property. Whether such distinction is well founded in law we need not inquire, for it is only where property is taken within the purview of the statute that such findings are required. Ballinger's Ann. Codes & St. § 784. The property in this case was damaged only, and the above provision has no application. In the course of the argument to the jury, the question arose whether a certain property owner's petition was properly in evidence, and the court ruled that it was. This ruling is assigned as error. The defendants in the action were exceedingly numerous, and at the commencement of the trial the city offered certain documentary testimony of a general nature, for the purpose of showing its right to institute the proceedings, such as the property owners' petition, the city ordinances relating to the improvements, etc. It was not necessary to reoffer this documentary evidence every time the court took up the claim for damages to a particular tract, and the court correctly ruled that such evidence was in the case for all purposes.

The judgment is sustained by competent testimony, and, there being no error in the record, the same is affirmed.

HADLEY, C. J., and FULLERTON, CROW, DUNBAR, and ROOT, JJ., concur.

ROBINSON v. SPOKANE TRACTION CO. (Supreme Court of Washington. Oct. 10, 1907.)

1. NEGLIGENCE — EVIDENCE — ADMISSIBILITY—EFFECT OF PENDING LAWSUIT ON NEURASTHENIA.

Where, in a personal injury action, there was evidence that plaintiff was suffering from neurasthenia, defendant should have been permitted to show what effect upon that condition the pendency of the lawsuit, the interest in and excitement of the approaching trial, would have.

2. DAMAGES—PERSONAL INJURY—EXCESSIVENESS.

In a personal injury action, the weight of the evidence showing that the injuries had produced a condition of neurasthenia rather than myelitis, as claimed by plaintiff, a verdict for \$8,000 was excessive by at least \$3,000; plaintiff being 23 years old and earning \$70 to \$85 per month.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 367.]

Rudkin, J., dissenting.

Appeal from Superior Court, Spokane County; Miles Poindexter, Judge.

Personal injury action by Lee H. Robinson against the Spokane Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed on condition that plaintiff remit \$3,000; otherwise, new trial ordered.

Graves, Klizer & Graves, for appellant. Kenyon & Setters, for respondent.

ROOT, J. This is an action for damages for personal injuries sustained by plaintiff while riding in one of defendant's street cars. From a judgment for \$8,000, defendant appeals.

On the trial of the cause the defendant admitted negligence, and the only questions submitted to the jury were those having to do with the amount of the recovery. The facts revealed by the evidence are about these: Plaintiff was seated in the forward end of the car, with one shoulder against the end of the car and the other against the side; his back being toward the corner. A collision occurred, and he says that he was thrown from the front of the car, and struck his breast against a seat. After the collision, he rode down town, alighted from the car, and walked into a tailor shop, where he was employed as a solicitor. Shortly thereafter a physician was sent for, who came and made a casual examination of plaintiff, and advised him to go to the hospital, where the doctor soon followed. This doctor says that at the hospital he stripped plaintiff, and made a thorough examination, and found no evidence of any injury, no mark or contusion; that plaintiff complained of pain behind the left shoulder blade. The doctor found his respiration and pulse normal, and no loss of motion or paralysis of any description. He directed that he apply some ointment to his back and take a rest. Shortly after this, the family physician of plaintiff was summoned and made an examination of plaintiff, and took charge of the case from that time

on, making visits upon him as follows: One in January, eight in February, one in March, one in April, one in May, and gave him one prescription in July. The accident occurred January 31, 1906, and the case came on for trial October 11, 1906. The family physician was a witness for plaintiff upon the trial. Testifying to his first examination, he stated as follows: "He was apparently suffering a great deal of pain, the muscles of his back were rigid, and upon any movement or touch it seemed to cause him a great deal of distress. Q. Were there any other evidences of injury? A. No; I do not remember of any other at the present time." This doctor, until a few weeks before the trial, considered plaintiff's condition as one of neurasthenia, and plaintiff's complaint alleged that the injuries had induced and resulted in a neurasthenic condition. Upon the trial, however, plaintiff changed this theory, and urged that the injury had resulted in myelitis, instead of neurasthenia. Neurasthenia is a somewhat indefinite term applied to certain nervous conditions, while myelitis is a diseased condition or degeneration of the spinal cord, and is regarded as a much more serious ailment than neurasthenia. The family physician upon the witness stand was asked as to the present nervous condition of plaintiff. He answered: "He seems to be extremely nervous at the present time, in the way that he had not full control of his nervous faculties and his nerves are very irritable, more irritable than a nervous person." It was urged on behalf of plaintiff that there was a fracture of the rib where it joins the twelfth dorsal vertebra. With reference to this, the family physician testified as follows: "Q. Did you diagnose the case as fracture of the rib at the twelfth dorsal vertebra? A. I could not. Q. On the contrary, you diagnosed it as not being any fracture, did you not? A. I think I did; yes, sir." It was the contention of plaintiff that the fracture had superinduced myelitis. The following questions were propounded to this physician, and answered as indicated: "Q. Now, what kind of myelitis is this? A. Well, there is a lesion of the spinal cord and degeneration of the tracts of the spinal cord; but I am not up in nervous diseases, not enough to know the distinction between the anterior, and positive or lateral. Q. You are expert enough to know it is myelitis, but not expert enough to know what kind of myelitis it is? A. Yes." Besides this physician, the plaintiff put upon the stand one other. He made some radiographs with an X-ray machine, and gave it as his opinion that there was a fracture of the twelfth dorsal vertebra, or of the rib where it connects therewith. He was unable, however, to give any dimensions whatever of the fracture, or any definite description thereof. The pictures were placed in evidence. Each of these two doctors gave it as his opinion that plaintiff was suffering from myelitis, and each testified that he

thought that a portion of the conditions now existing would be permanent.

Plaintiff remained at the hospital about one week, and was then taken to his home, where he remained for about three months before going out. The chart record kept by the nurse at the hospital was introduced in evidence. The record of the first night was not on the chart. The latter showed that the plaintiff slept well every night, except the first night recorded, when he slept only part of the night. The nurse who prepared the chart and waited upon respondent testified that the attending physician directed that certain medicine to produce sleep be given the patient in case he was unable to sleep, but that the medicine was not given, for the reason that he slept readily without such medicine. Plaintiff testified that he took medicine, after leaving the hospital, to make him sleep.

The defendant placed upon the witness stand six physicians. One of them was a doctor whom the plaintiff or his family had called to examine him, and most of them were physicians who had been appointed as a commission to make an examination of the plaintiff's condition. All of these doctors swore positively that plaintiff's condition was not myelitis, but neurasthenia. Most of these doctors were men of extended experience, and some of them of many years' experience with nervous ailments and conditions. Several of them showed themselves to be well acquainted with radiographs, and, upon examination of the pictures in evidence, stated positively that there was nothing whatever therein to show any injury to the vertebra or ribs, or anything whatsoever abnormal. None of the doctors on either side found any scars or any outward indications of an injury, except that shortly after the injury the muscles in the small of the back were somewhat swollen. The plaintiff appeared to still have a pain in that region, leaned forward when sitting, and in rising from a sitting position appeared to require a cane or something to take hold of in order to rise, and was evidently in a nervous condition, frequently contracting various muscles of the body and acting uneasily. Plaintiff testified that he had lost some 20 pounds in weight, and that he had suffered much pain and sleeplessness, and was unable to walk without canes. His skin was not of good color. Some of the muscles of the hips and legs did not appear to act normally.

Plaintiff placed in evidence a report of the commission of physicians who examined him. It contained a history showing that he was in bed seven weeks with typhoid fever in 1904, and had not been so strong since, although he testified that he had been in as good health; that in 1901 a horse fell upon him, fracturing right leg above ankle. He was 23 years old, and testified that he was earning from \$70 to \$85 per month.

Exception was taken to the action of the trial court in refusing to let the defendant

show what effect upon neurasthenia the pendency of a lawsuit, the interest in and the excitement of the approaching trial, would have. We think this evidence was admissible. Certain remarks of the court and his manner of giving instructions to the jury are complained of, as constituting comments upon the evidence and as calculated to emphasize the importance of certain testimony favorable to plaintiff at the expense of defendant. In view of the disposition which we purpose to make of the case, we think it unnecessary to go into these matters in detail.

Appellant makes no denial of its liability, but contends that the verdict was excessive, and asks to have the amount of the judgment reduced. Taking into consideration all of the evidence in this case, and viewing it, from any reasonable standpoint, as favorably as possible to respondent, we are unable to find justification for a verdict in the amount returned by the jury. The case was prosecuted upon the theory that the damages sustained by plaintiff arose principally from the injuries to his back, and the issue became sharply defined as to whether those injuries had produced a condition of neurasthenia or myelitis. It was conceded that, if it were the latter, the damages should be greater than if the condition were the former. The evidence as it appears from this record is overwhelmingly in favor of the defendant's contention. There were six of defendant's doctors to two of plaintiff's, and it cannot be seriously contended that the evidence of each of these doctors does not compare at least favorably with that of plaintiff's physicians. In many particulars it is much more reasonable and satisfactory. Neither of plaintiff's physicians claims to have had any extended special practice or experience in nervous ailments. We recognize the fact that a jury and trial court have the advantage of seeing and hearing the witnesses and observing their demeanor upon the witness stand; but, making full allowance for this and also for the fact that reasonable men may differ considerably as to what is a suitable award in a case of this character, we are constrained to hold that no jury should, or could properly, base a verdict exceeding \$5,000 in amount upon the evidence adduced in this case. If we were fixing the amount as an original proposition, we would place it at a lower figure.

The case is reversed and remanded to the lower court, with the following instructions: The respondent shall have 30 days after filing of the remittitur in the superior court within which to remit all of the judgment in excess of \$5,000. If such remission be made, the judgment will stand affirmed; but, if not, a new trial shall be ordered.

HADLEY, C. J., and MOUNT and CROW, JJ., concur.

RUDKIN, J. (dissenting). The majority opinion holds that the court below erred in

excluding testimony tending to show the effect that the worry and excitement incident to the pendency of a lawsuit would have on the disease from which the respondent was suffering, and in that conclusion I concur; but I cannot concur in the final disposition made of the case. Doubtless, where the injury resulting from an error committed in the trial of a cause can be segregated from the amount of the verdict, which is otherwise supported by the testimony, the judgment may be affirmed for the residue on the remission of the excess by the prevailing party; but, where it is impossible or impracticable for the appellate court to ascertain or determine the extent to which the verdict has been affected by the erroneous ruling, a new trial must be awarded. In *St. Louis, I. M. & S. Ry. Co. v. Hall*, 53 Ark. 7, 13 S. W. 138, the court said: "The difficulties which would beset a court in determining the justness or excessiveness of a verdict based upon these premises alone would not be inconsiderable. But superadd the element of punitive damages, erroneously allowed, and the process by which the court is to dissect the verdict, eliminate the error, eliminate the excess of compensation, and settle upon the exact sum which plaintiff's case entitles him to have, 'passeth all understanding.' To attempt it, we think, would be a violation of the spirit of the Constitution, which intends that every litigant shall have a trial of his cause before an impartial jury upon proper declarations of the law." In *Houston & T. C. R. Co. v. Bird* (Tex. Civ. App.) 48 S. W. 756, the court said: "In the absence of evidence from which the jury could properly ascertain the amount of loss sustained in impairment of ability to earn money, it was error for the court to submit this element to the jury, and because of the absence of such evidence we think, also, that the verdict is excessive. What would be a proper amount, with appropriate evidence on the points indicated, this court cannot, of course, determine, and, since there was error in the charge, it cannot be cured by a remitter." To the same effect, see *C. & M. & St. P. R. R. Co. v. Hall*, 90 Ill. 42; *Seeman v. Feeney*, 19 Minn. 79 (Gil. 54); *Slatery v. City of St. Louis*, 120 Mo. 183, 25 S. W. 521; *Thompson v. Lumley*, 7 Daly (N. Y.) 74; 3 Cyc. 439. If competent material testimony was excluded from the consideration of the jury, and is not now before this court, how the majority can say what the judgment should be likewise "passeth all understanding." To have reached the conclusion announced, the members of the court must have turned jurors and expert witnesses as well. In effect the majority has said to the appellant: You were denied a fair trial in the court below, but you must nevertheless submit to the payment of the largest judgment that any reasonable view of an incomplete record will warrant. From such an anomaly I dissent.

VINNETTE v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington. Oct. 11, 1907.)

DEATH—ACTION FOR—CONTRIBUTORY NEGLIGENCE OF BENEFICIARY.

The father of a six year old child left her in the custody of her mother, who negligently allowed her unattended to cross railroad tracks in constant use by trains. Upon the child's return she was killed by the cars. *Held*, in an action for her death by the father, as administrator, for his sole benefit, that his contributory negligence precluded his recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 25; vol. 37, Parent and Child, § 87.]

Appeal from Superior Court, King County; Geo. E. Morris, Judge.

Action by Joseph E. Vinnette against the Northern Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Carroll B. Graves, for appellant. Geo. P. Rossman, for respondent.

CROW, J. Action by Joseph E. Vinnette against the Northern Pacific Railway Company to recover damages for the death of plaintiff's child. The plaintiff alleged that his daughter, six years of age, was struck and killed by a backing train of freight cars while crossing defendant's tracks within the limits of the city of Seattle upon a platted street, and upon a crossing used and traveled by the the general public; that a city ordinance then in force prohibited the running of any steam engine and cars in Seattle at a rate of speed exceeding six miles per hour; that the defendant was backing a train of about 16 cars at a greater rate of speed; that the defendant had no person on the lookout at the forward end of the train as it was moving backward; that no signal was given, by bell, whistle, or otherwise; and that the child, being rightfully upon the alleged street and crossing, was killed by reason of such negligent acts of the defendant. The answer, after admitting the killing of the child, denied other material allegations of the complaint, and affirmatively alleged that the child was a trespasser upon the railway tracks situated in defendant's switching yards, and that her death was occasioned by the negligence of her parents, who then and there permitted her to play along and upon the tracks. The reply denied the affirmative allegations of the answer. On trial the jury returned a general verdict in favor of the plaintiff for \$600, and made special findings in answer to interrogatories submitted as follows: "At what rate of speed was the string of cars moving at the time it struck the child, Catherine Vinnette? A. About six miles an hour. At the time mentioned in the complaint, and for some time prior thereto, was the switch track, lying to the west of the main track at and near the point of the accident, used for the purpose of switching and storing cars? A. Yes. Did the men in

charge of the string of cars, or either of them, have any knowledge of the child's whereabouts, prior to the collision with her, and did they know of the accident before their attention was called to it after the child had been killed? A. No. Who was left in charge of the child, and had the custody of the child, the morning of the accident, and just prior to the accident? A. Her mother. If you answer to the last interrogatory that it was the mother of the child, find and state if the mother allowed the child to cross said railway track and enter into play with some other child or children near and in the vicinity of the railway tracks of the defendant, and across said tracks from its home. A. Yes." From a judgment entered on the general verdict, the defendant has appealed.

Th appellant's assignments of error present the single question of the sufficiency of the evidence to sustain the general verdict and judgment. The evidence shows that appellant had, when the accident occurred, two lines of railway track, running in a northerly and southerly direction, and used exclusively for distributing, moving, and storing freight cars; that all trains enter and leave the city on other lines; that one of the tracks was known as the "shore line," from which numerous spurs extended to various warehouses and industrial plants; that the other was known as the "long siding," being used for switching and storing cars; that the two tracks, being substantially parallel, were located side by side on a graded strip of land about 30 feet wide, between a high bluff or hill to the east and tide lands to the west; that the soil of the hillside is sustained by bulkheads; that the west line of the grade is sustained by a sea wall; that quite a number of small houses or shacks are located along the tracks, abutting the same on either side, those to the west being over tide lands and supported by piling; that a few feet further west is a public street or boulevard, located on an elevated bridge constructed on piling over tide lands, and occupied in part by a street car line running into the city of Seattle; that respondent's house is built on piling between the railroad track to the east and the boulevard to the west; that he had access to the boulevard; that to the east of his house, towards and abutting the railway, he has a small dooryard, floored with boards resting on piles, and inclosed with fence and gate. There was no competent evidence that any street had ever been platted, opened, graded, or maintained in the space occupied by appellant's tracks between the sea wall and hill, nor that such space had ever been traveled by teams or used for general public traffic. There was evidence, however, showing that people living in the small houses and shacks above mentioned frequently crossed and walked along the tracks at various points according to their own convenience. The evidence further shows that at the time of the accident a switching crew was backing about

16 freight cars on the long siding; that respondent had left the child in charge of his wife, its mother, at their home, who permitted her to cross the tracks to the hill on the opposite side and play with other children; that, after watching the child go across, the mother went into her kitchen, leaving the door open; that shortly thereafter the train backed down the long siding, when the child, returning alone and unattended, stepped on the track and was killed; that no employé of the appellant saw the child until after the accident; that no employé was on the car which struck the child; and that appellant made no claim to ringing its bell or sounding its whistle, its employés being engaged in moving freight cars within its switching yards, and not, according to its contention, upon any public street or highway. The only substantial conflict in the evidence was over respondent's contention that a well-defined pathway existed, which was used by the general public and intersected the tracks immediately in front of his house. In his brief the respondent continually assumes the existence of a highway, called "Ninth street," upon which the railway tracks were located, and upon which his house fronted to the east; but there was no competent evidence showing that any such street ever existed. Respondent contends that, at the time the child was killed, she was on Ninth street opposite his house, on the above-mentioned alleged pathway, that had been used by the public for many years. There was evidence given by different witnesses to the effect that people, both adults and children, living in the immediate neighborhood, had frequently crossed the tracks; but the evidence fails to show that there was a well-worn track at any particular point, as seems to be contended by respondent. A number of excellent photographs were admitted in evidence with the consent of both parties; but while they most clearly and distinctly show the buildings, railway tracks, abutment, sea wall, piling, respondent's dooryard, fence, and gate, with other surroundings, it is nevertheless impossible to distinguish upon them the slightest indication of any street or any pathway across or upon the railway tracks at any point near the scene of the accident. The substantial effect of the evidence as disclosed by these photographs and the oral testimony of the various witnesses is that the different persons who lived in the neighborhood and who walked back and forth over the tracks did so at such points as were severally convenient to them. But, were we to assume that a distinct pathway did exist opposite respondent's house, we could not, for reasons hereinafter mentioned, permit the respondent to recover in this action.

The appellant contends that the train was not running at an excessive rate of speed; that there was no public street, crossing, or path, at or near the point of the accident; that it was not required to give any signal

by bell or whistle; that the child was a trespasser; and that the contributory negligence of the parents bars a recovery by respondent. As we view the evidence, in connection with the special findings, there is no showing of negligence on the part of the appellant sufficient to make it liable for damages. But, assuming that such negligence did exist, we are nevertheless compelled to hold that the negligence of the respondent as father of the child, and the mother in whose care she was left, was such that no recovery by respondent can be permitted. The child was of such tender years that no negligence could be imputed to her. She was unable to protect herself or realize the dangers to which she was subjected. Had she been, not killed, but permanently injured, and were she now prosecuting an action for damages, the question whether the negligence of her parents could be imputed to her and bar a recovery might possibly arise. Here the father sues for damages resulting from the death of his child, and he will be the sole beneficiary of any judgment recovered. In *Bellefontaine, etc., Ry. Co. v. Snyder*, 18 Ohio St. 399, 98 Am. Dec. 175, an action prosecuted by a minor child, by her next friend, to recover damages sustained by personal injuries to herself, the Supreme Court of Ohio held that the negligence of a parent or custodian of the child, who was by reason of tender years unable to care for herself, could not be imputed to the child, so as to defeat her right to recover damages from a railway company for the injuries caused by its negligent acts. But in *Bellefontaine Ry. Co. v. Snyder*, 24 Ohio St. 670, when the father of the same child afterwards sued in his individual right for damages to himself arising from the loss of the services of his child in consequence of the same accident, the Supreme Court of Ohio held that he could not recover, as his right to do so was barred by his own negligence; it having appeared that he intrusted the child to the custody of another, who was guilty of negligence contributing to the accident. This distinction between an action for the benefit of the child and for the sole benefit of the negligent parent has been recognized by this and other courts. *Roth v. Union Depot Co.*, 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855; *Eskildsen v. Seattle*, 29 Wash. 583, 70 Pac. 64; *Pratt Coal & Iron Co. v. Brawley*, 83 Ala. 371, 3 South. 555, 3 Am. St. Rep. 751; *Williams v. T. & P. R. Co.*, 60 Tex. 205; *Bamberger v. Citizens' Street R. Co.*, 31 S. W. 163, 95 Tenn. 18, 28 L. R. A. 486, 49 Am. St. Rep. 909.

The unfortunate death of this little girl naturally arouses every feeling of human sympathy, and doubtless appealed to the jury; but the facts are that respondent's wife, with whom he left the child, assented to her going across the tracks unattended; that the mother watched her while leaving; that she was permitted to return alone; and that

while doing so she was struck by the train, before any of the switching crew saw her or knew of her presence. The acts of the parents constitute the most flagrant negligence upon their part. They must have known that the very existence of the railroad tracks was itself a sign of danger; that an unattended child only six years of age should not have been permitted to play upon or near them; and that, if allowed to do so, the child would in all probability be seriously injured or killed. Parents cannot delegate to trainmen or other persons in charge of dangerous agencies the care and protection of their unattended children. In the case of *Westerberg v. Kinzua Creek, etc., R. R. Co.*, 142 Pa. 471, 21 Atl. 878, 24 Am. St. Rep. 510, the Supreme Court of Pennsylvania said: "If we concede there was negligence on the part of the company in permitting the car to become detached and run down the road without any one to control it, the fact remains that the children were walking upon the track; and, while they could not be charged with contributory negligence by reason of their tender years, this suit is brought by their parents, who may be properly so charged. A parent owes a reasonable duty of protection to his children, and cannot cast the whole of that duty upon strangers. If he permits them, when of tender years, to wander off in places of known danger, and by reason thereof an accident occurs to them, he has no just claim to make others bear the consequences of his own neglect. We have a number of cases in which this principle has been enforced. In *Philadelphia, etc., R. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457, it was said that children of a tender age cannot be upon a railroad track without a culpable violation of duty by their parents or guardians. In *Philadelphia, etc., R. R. Co. v. Long*, 75 Pa. 257, it was said by Agnew, C. J.: 'To suffer a child to wander in the street has the sense of permit. If such permission of sufferance exist it is negligence.' To the same point is *Cauley v. Pittsburg, etc., Ry. Co.*, 95 Pa. 398, 40 Am. Rep. 664. And see, also, *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365." See, also, 1 Thompson's Commentaries on Law of Negligence, § 333; *Evansville, etc., R. R. Co. v. Wolf*, 59 Ind. 89; *Jeffersonville, etc., R. R. Co. v. Bowen*, 40 Ind. 545; *Senn v. Southern Ry. Co.*, 124 Mo. 621, 28 S. W. 66. In *Bamberger v. Citizens' St. R. Co.*, 31 S. W. 163, 95 Tenn. 18, 28 L. R. A. 486, 49 Am. St. Rep. 909, the action was prosecuted by the father, as administrator of his deceased child, for the benefit of himself as next of kin, and the Supreme Court of Tennessee, discussing his contributory negligence, said: "The underlying principle in the whole matter is that no one shall profit by his own negligence, and to allow the father, who has been guilty of negligence, to recover, notwithstanding that negligence, when he brings the suit as administrator, although he could not

do so in his own right, would defeat this underlying principle by a mere change of form, when the entire recovery, in either event, goes to him alone. Upon principle, we think that, no matter how the suit is brought—whether as administrator or as father—it can be defeated by the father's contributory negligence, when he is sole beneficiary."

Assuming that the evidence in this case disclosed facts sufficient to go to the jury upon the question of the appellant's negligence, yet the negligence of the parents of this child was sufficient to demand a judgment for appellant. The house in which respondent lived was located upon and abutted the railroad. The evidence and exhibits show the place of the accident to have been a veritable death trap for a small child. The mother, as found by the jury, had been left in the custody of the child at the time of the accident. She took the child to the door, and permitted her to cross the tracks and play with other small children. The testimony shows that the tracks were frequently used by appellant. The parents should have known that cars might be passing and switching there at any moment. They could not have placed their child in greater peril. The mother's testimony shows that she must have been aware of its dangerous position. No parent should be permitted to recover for his own benefit damages resulting from the death of his child, where he himself has been guilty of negligence which proximately contributed to the accident causing such death. The honorable trial court erred in refusing to sustain the appellant's motion for judgment notwithstanding the general verdict of the jury.

The judgment is reversed, and the cause remanded, with instructions to dismiss the action.

FULLERTON, MOUNT, ROOT, and DUNBAR, JJ., concur.

STATE v. BARUTH.

(Supreme Court of Washington. Oct. 10, 1907.)

1. CRIMINAL LAW—DECLARATIONS OF DECEASED—ADMISSIONS BY ACCUSED—STATEMENTS CALLING FOR DENIAL.

Ante mortem statements by deceased in the presence of accused are not for that reason alone admissible against accused as admissions, unless they relate to the matter at issue and are addressed to accused, or made under such circumstances as would naturally call for some action or reply from persons similarly situated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 808.]

2. SAME—PRESENCE OF ACCUSED.

Ante mortem statements made by deceased after he had been shot, and while accused was sitting at a table in an adjoining room with the door open and within easy hearing, with reference to the shooting, its immediate cause, conduct of both decedent and accused while it was going on, and everything related by deceased which might properly constitute *res gestæ* was admissible, but declarations made by

deceased after the door between the rooms had been closed, and while defendant was in conversation in the other room, were inadmissible against her, though she might by listening actually have heard the statements made and opened the door and denounced them as false.

3. SAME—RELEVANCY.

Ante mortem declarations made by deceased after he was shot, in defendant's presence, concerning her conduct toward him at times, other than when the shooting occurred, the fact that deceased was at one time possessed of considerable property which he lost through defendant's misconduct, and expressions of malice and hatred against her, were irrelevant.

4. HOMICIDE—CAUSE OF DEATH—NEGLIGENT TREATMENT BY PHYSICIAN—EVIDENCE.

Under the rule that unskillful or negligent treatment of the wound by the wounded person or his physician which may have aggravated deceased's condition and contributed to his death does not relieve the assailant from liability, unless such negligent and unskillful treatment was the sole cause of death, defendant was not entitled to show that the wounds inflicted on deceased were not mortal in more than 1 per cent. of the cases, and that the treatment afforded deceased by the physicians in charge was not the best medical treatment.

5. CRIMINAL LAW — APPEAL — PRESENTATION OF ERRORS IN TRIAL COURT.

The court's omission to give cautionary instructions as to the evidence against accused will not constitute error available on appeal, where no such instructions were requested.

Appeal from Superior Court, Spokane County; W. A. Huneke, Judge.

Josephine Baruth was convicted of manslaughter, and appeals. Reversed, and new trial granted.

Sullivan, Nuzum & Nuzum and M. J. Gordon, for appellant. R. M. Barnhart, Fred C. Pugh, and A. J. Laughon, for the State.

FULLERTON, J. On March 26, 1906, the appellant shot one C. L. Baruth with a revolver, inflicting upon his person certain wounds from which he died four days later. Thereafter she was informed against for murder in the second degree, tried and found guilty of manslaughter, and sentenced to imprisonment in the penitentiary for a term of 10 years and to pay a fine of \$1,000. From the judgment and sentence pronounced upon her, she appeals.

The assignments of error relate chiefly to the admission and exclusion of evidence, and the giving of certain instructions and failing to give certain others. These we will notice in the order they are discussed in the appellant's brief.

The state sought to prove the manner in which the crime was committed by showing the declarations of C. L. Baruth made to certain of his neighbors on the evening of the day the shooting occurred. To that end it called as a witness one W. E. Connelly. Mr. Connelly, after testifying to his acquaintance with the deceased and certain preliminary matters, further testified that he, in company with one Charles Steele, called at the Baruth home about half past 7 in the evening of the day of the shooting; that Mr. Baruth was then lying on a couch

in the front room of the house talking to a Mr. Le Fevre, who had also called upon him; that Mrs. Baruth was not then at home; that Mr. Le Fevre stayed for about a half an hour after the witness and Steele arrived, leaving just about the time Mrs. Baruth returned; that after the departure of Le Fevre Mr. Baruth arose from the couch and took the chair vacated by him; that Mr. Steele sat next to him, and the witness sat on the opposite side of the same room; that Mrs. Baruth took a seat at a table in an adjoining room—the kitchen—placed just to the right of the door opening between the rooms, in sight of the witness, the door between the rooms being open; and that, while the parties were in these positions, Mr. Baruth told the story of the shooting. This story the witness repeated, over the objection of the appellant, in the following language: "A. Mr. Baruth started it by saying: 'This is the first time that I ever revealed a secret regarding my family, or spoke to any man in Medical Lake or anywhere else of this trouble about my family in any way, and I defy any man to say so, but this is getting to a point where I will have to talk, I guess.' And he went on to say that, when he got home Sunday evening, he came in the house, he said, and laid down on the sofa, and picked up a paper, and his wife came in and said: 'Where have you been to-day?' (Objection by defendant.) The Court: This is a statement the deceased made? The Witness: Yes, sir. The Court: Proceed. A. (continued). He said: 'She asked me where I had been, and I made no reply. I laid there and went ahead reading just as though she wasn't talking. She next called me a few vile names, and by and by went off and left me, and at night I retired.' The next morning she comes in again and fetched in a coat and spread it down, and she says: 'Here is some mud on this coat. That proves the statement I made last night to you, and here is also a hair, and it is not mine, either'—at the same time pulling a hair off and showing it to him. She says: 'This is not my hair either.' He said he still made no reply, but laid there until she retired to the kitchen, and went on about getting breakfast again, and she commenced to tell the children what kind of a man he was, and he says, 'This much I couldn't stand,' and he jumps up out of bed and grabs his pants and went through into the kitchen door and says—Q. Indicate. A. Here is where he was. He came through these two doors this time, this door and this door, and he asked her, repeating the words he used, 'What in hell and damnation is the matter with you?' he says. Those are the very words he said to her. She retired through this door and out into this bedroom here, and through this way, and got a revolver and returned, and began shooting at him, and he claimed when she returned to the room where he was standing he was stooped over ready to put on

his pants. He had his pants in his hand when she fired the first shot, which struck him here (indicating). He grabs a chair up that sat here, and held it up between him and her, and he says she was shooting very rapid, and he held the chair up between them, and backed into this room through this door, and, just as he got the door closed, he stood at the side of the door here and he looks around, and she stands here at this window right by the side of him with the gun up, looking through the window. He retreats back, and he says: 'For God's sake don't shoot me any more. You have shot me now.' That there is where Mrs. Baruth says, 'You ought to have stopped when I told you.' Q. She said that at that point? Did he say that she said that? A. Yes; he said that she said that he ought to have stopped when she told him, so he retires to this room again, and sat down and sends for McCorkle, sends the little girl over to McCorkle's and McCorkle came over and went for a doctor. Q. Do I understand that Mrs. Baruth stated to Mr. Baruth that then is when he ought to have stopped? A. Mrs. Baruth said to Mr. Baruth he ought to have stopped when she told him to. The Court: Did she interrupt his statement to you, when he was making that statement? The witness: She just says— The Court: While he was telling you that? A. When he was telling me that she says he ought to have stopped when she said so. Q. I don't understand the statement, and I don't think the jury does. You say he stated, Mr. Baruth stated that she said he ought to have stopped? A. She says, when Baruth says that, she says to Steele right there—she turns to Steele and says, 'He ought to have stopped when I told him to.' Q. Proceed with any further conversation that you heard there or which was had, either by the defendant or Mr. Baruth in her presence. A. He said he sent for Mr. McCorkle to come over and he came, and he sent him for the doctors. Q. During that conversation did he tell you how many times he was hit during the shooting? A. No, sir; he didn't say—yes; he said when we went in he was shot twice. Q. I mean at this conversation. Do you recall anything further of the conversation that passed between you and Mr. Baruth in the presence of the defendant, or that was said by the defendant at that time? A. Mr. Steele he gets up, and goes into the room and talks with Mrs. Baruth and Mr. Baruth, and I sat there and talked for probably half an hour that he was in there. Q. During this conversation just him and you there alone? A. What I have stated was heard by all. Q. When Mr. Steele went into the kitchen where Mrs. Baruth was, do you know whether or not the door was closed after him. A. When he went into the kitchen, he closed the door behind him; yes, sir. Q. Did you from where you were sitting hear any conversation between Mr.

Steele and Mrs. Baruth with respect to the shooting? A. I did not. Q. And the subsequent conversation with the deceased on that night was not in the presence of the defendant? A. The remainder was between Baruth and I alone. Q. In that conversation did Mr. Baruth repeat the names which he said his wife called him? A. Yes, sir. Q. What did he say they were, Mr. Connelly? (Objection by defendant. Overruled. Exception.) Q. If you recall what those names were, state them? A. Well he said she called him a 'pimp' and a 'whore master,' and that he was chasing women all the time, and a few other vile names. I couldn't say exactly what he did say. He says, 'This was a common occurrence when I came home,' and that he paid no attention to it, when he came home and dressed up. He said: 'Always when I went away from home dressed up, put on a white shirt and went down town, and came home there was always trouble.'"

Mr. Steele was also called as a witness. He described the situation pretty much as it was described by the preceding witness, probably placing Mrs. Baruth a little closer to the open door than she was placed by Mr. Connelly, and adding that the place where she sat was about 10 feet distant from the position of Mr. Baruth. The record then shows the following: "Q. Proceed, Mr. Steele, and relate to the jury as near as you can recall what was said and done during the conversation that has been referred to at the time and place referred to, and when the parties were maintaining toward each other the relative positions that you have described, touching the shooting and circumstances that led up to and surrounded the shooting? Mr. Swanson: We object for the reason it has not been shown the defendant would have heard the statement made at the time, but as in fact the circumstances show that she would not be apt to have heard it. He says that the way they were sitting it must have been about 10 feet, and from the relative positions shown by the map the voice would have to travel first in an easterly direction then west to this door, and the circumstances show that this defendant could not very well have heard it, and I think anything as questionable as that ought not to be allowed to go in here. The statement was self-serving, not a dying declaration, and not a part of the *res gestæ*. The Court: Objection overruled. Exception. Q. Proceed, Mr. Steele. A. You want the story related? Q. I want the story related at that time and place, and any interruptions or suggestions that may have come from Mrs. Baruth or any question or statement that you or Mr. Connelly or any one else present made in the presence and hearing of Mrs. Baruth respecting this matter—the substance of it as near as you recall. A. When he started to tell his story, he started out by saying: 'This is the most contemptible piece of humanity

that God Almighty ever put the breath of life in.' Then he says: 'This all comes from my putting on a white shirt and going down town Saturday evening.' He says: 'When I was going to lodge, I put on a white shirt, and I goes down to lodge, and she makes a great kick before I started.' And he says: 'Sunday morning I got up and put on my collar and wore my white shirt down town on Sunday.' This was the day before the shooting, and he said: 'There was always a kick whenever he put on a white shirt and went out.' So he says: 'I never before have revealed any secret or any trouble that ever happened in my family.' And he went on to tell about when he came home the night before, on Sunday evening. He laid down on the lounge, and she came around and was accusing him of being with other women, and she called him violent names, and he said he said nothing but went to bed, and the next morning she came in and was examining his clothes. He said she took his under clothes and turned them wrong side out, and examined them all over. She examined them all through to see if she could find some hair or anything, and then took his overcoat. It had mud on it, and she spread that out and showed him, showed him where he had had his overcoat down in the mud, and he said that he didn't say anything to her, and she went on calling him names. Q. Did he repeat the names that he claimed she called him? A. No; I don't remember. Q. Proceed. A. (continued). So she comes out in the kitchen and commenced telling the little children a lot of stuff that wasn't for little children to hear and it made him angry, so he says he jumped out of bed, and went out and asked her what in the hell and damnation she was doing, and he says she run around and went through the kitchen door and run around the house. He proceeded to put on his pants, and while he was putting them on she came running in and fired at him, so he says he retreated back in the bedroom as fast as possible, and, as he was going, he picked up a chair to shield the bullets away. After he went into the bedroom, he said he looked out of the window, and she had gone around there looking through the window, and, if I remember right, he said she shot through the wall or door or something from the outside, and so he said he retreated back further in the other bedroom or back the other way where she couldn't get at him, and I guess that is the most of his story. Q. How many shots hit him? A. He said she hit him twice. He said several shots were fired, but only two hit him. Q. Do you recall anything further said at that time and place while you were sitting in the relative positions suggested before by you, either by the deceased or by the defendant, Mrs. Baruth, touching upon the shooting? A. He said that at one time, he was worth \$10,000 and she broke him up until he didn't have a

dollar, and that she was always continually telling stories outside to people trying to make him out an awful man and such as that. I don't remember anything more just now. Q. Did he go into any particulars and tell you—do you remember what this woman was saying to the children which angered him? A. He said that she was telling the children about him being with other women. He didn't come out and say the words that she used at all. Said that she was telling them what a bad man he was, and how he had been out with other women. Q. During the statement which he then and there made, do you recall any interruption or any statement that Mrs. Baruth herself made, or any response or any denials or any statement whatever that she made? A. Not right at that time; no, sir. Q. Did she make any statement or response whatever during that time or until later when you and she were alone? A. No. Q. Were any persons in the house other than the children, Mr. and Mrs. Baruth, yourself, and Mr. Connelly at the time this statement was being made? A. If there was, I didn't see them. I was only in the two rooms—the kitchen and the sitting room. Q. You knew nothing about the other rooms, the bedrooms? A. No, sir. Q. Afterwards at any time during the evening did you have any other conversation, did you have any conversation with Mrs. Baruth herself? A. I did. Q. About how long was it after this talk you heard from Mr. Baruth? A. Probably 10 or 15 minutes. Q. Where did you have that conversation? A. In the kitchen. Q. Were any other persons present beside yourself and Mrs. Baruth? A. No, sir. Q. Where was Mr. Baruth and Mr. Connelly? A. They were in the sitting room. Q. Was or was not the door leading from the kitchen to the sitting room open while this conversation was going on with Mrs. Baruth? A. No; I closed it when I went out. * * * A. (continued). In the meantime, while me and Mrs. Baruth was talking, Mr. Connelly and Mr. Baruth in the other room, every time they would say anything we could hear them distinctly— Q. Was the door closed? A. With the door closed, yes, sir; and no matter whether we was busily engaged in the subject or not Mrs. Baruth would stop and listen whenever Mr. Baruth would speak, and, of course, if it didn't amount to anything pertaining to this incident, she would go ahead then with her story with me, but, if it was about her, relating to this incident, she would listen. One time in particular while we were talking Mr. Baruth was merely relating over again what he had related to us—that is, one part of it, and that is when she came up to the bedroom door, or at least when she came in and was shooting at him—and he says, well, he started to tell, when she stopped, we were talking and she stopped to listen, and I heard him distinctly, the words he used, he

says, 'She commenced shooting,' and he says, 'I threw up my hands and hollered, "for God's sake stop. You have shot me now;"' and he says, 'I was retreating back in the bedroom as fast as I could,' and he says, 'She kept on shooting and me bleeding.' He was just merely relating what he had related to Connelly and myself. She turns right around to me and looks at me and says: 'Yes,' she says, 'he ought to have stopped when I told him to.' I don't know but what that is about all of the story."

It is the contention of counsel for the appellant that the admission of these recitals in evidence was error. They argue, first, that it was not shown that they were made in the presence or hearing of the respondent, or, if in her hearing, that they were not made under such circumstances as called for a denial upon her part; and, second, that if any part of it was admissible the court opened the door too wide, in that he permitted the witnesses to recite statements denunciatory of the appellant which could not have been evidence against her even had the person making the statements been upon the witness stand himself.

But, before discussing these objections, it is necessary to notice for a moment the legal aspects of the question. Counsel for the state contend broadly that any statement or declaration of the person injured made to a third person, in the presence or hearing of the accused, either charging him directly with the crime or pertaining to matters otherwise relevant to the issue, if not denied by the accused, may be given in evidence against him as an admission on his part. On the other hand, the appellant contends that the mere presence or hearing of the accused is not alone sufficient to render the evidence admissible, but the statements must relate to the matter at issue, must be addressed to the accused, or made under such circumstances as would ordinarily and naturally call for some action or reply from persons similarly situated, and that, if the condition be one of doubt as to whether a reply should or should not have been made, the evidence should not be received. There are cases which support the respondent's contention many of which are collated in its brief. But we think the better authority is with the appellant. Greenleaf, in his work on Evidence, while stating that admissions may be implied from the silent acquiescence of a party in the statements of another, adds that nothing can be more dangerous than evidence of this kind, and that it should always be received with caution, and never received at all unless the evidence is of direct declarations of that kind which naturally calls for contradiction, and then makes this general observation: "The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself either being misinformed, or not having clearly expressed his own

meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say." Greenleaf on Evidence (14th Ed.) § 200. In 1 Encyclopædia of Evidence, p. 367, the rule is stated as follows: "So the silence of a party when a statement is made in his presence against his interest, and is heard and understood by him, and is made in such way as to call upon him to deny it, if untrue, and the facts are within his knowledge, and the statement is made under such circumstances as naturally to call for a reply, amounts to an admission of the truth of the statement made, and may be sufficient to establish the fact as against him." In *People v. Koerner*, 154 N. Y. 355, 374, 48 N. E. 730, 736, the rule is stated as follows: "That, under some circumstances, admissions by a party may be implied from his acquiescence in the statement of others, is an established principle of the law of evidence. A party's acquiescence, to have the effect of an admission, must exhibit some act of voluntary demeanor or conduct. When the claimed acquiescence is in the conduct or in the language of others, it must plainly appear that such conduct or language was fully known and fully understood by the party before any inference can be drawn from his passiveness or silence. Moreover, the circumstances must not only be such as afforded him an opportunity to act or to speak, but also such as would properly or naturally call for some action or reply from men similarly situated. Declarations or statements made in the presence of a party are received in evidence, not as evidence in themselves, but to ascertain what reply the party to be affected makes to them. If he is silent when he ought to have denied, the presumption of acquiescence arises. But it is clearly otherwise when his silence is of a character which does not justify such an inference. Thus, when a person is asleep, or intoxicated, or deaf, or a foreigner unable to understand the language employed, he cannot be prejudiced by statements made by others in his presence. Nor is such silence an assent, unless the statements were such as to properly call for a response." See, also, *Davis v. State*, 131 Ala. 10, 31 South. 569; *Ackerson v. People*, 124 Ill. 563, 16 N. E. 847; *Commonwealth v. Brown*, 121 Mass. 69; *People v. O'Brien*, 68 Mich. 468, 36 N. W. 225; *State v. Swisher*, 186 Mo. 1, 84 S. W. 911; *Phelan v. State*, 114 Tenn. 483, 88 S. W. 1040; *People v. Amaya*, 134 Cal. 531, 66 Pac. 794; and in this court the question suggested, while it has not been before us in the form here presented, is not entirely new. In *Miller v. Territory*, 3 Wash. 554, 19 Pac. 50, where it was shown that the accused when arrested and charged with the murder of one of his neighbors displayed some agita-

tion, and afterwards, when brought into presence of the body of the murdered man and accused directly of the crime, made no answer, but turned away, and refused to again look upon the corpse, the court said that there was nothing in the defendant's conduct "which the most ingenious imagination could torture into an incriminating act." In *State v. McCullum*, 18 Wash. 394, 51 Pac. 1044, the defendant was jointly informed against with one Wilson for having burglarized a saloon building and stealing therefrom a quantity of cigars. On his trial an officer was permitted to testify that Wilson made a confession to him implicating McCullum; that he had McCullum and Wilson brought before him, when Wilson repeated his statement, and that McCullum when asked what he had to say concerning it said there was nothing in it. It was held error to admit this testimony, the court saying: "The fact that in this case Wilson's statement was made in the presence of the appellant and directed in part to the appellant did not thereby render it admissible. The fact that it was so made loses force when we come to consider that appellant was not voluntarily present did not acquiesce in it, and was obliged to remain and listen to it whether he would or not." And in *McCord v. Seattle Electric Co.* (Wash.) 89 Pac. 491, it was held that the statement of a third person concerning who was to blame for a street collision, made to the plaintiff while she was recovering from the shock of the accident, was not admissible as an admission by her, since under the circumstances she could not reasonably have been expected to reply to it.

Adopting the rule contended for by the appellant, it is plain that she has just cause for complaint against the broad ruling made by the trial court. All that the deceased said concerning the shooting itself and its immediate cause, his conduct and the conduct of the appellant while it was going on, in fact, anything related by him that might properly be said to be a part of the res gestæ, while the parties were in the position described by the witness Connelly, was properly admitted. The position of the parties at that time was such that it can be said that the statements were made in the presence of the appellant, and the circumstances were such that she might reasonably have been expected to reply, had she not intended to acquiesce in them. But this is as far as the statements were admissible. Anything said by him after the witness Steele left the room, closed the door between the two rooms, and engaged the appellant in conversation could not be admissible. Even if she could under those circumstances hear if she listened acutely the recitals made by the deceased, clearly the circumstances excused her from replying to them. The statements were not addressed to her, neither were they made in her presence. She could not be certain that Steele heard them, and it is too much to

say that she ought to have opened the door and denounced them as falsehoods, or that she should have interrupted her conversation with Steele to declare to him their untruth if she did not intend to acquiesce in them.

We think, too, that the second ground of the appellant's objection is well taken. Both the prosecuting attorney and the trial judge seem to have proceeded on the theory that anything said by the deceased at this time touching his relations with the appellant was admissible as an admission on her part. The questions propounded to both Connelly and Steele, it will be noticed, called for the entire recital made by Mr. Baruth, regardless of its relevancy to the question in hand. The witnesses were permitted to detail his statements concerning the appellant's conduct towards him at other times than at the time of the shooting, the fact that he was at one time possessed of considerable property which he lost through her misconduct, and even the expressions of malice and hatred the deceased made against her. Manifestly this was improperly admitted. Her conduct towards him at other times than at the time of the shooting as related by these witnesses could hardly have been admissible as evidence had the deceased himself been on the stand, testifying for the state, much less was it admissible when its only relevancy rests on the assumption that the appellant admitted the truth of the recitals by her silence. The statement concerning the loss of his property was irrelevant for any purpose, and his expressions of malice and hatred towards the witness, while perhaps harmless under normal conditions, were here highly prejudicial, since the recitals under the circumstances detailed by the witnesses took on the guise and solemnity of dying declarations, while they were, in fact, nothing more than the rancorous expressions of a partisan, bent on justifying his own conduct, and condemning that of his assailant. The recitals should have been confined to what was said concerning the immediate offense. See *People v. Smith*, 172 N. Y. 210, 231, 64 N. E. 814.

The appellant called as a witness one Dr. Byrne, and proceeded to interrogate him concerning the character of the wounds received by Baruth, whether or not they were mortal, or of such a nature as to necessarily cause death. On an objection being interposed, the appellant's counsel stated that he purposed to show "that the wounds received by the deceased as proven in this case were not mortal wounds; that the best authorities state that in wounds of the upper arm death results in approximately 1 per cent. of the cases; that septicæmia or blood poisoning is not the usual or necessary consequence of bullet wounds; that the Welch or gas bacillus does not of itself cause death, and that, if it was present in the wound, it would have shown in the internal organs of the deceased; and that the treatment afforded the deceased by the physicians in charge was not the best

medical treatment." On this statement being made, the court excluded any further evidence concerning the nature of the medical treatment, to which ruling the appellant duly excepted and assigns the same as error. It is at once manifest that the statement of counsel, even if proven, would afford no defense to the crime charged against the appellant. Where one unlawfully inflicts upon the person of another a wound calculated to endanger or destroy life, it is no defense to a charge of murder where death ensues to show that the wounded person might have recovered if the wound had been more skillfully treated. Even unskillful or negligent treatment of the wound on the part of the wounded person or his physicians which may have aggravated the wound and contributed to the death does not relieve the assailant from liability. He must show that the negligent and unskillful treatment was the sole cause of death, before he can escape the consequences of his unlawful act on this ground. *State v. Edgerton*, 100 Iowa, 63, 69 N. W. 280; *State v. Landgraf*, 95 Mo. 97, 8 S. W. 237, 6 Am. St. Rep. 26; *Daughdrill v. State*, 113 Ala. 7, 21 South. 378; *Sharp v. State*, 51 Ark. 147, 10 S. W. 228, 14 Am. St. Rep. 27; *State v. Strong*, 153 Mo. 548, 55 S. W. 78; *Denman v. State*, 15 Neb. 138, 17 N. W. 347; *Wharton on Homicide* (3d Ed.) § 35. Measured by this test, the court did not err in excluding the proofs offered. These proofs did not tend to show that the subsequent treatment of the wound was the sole cause of the death, but that the treatment was unskillful, and, at most, only contributed thereto. This did not constitute a defense.

The remaining assignments of error require no separate consideration. The legitimate evidence was sufficient to make a case for the jury, and no error was committed by the court in refusing to sustain the appellant's challenge thereto. Nor can we consider the assignment based on the failure of the court to give cautionary instruction concerning the evidence, relating to the appellant's admission by silence. While doubtless cautionary instructions would have been proper, yet none were requested by the appellant, and it is the rule in this state that even positive errors must be called to the attention of the trial court, and that court given a chance to correct them before they can be available here.

For the error above noticed, the judgment is reversed, and a new trial granted.

HADLEY, C. J., and RUDKIN, CROW, ROOT, DUNBAR, and MOUNT, JJ., concur.

MANNIX v. TRYON et al. (Sac. 1507.)
(Supreme Court of California. Sept. 19, 1907.)

1. APPEAL—NOTICE—ADVERSE PARTIES—WHO ARE—STATUTORY PROVISIONS.

Under Code Civ. Proc. § 940, providing for the service of notice of appeal on the adverse

party, persons whose interest in the subject-matter is determined by the judgment appealed from, and which interest will be injuriously affected by its reversal, are adverse parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2137, 2138.]

2. COURTS—JURISDICTION—MECHANICS' LIENS—AMOUNT IN CONTROVERSY.

When the superior court acquires jurisdiction by the filing of a suit to enforce a lien of mechanics' and others, under the statute relating to such liens, it has jurisdiction to render judgment for the amount claimed, though less than \$300 and though the right to a lien is denied.

3. APPEAL—NOTICE—ADVERSE PARTIES.

Code Civ. Proc. § 940, require the service of a notice of appeal on the adverse party. Section 1193 provides that, where a lien is filed on an indebtedness due from the original contractor to the lien claimant, the original contractor shall defend at his own expense; that during the action the owner may withhold from the contractor the amount for which the lien is filed; that on judgment against the owner or his property he shall be entitled to deduct the amount thereof from any sum due the contractor; and that, if the judgment exceed the amount due, he may recover the excess from the contractor. In an action to enforce a mechanics' lien, a personal judgment for \$178 was rendered against defendant contractor, a lien on the lot of the owner being decreed, with a provision for the sale thereof, and a deficiency judgment against the contractor if the proceeds of the sale were insufficient to pay the judgment. Held that, on appeal by the owner, the contractor was not an adverse party on whom a notice of appeal should have been served.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2138.]

4. CONTRACTS—SUBCONTRACTORS.

A subcontractor is not bound by the terms of the original contract where the same are not embodied in the contract between him and the original contractor.

5. SAME—WARRANTIES.

Under Civ. Code § 1770, providing that one who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose, a contractor who uses the materials called for by the specifications in plastering the walls of a building, and does the work according to the contract, is not liable under an implied warranty that the walls should be white.

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by D. J. Mannix against William M. Tryon and another. From the judgment, defendant Tryon appeals. Modified, and, as modified, affirmed.

See 84 Pac. 278.

A. L. Shinn and R. L. Shinn, for appellant.
R. Platnauer, for respondent.

LORIGAN, J. This is an action to foreclose a mechanic's lien. The defendant Tryon, owner of a lot in the city of Sacramento, contracted with the defendant Harris to erect a three-story building according to certain plans and specifications. The plaintiff, as a subcontractor, entered into a contract with the original contractor, Harris, to do the plastering and hard finish work according to said specifications, and, claiming to have performed it, and that a balance of \$178 was due

him therefor, filed a lien and commenced this action against the original contractor and the owner of the lot to enforce its payment. A personal judgment was rendered in favor of plaintiff against the original contractor, Harris, for the amount claimed, and it was then further decreed in the judgment that a lien on the lot of the defendant Tryon existed in favor of plaintiff for said amount, provided for a sale of the lot and the application of the proceeds to the payment of the judgment, and, in the event that the proceeds were insufficient for that purpose, that there be "docketed a judgment against the defendant J. E. Harris for the amount of such deficiency which may remain unpaid on the judgment of plaintiff, and that plaintiff have execution against the defendant for the amount thereof." The defendant Tryon appealed from the judgment, a bill of exceptions accompanying his appeal therefrom, and served his notice of appeal on the plaintiff alone. The notice of appeal given by defendant Tryon was only intended to embrace an appeal from the judgment in so far as it affected him by decreeing a lien upon his property, providing for the sale thereof and application of the proceeds to the satisfaction of the claim of plaintiff. The original contractor, Harris, against whom the personal judgment was entered, took no appeal, nor was any notice of appeal served on him by the appellant Tryon. The District Court of Appeal for the Third Appellate District, before which this matter came up originally, dismissed the appeal on motion of respondent, on the ground that Harris, the original contractor, was an adverse party within the meaning of section 940 of the Code of Civil Procedure, and should have been served with notice of appeal; that he was interested in maintaining the judgment of lien; that a reversal of the judgment in that respect would be against his interest; and, not having been served with such notice, the court was without jurisdiction to determine the appeal on its merits. A petition by appellant for a further hearing and determination of the cause before this court was granted, and upon the hearing here the motion to dismiss the appeal is renewed and submitted with the submission of the cause upon its merits.

The rule, of course, is that, in order to confer jurisdiction upon an appellate court to entertain an appeal, all adverse parties—parties to the controversy whose interests would be injuriously affected by a reversal of the judgment—must be brought before the court. Persons whose interest in the subject-matter is determined by the judgment appealed from, and which interest will be injuriously affected by its reversal, are adverse parties within the meaning of section 940 of the Code of Civil Procedure upon whom notice of appeal must be served. It is said "an adverse party to an appeal means the party whose interest in relation to the subject of the appeal is in conflict with a reversal of the order

or the decree appealed from, or the modification sought by the appeal." *Randall v. Hunter*, 69 Cal. 80, 10 Pac. 130; *Green v. Burge*, 105 Cal. 52, 38 Pac. 539, 45 Am. St. Rep. 23; *Pacific Mut. Life Ins. Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758; *Mohr v. Byrne*, 132 Cal. 250, 64 Pac. 257.

If this is the relation which the original contractor, Harris, bears to the appeal, if his interest in the judgment appealed from is such that its reversal will injuriously affect him, then as an adverse party he should have been served with the notice of appeal. Respondent insists that such is his relation to it, his contention being that it is to the interest of the original contractor that the judgment of the trial court establishing the lien should stand, because, by enforcing the lien against appellant's property, a sufficient sum might be realized through a sale of it to fully discharge the indebtedness due to plaintiff and relieve the original contractor from all obligation to plaintiff; that to reverse the judgment so as to defeat the lien would deprive the original contractor of such advantage under the judgment establishing it, and leave him subject to have the personal judgment recovered against him enforced under execution. In this view, it is insisted by respondent that, as the original contractor will be injuriously affected in his interest if it is reversed, it was essential that notice of appeal be served upon him.

The position of appellant is that a reversal of the judgment so far as the lien is concerned, which alone is involved on this appeal, cannot injuriously affect the original contractor; it being asserted that, if the lien be eliminated from the judgment by a reversal, the effect would be, although no appeal was taken by the original contractor therefrom, to destroy the personal judgment against him; that within the doctrine of *Miller v. Carlisle*, 127 Cal. 327, 59 Pac. 785, the jurisdiction of the superior court to entertain this action as the claim was for less than \$300, depended solely on the assertion of the right of lien and its establishment by that court, and, if it should be determined upon this appeal that there was no lien, then as the amount of the claim asserted was less than \$300 the superior court had no jurisdiction to enter a personal judgment against the original contractor for \$178; that the personal judgment is void and falls with the reversal of the judgment establishing the lien on which jurisdiction of the superior court in the cause alone depended. And it is further insisted by appellant that even if, as claimed by respondent, the personal judgment against the contractor is a valid one which would be unaffected by this appeal, the contractor could not be prejudiced by a reversal of the judgment establishing the lien; that the liability of the contractor for the full amount of the claim is fixed by it, and such liability would not be affected whether that portion of the

judgment establishing the lien be reversed or affirmed.

It is only proper in connection with this statement of appellant's position to say that when his briefs were filed and the case of *Miller v. Carlisle* was cited and relied on in support of that position, the case of *Becker v. Superior Court* (Cal.) 90 Pac. 689, had not been decided. In this latter case a conclusion was reached that the rule stated in *Miller v. Carlisle* was not the correct one, but, on the contrary, the true doctrine is that when the superior court acquires jurisdiction by the filing of a suit to enforce a lien of mechanics and others, under the statute relating to such liens, it has jurisdiction to render a personal judgment for the amount claimed, although the right to a lien is denied and the amount claimed is less than \$300. We mention this in justice to appellant, while at the same time a reference to this latter case of *Becker v. Superior Court* shows that the personal judgment entered against the original contractor in this case is a valid, subsisting judgment, which, as it is not appealed from, stands unaffected or unaffordable by any action which this court may take on the appeal of appellant involving the validity of the lien. Under this personal judgment, the primary obligation to pay the amount due plaintiff is fixed upon the original contractor; such primary obligation being secured by a lien enforced against the property of the owner. This being the condition and effect of that judgment, it will be seen upon a little reflection, and consideration of the record before us on its merits, that it can be of no moment to the contractor whether upon this appeal of Tryon, the owner, it be determined the lien is valid or invalid—whether the judgment as to it be affirmed or reversed. We say, upon the record before us, because it is upon an examination of that record in connection with the rights of owners charged with a lien as against original contractors under the mechanic's lien law, that we feel satisfied warrants a conclusion that no right of the original contractor here can be affected adversely or at all by a reversal of the judgment as to the lien. It, of course, appears from the record before us that the primary obligation to pay the indebtedness for which the judgment was obtained was upon the original contractor. He was personally responsible to the subcontractor for the payment of the claim under his contract with him. The law merely gave the subcontractor, in default of payment by the contractor, a right of lien against the owner's property enforceable by foreclosure to secure the payment which the contractor was primarily obligated to make. But the law also (section 1193, Code Civ. Proc.) provides that, where a lien is filed against the property of the owner on an indebtedness due from the original contractor to the lien claimant, the original contractor shall defend against any action

brought thereon at his own expense; that during the pendency of the action the owner may withhold from the contractor the amount of money for which such lien is filed; that, in case of judgment against the owner or his property upon the lien, he shall be entitled to deduct from any amount due the contractor the amount of such judgment and costs, and, if the amount thereof shall exceed the amount due by the owner to the contractor, or if he has settled with the contractor in full, he shall be entitled to recover back from the contractor any amount paid by him in excess of the contract price and for which the contractor was originally the party liable.

It appears from the record here that there is in the hands of the appellant, owner of the lot, over \$1,900 due from him to the original contractor. Under these circumstances, while it may be said theoretically and on the face of the judgment itself that the contractor would be benefited by having the judgment of lien stand and satisfaction of the claim of plaintiff had by a sale of the owner's property, yet, practically and by virtue of the section of the Code referred to, no advantage or benefit accrues to him at all thereby. In any event—reversal or affirmation—his primary liability for payment of the claim to plaintiff remains unaffected under the personal judgment obtained against him. Under any theory he can only claim that he would be injuriously affected by a reversal because under the judgment as it stands he is benefited by the enforcement of the lien. But, under the section of the Code referred to and upon the record, this theory is illusive. If the judgment establishing a lien stands and is enforced by a sale of the property, or is discharged by the owner through payment of the judgment, the owner is entitled to reimburse himself from the moneys in his hands due the contractor, which in this particular case the record shows are ample for that purpose. All this being true, it is obvious that in this particular case on a consideration of the motion on the merits of the appeal neither an affirmation nor a reversal of the judgment so far as it establishes a lien against appellant's property could be of any advantage to the original contractor. If it were reversed, he would be still liable under the personal judgment against him, which is unaffected by this appeal, and under which the primary liability on his part to plaintiff is fixed, and, if it were affirmed, the owner would have the right, which in this case could be effectively exercised of reimbursing himself or discharging the judgment as a lien against his property from moneys in his hands due the original contractor, or could pay the judgment in discharge of the lien to the subcontractor directly. Under this view, it appears to us that it is a matter entirely immaterial to the original contractor whether it be decided on appeal that the portion of the judgment decreeing a lien be valid or in-

valid. No substantial right of the original contractor under the judgment of lien is affected. Hence he was not a party interested in maintaining it, and not an adverse party upon whom a notice of appeal should have been served.

The District Court of Appeal in dismissing this appeal when the matter was before it based its decision on *Lancaster v. Maxwell*, 103 Cal. 67, 36 Pac. 951, which it cited as justifying its action. In that case, however, it does not appear that any personal judgment was rendered against the original contractor fixing a primary liability on his part to the subcontractor for the entire amount of his claim. The personal judgment there rendered was for such a deficiency as appeared after the sale of the property, and this fact seems to have controlled the decision. In the case at bar the personal judgment is for the entire amount of the claim, separate and distinct from any deficiency judgment which it is provided shall be docketed against the original contractor. Nothing is said in the portion of the judgment providing for such docketing that it shall be docketed as a personal judgment. This would be its effect, not, however, by virtue of the provision for docketing, but because independent of it there was a personal judgment expressly given against the original contractor in another part of the judgment. If, in the case at bar, the judgment, so far as it established a lien, were reversed and the deficiency judgment provided to be docketed against the original contractor were to fall with it, this would nevertheless leave the personal judgment against the original contractor entered against him elsewhere unaffected and subject to enforcement upon execution. Aside from this, in the *Maxwell* Case, the effect of section 1193 of the Code of Civil Procedure upon the rights of the owner of the premises affected by the lien against the original contractor did not seem to have been presented for consideration, nor the record examined upon the merits of the appeal to ascertain whether applying this section to the matters disclosed by it, and properly to be considered on the motion, any injury to the original contractor could possibly result from a reversal of the judgment establishing the lien. The consideration of these matters differentiates this case from the *Maxwell* Case sufficiently to make the ruling there inapplicable here, even if that ruling should be deemed correct in principle upon the record to which it is applied, which, we think, is extremely doubtful. The motion to dismiss the appeal is therefore denied.

Now, as to a consideration of the appeal on its merits. Aside from the question of attorney's fees, the principal contention of appellant is that the findings made by the court in support of the judgment in favor of the plaintiff are not sustained by the evidence. As we have heretofore stated, appel-

lant entered into a contract with J. E. Harris to erect a building for him for the sum of \$7,600, according to certain plans and specifications, and the respondent as subcontractor contracted with the latter to do the plastering and hard finish work according to specifications providing therefor for the sum of \$750. As the work progressed, he was paid the amount of his contract price, except \$178, for which the lien herein was filed and to recover which the suit was brought. The court found that plaintiff completed his contract according to its terms, and it is claimed that this finding is not supported by the evidence because there were certain discolorations on the plastering appearing after the completion of the work. The contract between the owner and the original contractor for the construction of the building contained specifications relative to the plastering thereof, and the contract between plaintiff and said original contractor embraced these latter specifications. The specifications set forth in detail the character and quality of the material to be furnished for the mortar and hard finish to be used in the work, the manner in which they should be compounded and applied and the work done, and the evidence shows that in discharging his contract plaintiff used exactly the materials that were required by the specifications and performed the work in a workmanlike manner, but that upon its completion portions of the surface of the walls showed a yellowish tint appearing in some places in streaks and in others in spots of a cloudlike form. How these discolorations were caused is not disclosed by the evidence. In fact, the testimony showed that the cause of them was unknown. Such discolorations might occur, the evidence shows, from various extraneous causes having no relation to the character of the materials used or the workmanship employed, and might occur where the best material and workmanship, as in the case at bar, were used and employed and still be inexplicable. The usual result, however, of the use of good materials properly applied is to produce a white coat or surface on the walls, and it is insisted by appellant that because that was not the result of the work of plaintiff his contract was not properly performed; that it was the duty of plaintiff to show that such discolorations were occasioned by some cause for which he was not responsible. In that connection it is insisted that there was both an express and implied warranty accompanying his contract that the rooms should be finished so that the walls would be white. The express warranty is based upon a provision of the main contract between the owner and the original contractor that the latter was to deliver appellant the building properly and entirely finished and "in an undamaged state." It is sufficient, however, on this point to say that the subcontractor was not a party to this main contract, its provisions were not incorporated in his contract

with the original contractor, and he is not bound by its terms. His contract was with the original contractor alone, and related solely to doing the plastering and hard finishing according to the requirements of the specifications in the main contract, and he is only bound by the terms of his agreement in that respect, and it is not claimed that the agreement between plaintiff and the original contractor contained any requirement or warranty that the walls should be of any particular color.

But it is said there was an implied warranty that they should be white; that as the usual result from the use of the materials specified and their application would be to produce a white surface, this result was contemplated and impliedly warranted, and it is insisted that this contention is supported by sections 1769 and 1770 of the Civil Code. The only one of these sections which could possibly have any relevancy is section 1770. That section provides that "one who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose." But it is obvious that this section has no application to the matter under consideration. As its language imports, the section only applies where an article is manufactured for a particular purpose. It contemplates that the manufacturer has selected the materials and determined the workmanship whereby the finished article is supplied for the particular purpose designed. It does not apply where the article to be furnished is to be supplied under a contract requiring that it be made according to a certain plan or certain specifications. Now, in the case at bar, we have seen that there was no express agreement that the plaintiff should plaster and hard finish the appellant's house so as to leave the walls white. There was no agreement that any particular result should follow. He did not agree generally to plaster the dwelling, which would leave to him the selection of the materials and the method of doing the work. His agreement was to do it in a way that the owner and the original contractor had designed, according to the specifications which they had agreed on. He had no discretion in the matter. When he followed strictly those specifications, used exactly the materials they called for in the composition of the mortar and hard finish, and applied them in a workmanlike manner, he did all his contract called for. He did not contract for results, but only to do the work in a specified way. If the usual result of white walls and ceilings did not follow, he was not responsible for it, unless there was some default on his part in furnishing the materials called for in the specifications or in doing the work with them. The court found, and the evidence fully sustained the finding, that the plaintiff had not been remiss in either particular. Under these circumstances, as he made no express warranty as to results

and plastered and hard finished the rooms with the materials specified in the contract and did the work skillfully, he did all that he had contracted to do. He did not expressly warrant any particular color, the specifications did not call for any, and, the work being done in a workmanlike manner with the materials designated in the specifications to be used, the plaintiff is not responsible under any implied warranty for the result. *Bancroft v. San Francisco Tool Co.*, 120 Cal. 228, 52 Pac. 496; *McKnight-Flintic Stone Co. v. Mayor*, 160 N. Y. 72-84, 54 N. E. 661.

There is nothing in the other points made by appellant, save as to the allowance to plaintiff of \$40 attorney's fees in the foreclosure of the lien. Since the appeal herein was taken, it has been decided by this court that the statute allowing attorney's fees in an action to enforce a mechanic's lien is unconstitutional. *Builders' Supply Depot et al. v. O'Connor et al.* (Cal. Sup.) 88 Pac. 982. This, however, only requires a modification of the judgment.

In that respect it is ordered that the judgment be modified by striking out therefrom the allowance of attorney's fees, and, as so modified, the judgment is affirmed.

We concur: ANGELLOTTI, J.; McFARLAND, J.; SLOSS, J.; HENSHAW, J.; SHAW, J.

153 Cal. 71
HALSEY v. SUPERIOR COURT OF CITY
AND COUNTY OF SAN FRANCISCO. (S. F. 4853.)

(Supreme Court of California. Sept. 23, 1907.)

1. GRAND JURY—TERM OF SERVICE.

When, in obedience to Const. art. 1, § 8, and Code Civ. Proc. § 241, requiring the impaneling of a grand jury once each year, a new grand jury is impaneled, the life of the former grand jury ends.

2. SAME.

Pen. Code, § 906, providing for the discharge of a grand jury by the final adjournment of the court, adopted as a part of the Code in 1872, when terms of court existed, is not effectual in discharging a grand jury after the Constitution of 1879, under which there are no terms, and the superior court is always open for business.

3. COURTS—RULES OF DECISION.

A decision construing a statute, which has been followed for over 20 years, will not be overruled, unless clearly erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 311.]

4. GRAND JURY—TERM OF SERVICE—STATUTES—CONSTRUCTION.

Code Civ. Proc. § 210, declaring that the persons whose names are returned, as provided in preceding sections for selecting jurors, shall be "regular jurors, and shall serve for one year," refers only to the persons set apart as a body, from which a jury, grand or petit, may be drawn, and in that capacity they serve for one year, the term of service being the time during which they may be drawn for actual jury service, and has no reference to the life of a grand jury drawn from their number.

5. SAME.

Code Civ. Proc. § 210, providing that regular jurors shall serve for one year, and until other persons are selected and returned, when considered in connection with sections 214, relating to the drawing of jurors for courts of record, and section 241, providing for the impaneling of grand juries, and Pen. Code, §§ 906, 1140, declaring that a grand jury shall be discharged by the final adjournment of the court, and providing for the discharge of a jury unable to agree, has nothing to do with the life of a jury, grand or petit, and under it a grand jury does not end because the clerk, in conformity with Code Civ. Proc. § 209, writes down the names in the list furnished in accordance with section 204, and deposits the same in the grand jury box, where no proceedings have been had under section 241 for impaneling any of the grand jurors from such list.

6. SAME.

The object of Code Civ. Proc. § 210, providing that regular jurors shall serve for a year, and until other persons are selected, is not to prevent the keeping in existence any particular grand jury for an indefinite time, that being the purpose of Pen. Code, § 906, enacted at the same time, which expressly limits the life of a grand jury to the term of court for which it is impaneled.

McFarland, J., dissenting.

In Bank. Application for writ of prohibition by Theodore V. Halsey against the superior court of the city and county of San Francisco to restrain the court from proceeding with the trial of petitioner under an alleged indictment. Denied.

Bert Schlesinger, William P. Humphreys, and D. M. Delmas, for petitioner. W. H. Langdon, Dist. Atty., and William Hoff Cook, Asst. Dist. Atty. (Francis J. Heney and Charles W. Cobb, of counsel), for respondent.

PER CURIAM. The petitioner seeks a writ of prohibition to restrain the superior court of the city and county of San Francisco from proceeding with his trial under a paper purporting to be an indictment, charging him with having committed a felony, which paper was presented and filed in said court as an indictment by a body of men assuming to act and acting as a grand jury of such city and county. It is claimed by petitioner that at the time of the finding and presentation of this indictment (March 20, 1907) this body of men did not constitute a grand jury at all, and that consequently the indictment is a nullity and the superior court is without power to try him on the charge therein made. Upon the oral argument it was admitted, for all the purposes of this proceeding, that this body of men was regularly and legally drawn from the names in the grand jury box for the year 1906, and regularly impaneled and organized as the grand jury of said city and county on the 9th day of November, 1906, and has never been discharged by any order of the court, but ever since such impanelment and organization has continued to act as the grand jury of the city and county, and has always been recognized by the superior court as such grand jury. Petitioner's claim here is that this grand jury was discharged by

operation of law not later than February 12, 1907, and that, by reason thereof, the members have ever since constituted not a grand jury, but an illegal and unauthorized body of men, without power to perform any function of a grand jury.

The facts relied on as accomplishing this discharge of the grand jury by operation of law are as follows: On January 27, 1907, in conformity with section 204, Code Civ. Proc., the judges of said superior court made an order designating the estimated number of grand jurors, and also the number of trial jurors, that would, in the opinion of the court, be required for the transaction of the business of the court and the trial of causes therein during the ensuing year, which number of grand jurors was 144. Immediately after said order designating the estimated number of grand jurors had been made, said court selected and listed the grand jurors required by said order to serve as grand jurors in said superior court during the ensuing year, or until a new list should be provided, which list of persons so selected was at once placed in the possession of the county clerk, and said clerk, on receiving said list, filed the same in his office. On February 12, 1907, in conformity with section 209, Code Civ. Proc., said county clerk wrote down the names contained on said list on separate pieces of paper, of the same size and appearance, and deposited the same in the grand jury box of said city and county. No proceedings have been had under section 241, Code of Civil Procedure, in drawing, impaneling, or summoning any of the grand jurors from said list of grand jurors so selected in January, 1907, by the said court as aforesaid.

The claim of petitioner in this regard is necessarily based on the language of section 210 of the Code of Civil Procedure, for there is no other provision of our law, constitutional or statutory, that affords any basis for such a claim. Our Constitution simply provides that "a grand jury shall be drawn and summoned at least once a year in each county." Article 1, § 8. Our Code of Civil Procedure provides (section 241) that every superior court, whenever in the opinion of the court the public interest requires it, must proceed to impanel a grand jury, and "in all counties there shall be at least one grand jury drawn and impaneled in each year." Nowhere, unless it be in said section 210, Code Civ. Proc., is there any express limitation on the life of the grand jury so impaneled in pursuance of the authorization and requirement of the law, or any implied limitation except such as may be implied from the requirement that at least one grand jury must be impaneled in each year. When, in obedience to this mandate, a new grand jury is impaneled, the life of the former grand jury must necessarily end. Section 906 of the Penal Code, adopted as part of the origi-

nal Code in 1872 and never amended, provides that, on the completion of the business before them, the grand jury must be discharged by the court, "but, whether the business is completed or not, they are discharged by the final adjournment of the court." This section was adopted at a time when we had terms of court. As, under the Constitution of 1879, we now have no such terms of court, and the superior court is always open for business, there is no such thing as a final adjournment of the court, and the quoted portion of the section is no longer effectual. It, however, assists somewhat in ascertaining the proper construction of section 210, Code Civ. Proc., as we shall hereafter note. Section 210, Code Civ. Proc., is contained in the article relating to the "selecting and returning jurors for courts of record" (article 3, c. 1, tit. 3), the article having to do with the selection and placing in the general jury box of the county by the proper officers of the names of persons who may be drawn as required for actual service as jurors, both grand and trial, in the court. The preceding sections of the article having provided for the fixing by the court in January of each year of the estimated number of the grand and trial jurors that will be required for the transaction of the business of the court and the trial of causes therein during the ensuing year, the immediate selection of that number by the officers designated for that purpose, the placing of the lists of such persons in the possession of the county clerk, the filing of the same by that officer, the writing by him of the names on separate pieces of paper, and the deposit of such papers in the "grand jury box" and "trial jury box," respectively (sections 204 to 209), section 210 provides: "The persons whose names are so returned shall be known as regular jurors, and shall serve for one year, and until other persons are selected and returned." Section 211 provides that "the names of persons drawn for a grand jury shall be drawn from the grand jury box and the names of persons for a trial jury from the trial jury box, and if, at the end of the year, there shall be the names of persons in either of the said jury boxes who may not have been drawn during the year to serve, and have not served as jurors, the names of such persons may be placed on the list of jurors drawn for the succeeding year." Subsequent articles provide for the method of drawing from these boxes and summoning jurors, both grand and trial, for actual service in the court as they may be required and ordered by the court. The claim of petitioner is that, under section 210, the grand jury drawn and impaneled in the year 1906 from the persons selected, listed, and returned as grand jurors for that year, was discharged by operation of law upon the selection, listing, and returning of the 144 grand jurors for the year 1907.

This is not a new contention in this court.

Section 210, Code Civ. Proc., has existed in practically its present form ever since the adoption of the Codes in 1872, and there has been no change in any other statutory provision applicable to jurors or juries that is material to the controversy here. The precise question here presented as to the effect of the provisions of section 210 upon a grand jury regularly impaneled from the list of the preceding year, was considered by this court in bank in the year 1886 in the cases of *In re Gannon*, 69 Cal. 541, 11 Pac. 240, and *Kelly v. Wilson* (Cal.) 11 Pac. 244. In the *Gannon* Case the court, in reply to the claim that the grand jury had ceased to exist for the reasons stated, and was not a legal body, said: "But, while the statutory law fixes the time within the year for the court to order the selection and return of grand jurors liable to serve in the capacity of a grand jury, and limits the time in which they shall serve for the purpose of the drawing and impanelment of a grand jury, it prescribes no specific time for the drawing of the grand jury, or for its official existence after it has been drawn and impaneled. These the law seems to have left to the judicial discretion of the court, for it provides that 'every superior court, whenever, in the opinion of the court, the public interest must require it, may make an order directing a jury to be drawn' (Code Civ. Proc. § 241); and, when the proceedings put in motion by an order made for the purpose result in the drawing and impanelment of a grand jury, it is, as an organized body, in the exercise of its functions and in its official existence, subject to the control of a court that is 'always open,' and may at any time, in the exercise of its jurisdiction, order it to be discharged. Pen. Code, § 906. A grand jury cannot dissolve itself (*Clem v. State*, 33 Ind. 414); and as the grand jury whose authority is challenged was not impaneled for any particular time prescribed by law, and has not been discharged by the court in which it is acting, it still exists as an original body, with power to perform its duties." Six of the seven justices concurred in this opinion. *Kelly v. Wilson*, supra, which was a proceeding in prohibition by an indicted person to restrain the superior court from trying him, under precisely similar facts to those existing here, was decided on the authority of the *Gannon* Case. It is strongly urged that the language above quoted was not necessary to the decision in the *Gannon* Case. This is true in the sense that the case could have been disposed of on other grounds stated in the opinion. It is to be observed, however, that the case of *Kelly v. Wilson*, in which a decision upon this question was absolutely essential to a denial of the writ sought, was presented by the same counsel appearing in the *Gannon* Case, and was decided on the same day as the *Gannon* Case. It is thus apparent that the two cases were under submission at the same time and were

considered together, and practically constituted but one case in which the question before us was necessary to a decision. It thus appears that the court in these cases construed section 210, Code Civ. Proc., as only limiting the time in which the persons selected shall serve for the purpose of the drawing and impaneling of a jury, and as having nothing whatever to do with the life of a jury, either grand or trial, once regularly drawn and impaneled. No different construction has been given the section by any later case. *People v. Leonard*, 106 Cal. 302, 39 Pac. 617, certainly cannot be held to have so done. While the court in that case did observe that it did not even appear that the new jurors had been selected and returned, and that, if they had not been, it was clearly proper to continue the jury of the preceding year until such event happened, it also apparently adopted the reasoning of the *Gannon Case* as one of the grounds of its decision. The above cited decisions as to the proper construction of the section under consideration, rendered 21 years ago, and, it is fair to assume, ever since followed by the courts of the state, certainly should not be overruled unless they are clearly erroneous. No such situation is here presented. On the contrary, it is our opinion that the construction given the section by our predecessors was the correct one.

Neither section 210 nor any other section contained in the article of which it is a part assumes to deal with any impaneled jury, grand or trial. As to these, elaborate provision is elsewhere made. These sections relate exclusively to the setting apart of a sufficient number of persons eligible for jury duty from whom may be drawn and brought into court from time to time so many as are required to render actual jury service in court. Section 210 refers only to the persons so set apart, and to them solely in that capacity; i. e., in the capacity of persons set apart as a body from which a jury may be drawn when wanted. In that capacity all the persons so set apart are, by express provision of the section, known as "regular jurors," although many of them may never be drawn and summoned to attend upon the court at all. In that capacity alone they "serve for one year and until other persons are selected and returned" to take their places. When, serving in that capacity, some of them are drawn and summoned into court and impaneled on a jury, they there render an entirely different and additional service, which is regulated both as to manner of service and time of discharge by the provisions of the law relating to impaneled juries. Section 210 refers only to the two special classes from which jurors are to be taken, and it is only as members of those special classes one for grand juries and the other for trial juries, that these so-called regular jurors are required to serve by that section. The term of service there mentioned is

the term during which they serve in that capacity, the term during which they may be drawn or selected for actual jury service. This is the only possible reasonable construction of the language of section 210 as to the term of service, in the connection in which it is used. The meaning thus given to the word "serve" is an entirely permissible one, and the fact that the same word is obviously used in a different sense in other connections is not important.

An examination of other provisions of law enacted at the same time as section 210, Code Civ. Proc., demonstrates that the Legislature could not have intended the section to operate as a discharge of any impaneled jury. As we have seen, the section applies to both grand and trial jurors, and the claim of petitioner leads to the result that the selection and return to the county clerk of the list of jurors for the succeeding year and the placing of those names in the general jury box ipso facto discharges from service and dissolves any impaneled jury, grand or trial, that may then be in attendance on the court, members of which were drawn from the lists of the preceding year. It is inconceivable that there was any such intention as to trial juries. It would be a most absurd provision that a jury engaged in the actual trial of a cause, and perhaps just about to render a verdict after a long and expensive trial, should be deprived of power to act further in the case solely by reason of the fact that a new list of available jurors for the ensuing year had been returned to the county clerk, and the names had been deposited in a trial jury box. Such a provision could accomplish no good, and would be productive of great injury. The intention of the Legislature as to such juries is clearly shown by the other section of the Code adopted at the same time, specially relating to juries. It is apparent therefrom that a jury impaneled to try a case was to conclude that case, if possible. As to criminal cases, after providing for the discharge of the impaneled jury in certain contingencies only, such as sickness of a juror, etc., it was provided in section 1140 of the Penal Code that, except as otherwise provided, a jury "cannot be discharged after the cause is submitted to them until they have agreed on their verdict and rendered it in open court," except by consent of the parties or by the court when the jury is unable to agree. Practically the same was true as to civil cases. We cannot reconcile these provisions with section 210 of the Code of Civil Procedure if that section is to be construed as urged by petitioner.

The intention as to grand juries is equally clear. Express provision as to the time during which an impaneled grand jury shall continue in existence was made in the Penal Code. Unless sooner discharged by the court, they were discharged only by the final adjournment of the court for the term. Section

906. The grand jury was at that time a part of our old county court system. The law provided for the impanelment of a grand jury at the opening of each regular term of the county court, unless otherwise directed by the judge (section 241, Code Civ. Proc.), and, where such impanelment was to be had, the judge was required to make an order for the drawing from the "regular jurors" of a sufficient number of grand jurors from which the grand jury might be selected. Section 214, Code Civ. Proc. This drawing was required to be made at least seven days before the opening of the term. The terms of the county court were fixed by the same Code (section 88, Code Civ. Proc.), and in more than half of the counties, including San Francisco, a term commenced on the first Monday of January in each year. By the provisions of a general act, approved March 1, 1872, each term of court continued until the next regular term, a period varying in length from two to four months, unless the business of the court was sooner disposed of. The selections of persons to serve as "regular jurors" for grand jury purposes were then required to be made by the board of supervisors of each county at their first regular meeting in each year, which was ordinarily the first Monday in January. It is apparent from this that the grand jury impaneled at the opening of the term of each county court commencing on the first Monday of January would be taken from the list of the preceding year, and that within a very few days after such impanelment the new selections of "regular jurors" for the ensuing year would be made and returned. Under petitioner's construction, the selection and return of the new jurors would have discharged the grand jury impaneled only a few days before, and just commencing the business for which it had been brought together, and this in the face of a provision in the Penal Code which clearly implies that such jury should continue until it completed the business before it and was discharged by the court, or until the final adjournment of the court for the term. Of course, no such absurdity was intended. Force and effect can be given to the various provisions enacted in 1872 relative to juries, as distinguished from jurors, only by construing section 210, Code Civ. Proc., as it was construed in the Gannon and Kelly Cases. So construed all the provisions are harmonious and the result sensible. See, also, *State ex rel. Clark v. Second Judicial District Court*, 31 Mont. 428, 78 Pac. 769. It has been suggested that the object of section 210 of the Code of Civil Procedure was to prevent the keeping in existence any particular grand jury for an indefinite time. It is obvious that this could not have been the purpose of the section, in view of the provisions of section 906 of the Penal Code enacted at the same time, which expressly limited the life of the grand jury to the term of the court for which it was impaneled, a pe-

riod of from two to four months. We are satisfied that the latter section of the Penal Code was intended to cover the whole subject of the discharge of a grand jury.

While we have not discussed all the arguments made by learned counsel in support of the contention of petitioner, we have considered them all, and find therein no reason to doubt the correctness of the decisions in the Gannon and Kelly Cases.

The application for a writ of prohibition is denied.

McFARLAND, J. (dissenting). I dissent, and think that the writ of prohibition asked for should be granted. I base this conclusion on the ground that at the time of the presentation of the indictment against the petitioner the body of men who undertook to indict him was not a grand jury, and that the purported indictment was a nullity and gave no jurisdiction to the superior court to try the petitioner.

A man cannot be legally placed on trial for a felony at the will of any person, or body of persons, who may choose to make an accusation against him. The accusation must be made in manner as provided by law, and, if there is no such accusation, there is no jurisdiction in any court to try the accused. In this state there are only two legal ways of putting a man upon trial for a felony—one by information after open examination and commitment by a magistrate, which need not be here considered, the other, the one claimed to have been followed in this case, by indictment by a grand jury. The court is about to proceed to try petitioner upon a paper writing in the form of an indictment for a felony, filed in the court, and presented by a body of men claiming to be a grand jury. Petitioner alleges that this body was not a grand jury at the time the said paper writing was presented; and if this be so, as I am clear it is, then there is no jurisdiction in the subordinate court to proceed with the trial and the writ of prohibition should issue. Respondent concedes that, if this be so, the remedy by prohibition is proper. The ordeal of being compelled to submit to a trial upon an indictment for an alleged felony is a most onerous one. The accused must prepare for a trial. He must endure all the temporary obloquy of such a charge. Though innocent, he must take the chances of being convicted upon insufficient evidence, which may easily happen when there is a great public feeling against him, or against a class to which he is supposed to belong, and juries are liable to be insensibly influenced by popular clamor. Moreover, though acquitted, he can never wholly escape the shadow of the cloud which an indictment and trial have cast over him. His enemies may always intimate that he was acquitted merely because the evidence was not quite strong enough to show him guilty beyond a reasonable doubt. It is therefore not only the right of the ac-

cused person to resist a trial when not prosecuted according to law, but it is his duty to himself, to those dependent on him, and to his friends to do so.

The provisions of the Code upon which the question in this case arises are, so far as material, briefly as follows: Section 204, Code Civ. Proc., provides that in January "in each year" a majority of the judges of the superior court of San Francisco shall make an order designating the estimated number of grand jurors that will in their opinion be required for the transaction of the business of the court "during the ensuing year." Immediately after making such order they "shall select and list" the grand jurors required by said order to serve as grand jurors in said superior court during the ensuing year, or until new lists shall be provided, and lists of "persons so selected" shall immediately be placed in the possession of the county clerk. Section 209, Code Civ. Proc., provides that, upon receiving such list, the county clerk shall file the same in his office, write the names of the persons selected on separate pieces of paper of same size and appearance, and fold each piece so as to conceal the name thereon, and shall deposit these pieces of paper with the names on them in a box to be called the "grand jury box." From the persons whose names are thus in the box a grand jury must be drawn and impaneled whenever a grand jury is needed for the transaction of the business of the court. Section 210 provides (and this is the most important provision bearing on the question here involved) as follows: "The persons whose names are so returned shall be known as regular jurors, and shall serve one year and until other persons are selected and returned." The facts bearing upon the question presented in the case at bar are these: In January, 1906, the judges of said superior court made an order that 144 grand jurors would be required for the transaction of the business of the court during the ensuing year. They selected 144 persons and gave a list thereof to the clerk, who filed the same in his office, and put the names of such persons each on a separate and similar piece of paper in the grand jury box as required by the provisions of the Code hereinbefore referred to. From this box a grand jury was drawn and impaneled during the year 1906. In January, 1907, the judges again made an order that 144 grand jurors would be required to transact the business of the court for the ensuing year. They selected that number of persons for grand jurors and gave a list of them to the clerk, who filed the same and put the names on separate piece of paper in the grand jury box, as provided by the Code. This was all done not later than February 14, 1907, and, if thereafter during the ensuing year it became necessary to have a grand jury for the transaction of the business of the court, these persons who were thus selected in January, 1907, and whose

names were in the grand jury box for that year were the proper persons from whom to draw and impanel such grand jury. No jury, however, was impaneled from such persons; but the persons who constituted the said former grand jury of 1906 assumed to continue to act as grand jury after January and are still assuming so to act, and on May 24th, about four months after said new list had been provided, they presented to the superior court a paper writing which in form is an indictment of petitioner for felony. It is upon this paper writing that the respondent court is about to proceed to try petitioner. There is no other accusation against him. Under the Code provisions and the facts as above stated the invalidity of said paper writing as an indictment is so plain, clear, and obvious to my mind that the subject does not present to me even a debatable question.

Under the Code the persons selected in January of each year are to act for one year and "until" other persons are selected the next year. This means that they shall act only until the happening of the event mentioned, and not afterwards. The word "until" as used in section 210 is a word of limitation, and designates the end of the thing referred to. The meaning of this word when used as in the Code is aptly stated by the Court of Appeals of Missouri in *Maginn v. Lancaster*, 100 Mo. App. 116, 73 S. W. 372, as follows: "The word 'until' is a word of limitation, used ordinarily to restrict what immediately precedes it to what immediately follows it. Its office is to point out some point of time, or the happening of some event, when what precedes it shall cease to exist, or have any further force or effect." But there is no need to elaborate this proposition further, because, as I understand it, there is no serious contention that the word "until" in section 210 is not a word of limitation as to the persons and things to which it refers, but it is contended that it does not apply to the persons who constituted the grand jury of 1906 and who claim to still constitute a legal grand jury, notwithstanding the provisions of the Code and the fact that in January, 1907, "other persons" were selected. In support of the point last above mentioned, it is contended that the provision in section 210, that after the selection of "other persons" the former persons shall not serve, does not mean that they shall not serve when impaneled in a grand jury, but that it refers only to those whose names are in the jury box liable to be called upon to form a grand jury, but who have not been so called. I see no rational ground for such contention. The language of the Code certainly does not contain any such out of the way limitation of the word. It simply uses the plain word "serve" in its ordinary sense. There is no limitation of its meaning—no intimation of an intent to employ a well-known English word in a sense different

from that which is commonly attached to it. We are therefore to give the word its ordinary meaning, just as we give to other common words their ordinary meaning, considered, of course, in the relation which the word bears to the context. Now, what is the plain meaning of the word "serve" as applied to the persons selected as regular grand jurors under the Code? The general meaning of the word "serve" is to "perform service," and it is difficult to see how a person whose only relation to a grand jury consists of his name being in a box—frequently without his knowledge—can possibly serve in the sense of performing service. It seems to me that he can properly be said to "serve" as a grand juror only when he is in a position to do something as such juror—only after his impanelment into a grand jury has given him the power to perform some act in the capacity of grand juror. But, suppose it be considered not improper to say that he serves when he is merely in the negative position of being liable to be called upon to act as a grand juror—upon what species of reasoning can it be held that he ceases to serve as soon as he is impaneled into a grand jury. When he is acting as a member of an impaneled grand jury, is he not serving? To say that before he becomes a member of an impaneled grand jury and while he does not do and cannot possibly do any act of service he is nevertheless serving, but that when he becomes part of a grand jury and can and does render service he does not "serve" is substantially to say that when he does not serve he "serves," and that when he does serve he does not serve. The word "serve" as used in section 210 clearly includes every act and every situation to which the word "serve" as a grand juror can in any sense apply. There is certainly no language in the Code that intimates that a grand juror is not serving when he is acting as part of an impaneled grand jury. On the other hand, it appears from section 211 that serving on such a jury is the only way in which he can "serve," for it provides that, if at the end of the year there shall be persons selected as grand jurors "who may not have been drawn during the year to serve," and have not served as jurors, "such persons may be placed on the list of jurors drawn from the succeeding year." I cannot imagine how, in the face of this provision, it can be gravely asserted that to "serve" as used in section 210 does not mean to serve as a grand juror. Clearly section 210 limits the term of service of a person selected as a grand juror, limits it for all purposes, limits it as to all kinds of service as a grand juror; and, after the happening of the event referred to in said section, he is no longer qualified as such juror. This plain and obvious meaning of the Code is, in some of the respondent's briefs, sought to be explained away by the assertion that, while the term of a grand juror is

limited, there is no limitation of the term of a grand jury. But how can there be a legal grand jury which is composed of persons who are not qualified to act as grand jurors, and why speculate about the impossible term of an imaginary grand jury which has no existence?

It is also sought to escape the plain, obvious meaning of the Code as above stated by invoking the rule of stare decisis. This attempt is based on the case of *In re Gannon*, 69 Cal. 541, 11 Pac. 240. The opinion in that case no doubt expresses views favorable to respondent's contention, but, so far as it does so, the opinion is, I think, clearly erroneous. But that case does not support the doctrine of stare decisis for several reasons. In the first place, the rule of stare decisis has seldom or never been successfully invoked in a criminal case involving liberty. It applies to civil actions where a rule of property or commercial business has been established. In the second place, the question here under discussion was not necessarily involved in the *Gannon* Case. That case was an attempt, on habeas corpus, to be discharged from a judgment of imprisonment rendered by a superior court for contempt committed by the petitioner in refusing to testify as a witness before an acting grand jury claimed by him to be an illegal body; but the court held that the illegality of a grand jury could not be thus collaterally attacked. The court said: "The authority of such a body, whether it be de facto or de jure, cannot be legally assailed or called in question by a witness summoned before it. The authority of such a body, exercising its powers as instrumental to the court of which it is a part, must be respected and obeyed." That was an adjudication of the case on that point; and whatever else was said in the opinion was obiter. The position taken in the *Gannon* Case, which is here relied on, was also assumed to be correct in the case of *Kelly v. Wilson*, which has not been reported, but may be found in 11 Pac. 244. That case, however, was decided at the same time as the *Gannon* Case, and was based entirely upon the authority of the *Gannon* Case, and therefore adds nothing to that authority. Afterwards the only case in which the *Gannon* Case was brought before this court is the case of *People v. Leonard*, 106 Cal. 302, 39 Pac. 617; and in the latter case the part of the opinion in the *Gannon* Case here relied on was questioned, and substantially disapproved. In the *Leonard* Case the question was whether a valid indictment could be presented by a grand jury of a former year attempting to hold over after the list of other persons had been selected for the succeeding year. If the court had been satisfied with the opinion in the *Gannon* Case on that point, it clearly would have acted on the authority of that case. It, however, proceeded to inquire into the very question disposed

of in the opinion in the Gannon Case, and held the indictment good because it did not appear that a new list had been prepared for the coming year. The court says: "It does not appear from the record, and is not probable, that, in fact, the jurors for 1894 had been 'selected and returned' at the date of the finding of the indictment. If they had not been, it was clearly proper to continue the jury of 1893 until such event happened." This language leaves an inference as broad as the trail of an army that, if the record had shown that a new list had been made, the indictment would have been held invalid. While this may not, perhaps, be said to be an express overruling of that part of the opinion in the Gannon Case here relied on, it certainly undermined and shattered it so much as to leave it without value as a basis for the extreme doctrine of stare decisis here invoked.

I see, therefore, in all that is argued by respondent, no successful method of evading the obvious meaning of the Code provisions on the subject of grand jurors; and why should not that obvious meaning be accepted. Instead of trying to find some hidden and labored reason for evading it? The kind of construction contended for by respondent would be too strained to warrant even a ruling in support of marriage, or legitimacy of children, or any other status expressly favored by the law. But when such construction is invoked in a criminal case, and against the liberty of the citizen, it is, in my opinion, beyond the reach of the farthest and thinnest shadow of any legitimate principle of interpretation. The history of free government presents no spectacle more noble than that of an accused American citizen successfully demanding that he be proceeded against according to "the law of the land." The right to make such demand is the beneficent result of centuries of struggles by English-speaking people for personal liberty, and to sustain the contention of respondents in the case at bar is, in my opinion, to clearly deny that right, and to mar the most important and sacred feature of American law.

When a list of persons have been selected in January to serve as grand jurors for the ensuing year, why should not a grand jury when afterwards required be drawn and impaneled from such list? In the case at bar it may be assumed that this course was not taken through inadvertence, and not from any unworthy motive. But the power to thus juggle with grand juries—to retain the old jury indefinitely or to impanel one from the new list, just as certain ruling interests may be subserved by the one course or the other—is a most dangerous power and should not be countenanced for an instant, unless clearly given by the law, and the law gives no such power. It would be better for a score of accused persons to be temporarily discharged than that one accused person

should be denied due process of law. The public will suffer nothing by a compliance with the Code provisions about grand jurors. A grand jury can be immediately drawn from the box of 1907 and legally impaneled, and such jury, if there really is a prima facie case of guilt against the petitioner, can at once legally indict him, and he then can be properly placed upon his trial.

GLASS v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. ABBOTT v. SAME. SCHMIDT v. SAME. (S. F. 4,863, 4,858, 4,855.)

(Supreme Court of California. Sept. 23, 1907.)

In Bank. Separate applications for writs of prohibition by Louis Glass, by William M. Abbott, and by Rudolph Schmidt against the superior court of the city and county of San Francisco. Denied.

D. M. Delmas, T. C. Coogan, and H. C. McPike (D. M. Delmas, of counsel), for petitioner Louis Glass. A. A. Moore, Stanley Moore, Earl Rogers, and Alex. C. King (John Garber and Garret McEnerney, of counsel), for petitioner W. M. Abbott. Edward F. Moran, Cleveland L. Dam, and George Appel (John C. Quinlan, of counsel), for petitioner R. Schmidt. W. H. Langdon, Dist. Atty., and Wm. Hoff Cook, Asst. Dist. Atty. (Hiram W. Johnson, of counsel), for respondent.

PER CURIAM. These are applications for writs of prohibition. The facts in each of the cases are, in all material respects, the same as those in the case of Halsey v. Superior Court, etc. (S. F. No. 4,853) 91 Pac. 987, this day decided.

Upon the authority of that case, the application for a writ in each of the above-entitled causes is denied.

153 Cal. 23

MANN v. MANN et al. (Sac. 1,406.)

(Supreme Court of California. Sept. 19, 1907.)

1. FRAUDS, STATUTE OF—BOUNDARIES—ESTABLISHMENT—ORAL AGREEMENT.

An oral agreement of adjoining landowners to exchange certain parcels separated from their respective main bodies by a road, and that the road should be the boundary line, is not effective when there was no dispute as to the real boundary, which is known.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 112.]

2. ADVERSE POSSESSION—REQUISITES—PAYMENT OF TAXES—IDENTITY OF PROPERTY.

Under Code Civ. Proc. § 325, providing that adverse possession shall not be established unless the parties have paid all the taxes, payment of the taxes according to the original description will not sustain adverse possession in a defendant who has fenced and had actual possession of the tract under an oral agreement with an adjacent landowner to exchange certain triangular parcels separate from their original

main bodies by a diagonal road, when there is no dispute as to the true original boundary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 518.]

3. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE—FACTS OTHERWISE ESTABLISHED.

Where plaintiff in an action to recover possession of land shows a clear title under an absolute conveyance, which is not overcome by defendant, any error in the admission of the testimony as to a right previously acquired by plaintiff under another agreement is harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4035.]

In Bank. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by Daniel L. Mann against Catherine Mann and Esther Durgan. From a judgment for plaintiff and an order denying a motion for new trial, defendants appeal. Affirmed.

J. P. O'Brien, for appellants. F. P. Otis and F. W. Street, for respondent.

SLOSS, J. This action was brought to recover possession of a parcel of land situate in Tuolumne county. The plaintiff recovered judgment declaring that he was the owner and entitled to possession of the premises. The defendants appeal from the judgment, and from an order denying their motion for a new trial.

The land in question is a portion of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 15, township 1 N., range 14 E. On February 1, 1882, a United States patent was issued to Thomas Sayre for certain land which included said N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 15. Adjoining this 40-acre tract on the south lies lot 2 of said section 15, for which on May 20, 1882, a patent was issued by the government of the United States to Sarah A. Mann. The defendants are the successors in interest of Sarah A. Mann, while plaintiff claims to be the successor in interest of Thomas Sayre. For many years prior to the issuance of either of the patents above mentioned, a county road, known as the Woods Crossing and Campo Seco road, had run, and still runs, diagonally through lot No. 2 and through the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 15, leaving a triangular piece of lot 2 lying to the north of the road and a piece of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 15, similar in shape, south of said county road. The latter is the parcel in controversy. The respective patentees of these adjoining tracts had been in occupation of the same before they received their patents. About the year 1873 the Sayre tract was inclosed with a fence. The Mann tract was inclosed with a fence in the year 1884. In inclosing each of these tracts the owners built their respective fences upon the lines of the county road; that is to say, Thomas Sayre built his fence along the northerly line of the Woods Crossing and Campo Seco road, thus inclosing the portion of lot 2 lying to the north of that road, and the occupant of the Mann tract built a fence

along the southerly line of the road, inclosing a portion of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 15 within said fence. Thomas Sayre and his successors have, during all of the intervening years, included within their inclosure, and occupied and used, the portion of lot 2 which lies north of the county road, and the defendants and their predecessors have, during all of these years, included within their inclosure, and occupied and used, the portion of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 15 which lies south of the road. On August 29, 1903, Ann O'Donnell, who had succeeded to the interest of Thomas Sayre in the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 15, conveyed to the plaintiff the strip of land in controversy. By showing that the property in dispute was a part of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 15, patented to Thomas Sayre, and that he was the grantee of the successor in interest of Sayre, the plaintiff made out a prima facie case of title in himself.

The defendants pleaded, in their answer, that they were the owners of lot 2 in section 15, and that for more than 25 years the Woods Crossing and Campo Seco road had been recognized and acquiesced in by the defendants, their grantors, and predecessors in interest, and by their coterminous owners, and by all other persons, as being the common dividing line between the Mann tract (including lot 2) and the lands of the adjoining owners; that about 25 years ago the said county road was fixed upon and established by the defendants' grantors and predecessors in interest and by their coterminous owners as being the common boundary line between the said Mann tract and the lands of the contiguous owners thereof; that said lands were inclosed and fenced according to said boundary line so fixed and established, and that said inclosures and fences have ever since been maintained upon said common dividing line; that the lands involved in this controversy are included within the inclosures and fences of the Mann tract and made a part thereof.

In the cross-complaint substantially the same facts are alleged, together with the further fact that during all of said times the defendants and their grantors have occupied said lands and premises and claimed the same as their own, and during all of said time have paid all taxes which were levied and assessed upon said premises. The cross-complaint prays that the defendants' title be quieted against any claim of the plaintiff. The findings of the court were against the affirmative defense set up and against the allegations of the cross-complaint. The court found that the dividing line between the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 12, and lot 2 in said section 15, is a certain line as surveyed in 1884 or 1885 and established by iron pins driven in the ground. It found, further, that the county road above referred

to has never been recognized or acquiesced in by the coterminous owners as being the common dividing line between the lands owned by defendants and the lands of the adjoining owners; that in the year 1884 a fence inclosing the property in dispute had been erected, but said fence did not fix or establish the boundary line between said lot 2 and said N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section 15. There is also a finding against the plea of adverse possession.

The main contention of the appellants is that these findings are contrary to the evidence. It is urged that the testimony of several witnesses shows without conflict that prior to the erection of the fences two agreements had been made between Sarah A. Mann, the owner of lot 2, and the then owners of the adjoining premises, whereby the said county road was agreed upon as the boundary of the respective parcels of land. The defendants rely upon the rule, declared by repeated decisions of this court, that "where coterminous proprietors of land in good faith agree upon, fix, and establish a boundary line between their respective tracts of land, in which they acquiesce, and under which they occupy, for a period equal to that fixed by the statute of limitations, the line as thus established is binding upon them." *Cooper v. Vierra*, 59 Cal. 283; *White v. Spreckels*, 75 Cal. 616, 17 Pac. 715; *Helm v. Wilson*, 76 Cal. 485, 18 Pac. 604; *Dierssen v. Nelson*, 138 Cal. 398, 71 Pac. 456. But this rule is subject to the limitation that the agreement must be for the purpose of settling some uncertainty or dispute as to the real boundary. This qualification was fully explained in *Lewis v. Ogram*, 149 Cal. 505, 87 Pac. 60, where Shaw, J., in speaking of an agreement which purported to fix a boundary between adjoining parcels of land, said: "Such an agreement necessarily is not valid for any other purpose than that of settling an uncertainty in regard to the common boundary. If adjoining owners agree on a division line, knowing that it is not the true line, and with the purpose of thereby transferring from one of them to the other a body of land which they know his true line does not embrace, the agreement will not be enforced. Such a transaction would not constitute an adjustment of uncertainties or doubts as to the line, but would be an attempt to convey or release land from one to the other. Land cannot be conveyed by the device of moving fences or changing the marks or monuments which define its limits. If an agreement having for its real object the transfer of the land, but relating by its terms solely to the boundary line and made with knowledge that the true line is elsewhere than at the place fixed, is oral, it would be void, being an attempt to transfer land without writing. If it is in writing, it would be ineffectual to pass title, for it would lack the apt words of conveyance that are

necessary to accomplish a transfer of real property. The authorities are to the effect that these agreements, when deemed valid, are of such a nature that they do not operate upon the title at all."

The testimony which is relied upon by defendants as showing that the county road had been agreed upon as the boundary line between lot 2 and the land lying to the north thereof shows clearly that the parties in making such agreements were not endeavoring to settle any dispute or doubt as to what the actual boundary was, but were, in fact, undertaking to exchange a piece of land lying south of the road and which was a part of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 15 for a tract of about equal size which lay north of the road, and was, in fact, a part of lot 2. It was known to the parties at the time they made the alleged agreements that the true boundary line between the two adjoining tracts of land was not the county road, and the object sought to be accomplished was not to ascertain and fix the boundary, but to make transfers of the two parcels so that all of the land owned by each party should be on one side of the road. The witness Metzgar, the first witness called by the defendants to prove such an agreement, testified that in 1873 he had been in possession of the property subsequently patented to Sayre; that at that time he had built a fence along the line of the Campo Seco and Woods Crossing road pursuant to an understanding with Mrs. Mann, the occupant of the Mann tract. "The understanding we had was we thought owning equal portions of the land to put the fence there. She owned a little more than I did on one side of the road, and I on the other. We agreed to run the line there, and when we got the title to deed back to the other." And on cross-examination, being asked, "That is she was to convey what lay north of the road and you were to convey to her what lay south of the road?" he answered, "That is the agreement we had all around with quite a number of neighbors; had the same agreement." The witness James Bogan testified that at the time the Sayre tract had been sold in 1884 the representative of the vendor had said "that there was a small portion of the Mann tract north of the Campo Seco road, and a small portion of the Sayre tract south of the Campo Seco road, and that the fences were to remain as they were because they had traced them off; that there was an agreement between Mrs. Mann and Sayre." The defendant Esther Durgan testified that she had been present on many occasions when conversations occurred between her mother, Sarah A. Mann, and Thomas Sayre. The conversations occurred between 1868 and 1871. They were "in regard to an exchange of a piece of land in Mr. Sayre's property and the piece of land in my mother's property, and they agreed to exchange properties. It was said

that the fence should be constructed on the line along the side of the road instead of across the road with the other fences." Taking the testimony of these witnesses as uncontradicted, the utmost that is established is that the parties, knowing that a portion of the land of each was separated from the main body of the tract to which it belonged by the county road, orally agreed to exchange the parcels so separated, and that they built fences and went into possession of the pieces as if these exchanges had been effected by proper conveyance. Such agreement, under the rule declared in *Lewis v. Ogram*, supra, could have no effect as an agreement for the location of a disputed boundary line. As was said in that case: "It had no relation whatever to the true line, nor to any doubt concerning the location of the boundary, and hence it does not come within the rule which makes an agreed line binding between the parties, not as a contract to convey, but as an attempt in good faith to make certain that which before was in doubt." Notwithstanding the alleged agreements, therefore, the land here in controversy still remained a portion of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 15, just as the piece for which it was to have been exchanged remained a portion of lot 2.

Nor did the defendants establish their plea of adverse possession. Granting, as they contend, that the evidence shows that they were in the actual occupation of the disputed premises since the construction of the fence in 1884, claiming them as their own, there was no evidence that the defendants or their grantors had for the statutory period paid the taxes which had been levied upon the land, as required by section 325 of the Code of Civil Procedure. The only evidence in this regard was that they had paid the taxes upon lot 2. But, as we have seen, the premises in question were not a portion of lot 2, but were a part of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 15, and the taxes on this subdivision were paid by Sayre's successors. The statutory requisite to the acquisition of a title by adverse possession had therefore not been fulfilled.

The plaintiff, who had been in possession of the Mann tract as a life tenant, testified that during his occupancy he had made an agreement with one O'Donnell, then the owner of the Sayre tract, by which he was "to exchange the piece on the south side, when he [I] could get title to it for this corner." The defendants objected to this testimony, "on the ground that the writing is the best evidence," and now assign the overruling of the objection as error. If we assume that the objection was properly framed and should have been sustained, the admission of the evidence was in no way harmful to the appellants. The plaintiff showed a clear title in himself by the production of the deed from Ann O'Donnell. No attempt was made to meet this case otherwise than by defendants'

claims (1) that the property in question had become a part of the Mann tract, by the agreement as to boundaries; and (2) that the defendants had a good title by adverse possession. Neither of these claims was established by the evidence. It is immaterial, therefore, that the plaintiff was allowed to prove matter, which, as he claimed, had a tendency to show that he had acquired the Sayre title before the conveyance from Ann O'Donnell.

From what has been said it follows that the findings that the county road had not been fixed by the coterminous owners as being the dividing line of the adjoining tracts and that the defendants did not have title by adverse possession were fully sustained by the evidence. It follows, further, that the court properly determined that the plaintiff was the owner of the premises in question.

It may be added that the question whether the defendants, on pleadings framed for that purpose, would be entitled to a decree specifically enforcing the alleged agreements of exchange, is not here involved. The answer and cross-complaint, asserting title to the disputed premises to be in the defendants, do not contain the allegations required in a bill for such relief, nor do they seek it.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; MCFARLAND, J.; HENSHAW, J.; LORIGAN, J.

153 Cal. 42

PEOPLE v. CRAIG. (Cr. 1,402.)

(Supreme Court of California. Sept. 19, 1907.)

1. CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS.

On appeal from an order denying a motion for new trial, the bill of exceptions must show that such a motion was made.

2. SAME—HARMLESS ERROR—ORDER OF INTRODUCING EVIDENCE.

The defense to a prosecution for assault being that defendant merely made a justified resistance of an illegal attempted arrest, it is no ground for complaint that the prosecution put in as part of the main case, rather than in rebuttal, evidence to show justification in making the arrest without a warrant.

3. SAME—EVIDENCE OF OTHER CRIME.

On a prosecution for assault, the defense being justification in resisting an attempt to arrest because made without a warrant, evidence to show justification under Pen. Code §§ 836-840, in so making the arrest, is admissible, if competent, though it tend to show commission by defendant of an offense distinct from the assault.

4. ARREST—NECESSITY OF WARRANT—OFFENSE IN PRESENCE OF OFFICER.

Vagrancy, as defined in Pen. Code, § 647, subd. 6, declaring guilty of vagrancy every idle, lewd, or dissolute person, or associate of known thieves, or every person who wanders about the streets, at late or unusual hours of the night, without any visible or lawful business, though it cannot be committed by a single act observable at one time, is a misdemeanor that can be committed "in the presence" of an officer, so as to

justify him, under sections 836-840, in arresting him without a warrant.

5. ASSAULT—DEFENSES—RESISTING UNLAWFUL ARREST—EVIDENCE.

In a prosecution for assault, the defense being that it was merely resistance to an illegal arrest, testimony of the officer that for three months prior to the attempted arrest he had seen defendant at all hours of the night, from 9 p. m. to 3 a. m., in and about the saloons in the disreputable part of the city, that he had no visible or lawful business, and that he had associated with a reputed prostitute, is relevant to prove the officer was personally cognizant of the facts constituting defendant a vagrant, within Pen. Code, § 647, subds. 5, 6, so as to justify him, under sections 836-840, in arresting defendant without a warrant.

6. ARREST—NECESSITY OF WARRANT—OFFENSE IN PRESENCE OF OFFICER.

An arrest of defendant without a warrant for the offense of vagrancy, committed in the presence of the officer, is justified, though the fact of his being a vagrant has been known for some time, and the real motive of the arrest is a report brought to the officer that defendant had assaulted and beaten a man.

7. CRIMINAL LAW—IRRESPONSIVE ANSWER—MOTION TO STRIKE.

Where part only of the answer to a question is unresponsive, a motion to strike out, on the ground of it being unresponsive, should specify and be confined to the objectionable part.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1643.]

8. SAME—HARMLESS ERROR—STRIKING OUT TESTIMONY.

Where, under the other evidence, there could have been no other conclusion than that of guilt, refusal to strike out unresponsive testimony was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3137, 3138.]

9. ASSAULT—RESISTING ARREST—JUSTIFICATION—EVIDENCE.

In a prosecution for assault, the defense being that it was merely resistance to an unlawful arrest, for the purpose of corroborating other evidence that defendant was a vagrant, to the personal knowledge of the officer arresting, so as to justify the arrest without a warrant, testimony of another as to how frequently, during the preceding month, defendant visited a disreputable saloon in the officer's beat, is admissible.

10. SAME.

As bearing on the question of the knowledge of an officer that defendant was a vagrant, justifying him in arresting defendant without a warrant, his testimony that defendant, during the preceding three months, had no business that he knew of, is admissible.

11. WITNESSES—CROSS-EXAMINATION OF ACCUSED.

Defendant, for the purpose of rebutting the evidence of his vagrancy, which was claimed to have existed to the knowledge of the officer arresting him, so as to justify the arrest without a warrant, having testified that he had a lease, covering several months prior and up to the time of the arrest, of a certain tenement, which he had sublet to prostitutes, and that he had in the meantime purchased a mining location, on which he intended to go as soon as the lease expired, may, for the purpose of showing that he had no lawful business, which fact, in connection with his wandering about the streets at late and unusual hours of the night, would constitute him a vagrant under Pen. Code, § 647, subd. 6, be required on cross-examination to testify that during the running of his lease he had no other business except gambling.

12. ARREST—NECESSITY OF WARRANT—OFFENSE COMMITTED IN PRESENCE OF OFFICER.

An officer who, in aiding in an arrest for a misdemeanor, is acting under the order of his superior officer, who is present, is justified in so doing without a warrant, though the offense was not committed in his presence, but in that of the superior officer.

13. ASSAULT—DEFENSE—AIDING ANOTHER IN RESISTING ARREST.

Under Pen. Code, § 694, providing that one, in aid or defense of a person about to be injured, may make resistance sufficient to prevent the offense, he can interfere only in aid of a lawful resistance by the person threatened, and, that resistance not being confined to lawful means when he comes to the rescue, he may not aid it.

14. CRIMINAL LAW—PROVINCE OF JURY—INSTRUCTION.

An instruction that the jury assume a fact to be conclusively proven is erroneous, even where the evidence is without conflict; and it therefore cannot be required to give such an instruction, though the giving thereof might be harmless.

15. SAME—HARMLESS ERROR—ARGUMENT OF PROSECUTING ATTORNEY.

The recollection of the jury as to what the testimony was will be deemed a sufficient protection to defendant, where the prosecuting attorney in his argument claimed the defendant's testimony showed a certain matter, damaging to him, as to which there was no evidence, and, on the court's admonishing him to confine himself to the testimony, he still contended such evidence had been given by another witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3127.]

In Bank. Appeal from Superior Court, Sacramento County; E. C. Hart, Judge.

Charles Craig was convicted of assault with a deadly weapon, and appeals. Affirmed.

R. Porter Ashe, Gaston M. Ashe and E. S. Wachhorst, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for respondent.

BEATTY, C. J. The defendant and one Charles Mack were jointly accused by information of the crime of assault with a deadly weapon with intent to commit murder. Upon a separate trial defendant was convicted of the crime of assault with a deadly weapon. He appealed from the judgment, and from an order denying his motion for a new trial, to the District Court of Appeal, where, by reason of a difference of opinion among the judges, there was a failure to decide the cause, and it has accordingly been transferred to this court for hearing and decision.

There is an objection by the Attorney General to any consideration of the appeal from the order, upon the ground that it does not appear from the bill of exceptions that any motion for a new trial was made. The objection seems to be well founded according to the decision of this court in *People v. Ruiz*, 144 Cal. 251, 77 Pac. 907, and that of the District Court of Appeal in *People v. Frank*, 2 Cal. App. 233, 83 Pac. 578; but in this case it is of no practical consequence whether the objection be sustained or not, since every assignment of error urged by counsel for appellant is reviewable on the appeal from the judgment.

Such facts as are essential to a clear understanding of the questions to be considered on that appeal may be briefly stated as follows: About 3 o'clock in the morning of December 25, 1905, Sergeant Wilson and Officer Ryan, of the Sacramento police, entered a saloon in what appears to have been an exceedingly disreputable quarter of that city for the purpose of arresting the appellant and his codefendant Mack. They found them drinking at the bar in company with a number of women and other men. Wilson arrested Craig, and took him to the sidewalk in front of the saloon, while Ryan, by Wilson's direction, was attempting to arrest Mack, who, with the aid of some bystanders, violently resisted the attempt. Wilson, attracted by the noise, left Craig on the sidewalk and hurried to Ryan's assistance, closely followed by Craig. The evidence as to what ensued is conflicting and confusing, but there was testimony which would warrant a jury in finding that several of the men present in the saloon made common cause with appellant and Mack in resisting the arrest, and in vicious assaults upon the officers, who were speedily overpowered, deprived of their clubs, and otherwise roughly handled. Appellant and Mack, who had gained possession of the clubs, at one period of the affray concentrated their attack upon Ryan, who was then on the floor, encouraging each other by such suggestions as "kick the son of a bitch's head off, Buff!" (the "Buff Kid" was a familiar nickname of Mack). The result of the fracas was that Ryan was very badly beaten, both officers disabled, and their prisoners enlarged. The information against the defendants was based upon the assault on Officer Ryan.

There seems to have been some attempt made at the trial to show that the club with which Ryan was beaten by appellant was not a deadly weapon, but the state of the record does not warrant a consideration of that point, and it is not pressed.

The principal defense in the trial court was that the attempted arrest of the defendants was illegal, and that they were justified in such resistance as they made. The appellant, at least, defends his acts upon the ground that he was justified in resisting his own arrest, and in aiding Mack to resist an unlawful attempt to arrest him. The facts as to this matter are that the officers had no warrant of arrest for either party, and neither had committed or been suspected of committing any felony. The only justification which could be alleged for the action of the officers was that the defendants had committed a misdemeanor in their presence. Pen. Code, §§ 836-840. This the prosecution undertook to show as a part of their case in chief, by proving acts constituting the crime of vagrancy; and the main contention on the part of appellant is that the superior court erred in admitting evidence of these acts. Since the right of a person to resist

an unlawful attempt to subject him to arrest cannot be denied, we think there can be no question, in view of the circumstances of this case, that the prosecution were right in submitting such evidence as they could to show that the attempted arrest of appellant and Mack was strictly legal, and certainly the fact that it was put in as a part of their main case, rather than in rebuttal, affords the appellant no ground of complaint. The only question is whether the evidence offered and admitted was relevant to the issue; for, the fact that the offense was committed in the presence of the arresting officer being material, if the evidence offered to prove it was relevant, the fact that it also tended to prove that the appellant had committed other substantive offenses, distinct from the assault upon Ryan, was not a ground of objection to it. We think the evidence was clearly relevant, as tending to prove that the arresting officers were personally cognizant of facts constituting the appellant a vagrant within the statutory definition of vagrancy. Pen. Code, § 647, and especially subdivisions 5 and 6. It was to the effect that for a period of three months prior to the assault charged he had been seen by Sergeant Wilson at all hours of the night, from 9 p. m. to 3 a. m., in and about the saloons clustering around Second and L streets, "McCarthy's," "The Art," "The Palm," and "The Casino," and in the immediate neighborhood of the "Concentration Camps" (a local euphemism for houses of ill fame). It was to the further effect that he had no visible or lawful business and that he associated with a reputed prostitute. This was vagrancy, and, if vagrancy of this species is a misdemeanor which can be committed "in the presence" of an observer, this misdemeanor, supposing the evidence to be true, was committed in the presence of the arresting officer. If, as a witness, he could testify from actual knowledge to every element of the offense, the offense must have been committed in his presence. And it makes no difference that this species of vagrancy cannot be committed by a single act observable at one point of time. A series of acts extending over a considerable period of time, and only constituting a criminal offense because of their continuance and repetition, alone or in conjunction with other circumstances, being capable of observation and actual knowledge by a peace officer, will justify him, when the series of acts is complete, in making an arrest without a warrant as fully as in the case of any other misdemeanor committed or attempted in his presence. The only thing decided in *People v. Denby*, 108 Cal. 54, 40 Pac. 1051, is that the solicitation of alms by a healthy beggar on one occasion does not make him a vagrant, or justify a citizen in arresting him. The case did not involve the question here presented; but the implication from what was decided is that habitual begging, known to the citizen, would have made

the arrest legal, a point as to which we have no doubt.

A more doubtful question is raised by the uncontradicted evidence of the officers themselves that the real motive of the arrest was not the fact that the defendants were vagrants, but was a report brought to their knowledge that at an earlier hour in the night the defendants had assaulted and beaten a man passing along the street. This offense they had not seen, and upon consultation they concluded that, as they could not arrest them for the battery without a warrant, they would arrest them as vagrants, known to them to be such. It seems to be generally held that an arrest for a misdemeanor without a warrant cannot be justified, if made after the occasion has passed, though committed in the presence of the arresting officer; and it is contended here that according to Sergeant Wilson's own testimony the occasion for arresting appellant as a vagrant had long passed, since, if he knew him to be a vagrant at all, he had known it for some time prior to December 25th. On cross-examination Wilson was asked why he had not sooner arrested him for vagrancy, and he made this answer: "I was told by a former administration to not bother these fellows as long as they behaved themselves. On this morning I was notified that this man and Mack had beat up a man by Officer Ryan, and I says: 'Well, the only thing we can do—we didn't see it—we will will go and vag them.'" Whether this is an entirely commendable attitude towards the appellant's class of misdemeanants we need not stop to consider; but we think the admitted fact that the appellant would not have been arrested if he had confined himself to vagrancy did not render his arrest for that offense illegal. Vagrancy differs from most other offenses in the fact that it is chronic, rather than acute; that it continues after it is complete, and thereby subjects the offender to arrest at any time before he reforms. Here there was no evidence of reformation, but the reverse; for, according to the evidence, the appellant was comporting himself quite consistently with his usual line of conduct at the moment of his arrest. All this Sergeant Wilson knew, and, having heard that he had ceased to conduct himself peaceably, he had a sufficient reason, as he had a perfect right, to make the arrest at that time.

The appellant assigns another error in this connection. He moved to strike out the above-quoted answer of Sergeant Wilson upon the ground that it was not responsive to his question, and that it was incompetent, irrelevant, and immaterial. It is contended that the court erred in overruling this motion. The answer of the witness certainly did contain matter which was not strictly responsive to the question. He was not asked why he arrested appellant on the 25th, but only to explain why he had not arrested him sooner, and that part of his answer relating to

the reported beating of a man by appellant and Mack went beyond the scope of the question, and was hearsay, and therefore incompetent. It was necessary, however, for the appellant, in moving to strike out, to specify the objectionable part of the answer and confine his motion to that, and a part of the answer being strictly responsive, and his motion embracing the whole, the court was technically correct in overruling it. *People v. Rodley*, 131 Cal. 242, 63 Pac. 351. We are satisfied, moreover, in view of all the other testimony in the case, that the jury could have come to but one conclusion as to the guilt of appellant, and that the ruling was harmless.

May Graves, a woman employed in the "Art Saloon," was called as a witness for the prosecution, and, after answering that she knew the appellant, was asked by the district attorney: "How frequently during that time [the month of December] did you see the defendant?" The question was objected to as incompetent, irrelevant, and immaterial, and the objection overruled. The witness answered: "Oh, he would come in the house four or five times during the week, I should imagine." It is contended that this answer was seriously prejudicial to the appellant, as tending to degrade his character, and that the district attorney called it out for no other purpose. It seems probable that the district attorney was seeking by this testimony to corroborate the other evidence as to vagrancy; and, if so, it is by no means clear that the question was objectionable, for, if it was material to show that the officers knew that appellant was a vagrant, it was permissible to prove that he was comporting himself as a vagrant in that part of the city comprised in their beat. But, whether technically objectionable or not, it is clear that the evidence could not have been prejudicial.

Ryan, the prosecuting witness, was asked, "Do you know what business he [appellant] was engaged in, if any, during that time?" and answered without objection, "None that I know of." There would have been no error in permitting this question and answer, even if they had been objected to. The evidence bore directly upon the question as to the officer's knowledge that appellant was a vagrant.

Called as a witness in his own behalf, the appellant, evidently for the purpose of rebutting the evidence as to vagrancy, testified that in July, 1905, he had taken a lease of a certain tenement on Second street, covering the months from August to December, inclusive, which he had sublet to women for purposes of prostitution at a very considerable profit, and that he had in the meantime purchased a mining location in the state of Nevada, upon which he intended to go to work as soon as the Second street lease expired. On cross-examination he was asked if, during the running of his lease, he had any other business besides letting rooms to

prostitutes, and answered that he had other business. He was then asked what his other business was, and compelled, over his objection, to answer that it was gambling. The court did not err in requiring him to answer. His effort was to show that he was not a vagrant, and it was permissible to show out of his own mouth that he had no lawful business.

It is scarcely necessary to add that the court did not err in refusing to instruct the jury as matter of law that under the evidence appellant at the time of the assault was not a vagrant. There was evidence of every element of that species of vagrancy defined in subdivision 6 of section 647 of the Penal Code. Appellant wandered about the streets at late and unusual hours, and his only business—gambling and subletting for purposes of prostitution—was not a lawful business. Pen. Code, §§ 316-330.

Neither did the court err in refusing to give the following instruction requested by appellant: "The witness Ryan has testified that he arrested Charles Mack for a misdemeanor, to wit, vagrancy, and that said misdemeanor was not committed in his (Ryan's) presence, and that he had no warrant for such arrest. If you believe said evidence, then you must find that said arrest, or attempted arrest, was illegal and unlawful; and I instruct you that the defendant Craig, or any third person, was justified in lawfully interfering to prevent the said Mack's illegal arrest, provided that they did no more than was necessary for that purpose." In arresting Mack, Ryan acted under the orders of his superior officer there present, and the legality of the arrest depended upon Wilson's right to give the order which would not have been conclusively determined by that portion of Ryan's testimony quoted in the instruction, even if it had been entirely unqualified by other portions of his testimony; but, in fact, Ryan testified on redirect examination that he had known Mack to be a vagrant all the time. In view of all his testimony, the portion quoted in the instruction may have meant no more than that the beating of a man on the street (which was the real occasion, though not ground, of the arrest) had not occurred in his presence. Besides, the instruction, as requested, was not strictly correct in point of law. The right of one person to aid another in defending against a threatened injury is defined by our statute (Pen. Code, § 694), and does not differ substantially from the right as it existed under the common law. He cannot interfere, except in aid of a lawful resistance by the person threatened. Here the evidence shows very clearly that Mack was resisting; but it is far from clear that his resistance was confined to lawful means at the time appellant came to his rescue. A court cannot, in instructing a jury, assume any fact to have been conclusively proven, even where the evidence is without conflict. Such a state of

the case might render an erroneous instruction harmless; but a court is not required to give an erroneous instruction, no matter how harmless it may be.

The alleged misconduct of the district attorney does not call for extended notice. He did in one instance claim in his argument to the jury that appellant had shown by his own testimony that he was living off the earnings of women who had consorted with Japanese. There was no evidence as to consorting with Japanese; but, on the objection of counsel, the court admonished the district attorney to confine himself to the evidence. He, however, still contended that such evidence had been given by Sergeant Wilson. He appears to have been mistaken; but there is no reason to suppose that he had purposely misrepresented the testimony. In such a case the recollection of the jury as to what the testimony of a witness was must be deemed a sufficient protection to the accused. It is not like the case where a prosecuting officer deliberately and purposely imputes to the accused a distinct and infamous offense regarding which there has been no evidence, and where the court approves his conduct. As to the terms in which the district attorney chose to characterize the offenses of the defendant, we cannot see that they passed the bounds of legitimate censure.

We find no prejudicial error in the record, and accordingly the judgment and order of the superior court are affirmed.

We concur: SLOSS, J.; LORIGAN, J.; HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.

(152 Cal. 17)

DOAK v. BRUSON (ELECTRIC IRON & STEEL CO., Intervener). (Sac. 1428.)

(Supreme Court of California. Sept. 19, 1907.)

1. APPEAL—REVIEW—QUESTIONS OF FACTS—CONFLICTING AFFIDAVITS.

On appeal from an order made on affidavits, involving the decision of a question of fact, there being a conflict in the affidavits, those in favor of the prevailing party are to be taken as true and to establish not only the facts directly stated therein, but also all facts which may reasonably be inferred or presumed from the direct and positive statements.

2. TENDER—OFFER IN WRITING—GOOD FAITH AND ABILITY TO PERFORM.

Code Civ. Proc. § 2074, providing that an offer in writing to pay a particular sum, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property, and Civ. Code, § 1496, making a similar provision with regard to offers of performance in general, have the effect only, where a written offer to pay money is made and not accepted, to excuse the actual production and tender of the money, and do not dispense with the requirement of Civ. Code, § 1493, that a tender shall be made in good faith, or with that of section 1495, that, in order for an offer of performance to be of effect, the person making it must be able and willing to perform according to the offer, and such a written tender not being made in good faith, and the person making it not being able to per-

form, it is ineffectual, though pursuant to the provision of section 1498, that one making a tender may make it depend on the due performance of a concurrent condition, it is conditioned on the other party giving a deed, and he is unprepared to give it.

In Bank. Appeal from Superior Court, Shasta County; C. M. Head, Judge.

Action by David P. Doak against Willard C. Bruson; the Electric Iron & Steel Company intervening. From an adverse order, defendant appeals. Affirmed.

Aylett R. Cotton and W. H. H. Hart, for appellant. S. C. Denson, for respondent.

SHAW, J. On January 21, 1905, the plaintiff obtained a decree that all the equitable rights of the defendant and of the intervener, under a certain contract, in certain lands, were thereby foreclosed and declared null and void, but further providing that the defendant, or the intervener, might at any time within 120 days thereafter pay to the plaintiff or his attorney the sum of \$11,711.64, with interest at 8 per centum per annum from January 21, 1902, to the date of such payment, and that, if payment was so made within the same time so specified, the said plaintiff should execute to the party making the payment a deed conveying to him or it, as the case might be, all the right, title, and interest of the plaintiff in the lands, and that, if they failed to make such payment within said time, they be enjoined from asserting any right, title, or interest in the land, and the plaintiff was, in that event, adjudged to be the owner thereof free from all and any claims of Bruson or the intervener. The decree also provided as follows: "At any time after the 21st day of May, 1905, upon ten days' previous notice given to the attorneys of the adverse parties, any party to this action may, on motion, have an order and judgment entered in this court, adjudging whether or not payment in redemption has been made in accordance with this decree, and such order or judgment shall be binding and conclusive upon all the parties." In pursuance of this provision, the plaintiff, upon due notice, moved for an order adjudging that payment of the \$11,711.64 had not been made within the time allowed. The motion was heard on June 10, 1905, and, after hearing the affidavits offered, the court made an order in favor of the plaintiff. From this order the defendant, Bruson, appeals.

In the consideration of an appeal from an order made upon affidavits, involving the decision of a question of fact, this court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered as established. *Ludwig v. Harry*, 126 Cal. 378, 58 Pac. 858; *Daniels v. Church*, 96 Cal. 13, 30 Pac. 798; *Hastings v. Keller*, 69 Cal. 606, 11 Pac. 218; *Creditors v. Welch*, 55

Cal. 469; *Hyde v. Boyle*, 105 Cal. 107, 38 Pac. 643; *Barrett v. Graham*, 19 Cal. 635; *In re Fisher*, 75 Cal. 524, 17 Pac. 640; *Fanning v. Leviston*, 93 Cal. 188, 28 Pac. 943; *Savings Bank v. Schell*, 142 Cal. 507, 76 Pac. 250. And as error is not presumed, and all intentions are in favor of the action of the lower court, it follows that the affidavits in behalf of the successful party are to be deemed to establish not only the facts directly stated therein, but also all facts which may reasonably be inferred or presumed from the direct and positive statements.

The claim of Bruson that the payment had been made within the time allowed is based entirely upon a written offer to pay the money, made on his behalf to S. C. Denson, the attorney for the plaintiff, at his office in San Francisco, after 4 o'clock, in the afternoon of May 22, 1905, which was the last day on which payment could be made. It is contended that the effect of such an offer is in all respects equivalent to an actual payment of the money. Section 2074 of the Code of Civil Procedure declares that "an offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property." Section 1496 of the Civil Code makes a similar provision with regard to offers of performance in general. The only effect of these sections, where an offer to pay money is made and not accepted, is to excuse the actual production and tender of the money. They do not absolve the party from the observance of any other requirement of the law necessary to a valid tender. In *Hyams v. Bamberger*, 10 Utah, 3, 36 Pac. 203, the court, speaking of a similar statute, says: "Ordinarily where a party makes a tender, independent of statute, he must actually produce the money to the creditor. It must be in sight, capable of immediate delivery. * * * Where a person makes a tender in writing, the statute excuses him from actually producing the money at the time of making the tender, but it excuses no other act or requirement on his part which would be necessary in order to make a valid tender, independent of statute. To hold otherwise would be to turn the statute, which was intended as a mere convenience, into an instrument of fraud." The cases of *Ladd v. Mason*, 10 Or. 314, *Holladay v. Holladay*, 13 Or. 523, 11 Pac. 260, and *McCourt v. Johns*, 33 Or. 561, 53 Pac. 601, are to the same effect, and construe a statute identical in language with ours.

The facts concerning the written offer in controversy were as follows: Mr. Denson, the attorney for the plaintiff, Doak, had on several occasions, after the entry of the judgment, and before the offer was made, informed Bruson and his attorney that Doak would grant no further extension of time, and that the money would have to be paid within the

time fixed by the judgment. A few days prior to May 20, 1905, Denson told Bruson that Doak was then in San Francisco, and was ready to make the deed if the money was paid, but was going to Mexico in a few days to be gone several weeks, and urged upon Bruson the necessity of getting the money to make the payment before the time was up and while Doak was here to sign the deed. On May 20, 1905, two days before the offer, Denson told Bruson that Doak had left the city, and had not left with him, Denson, any deed to be delivered if payment should be made. On May 22, 1905, at the hour stated, two men, unknown to Denson, appeared in his office, and one of them, who said his name was Albert Batz, served upon Denson the written offer in question. It was signed by Bruson and purported to offer to pay to "Denson, as attorney for said David P. Doak, and for said Doak," the sum required, stating it, and to demand of Doak, through Denson, a deed as provided in the decree, and declared that the tender was dependent on the delivery of a duly executed deed. Denson thereupon inquired, "Where is the money?" to which Batz answered, "They did not give me any, and I did not bring any." Denson then asked: "Have you no money or any check with which to make this tender?" Batz said he had not. Denson then told him he was ready and willing to receive the money, and would see that Bruson got a deed if the money was paid within the time. Batz said he was furnished with no money and was not authorized to pay any. Nothing further occurred at the time, and no other offer was ever made. At the hearing Denson filed a counter affidavit, stating that he had prepared the form of a deed, but that, as it was not known whether Bruson or the intervener would pay the money, it was not signed, and that he was informed and believed that Bruson had tried to get the money to make the payment, but had not succeeded and had not the money and was unable to pay. The notice of motion was served on May 31, 1905. In opposition to the motion, the affidavits of Bruson, James Camp, and Aylett R. Cotton, attorney for the intervener, were read. It was not stated or claimed in either of these affidavits that Bruson, at the time of the tender, or at any time afterward, had the money wherewith to pay the sum required, or was or had been able, ready, or willing to make such payment. No money was produced or offered at the hearing. The affidavits for the defendant appear to have been intended to show that the deed was not ready for delivery at the time of the offer. The defendant did not profess to be then able, ready, or willing to pay, but claimed that, by reason of the failure of Doak to have the deed ready, he was entitled to further time in which to make the payment. One of the essential requirements of a tender is that it must be made in good faith. Civ. Code,

§ 1493; *Horan v. Harrington*, 130 Cal. 142, 62 Pac. 400; *Potts v. Plaisted*, 30 Mich. 149; *McPherson v. Wiswell*, 16 Neb. 625, 21 N. W. 391. It is also provided by the Code that "an offer of performance is of no effect if the person making it is not able and willing to perform according to the offer." Civ. Code, § 1495. The provisions of section 2074, Code Civ. Proc., and section 1496, Civ. Code, do not dispense with these requirements. In *Ladd v. Mason*, supra, the court says: "Surely the justice and good sense of the Legislature should not be impugned by such a construction of this provision as would place its framers in the position of having intended to provide a mode whereby a party might make a valid tender if his offer should not be accepted, without the readiness or ability to make it good, in the event of its acceptance." And in *Holladay v. Holladay*, supra, it is said that this statute dispenses with the necessity of actually producing the money with the offer, "but this does not dispense with the necessity of the party having the money in fact." See, also, *Kuhns v. Chicago, etc., Co.*, 65 Iowa, 528, 22 N. W. 661; *Shugart v. Potter*, 37 Iowa, 422; *Ladd v. Mason*, supra; *Holladay v. Holladay*, supra; *McCourt v. Johns*, supra. We are of the opinion that the court may well have concluded, from the facts shown, that, at the time the offer was made, the defendant Bruson did not have the money he offered and was not able or willing to perform, and that the offer was made with knowledge, or in the belief, that Doak had left the city without providing a deed for delivery, and for the purpose of taking advantage of his absence to make an offer on paper to his attorney, Denson, without the ability to make it real. The fact that the offer was in terms directed to Denson, as attorney for Doak, after information that he had no deed and that Doak was absent, the fact that the agent who made the paper offer was provided with neither money, check, nor authority to pay, the fact that no offer was made at the hearing, nor any showing made of ability to pay them, or at any other time, in the face of the objections, suggested by the affidavits served with the notice, and stated on information and belief, that the money did not accompany the offer and that the offer itself was a sham, all tend strongly to this conclusion. The court was therefore justified in making the order complained of.

The rule stated in section 1496 of the Civil Code, that one making a tender may make it depend upon the due performance of a concurrent condition, does not affect the case, for nevertheless the party must act in good faith and be able and willing to perform, else, under sections 1493 and 1495, and the authorities above cited, his written offer will be of no avail. Nor does the fact that the other party was also unprepared to perform furnish any justification for his own in-

ability, nor change what would otherwise be an ineffectual and shadow form into a substantial, bona fide, and effective tender.

The order is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.; HENSHAW, J.; MCFARLAND, J.; LORIGAN, J.

(152 Cal. 51)

FOX v. TOWNSEND et al. (L. A. 1,702.)
(Supreme Court of California. Sept. 20, 1907.
Rehearing Denied Oct. 19, 1907.)

TAXATION—ASSESSMENT BOOKS—DESCRIPTION OF REALTY—SUFFICIENCY.

A description of property in an assessment as: "In Los Angeles County. In Electric Ry. Homestead Assn. Tr. Lot 17 Block 20"—is prima facie insufficient to identify the land, and, though it might be shown that the description was in fact sufficient, in the absence of such showing, the assessment will be held void.

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Edwin R. Fox against W. R. Townsend, Robert S. Carter and others. From an order refusing a new trial, plaintiff appeals. Affirmed.

See 87 Pac. 82.

E. R. Fox, in pro. per., and Cole & Cole, for appellant. O. B. Carter, for respondent.

ANGELLOTTI, J. This action to quiet title to certain lots of land in Los Angeles county was brought by plaintiff, claiming title under certain tax sales to the state of California, and deeds from the state to him, against various persons who were the owners thereof if the tax proceedings were ineffectual to vest title in plaintiff. The lots involved were parts of the Electric Railway Homestead Association tract in Los Angeles county. As to four of these lots, viz., lot 11 in block 5 and lot 19 in block 28, claimed by defendant Taylor, and lot 17 in block 20 and lot 17 in block 24, claimed by defendant Carter, judgment went for said defendants, and motions for new trial made by plaintiff were denied. Plaintiff appealed from the order denying his motion. This court, on such appeal, affirmed the order as to lot 19 in block 28, and reversed it as to the remaining three lots.¹ As to the Carter lots, lot 17 in block 20 and lot 17 in block 24, the objection that the description of property in the assessment was insufficient to make a valid assessment (the description being: "In Los Angeles County. In Electric Ry. Homestead Assn. Tr. Lot 17 Block 20," and the same practically as to lot 17 block 24) was answered by stating that a map of the Electric Railway Homestead Association Tract, recorded in book 14, p. 17, of Miscellaneous Records, showing the location of the lots, was introduced in evidence on the trial, in aid of the assessment description, and that the case in this respect was therefore the same as that

of *Baird v. Monroe*, 89 Pac. 352. Upon petition by defendant Carter for a rehearing, it was developed that the record available to plaintiff as against said Carter did not show the introduction of any map in evidence, or that there was any map of any kind in existence at any time during the tax proceedings. The map mentioned was introduced in evidence on the separate trial had between plaintiff and defendant Taylor, and is shown only in the bill of exceptions settled between plaintiff and Taylor, and that bill of exceptions specifies only lot 19, block 28, and lot 11 in block 5, as shown on said map. Under these circumstances, it was considered proper to grant a rehearing as to defendant Carter, and an order was made accordingly. The matter is now before us on such rehearing.

The question remaining for determination is as to the legal sufficiency of the descriptions of property contained in the assessment. Were such descriptions sufficient to identify the land? We have already stated the nature of the descriptions. They were in all vital respects the same as the descriptions contained in the assessments of property considered in *Miller v. Williams*, 133 Cal. 183, 67 Pac. 788, *Best v. Wohlford*, 144 Cal. 733, 78 Pac. 203, and *Baird v. Monroe*, supra, namely, a designation of a parcel of land as a portion of a larger tract simply by number and block, without any reference to a map. In *Miller v. Williams*, supra, an action to quiet title, it was held that such a description in an assessment is not sufficient prima facie to identify the portion assessed. In that case, as in this, there was no attempt to supplement the assessment description by evidence showing that it did sufficiently identify the land. The theory of the decision apparently is that a description of this kind is of such a nature as to indicate that the property can ordinarily be located only by reference to some map or plat, and, no such map or plat being referred to as being in existence, the description is prima facie insufficient. There is no presumption, in the absence of such a reference, that there is such a map in existence. *Labs v. Cooper*, 107 Cal. 656, 658, 40 Pac. 1042. Under this theory, there is a distinction between such a description, and a description of a tract of land by name, such as "Forks House Ranch," as to which it has been held that "a description of a tract of land by name is sufficient, as it is presumed that the tract, and the extent of its boundaries, is well known by name." *People v. Leet*, 23 Cal. 161, 163. We cannot say that this distinction is not well based. The rule in *Miller v. Williams* in this regard, namely, that such a description is prima facie insufficient, has not been impaired by any later case, but has always been accepted as correct. Nor can it reasonably be said that the change in our revenue laws under which all property delinquent for taxes is sold to the state affords

¹ See note to 91 Pac. 1007.

sufficient warrant for declaring a different rule from that laid down in *Miller v. Williams*. Such change eliminates some of the reasoning in support of the requirements of a certain description of the assessed property, for the purchaser who should know the exact location of the property offered for sale is no longer present, but the owner who is entitled to know with certainty what property is assessed to him still remains. The later cases of *Best v. Wohlford*, *supra*, and *Baird v. Monroe*, *supra*, accepting the rule of *Miller v. Williams* as correct, establish the doctrine that, while such description is *prima facie* insufficient, it may be, in fact, sufficient to identify the property, and that whether or not it is so sufficient is a question of fact to be determined by the trial court upon such evidence as may be presented on that issue. The party relying on an assessment containing such a description may therefore supplement his case by showing that the description in the assessment was, in fact, sufficient to identify the land. Thus, in *Baird v. Monroe*, *supra*, it was made to appear to the satisfaction of the trial court that there existed as a public record a map of the tract named, and but one such map, and that this map showed lot 5 in block K of that tract named in the assessment there involved. It was held that there was enough in this, in the absence of other evidence tending to impeach it, to justify the conclusion of the trial court that the description in the assessment was sufficient to identify the land to the owner. But, in the absence of any evidence tending to show the sufficiency of such a description to identify the land, it must be held insufficient, unless we are to disregard the doctrine of *Miller v. Williams*, to the effect that such a description is *prima facie* insufficient. This we do not feel warranted in doing. In the case at bar, the record fails to make it appear that any evidence whatever was introduced tending to show that the descriptions were, in fact, sufficient to identify the land. It follows that the conclusion of the trial court that the descriptions in the assessment were insufficient and the assessment void must be upheld.

The order denying plaintiff's motion for a new trial as to the defendant Carter, and the land claimed by him, viz., lot 17 in block 20 and lot 17 in block 24, is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.

152 Cal. 59

FOX v. WRIGHT et al. (L. A. 1,734.)
(Supreme Court of California. May 13, 1907.
Rehearing Denied June 10, 1907.)

1. TAXATION—SALE FOR NONPAYMENT OF TAX—OMISSION OF DOLLAR SIGN IN DELINQUENT TAX LIST.

Where the dollar mark was not prefixed to the numerals representing the dollars and cents in a published delinquent tax list, but

the meaning and use of the numerals were fully explained in the publication itself, the meaning was as fully explained as though the figures had been preceded by the dollar sign.

2. SAME—TAX DEEDS—NOTICE—NAMES OF FORMER OWNERS.

In view of Pol. Code, § 3787, making a deed conclusive evidence of nonessential details in matters relating to taxation, failure of the tax collector to give the name of the person to whom the property was assessed for the years for which taxes were delinquent in the notice of sale by the state will not invalidate a deed on sale by the state, notwithstanding Pol. Code, § 3897, requiring such statement in the notice, since after the sale to the state further notice to the former owner is not necessary.

3. SAME—NOTICE BY PUBLICATION.

Under Pol. Code, § 3897, requiring publication for three weeks prior to resale of land purchased by the state at tax sale, publication once a week for three weeks in a daily paper is a good publication.

4. EVIDENCE—PRESUMPTIONS—"DAILY" PAPER.

The court will not presume that a paper was published daily from the mere fact that the word "Daily" is a part of the name of the paper.

5. TAXATION—TAX SALE—STATUTORY PROVISIONS—"HIGHEST BIDDER."

Under Pol. Code, § 3897, providing that, when the state shall become the owner of property sold for taxes, in reselling it, the tax collector shall sell the property to the highest bidder for cash, etc., the term "highest bidder" means the one who will make the highest cash bid for all the property, and not the person who will pay all the tax for the least amount of the land.

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Edwin R. Fox against W. S. Wright and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Cole & Cole, for appellant. Charles Lantz, for respondents.

HENSHAW, J. This is an action to quiet title, wherein plaintiff relied upon a tax deed to himself from the state of California. It is in all vital respects like the case of *Fox v. Townsend et al.*, L. A. No. 1702 (this day decided).¹ In the published delinquent list numerals were employed to represent dollars and cents, without having prefixed thereto the dollar mark. But the meaning and use of these numerals were fully explained in the publication itself. The case is therefore not at all the one where nothing appears to explain the intended meaning of the figures (*People v. Hastings*, 34 Cal. 571), but, to the contrary, is a case where the meaning of the figures is quite as fully and elaborately explained as though they had been preceded in each instance by the dollar sign. Nor was the property sold for an excessive amount. Without entering into the computations, which were fully and accurately set forth in the respondents' brief, the sums for which the properties were sold were accurately made up of taxes, 15 per cent. delinquency, 5 per cent. penalty, and the added cost of advertising.

¹ See note at end of opinion.

Reference is made to the notice of sale by the state contemplated by section 3897 of the Political Code, and it is said that these notices are void, as they do not contain the name of the delinquent owner. This, however, is a requirement of section 3764 of the Political Code, which provides for the notice of sale to be given by the tax collector where the property is to be sold to the state, and not by it. It has been held in *Ellis v. Witmer*, 134 Cal. 249, 66 Pac. 301, that a notice which falls to give the name of the delinquent owner is insufficient. Such requirement, however, is not found in section 3897 of the Political Code. In this the only requirement is that the tax collector's notice shall contain the description of the property sold, a detailed statement of all delinquent taxes, penalties, costs, and expenses up to the date of sale, "and shall give the name of the person to whom the property was assessed for each year on which there may be delinquent taxes against said property, or any part thereof." The notices here in question seem to be deficient in this respect. It is made to appear that the properties were sold for delinquent taxes, penalties, costs, and charges for the years 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, and 1895. The name of the person or persons to whom the property was assessed during these years is not given. But, upon the other hand, since the owner had received due notice by publication of the fact that his taxes were delinquent and the property had been sold to the state for such delinquency, it was not necessary to the validity of the proceedings that any notice of the intended sale by the state should be given to him at all. Indeed, the state might have provided that such sales could be made in private. And under section 3787, by the issuance of the deed, the presumption of the regularity and sufficiency of this notice of sale became conclusive. See *Bank of Lemoore v. Fulgham* (Sac. No. 1,338) 90 Pac. 936.

The publication of the notice of sale required by section 3897 of the Political Code must be for three weeks. The publication as recited in the deeds was made in a paper designated "The Los Angeles Daily Journal." It is argued from this, without any proof, that the paper was in fact a daily journal, and that the notice should have been published as often as the paper was issued during the specified period. But the court will not presume, merely from the title of the paper, that it was published daily, and, moreover, a publication under this law once a week for the prescribed period is a good publication, even if it appear in a newspaper published daily. *People v. Reclamation Dis.*, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085.

Section 3897 of the Political Code declares that "at the time set for such sale the tax collector must sell the property described in the Controller's authorization and said notices at public auction to the highest bidder

for cash in lawful money of the United States." Respondent argues from this, under the earlier system of taxation which prevailed in this state, and which elsewhere at present prevails, that it was the duty of the tax collector to have sold the property for the amount of the tax to the person who would pay the tax for the least quantity of land, and such is what is meant by the phrase "highest bidder" as now employed. If the law in fact contemplates that all the property must be sold, and the phrase "highest bidder" means him who will pay the largest cash sum for the property, it must result that the state will receive from its sales of such lands amounts far in excess of its accrued taxes, charges, and penalties. And (so runs respondents' argument) as there is no provision in our law for repayment to the original owner of this surplus, the law operates inequitably and unjustly in compelling such unfortunate delinquent owners to bear an excessive burden for the support of the government, and such a law violates the fundamental, equitable principle which is at the basis of all of our systems of taxation, namely, that, in the apportionment of taxes, due regard shall be had to making taxes uniform, and compelling every person to bear only his proportionate share of them. It may at once be admitted that in the statutes of sister states, as well as of the United States, where the law requires the sale of all the property, there is commonly found a provision whereby the excess over the demands of the state is made over to the owner. It also may be admitted that in our system of revenue collection a like provision might have been inserted. But such a provision is not found. The owner of the property who has permitted his taxes to become delinquent receives notice that, unless the taxes be paid by a given date, his land will be sold to the state. From the date of the sale, for the full period of five years, the owner has an absolute right of redemption from the state, and after that period of five years this right of redemption is still his until the state shall have actually sold the property. For two reasons it is to the benefit of the state that property so acquired should by it be resold into private ownership. The first, because it is inexpedient that the state should be charged with the burden of the care of many such parcels of property, its administrative machinery not being adapted to such end. In the second place, it is desirable always that the ownership of state lands, saving those which are necessary for its governmental functions, should be transferred to its citizens, whereby follow increasing population and the higher development, betterment, and improvement of the land, thus adding greatly to the wealth of the state. It must be concluded, therefore, that, when the law speaks of the sale of "the property," it means all of the land, and, when it says that the land shall be sold to the "highest bidder," it means him

who will make the highest cash bid for all the property. It will not be questioned but that the state might have provided that the surplus moneys received by it from such sales should be paid over to the former owners of the properties sold. But the single question which is to be considered is that of the power of the state to decree such sales and retain the money. If there be no violence done to the Constitution of this state or of the United States by a law whereby under the indicated circumstances the state retains such excess moneys to its own use, no equitable considerations may move a court to declare void that which the Legislature has the power to decree. It is to be noted, then, in considering this, that the delinquent owner is given process of law in the notice of the sale to the state of which he is advertised by publication. It is to be noted, moreover, that the liberal period of redemption of full five years is accorded him as an absolute right. At the end of this five years the deed to the state is made, and the title of the state becomes absolute. We are unable to discover any constitutional objection which interposes and invalidates the state's title, and none has been pointed out. We are unable to see why the state may not obtain a title free from all equities in the former owner at the expiration of five years as may a private citizen after foreclosure upon the mortgage when the period of redemption following such foreclosure has passed. That in other states the laws provide for a payment to the owner of the surplus moneys after the state's exactions have been met we can regard only as an act of generosity upon the part of the state, and not as the performance by it of a constitutional duty to its citizens. For these reasons, we conclude that the law in this respect is constitutional.

The other propositions advanced by respondent are sufficiently answered by the cases of *Fox v. Townsend*, supra, *Bank of Lemoore v. Fulgham* (L. A. No. 1,338) 90 Pac. 936, and *Baird v. Monroe* (Cal.) 89 Pac. 352, and no particular mention of them is, therefore, necessary.

For the foregoing reasons, the judgment and order appealed from are reversed, and the cause remanded.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; SHAW, J.; McFARLAND, J.

(152 Cal. 51)

NOTE.—The following opinion, per Henshaw, J., was reversed in part on rehearing (91 Pac. 1004):

Plaintiff sued to quiet title to certain lots of land, claiming title thereto under and by virtue of certain tax sales to the state of California and deeds from the state of California to him. The court gave its decree against the claim of plaintiff, and he appeals from the order denying his motion for a new trial.

One of the lots in question was lot 19 in block 26. The assessment of this lot, upon which the tax sale was based, shows that there was no dollar mark, or other mark, sign, word, abbreviation or explanation on the assessment

roll to indicate what was meant by the figures in the column designed to show the value of the property and the amount of the taxes. This being the case, the assessment was void and the sale and deeds made thereunder are likewise void. *Hurlbutt v. Butenop*, 27 Cal. 54; *Brady v. Seaman*, 30 Cal. 611; *People v. S. F. Sav. Union*, 31 Cal. 132; *People v. Hastings*, 34 Cal. 571; *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356. This omission appearing in the assessment itself necessarily invalidates the proceedings. In this respect this case is to be distinguished from the case of *Carter v. Osborn* (L. A. 1,735, filed March 7, 1907), 89 Pac. 608, where the omission of the dollar mark or sign was in the delinquent list and not in the assessment. The decree as to lot 19, block 26, was therefore correct. The other lands whose titles are in controversy are lot 17, block 20, lot 17, block 24, and lot 11, block 5. The assessments of these lots were in all vital respects the same as the assessment set forth and discussed in *Baird v. Monroe* (Cal.) 89 Pac. 352, saving only that, instead of being described as "in Pellissier Tr.," they were described as "in Electric Railway Homestead Assn. Tr." As in *Baird v. Monroe*, a map of the Electric Railway Homestead Association, recorded in book 14, p. 17, of Miscellaneous Records of the County of Los Angeles, was introduced in evidence, which map showed the location of the lots in controversy. The assessments therefore in this respect are identical with that discussed in *Baird v. Monroe*, and aided by the map which was introduced in evidence, the descriptions contained in these assessments were "sufficient to identify" the land. *McCullough v. Olds*, 108 Cal. 529, 41 Pac. 420.

Certain propositions are urged against the validity of the deeds made by the tax collector to the state. Section 3776 of the Political Code provides for a certificate of sale, and declares what that certificate must contain. Section 3785 provides for a deed from the tax collector to the state when the time for redemption has expired, and sets forth what such deed must contain; the recitals being identical with those called for in the certificate of sale. Section 3786 declares "that the matters recited in the certificate of sale must be recited in the deed." By reason of legislative oversight, there was at the date of these sales no law providing for the issuance of certificates of sale. It is contended that, as there was no law for a certificate of sale, there could in these deeds be no compliance with the requirement of section 3786, to the effect that the deed must contain a recital of the matters contained in the certificate. To this, however, it must be answered that, when the law requiring a certificate was repealed, there fell with it the requirement that the deed must contain the matters recited in the certificate. Moreover, section 3785 requires in the deed a recital of all the matters and things which the certificate contains, and those matters were in fact fully set forth in the deed. The only imperfection that can be charged in this regard was an imperfection in stating the time when the right of redemption had expired. But this irregularity was cured by the confirmatory act of February 28, 1903, fully discussed in *Baird v. Monroe*.

Certain correction deeds were made by the tax collector to the state, and it is urged that these deeds were without authority and void. The general principles governing such correction deeds are well settled. When a tax deed does not conform in its recitals to the facts, the officer is authorized to execute a second and corrected deed, but he has no power to execute a second deed which shall misstate the facts respecting any proceedings prior to its execution. Such a deed would be void. The power and the duty of the proper officer is not exhausted by the execution of an irregular or imperfect tax deed. *Douglass v. Nuzum*, 16 Kan. 515; *McCready v. Sexton*, 29 Iowa, 356, 4 Am. Rep.

214; *Woodman v. Clapp*, 21 Wis. 350. Section 3805b of the Political Code, dealing with the subject of misstatement of facts or clerical errors occurring in the tax collector's deeds, declares that these may be corrected by the tax collector upon an order of the board of supervisors entered upon its minutes directing correction by the issuance of a new or amended tax deed. If, as respondent here contends, such an order of the board of supervisors was necessary and was not made, it was incumbent upon him to have shown it. As the record is here presented, the presumption will be that the deeds were executed by the officer under proper direction and authority. Moreover, these correction deeds seemed to have been made for the sole purpose of making a more certain statement of the time when the right of redemption had expired, and for the reasons above given the original deeds themselves were sufficient upon this point. Nor do we perceive any force in the objection that the correction deeds to the state were made after the state had parted with the title. No reason is discernible why the state, like a private individual, may not obtain a proper correction deed for the betterment of the title to property which it has conveyed, and, if this be done after conveyance, why, as in the case of an individual, it should not serve to perfect the title granted.

The deed contained a description of the property as "situate, lying and being in the county of Los Angeles, state of California, and described thus: Mortgage interest in the following described property, Electric Ry. Homestead Association Tract, lot 17, block 24." It is contended that the deed here purports to convey only a mortgage interest in the lot, without any explanation, and that the deed is therefore void. But article 13, § 4, declares that "a mortgage for the purposes of assessment and taxation shall be deemed and treated as an interest in the property affected thereby." The further recitals in the tax deed make this case parallel with that of *Doland v. Mooney*, 72 Cal. 34, 13 Pac. 71, where such a deed was held to be sufficient. This property was sold for taxes for the year 1894. It is objected that, upon the assessment book for 1895, there was not stamped an entry of the fact "that said lot had been sold for taxes, and the date of such sale," as required by section 3801 of the Political Code as it read in 1905. Only the words, "sold to the state," were so stamped. But it is the assessment and sale for taxes for 1894 which are involved in this case, and a clerical misprision of the year after cannot affect the validity of such proceeding. Moreover, if the purpose of the requirement is to give notice to the fiscal officers, certainly a notice, "Sold to the state," is sufficient to put them on inquiry, and the same is true if it be said that the requirement was designed to give notice of the sale to the owner.

For the foregoing reasons, the order refusing to grant a new trial was proper as to lot 10, block 26, and the judgment stands affirmed as to this lot. The order is reversed as to lot 17, block 20, lot 17, block 24, and lot 11, block 5.

152 Cal. 64

LOFSTAD v. MURASKY, Judge. (S. F. 4,776.)

(Supreme Court of California. Sept. 20, 1907.)

1. RECORDS—LOSS OF RECORDS—ESTABLISHMENT OF TITLE.

St. Ex. Sess. 1906, p. 78, c. 59 (the McEnerney act), creating a system of procedure for establishing title to real property where the public records thereof have been destroyed, provides that an action may be brought by any person claiming an estate in real property who by himself or his tenant is in the actual possession thereof, and requires an affidavit showing the character of the estate claimed and of the pos-

session. *Held*, that an affidavit alleging that plaintiff had no physical possession of the premises, that his only possession was the constructive possession accompanying the legal title, and that such constructive possession had never been disturbed, did not show the actual possession required.

2. WORDS AND PHRASES—"CONSTRUCTIVE POSSESSION."

"Constructive possession" is that which exists in contemplation of law without actual personal occupation of the property.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1474-1475.]

3. SAME—"ACTUAL POSSESSION."

To constitute actual possession of land, there must be such an appropriation of the land by the claimant as will convey to the community where it is situated visible notice that the land is in his exclusive use and enjoyment, an appropriation manifested by either inclosing, cultivating, improving, or adapting it to such uses as it is capable of.

4. STATUTES—SPECIAL LEGISLATION—RECORDS—LOSS OF RECORDS—ESTABLISHMENT OF TITLE.

St. Ex. Sess. 1906, p. 78, c. 59 (the McEnerney act), creating a system of procedure for establishing title to real property where the public records thereof have been destroyed, and providing that an action may be brought by any person claiming an estate in real property who by himself or his tenant is in the actual possession thereof, is not unconstitutional as special legislation, in that it divides property owners into two classes, one having actual and the other only constructive possession of their property, without any constitutional basis for the distinction.

In Bank. Application by John N. Lofstad for writ of mandamus against Hon. F. J. Murasky, as judge of the superior court. Petition denied.

Edward C. Harrison, for petitioner. Page, McCutchen & Knight, for respondent.

LORIGAN, J. This is an application for a writ of mandate. The petitioner commenced an action, under the provisions of what is familiarly known as the "McEnerney act" (St. Ex. Sess. 1906, p. 78, c. 59), to establish and quiet his title to certain lots in the city and county of San Francisco, being part of outside land blocks Nos. 270, 299, and 701. This act, which creates a system of judicial procedure for the establishing of title to real property where the public records which would otherwise establish it have been destroyed, provides that an action may be brought under it by any person who claims an estate in real property, and "who by himself or his tenant, or any other person holding under him, is in the actual and peaceable possession thereof," and requires that the complaint filed shall be accompanied by an affidavit which shall show the character of the estate which the plaintiff claims in, and the possession he has of, the real property described in the complaint. The affidavit filed by the petitioner with his complaint stated that he was the owner in fee simple of the said property, having derived title thereto under sundry conveyances to him made in 1897 and 1898, and duly recorded in the recorder's office of the city and

county of San Francisco, and, as to the character of his possession of said property, declared that "there is no physical possession of said premises by said petitioner for the reason that the plaintiff has not been able to occupy the same personally, or to find any person to whom he can lease the same, and the same are uninclosed and vacant; that the only possession thereof is therefore the constructive possession which accompanies the legal title in it; that this constructive possession of plaintiff has never been disturbed by any claim or any occupation, intrusion, or trespass of any other person, and said plaintiff therefore alleges the same to be both actual and peaceable within the meaning of the 'act to provide for the establishment and quieting of title to real property in case of loss or destruction of public records,' approved June 16, 1906." Upon the filing of his complaint and affidavit, the petitioner applied to the respondent, as judge of the superior court in which the action was pending, for an order, required by section 4 of the act, designating the newspaper in which publication of summons in the suit should be made. The respondent refused to make the order, and petitioner now applies to this court for a writ of mandate requiring him to do so.

The refusal of the respondent to make the order in question was based upon the ground that the character of the possession of petitioner of said property, as stated in his affidavit, was not such as to give the superior court jurisdiction to proceed in the action or to grant the relief provided for in the act; that the court could only acquire jurisdiction to proceed when the affidavit showed that the party bringing the action was in the actual possession of the property, title to which was sought to be established by him, and that the affidavit of petitioner showed that he was not in such actual possession, and, at most, was only in constructive possession of the property. We do not think there can be any doubt but that the action of the respondent in refusing to make the order was correct.

The position of the petitioner seems to be, as stated in his affidavit, that because it appears therefrom that he has the legal title to the property, and hence in contemplation of law is in constructive possession of it, and as there is no adverse claim to the property or any adverse occupancy thereof, he is, therefore, to be deemed in the actual possession of it within the intent and meaning of the McEnerney act. This process of reasoning, while possibly warranted by the exigency of the situation confronting petitioner when endeavoring to avail himself of the benefit of the act, is obnoxious to the objection that it obliterates the well-recognized distinction between actual and constructive possession, while at the same time it attempts to force upon a phrase well recognized in law a meaning entirely different from what it usually

possesses, and the ordinary meaning of which the Legislature is supposed to have understood when it employed it in the act. It must be assumed that when the Legislature required, as a prerequisite to the right to invoke the remedy which it provided, that the party should be in the actual possession of real property, it understood the distinction between the legal classes of actual and constructive possession, and that it used the term "actual possession" advisedly and as generally understood. When the petitioner stated in his affidavit that he was not in the physical possession of the property himself or by any one else, and that it was uninclosed and vacant, he showed that he was not in the actual possession under any definition of what constitutes actual possession, and stated himself out of court, unless, as he claims, the further facts stated by him amounted to a showing of actual possession. But that they do not we think it quite apparent. These facts relied on consist of the conveyances by which he acquired the property, that he is the owner in fee simple, and that no person makes any claim to it beside himself, nor is any one in adverse occupancy of it. Treating the affidavit as proof of these facts which it states, and for the purpose of obtaining the order required under the act it must be so treated, it only shows legal title to the property in petitioner, from which it follows as a fiction of law that he is constructively in possession of it. The further fact stated by him that there is no adverse claim or adverse occupancy of the property by any one does not affect this constructive possession one way or the other. The mere fact that there is no adverse possession of the premises to which one holds the legal title does not make the possession of such holder anything more than a constructive one. It only tends to show that there is no actual possession of it by any one, and hence his constructive possession is undisturbed. For the purpose of this proceeding, it does not have the effect of changing petitioner's constructive possession into actual possession within the intent of the act under any possible theory. All the possession he has, even if there be no adverse possession, is constructive possession, the possession which in contemplation of law followed his legal title to the property, while what the act required him to have, in order to avail himself of its provisions, is actual possession—possession in fact.

While it is true that the act in question is of a remedial nature and should be liberally construed so as to effect the purpose contemplated by it, a court is not warranted under the guise of liberal construction in giving to a term or phrase a different meaning than such as it is generally understood to possess. "Actual possession" is a term of well-understood legal meaning, and is used in opposition to the other term "constructive possession" or "possession in law." The dis-

inction between these classes of possession is so well defined and so generally recognized that it is hardly necessary to proceed to any great extent in pointing it out. In a general way, it may be said that constructive possession is that which exists in contemplation of law without actual personal occupancy of the property, such a possession as in contemplation of law proceeds from the vesting of the paramount title or follows in the wake of the legal title, or, as more exactly defined, "constructive possession, or possession in law as it is sometimes called, is that possession which the law annexes to the legal title or ownership of property when there is a right to the immediate actual possession of such property, but no actual possession." 28 Am. & Eng. Ency. of Law (2d Ed.) 239. This is the possession, and the only possession, which it appears from the affidavit of petitioner he had of the land described in his complaint, constructive possession which the law connects with his ownership of the legal title. Opposed to this constructive possession is actual possession, the character of the possession which the act requires in order that its provisions may be availed of. What constitutes such possession was early defined by this court, and some of the cases doing so are found quoted from in *Brumagim v. Bradshaw*, 39 Cal. 24-44. It is there said: "In *Coryell v. Cain*, 16 Cal. 573, which is a leading case in this state on that point, we define actual possession to be 'a subjection to the will and dominion of the claimant, and it is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property.' In *Plume v. Seward*, 4 Cal. 96, 60 Am. Dec. 599, it is said that, to maintain an action on the ground of prior possession, 'there must be an actual bona fide occupation, a *possessio pedis*, a subjection to the will and control, as contradistinguished from the mere assertion of title and the exercise of casual acts of ownership, such as recording deeds, paying taxes,' etc. In *Wolf v. Baldwin*, 19 Cal. 313, in stating what kind of 'actual occupation' was required under the Van Ness Ordinance, the court says it was a 'possession which is accompanied with the real and effectual enjoyment of the property. It is the possession which follows the subjection of the property to the will and dominion of the claimant to the exclusion of others; and this possession must be evidenced by occupation, or cultivation, or other appropriate use, according to the locality and character of the particular premises. * * * It must, in other words, be an open, unequivocal, actual possession—notorious, apparent, uninterrupted, and exclusive—carrying with it marks and evidences of ownership, which apply in ordinary cases to the possession of real property.'"

We do not think it necessary to further refer to the authorities defining actual possession. They are agreed that, in order to con-

stitute such possession, there must be an appropriation of the land by the claimant such as will convey to the community where it is situated visible notice that the land is in his exclusive use and enjoyment and appropriation manifested by either inclosing it, or cultivating it, or improving it, or adapting it to such uses as it is capable of. This rule announced in the authorities cited, which is the general rule in respect to what constitutes actual possession, is embodied in our Code (Code Civ. Proc. §§ 322, 323) as the one which shall prevail when accompanied by payment of taxes (Code Civ. Proc. § 325), in order to sustain title by adverse possession when such title is founded upon a written instrument, and we see no reason why it should not be applicable as defining the actual possession required to be had in order to invoke the benefit of the McEnerney act.

It is insisted by the petitioner that the actual possession required by that act is not to be construed as strictly as it is in the authorities defining the phrase for the purpose of constituting adverse possession under the statute of limitations referred to, as the reasons and objects of the two statutes are different. But the rule as to what constitutes actual possession when title by adverse possession is asserted under the statute is no different from the general rule which obtained before the statutory enactment, so that the statute lays down really no stringent rule upon the subject. It simply embodies the general rule. Nor do we discover any purpose disclosed by the term as used in the McEnerney act which would justify us in making the distinction suggested, or any reason why we should define actual possession as used in that act to mean something different from actual possession when asserted to support a claim of title by adverse possession. What constitutes actual possession in respect to such claim, or whenever the meaning of the term has been in question, has been sharply and clearly defined by the authorities in this state, and, as we say, is really the general rule on the subject, and, in the absence of any disclosed intention on the part of the Legislature to give it a different meaning than its general one, we cannot assume that it so intended. We are referred to no authorities in this state where, when the meaning of the term "actual possession" was under consideration, any different meaning was given to it than the authorities cited by us disclose. It may be said, too, in passing, as accentuating the proposition that when the Legislature used the term "actual possession" it employed it as generally defined and to require possession in fact, that it declares in the act that such possession shall be by the party or his tenant or other person. Possession by tenant or other person could have no relevancy except as applied to actual possession. Aside from this, we do not discover anything in the affidavit of petitioner which

could invoke making a distinction, if it were permissible. His affidavit states no facts showing that he is in the actual possession under the most liberal rule that might be indulged in short of defining actual possession to be synonymous with constructive possession, which, of course, would be absurd. We are therefore of the opinion that the actual possession of property required to be had in order to give the court jurisdiction under the McEnerney act must be such an actual possession as defined by the general rule, and embodied in the Code sections referred to, as necessary to sustain title by adverse possession if maintained and continued for the period required by law. All petitioner shows in his affidavit is that he had constructive possession of the property. Before he is entitled to avail himself of the benefit of the McEnerney act, he must be in the actual possession of the property as that term is defined by the authorities cited, and the fact that he is in actual possession must be stated or shown in his affidavit. And, upon the hearing before the court for the purpose of obtaining the decree authorized under the act, he must prove actual possession of the property at the time of filing his complaint and making his affidavit, as it is defined by these authorities.

It is further claimed by petitioner that, if the phrase "actual possession" is to be given the construction which we here give it, then the act is unconstitutional as special legislation, in this: that it divides property owners into two classes, one having actual possession of their property, the other only constructive possession, without any natural intrinsic or constitutional basis for the distinction. This is not a new point. This act was attacked in *Title, etc., Co. v. Kerrigan* (Cal. Sup.) 88 Pac. 856, as unconstitutional, on all the grounds to which it was deemed vulnerable in that respect, and the point made now was made there, but was not pressed, probably because on reflection it was deemed untenable, as we are satisfied it is.

The petition for the writ is denied.

We concur: BEATTY, C. J.; HENSHAW, J.; ANGELLOTTI, J.; SLOSS, J.; McFARLAND, J.; SHAW, J.

6 Cal. App. 251

JOHNSTON v. BEADLE et al. (Civ. 259.)
(Court of Appeal, First District, California.
Aug. 19, 1907.)

1. TRIAL—INSTRUCTIONS—SEVERAL INSTRUCTIONS ON SAME SUBJECT—EFFECT.

The giving of several instructions on the question of damages has not a tendency to lead the jury to think the court believes plaintiff should have a verdict; the court cautioning them that they are to make no such deduction, and all but one of the instructions being worded to prevent the giving of excessive damages in the event of a verdict for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 513.]

2. DAMAGES—PERSONAL INJURIES—EVIDENCE OF FINANCIAL CONDITION.

The general financial condition of plaintiff in an action for personal injuries is immaterial and irrelevant on the question of damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 499.]

3. TRIAL—STRIKING OUT ANSWERS.

An irresponsible answer putting before the jury what the court had properly ruled could not be shown should be stricken out on motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 238.]

4. SAME—NECESSITY OF OBJECTING TO QUESTION.

Where it is not apparent from a question that the answer will be inadmissible, the question need not be objected to, to entitle the opposing party to move to strike out the answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 242.]

5. SAME—INSTRUCTIONS—ASSUMING FACTS.

The conclusion to a requested instruction on contributory negligence that plaintiff had no right, on the happening of some trivial occurrence, to bring injury on herself, is objectionable as assuming that plaintiff did, on the happening of a trivial occurrence, bring injury on herself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 430.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Frances H. Johnston against C. B. Beadle, and others. From a judgment for plaintiff and from an order denying a motion for new trial, defendants appeal. Reversed.

C. H. Wilson, for appellants. Maguire, Lindsay & Wyckoff and Houx & Barrett, for respondent.

HALL, J. Appeal from judgment and order denying defendants' motion for a new trial. The action was brought to recover damages for injuries received by plaintiff while a passenger on the steamer Point Arena, and the verdict and judgment were in favor of plaintiff.

While the plaintiff was a passenger on the steamer Point Arena, voyaging from San Francisco to Little River, in Mendocino county, the steamer struck on the rocks near Point Fort Ross, and plaintiff, while attempting to get out of her berth, was thrown or fell to the floor and was injured. It is insisted by appellants "that there is absolutely no evidence of negligence on the part of the defendants to sustain the verdict and judgment," and also that "the evidence did not show any negligent act on the part of the defendants which was the proximate cause of the injuries complained of." After a careful examination and consideration of the evidence in the record, we are satisfied that neither of these contentions of appellants can be sustained. The evidence is sufficient to justify the conclusion that the vessel ran on the rocks because of the negligence of defendants, and that such running on the rocks was the proximate cause of the injuries to plaintiff; but, as we are of the opinion that the judgment and order must

be reversed, and the action remanded for a new trial, for reasons hereinafter stated, we do not think it necessary or expedient to discuss in detail the evidence in the record.

The court repeated in substance several instructions on the question of damages. It is not claimed that any of these are not correct statements of the law, but it is urged that the court, by thus laying stress on the question of damages, led the jury to think that the court believed a verdict should be rendered in favor of plaintiff. But the court in express words cautioned the jury against any such result. It said: "But the jury are not to understand that, because the court instructs them upon the question of damages, it thereby means to convey any intimation that in its opinion the plaintiff is or is not entitled to damages." Besides, an examination of the instructions on the subject of damages discloses that all but one were manifestly intended and so worded as to prevent the jury from giving excessive or unreasonable damages in the event that they gave a verdict for the plaintiff.

We now come to a matter that necessitates a new trial. The plaintiff pleaded special damages through loss of time and earnings as a dressmaker, and at the trial gave evidence in support thereof, to the effect that she had been steadily employed prior to the injury complained of as a dressmaker, and earned at such employment \$2.50 per day and her board. She was then asked by her counsel: "Are you a woman of means?" Defendants objected to the question as immaterial, and the court sustained the objection. Thereupon her counsel asked this question: "During the period you have been a dressmaker, state the means by which you have supported yourself?" And she answered: "I have no other means or resources." Whereupon counsel for defendants at once moved to strike out the answer as not responsive, and on the ground that her means and resources are immaterial and irrelevant. The court denied the motion, and in so doing, we think, committed error, for which a new trial must be ordered. The ruling of the court to the first question above quoted was correct. The general financial condition of the plaintiff was immaterial and irrelevant to the question of damages, or to any issue in the case. *Shea v. Railway*, 44 Cal. 414; *Malone v. Hawley*, 46 Cal. 409; *Green v. Southern Pacific Co.*, 122 Cal. 563, 55 Pac. 577; *Mahoney v. San Francisco, etc., Ry. Co.*, 110 Cal. 471, 42 Pac. 968. The answer of the witness (plaintiff) to the second question went beyond the legitimate scope of the question, and put before the jury the fact that she was not only not a woman of means, but had no means or resources other than her earnings as a dressmaker, and was thus a flagrant evasion of the ruling of the court to the first question above quoted. It is no answer to the contention or to the motion of counsel for appellants to say that he

should have objected to the question before it was answered. The answer actually given is not a direct answer to the question put, as would have been such an answer as "I have supported myself by my earnings as a dressmaker." The question put was susceptible of an answer that would have been in accord with the previous ruling of the court. Counsel for defendants were not obliged to assume that counsel for plaintiff was attempting to intentionally get an answer that would contravene the ruling of the court that had just been made any more than we will impute any such purpose to counsel. It was only when the answer had been given that it could be known that it was immaterial and in violation of the previous ruling of the court. The proper practice in such a case is to move to strike out the answer. "When it is apparent from the question that the answer will contain evidence necessarily inadmissible, then a motion to strike out comes too late, unless preceded by an objection to the question, but the rule is otherwise where the evidence may or may not be admissible." *People v. Williams*, 127 Cal. 212, 59 Pac. 581; *People v. Lawrence*, 143 Cal. 148, 76 Pac. 893, 68 L. R. A. 193. The court erred in refusing to strike out the answer, "I have no other means or resources."

It is also urged that the court erred in refusing to give two instructions requested by defendants upon the defense of contributory negligence. The first of these instructions, we think, is open to the objection that it assumes that plaintiff, upon the happening of a trivial occurrence, brought the injury on herself, and for that reason was properly refused. It concludes in these words: "The plaintiff had no right, upon the happening of some trivial occurrence, or such an occurrence as would not create fear or apprehension of injury in the mind of an ordinarily prudent person, to bring injury on herself." To say that a person had no right to do a certain thing strongly suggests that such person did do that thing. The second of these instructions is in these words: "If you find from the evidence in the case that the plaintiff, in attempting to get out of and descend from her berth on the steamer Point Arena at the time complained of, did not act with ordinary care and prudence, and hold and guard herself from falling and injuring herself as a result of any motion of the vessel that might have been expected at the time by an ordinarily prudent person, and that such want of ordinary care and prudence contributed to or caused the accident, then and in that case your verdict must be for the defendant." This instruction is correct in its statement of principles of law, and the only reason suggested by respondent why it should not have been given is that the court sufficiently instructed the jury upon the subject of contributory negligence, and, in substance, gave the instruction under discussion. An examination of the instructions giv-

en upon the subject, however, discloses that they were all couched in very general terms, and it is at least doubtful whether they fully cover the ground of the requested instruction. Inasmuch as the judgment and order must be reversed for the error heretofore pointed out, it is sufficient for us to say that it would have been the better practice to have given the requested instruction.

The judgment and order are reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

6 Cal. App. 255

PEOPLE v. GONZALEZ. (Cr. 55.)

(Court of Appeal, Second District, California. Aug. 20, 1907.)

1. CRIMINAL LAW—APPEAL—VERDICT—CONCLUSIVENESS.

Where the evidence in a criminal case is conflicting, the verdict will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3076.]

2. RAPE—EVIDENCE—SUFFICIENCY—PROOF OF NONMARRIAGE.

Where on a trial for rape, there is ample opportunity for the state to prove directly that the accused and the prosecutrix were not husband and wife, indirect evidence of that fact will not suffice.

3. SAME—COMPLAINT—ADMISSIBILITY.

The complaint made by the victim of a rape on her return home a month and a half after the occurrence testified to by her is inadmissible, though she is under the age of consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 67.]

4. SAME.

On a trial for rape on a child under the age of consent, the prosecution asked the mother of the child as to whether the child on the date of the offense, or shortly thereafter, made complaint. On cross-examination, she testified that it was made about a month and a half after the occurrence. On redirect examination the mother disclaimed knowledge of the exact time, but stated that it was a short time after the occurrence. *Held*, the proof of the complaint was inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 67.]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Juan Gonzalez was convicted of rape, and he appeals. Reversed.

James D. Reymert, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Defendant was convicted of the crime of rape alleged to have been committed by having sexual intercourse with a female child under the age of 16 years who was not his wife. He appeals from the judgment of the superior court sentencing him to 10 years' imprisonment in the state prison at Folsom, and from the order of the court denying his motion for a new trial.

In support of these appeals he urges that the verdict is not sustained by the evidence; that there is no proof that the prosecutrix is not the wife of defendant; that the court

erred in the instruction relating to this matter, and in not striking out certain testimony of the mother of the prosecutrix as to the complaint said to have been made by the latter.

In so far as the first matter urged is not covered by the second, the presentation thereof brings it clearly within the rule so often announced by appellate courts that, where the evidence is conflicting, the verdict of the jury will not be disturbed. The probability of the story told by the prosecutrix is a matter for the jury. *People v. O'Brien*, 130 Cal. 1, 5, 62 Pac. 297. It is admitted that there is no direct evidence that the prosecutrix is not the wife of the defendant. There was no attempt to establish this element of the case, but there is some testimony from which the inference might be drawn that the parties were not married. On the other hand, all the testimony of this character introduced by the prosecution might have been true, and yet such a marriage exist. The case is to be distinguished from that of *Lewis v. People*, 37 Mich. 518, relied upon by the Attorney General, in this: That the objection is a part of the record on the motion for a new trial here, while in the Michigan case the point was not made in the court below, and the appellate court refused to consider "the lack of evidence direct in form, there being abundance of other evidence," because it was too late to make this objection in the appellate court for the first time. Page 520. The age of the girl as testified to by the defendant (13) was not such as to compel the assumption that there was no valid marriage between the parties for this reason. Marriage under the age of legal consent without consent of parent or guardian is made voidable only under our statute, and, if followed by cohabitation freely and voluntarily after attaining the age of consent, cannot even be annulled. Civ. Code, § 82; *People v. Beevers*, 99 Cal. 286, 33 Pac. 844. It is apparent either that the prosecution overlooked this element of the case, or tried it on the theory that the presumption of the innocence of the defendant was overcome by the presumption that a marriage contracted by a girl under the age of consent was void. The age of the girl as shown by her own and her mother's testimony (11) might well justify this assumption of nonmarriage. This was further strengthened by the testimony of the physician who examined the child and found that the menses had not yet appeared. The circumstances and evidence strongly support the inference that there was no marriage, but we cannot accept or indorse the view that, where there is ample opportunity for the prosecution to prove this element of the crime directly, indirect evidence will suffice. We feel particularly disinclined to this view as applied to this case, owing to the unsatisfactory character of the evidence upon which the conviction rests. It is not the province of this

court to deal with the weight of the evidence where there is any conflict, but where the sole evidence of the commission of the crime of rape rests upon the testimony of a child who says the act was committed while she was asleep, that she woke up and found that something was inserted in her body wrong, and the defendant was at the foot of the bed, that this was the only time she had intercourse with the defendant, though she left her mother's house, and, the evidence shows, was gone for a month and a half, with him, it seems imperative that every element of the crime should be clearly and legally established.

The complaint made by the child to her mother upon her return home a month and a half after the occurrence testified to by her was improperly admitted in evidence, and this must have been largely responsible for the verdict of guilty found by the jury. The complaint by the victim of rape which the law permits to be introduced in evidence is one which follows so closely upon the occurrence as to be practically the first opportunity available to tell one in whom she has confidence. It is the fact of complaint immediately that is supposed to show that she was an unwilling victim; it being presumed that an innocent woman, so assaulted and outraged, will complain of the injury at the earliest practicable moment. What she may say is hearsay, but the act of complaining is original evidence. *People v. Mayes*, 66 Cal. 599, 6 Pac. 691; *People v. Stewart*, 97 Cal. 238, 32 Pac. 8; *People v. Lambert*, 120 Cal. 170, 52 Pac. 307. The same rule is applied in those cases in which the female child is under the age of consent. *People v. Baldwin*, 117 Cal. 244, 49 Pac. 186; *People v. Wilmot*, 139 Cal. 103, 72 Pac. 838. The evidence asked to be stricken out, the failure of the court to do which is assigned as error here, is the following answer to a question propounded by the district attorney to the mother of the prosecutrix: "I know that he did wrong. She told me that he did wrong. I examined her, and found her condition such that she had been wronged." The question was: "I will ask you whether or not Carmen on or about May 15, 1906 (the date of the alleged occurrence), or shortly afterwards, made any complaint to you that Juan Gonzalez had had sexual intercourse with her?" The court instructed the witness to answer "yes or no." She did not do so. The defendant immediately cross-examined the witness as to the time of this complaint, and elicited the statement that the complaint was about a month and a half after the occurrence, whereupon he made the motion to strike out, which was denied. The question was not objected to, and, as limited by the court, should have elicited an unobjectionable answer. A motion to strike out the answer as not responsive would have cleared the record, but, assuming that the witness attempted to answer the ques-

tions asked, the most that can be said is that she appears to have answered that "on or about May 15th, 1906, or shortly thereafter," the child told her mother that "he did wrong." On cross-examination she modified this by saying that it was a month and a half after the occurrence. On redirect examination by the district attorney the witness disclaimed exact knowledge of the time, but says it was a short time after the occurrence. The only definite fixed time mentioned by the witness is "about a month and a half after the happening." This in the witness' mind might be, and perhaps was, entirely reconcilable with the term "shortly thereafter" of the direct examination, or the "short time" of the redirect. The only definite time to be considered by the court in ruling upon the motion to strike out the testimony was that given on cross-examination. The remarks of the court in making the ruling justify the inference that the testimony was admitted on the theory that the jury might determine the question of time as a fact. This was error. The time of the complaint was material to the determination of the question of law affecting the admissibility of the evidence, and it was the duty of the court to make its own finding of fact as to the time shown by the testimony. Conceding that the admission of the evidence by the trial court was an implied finding that the complaint was made immediately, such a finding is not conclusive upon this court, as there is no conflict in the evidence. The various statements of the witness are all compatible with each other, and, when properly reconciled each with the others, show that the complaint was made a month and a half after the occurrence. This being true, it should not have been admitted.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are reversed, and the cause remanded for a new trial.

We concur: ALLEN, P. J.; SHAW, J.

7 Cal. Unrep. 338

•ROTHROCK v. BALDWIN. (Civ. 318.)

(Court of Appeal, Second District, California. Aug. 20, 1907.)

APPEAL — RECORD — ERRORS — DISPOSITION OF CASE.

Where an examination of the record on appeal suggests no error, and the attention of the court is called to none by reason of the failure of appellant to file points and authorities, the judgment will be affirmed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3109.]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Mandamus proceedings by A. B. Rothrock against Fred P. Baldwin, as clerk, and another, as president of the board of trustees of the city of Long Beach, to compel defendants to issue and deliver a warrant for labor

performed for the city. From a judgment for plaintiff, defendants appeal. Affirmed.

John E. Daly and Carl Monk, for appellants. F. A. Knight, for respondent.

ALLEN, P. J. This is a proceeding in mandamus commenced by plaintiff to obtain an order of the superior court commanding defendant Downs, as president of the board of trustees, and defendant Baldwin, as clerk of the city of Long Beach, to draw, sign, countersign, and deliver a certain warrant on account of labor done and performed by plaintiff for said city at its request, which payment had not theretofore been made. A demurrer was interposed to the petition and overruled. The cause was subsequently tried upon its merits, findings of fact and conclusions of law filed and judgment entered in favor of plaintiff. From the judgment, so entered, this appeal is taken.

The transcript on appeal was filed November 2, 1906. Stipulations were filed for an extension of time within which appellants should file points and authorities. This time expired in December, 1906, and no points or authorities have ever been filed in the case.

An examination of the record suggests no error, and, our attention being called to none, the judgment is ordered affirmed.

We concur: SHAW, J.; TAGGART, J.

6 Cal. App. 242

BEAULIEU VINEYARD et al. v. SUPERIOR COURT OF NAPA COUNTY et al.
(Civ. 383.)

(Court of Appeal, Third District, California.
Aug. 19, 1907.)

1. PROHIBITION—GROUNDS FOR RELIEF—WANT OR EXCESS OF JURISDICTION—STATUTES.

Under Code Civ. Proc. § 1102, the writ of prohibition is issued to restrain subordinate courts acting without or in excess of jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, § 37.]

2. EMINENT DOMAIN—PROCEEDINGS TO TAKE PROPERTY—JURISDICTION OF COURTS.

Under Code Civ. Proc. § 1243, the superior court has jurisdiction of proceedings to condemn land situated in the county.

3. PROHIBITION—GROUNDS FOR RELIEF.

The regularity of the proceedings of an inferior court acting within its jurisdiction cannot be reviewed on prohibition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, § 37.]

4. EMINENT DOMAIN—PROCEEDINGS TO TAKE PROPERTY—ISSUES.

Where, in proceedings to condemn land for a railway right of way, the allegations of the complaint were put in issue and the necessity for the taking was denied, it was necessary to find on every material averment of the complaint before judgment for the taking of the land could be awarded.

5. SAME—TRIAL BY COURT.

Where, in proceedings to condemn land for a railway right of way, the allegations of the complaint were put in issue and the necessity

for the taking was denied, and defendant did not demand that the issue of necessity should be submitted to the jury, the right to submit the issue to the jury was waived and the court must find on it.

6. PROHIBITION—GROUNDS FOR RELIEF—IRREGULARITY IN PROCEEDINGS.

In proceedings to condemn land for a railway right of way, the court left to the jury the determination of the value per acre of a tract, and reserved for itself the determination of the question of necessity, after the jury had rendered a verdict. The jury awarded damages by finding the value per acre, and the court subsequently made findings on the question of necessity. Held that, though the more orderly procedure required a finding on the question of necessity before leaving to the jury the determination of the amount of damages to be awarded, the action of the court was not in excess of jurisdiction, and was not reviewable on prohibition.

7. SAME.

The action of the court in denying to defendant in proceedings to condemn land for a railway right of way the benefit of a jury trial is not in excess of the jurisdiction of the court, and is not reviewable by writ of prohibition.

8. SAME—ISSUES.

The court on application for writ of prohibition cannot impeach the verity of the recitals of the findings and judgment of the trial court, as any error in the decision based on the insufficiency of the evidence may be disposed of by appeal.

Application for a writ of prohibition by the Beaulieu Vineyard and others against the superior court of Napa county and another to prohibit the superior court and the judge thereof from enforcing an order and to prohibit proceedings under or in furtherance of a judgment. An alternative writ was issued, the order to show cause discharged, and a peremptory writ denied.

Carlton W. Greene, for petitioners. John T. York, for respondents.

BURNETT, J. The proceeding is for a writ of prohibition. An alternative writ was issued upon a verified petition. On the return day respondent filed a demurrer and also an answer, denying many of the allegations of the petition. Thereafter petitioners filed a traverse of the answer; and respondent—not to be outdone in volume of asseveration and denial—replied with a “rejoinder to the traverse.” We do not deem it necessary to give special consideration to the demurrer of respondent. It is true that a sharp issue is presented as to some of the facts, but, notwithstanding this want of agreement between the parties, the record is sufficient to enable us to determine the controversy.

This proceeding grew out of an action brought by the San Francisco, Vallejo & Napa Valley Railroad Company against petitioners, in the superior court of Napa county, to condemn certain lands of the defendants for a right of way for the railroad of the plaintiff in that action. Petitioners state that “the object of this application is particularly to prohibit the superior court of Napa county and the judge thereof from enforcing

an order made July 1, 1907, authorizing the said plaintiff to take possession and use said lands during the pendency of and until the final conclusion of the litigation, and to prohibit all other proceedings under or in furtherance of the judgment; and incidentally to annul all the proceedings subsequent to the verdict of the jury." The proceedings of the trial are set out in extenso in the pleadings before us. It is not claimed that the court acted in excess of its jurisdiction until after the verdict of the jury was rendered. The said verdict, in response to the only issues submitted to said jury, was as follows: "We, the jury in the above entitled cause, find for the defendants as our verdict, in this case, and answer the questions submitted as follows: (1) What was the value per acre on the 13th day of November, 1906, of the first or smaller tract or parcel including the improvements thereon sought to be condemned? Answer: 0.354 acres at \$400 per acre—\$141.60. (2) What was the value per acre on the 13th day of November, 1906, of the second or larger tract or parcel of land sought to be condemned? Answer: 2.723 acres at \$500 per acre, \$1,361.50. (3) What damages, if any, will accrue to the larger tract not sought to be condemned by reason of the deprivation of a site for a wine cellar? Answer: \$2,000. (4) What will be the damages, if any, accruing to the larger tract not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff, accruing from all sources other than the deprivation of a site for a wine cellar? Answer: \$500. (5) What will be the cost of a good and sufficient fence along the line of the proposed railroad? Answer: \$1,025.00. (6) Total value of land \$1,503.10. Total damages, \$2,300."

Neither party demanded that any other issue be submitted to the jury, and it is claimed by respondent that no objection was made by petitioners to the form of the issue. Petitioners, however, aver that they objected to the segregation of the damages to the portion not to be taken as provided in questions 3 and 4. This conflict in the pleadings as to the objection must be considered of no importance on an application for a writ of prohibition. The peculiar method of presenting the question of damages to the land not to be taken, though, has a bearing of some significance upon the determination of the question before us. It was claimed by the defendants in the condemnation proceeding that, if the portion of tract No. 2 described in the complaint and sought to be condemned should be taken, they would be deprived of a site for a wine cellar of great value for that purpose on account of its peculiar location. During the trial, after the plaintiff became apprised of this contention of the defendant, it sought to abandon any claim to a portion of said tract and to withdraw it from condemnation, and thereby leaving a sufficient

area of said tract 2, according to the testimony of some of the witnesses and the subsequent finding of the court, for every purpose of a wine cellar. It asked permission of the court to so amend its complaint as to eliminate the element of damage on account of the deprivation of the site for a wine cellar. Defendants objected to the proposed abandonment or to any amendment to the complaint, and their objection was sustained. The judge of the court, however, remarked: "At the conclusion of the case, if the plaintiff sees fit to abandon the piece now under discussion, the court will consider that proposition, and, if the plaintiff asks the court to instruct the jury to eliminate from their estimate of damages and values that caused by this piece, the court will consider that proposition. * * * I will consider those propositions at the conclusion of the case." There is some controversy as to what took place subsequently and before the verdict of the jury was rendered, but respondent avers that when the evidence was closed plaintiff, through its attorneys, stated to the court that it abandoned that proportion of the proposed right of way described in the complaint as tract No. 2 and constituting the so-called wine cellar site, and that the court instructed the jury that the motion to amend the complaint and all proceedings under that motion were for the court, and not for the jury, "and that during the course of the opening argument of plaintiff's attorney to the jury he was proceeding to state that this portion of the land was not necessary for plaintiff's use, and for that reason plaintiff had abandoned it, and that thereupon the attorneys for defendants objected to this line of argument upon the ground that it was a matter for the action of the court alone. Whereupon the court sustained the objection, and instructed the jury to disregard the matter objected to, and that the question of the necessity of the taking of said land and of the abandonment by plaintiff of one portion of the land sought and described in the amended complaint was wholly reserved for the court, and that the court would attend to that matter, after the verdict of the jury upon the issues of value of land taken and damages sustained was rendered. Some time after the jury was discharged the court filed its findings." These covered the various allegations of the amended complaint as to the incorporation of the plaintiff, and the location and general route of its railroad. They contained, also, the verdict of the jury and a declaration that it is necessary that plaintiff shall acquire a right of way over tract No. 1 as described in the amended complaint, and that it is not necessary for said purpose that plaintiff should acquire a certain portion of the second tract described in paragraph 6 of the amended complaint. It is also found that at the trial in open court plaintiff abandoned, waived, and relinquished any right to acquire or condemn said portion of lot No.

2, and admitted and declared, and the evidence adduced by plaintiff established the fact, that said piece of land is not required, and that the sum of \$500 comprises the entire damages to the portion of the land not taken and that the residue of the land adjacent to a certain spur track of the Southern Pacific Railroad Company is available for a site for a wine cellar for the deprivation of which site the jury assessed the damage at \$2,000. Then follow the specific findings of damage in accordance with the verdict of the jury, except that the \$2,000 for the said site is eliminated, and the value of the land found necessary to be taken is substituted for that of the whole tract at the price per acre found by the jury. Judgment was entered accordingly. Afterwards the defendants gave notice of a motion to set aside the judgment as provided in section 663, Code Civ. Proc. The court sustained an objection of the plaintiff to the hearing of said motion on the ground that proper notice was not given as required by section 663½, Code Civ. Proc. The court afterwards made and entered its final judgment of condemnation authorizing the plaintiff to take possession of the land after reciting that the money due the defendants had been deposited in court as provided in section 1253, Code Civ. Proc. Petitioners maintain that the court exceeded its jurisdiction in finding that a portion of the land described in the complaint was not required and in its modification of the verdict of the jury accordingly, in its refusal to hear the motion to set aside said judgment, and also in rendering its final decree of condemnation.

Respondent insists that a case for prohibition is not presented for three reasons: (1) Petitioners have a plain, speedy, and adequate remedy at law under the authority of many cases, among which are the following: *Murphy v. Superior Court*, 84 Cal. 594, 24 Pac. 310; *Mines D'Or, etc., Soc. v. Superior Court*, 91 Cal. 101, 27 Pac. 532; *White v. Superior Court*, 110 Cal. 58, 42 Pac. 471; *Valentine v. Police Court*, 141 Cal. 616, 75 Pac. 336; *McAdoo v. Sayre*, 145 Cal. 351, 78 Pac. 874; *Carr v. Superior Court*, 147 Cal. 227, 81 Pac. 515. (2) The acts challenged have already been consummated and the writ of prohibition is a preventive, and not a corrective, remedy. *Valentine v. Superior Court*, supra, and cases therein cited. (3) It does not appear that the court was without jurisdiction or acted in excess of its jurisdiction in any of the matters of which complaint is made by petitioners.

We pass by a consideration of the first two grounds above stated, as we feel satisfied that the record as presented would not justify us in holding that the court either has exceeded or is about to exceed its jurisdiction in the premises. We are not left in any uncertainty as to the nature and scope of the writ of prohibition. In section 1102, Code Civ. Proc., it is defined as follows: "The writ of prohibition is the counterpart

of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, whether exercising functions judicial or ministerial when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." The significance and scope of this legislative declaration have been considered many times by the higher courts. Among the cases the following will be found of interest: *Raine v. Lawlor*, 1 Cal. App. Dec. 352, 82 Pac. 688; *Kinard v. Police Court*, 1 Cal. App. Dec. 682, 83 Pac. 175; *Maurer v. Mitchell*, 53 Cal. 289; *Talbot v. Pirkey*, 139 Cal. 326, 73 Pac. 858. In the *Maurer Case*, supra, it is said: "At the common law the writ of prohibition was issued to restrain subordinate courts and inferior judicial tribunals from exceeding their jurisdiction. * * * We are of the opinion that the writ mentioned in the Constitution is the writ of prohibition as known to the common law. Nor does the language of section 1102 of the Code of Civil Procedure require of us to hold that the office of the writ has been extended or that it should now issue in cases in which it could not have been resorted to prior to the statute." The foregoing decision was rendered under the old Constitution and prior to the amendment of 1881 to said section 1102, adding the words: "Whether exercising functions judicial or ministerial." The scope of said writ, however, has not been enlarged by said amendment. *Camron v. Kenfield*, 57 Cal. 550. The question under this application, then, is whether the superior court had the legal power to hear and determine the matters in the manner disclosed by the record. *Ex parte Bennett*, 44 Cal. 84; *Sherer v. Superior Court*, 96 Cal. 653, 31 Pac. 565. It cannot be controverted that the court had jurisdiction of the subject-matter and of the parties. Section 1243, Code Civ. Proc.; *Bishop v. Superior Court*, 87 Cal. 226, 25 Pac. 435; *Los Angeles v. Pomerooy*, 124 Cal. 597, 57 Pac. 585. Again, the regularity of the proceedings of the court, if within its jurisdiction, cannot be reviewed on prohibition. *Powelson v. Lockwood*, 82 Cal. 613, 23 Pac. 143; *Goddard v. Superior Court*, 90 Cal. 367, 27 Pac. 298; *Talbot v. Pirkey*, supra.

All the allegations of the amended complaint were put in issue by the answer. Hence it was necessary to find upon every material averment. The necessity for the taking of the land or any portion of it was denied by the defendants. Petitioners made no demand that this issue should be submitted to the jury. In fact, petitioners are here contending that the only issue to be decided was as to the value of the land to be condemned and the damage to the residue, but we determine what the issues are by an inspection of the pleadings. As the privilege of submitting to the jury the other questions is deemed to have been waived, it became the

duty of the court to find upon them. *Shepherd v. Jones*, 71 Cal. 224, 16 Pac. 711; *Montgomery v. Sayre*, 91 Cal. 210, 27 Pac. 648; *Reclamation District v. Thisby*, 131 Cal. 574, 63 Pac. 918; *San Francisco & S. J. V. R. Co. v. Leviston*, 134 Cal. 418, 66 Pac. 473. Under the circumstances shown by the record the court not only had the jurisdiction, but it was its duty to determine the question of fact—whether any, and, if so, what, portion of the land was necessary for the purpose of plaintiff. So, *Pac. R. R. Co. v. Raymond*, 53 Cal. 223; *City of Pasadena v. Stimson*, 91 Cal. 253, 27 Pac. 604; *Spring Valley W. W. v. Drinkhouse*, 92 Cal. 528, 28 Pac. 681; *City of Santa Ana v. Gildmacher*, 133 Cal. 399, 65 Pac. 883. At most, petitioners might contend that the action of the court was irregular in reserving the question of necessity until after the jury rendered its verdict. The more orderly procedure would be for the court to have allowed the amendment proposed by plaintiff during the progress of the trial, or to have found upon the question of necessity before the issue of compensation was submitted to the jury. But, if the jury have sufficient information as to the proposed action of the court to enable it to act intelligently upon the issue of compensation and without prejudice to the substantial rights of the defendant, the reservation by the court of the decision of the question of necessity until after the verdict is rendered is not even erroneous, much less in excess of jurisdiction. Of course, no one would contend for the absurd proposition that the jury could determine the total value of the land to be taken without knowing its area, but there is no insuperable objection to a course that would leave to the jury the determination of the value per acre of a tract and to the court the number of acres necessary to be taken.

In reference to the procedure in similar matters, in the case of *City of Los Angeles v. Pomeroy*, supra, the court, speaking through the learned chief justice, said: "All other issues were tried by the court, and it was of no importance in what order they were decided, except in so far as a determination of one point was necessary as a basis for the determination of another. Undoubtedly it was necessary that the jury should be correctly instructed as to the quantity and extent of the estate and interest of the defendants in the land in order that they might correctly estimate its value, and, since * * * that point was to be decided by the court, it was necessary that the jury should be informed before retiring what the conclusion of the court was, but that conclusion could be stated as well before as after the filing of formal findings of fact and conclusions of law." But if the court, deeming it unnecessary to announce its conclusion before the jury rendered a verdict on the question of value, should fail to do so, it would

not be a case for prohibition. Error might be predicated upon such action and a review be had of it in the proper proceeding, but it would not show excess of jurisdiction because the court has the legal power to make a wrong, as well as a right, decision upon the question whether it is necessary for the guidance of the jury for the court to decide the issue submitted to it or to announce its conclusion before the jury retires. The matter is one of expediency and orderly procedure rather than of jurisdiction.

Petitioners argue that the effect of the action of the court was to deny to defendants the benefit of a jury trial. Even so, under the decisions of the Supreme Court, a question of jurisdiction would not be involved nor would it constitute the occasion for prohibition. *Clark v. Superior Court*, 55 Cal. 199; *Curtis v. Superior Court*, 63 Cal. 436; *Ex parte Miller*, 82 Cal. 454, 22 Pac. 1113; *Powelson v. Lockwood*, supra; *In re Fife*, 110 Cal. 8, 42 Pac. 299. But petitioners are entirely mistaken in their construction of the action of the court below, and they seem to misapprehend the rule that must govern us in this proceeding in our examination of the record. We cannot impeach the verity of the recitals in the findings and judgment of the trial court, at least, unless it appears that there was no evidence to support them. But the verified answer of respondent discloses such support in the evidence. It is true that the pleadings of petitioners, verified by their attorney, makes emphatic denial of these representations, but that furnishes no justification here for annulling the judgment or pursuing the inquiry any further. The function of prohibition is not to determine the sufficiency of the evidence to support the findings. As said in *Wreden v. Superior Court of Stanislaus County*, 55 Cal. 504: "Any error committed in the decision of a motion can be saved by a bill of exceptions and be disposed of by appeal or any other method of review known to the law; but judicial acts which are the subject of review by these ordinary and adequate remedies are not the subject of prohibition." We are nevertheless asked to issue the writ, although we must accept as true the facts found by the court that the jury was fully informed that the plaintiff had abandoned any claim to a certain portion of tract No. 2, and that the court would pass upon the question of the amount of said tract that was necessary to be taken; that in view of this contingency the issue of compensation was submitted to the jury as embodied in propositions 3 and 4; that the residue of said tract 2 was amply sufficient for a wine cellar as desired by the defendants; that there was substantial evidence to support the ruling of the court that the motion of defendants to vacate the judgment was not made as required by the statute; and that upon a sufficient showing the court deter-

mined that notice of the final judgment of condemnation was properly given. This we cannot do.

Many cases are cited by petitioners relating to the different phases of the subject before us. We have examined them and we find nothing in any of them necessary to the decision militating against the views we have herein expressed.

The order to show cause is discharged, and the peremptory writ is denied.

We concur: CHIPMAN, P. J.; HART, J.

6 Cal. App. 272

FINCH v. McVEAN et al. (Civ. 253.)

(Court of Appeal, Second District, California. Aug. 23, 1907.)

1. ATTACHMENT — DISSOLUTION — MOTIONS — NOTICE.

Code Civ. Proc. § 1005, provides that notice of a motion must be given if the court be held in the same county with both parties five days before the hearing, otherwise ten days. Section 1015 provides that, where a party has an attorney, the service of papers must be on the attorney. A nonresident plaintiff procured an attachment, and defendant moved for a dissolution thereof. *Held*, that plaintiff was not entitled to ten days' notice of the hearing of the motion; service of the notice on the attorney being sufficient.

2. SAME — PROCEEDINGS TO PROCURE — AFFIDAVITS — AVERMENTS AS TO INDEBTEDNESS.

Under Code Civ. Proc. § 540, providing that the writ of attachment must require the sheriff to attach so much of defendant's property "as may be sufficient to satisfy the demand, the amount of which must be stated in conformity with the complaint," the basis for a writ of attachment is the affidavit therefor, which must specifically state the amount of the indebtedness, and, where a complaint in an action on notes set out the notes, and demanded judgment for the principal with interest according to their terms, and the affidavit for attachment stated the amount of the indebtedness to be the principal of the notes "besides interest," and the writ of attachment recited the amount claimed in the complaint, the writ was issued for an amount in excess of the amount imported by the affidavit, and was properly dissolved on motion.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by John A. Finch against A. J. McVean and another. From an order dissolving an attachment, plaintiff appeals. *Affirmed*.

W. W. Kaye, for appellant. Fred E. Borton, for respondents.

TAGGART, J. Appeal from an order dissolving an attachment.

The action was on two promissory notes of \$4,000 and \$3,500, bearing interest, respectively, at the rates of 10 and 7 per cent. per annum. Both are set out in extenso in the complaint, and the prayer of the complaint is for \$7,500, "with interest thereon according to the terms of said promissory notes, and costs of suit." In the affidavit for the attachment the indebtedness is stated to be "in the sum of seven thousand five hundred dollars, besides interest." The writ of attachment recites that the action was com-

menced to recover \$7,500, "besides interest at the rate of 10 per cent. per annum from the 19th day of March, A. D. 1904, on the sum of \$4,000, and interest at the rate of 7 per cent. per annum from the 30th day of December, 1904, on the sum of \$3,500, and costs of suit." These are in accordance with the terms of the notes as pleaded in the complaint.

The ground of the motion to dissolve is that the writ of attachment was issued for a greater amount than that stated in the affidavit. Plaintiff objected to the hearing of the motion to dissolve on the ground that proper notice of the motion had not been given. In support of this objection, an affidavit showing that plaintiff was a nonresident was presented. It is claimed that the court was not held in the same county "with both parties," and therefore the plaintiff was entitled to 10 days under the provisions of section 1005, Code Civ. Proc., as that section stood prior to its amendment in 1907. This objection was properly overruled. Section 1015, Code Civ. Proc., provides that service of notices of this character shall be upon the attorney instead of the party, and it would be idle for the law to measure the time of notice by the residence of the litigant when the service is to be made upon his attorney. After the appearance of the party by attorney, only such writs and process as affect the party as distinguished from the litigation are required to be served upon the party personally. Section 1015, Code Civ. Proc. Section 540, Code Civ. Proc., provides that the writ of attachment directed to the sheriff must require him to attach so much of the defendant's property "as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint," etc. "The basis for the writ is the affidavit, and the clerk must look to that alone for the purpose of determining the amount for which the sheriff is to levy under the writ, as well as the amount for which an undertaking is given." *Baldwin v. Napa Wine Co.*, 137 Cal. 649, 70 Pac. 732. The apparent inconsistency between this construction of the law and the provisions of section 540, Code Civ. Proc., above quoted, is conceded by the Supreme Court in the opinion in the case of *De Leonis v. Etchepare*, 120 Cal. 407, 52 Pac. 718, and the language of the section reconciled by a construction there given to it. The word "conform" as used in the section is held not to be the equivalent of "identical," but rather to mean "in correspondence in character and in harmony or congruity." Page 415 of 120 Cal., and page 721 of 52 Pac. This construction is approved in *Baldwin v. Napa*, *supra*, and considered in declaring the rule to be that the clerk must look to the affidavit alone. In the case at bar, the amount of the plaintiff's demand is stated in the writ in strict conformity with the allegations of the complaint. In this statement the rates of interest and the dates from

which it is to be computed are set out specifically, while neither rates nor time appear in the affidavit. There is nothing in the affidavit by which the amount of interest due can be determined, and the only indebtedness the amount of which is expressly set forth therein is the principal sum of \$7,500. On the other hand, the sheriff is required by the writ to attach enough of defendant's property to satisfy a demand of \$7,500, principal, and, as ascertained by computation, about \$475 interest. While the same particularity of statement is not required in an affidavit for attachment that is required in a pleading, this rule does not extend to the matter of the indebtedness. The amount of the indebtedness to the plaintiff is the principal and all important element in the affidavit. *Bank v. Boyd*, 86 Cal. 388, 25 Pac. 20. The amount stated therein determines how much of defendant's property the sheriff is to seize, and this, in turn, limits the amount for which an undertaking may be demanded by the sheriff to prevent or release the attachment. *Baldwin v. Napa*, supra; section 540, Code Civ. Proc. Under the construction given to the statute by the case last cited, we do not think the interest can be treated as a mere incident to the principal. Nor can an attachment be sustained which requires the taking of more of a defendant's property than is requisite to secure the indebtedness stated in the affidavit.

An attachment proceeding is not a part of every civil action brought to recover on a contract for the direct payment of money. It is a provisional remedy to be used by the creditor at his election to make the property of the debtor available for the execution of any judgment that may be obtained in the action. It is initiated by an affidavit (in case of residents) setting forth the amount of the indebtedness due to plaintiff from defendant over and above all legal setoffs or counterclaims, upon a contract, for the direct payment of money, payable in this state, which has not been secured by mortgage, pledge, or lien, or, if secured, the security has become valueless. In stating a cause of action in a complaint, it is not necessary to state under oath the amount due, nor to allege that the amount of indebtedness stated is over and above all legal set-offs or counterclaims, or that the indebtedness has not been secured, but only indebtedness so qualified under oath can authorize the issuance of an attachment. The clerk, before issuing the writ, must see that the affidavit complies with the provisions of the statute and that the indebtedness therein stated, and so qualified, is supported by the statement in the complaint of an attachable cause of action for the direct payment of money, in an amount equal to or greater than the amount stated in the affidavit. Upon receiving the proper undertaking, he must then issue the writ for the amount stated in the affidavit. No indebted-

ness not covered by the affidavit can be included in that for which the writ issues.

There is nothing in *O'Connor v. Roark*, 108 Cal. 173, 41 Pac. 465, in conflict with the view here taken. In the statement of the contract in the affidavit for an attachment in that case there appeared the date of maturity of the obligation upon which the attachment rested, and the amount stated would be presumed to draw the legal rate of seven per cent. from that date. The demand set forth in the writ was well within that averment of the affidavit, and stated the amount demanded in the complaint. Conceding, for the sake of argument, that in the affidavit in the case at bar the words "with interest" imply the legal rate, and that we may look to the complaint to ascertain the date of maturity, there yet remains the variance and excess over the amount stated in the affidavit caused by one of the notes bearing interest at the rate of 10 per cent. per annum.

The writ, therefore, issued for an amount in excess of that stated in the affidavit, and in excess of any amount that might be imported into the affidavit by any of the theories suggested. The ruling of the superior court was proper, and should be sustained.

Order appealed from affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(6 Cal. App. 261)

SCHAMBLIN v. MEANS et al. (Civ. 349.)
(Court of Appeal, Second District, California.
Aug. 20, 1907.)

1. STATUTES—AMENDMENTS—REPEALED STATUTES.

An attempt to amend sections of the Code after their repeal at the same session of the Legislature is ineffectual.

2. TAXATION—SALES FOR DELINQUENT TAXES—DEEDS—VALIDITY.

Where the law did not require a certificate of sale for taxes, the provision that the recitals in the certificate should be embodied in the tax deed was inoperative, and a compliance therewith was unnecessary.

3. SAME—VALIDATING TAX DEEDS—STATUTES.

The act of 1903, legalizing tax certificates and deeds to the state for nonpayment of taxes, is applicable to a tax deed executed June 28, 1901, and showing in its recitals that the tax sale was made on June 27, 1896.

4. SAME.

Land was sold to the state for nonpayment of taxes on June 27, 1896. The deed to the state was made June 28, 1901, and the deed from the state to a purchaser was dated January 14, 1902. Held, that the act of 1903, validating tax certificates and deeds, operated to make good the tax deed as of the date it was made, and cured defective proceedings prior thereto.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Gus Schamblin against T. A. Means and others. From a judgment for defendants and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

W. W. Kaye, for appellant. Chas. N. Sears (O. B. Carter, *amicus curiæ*), for respondents.

TAGGART, J. This is an action to quiet title. Defendant relied upon a deed from the state of California. The only title of the state to the property in dispute was vested by tax sale and deed. The deeds and tax sales were held valid, and judgment was in favor of defendant. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

Appellant contends that the deed from the tax collector to the state is void because (1) it does not recite the amount for which the property was sold; (2) it does not recite when the right of redemption expired; (3) it does not correctly recite the date of sale; (4) it incorrectly recites that the time for redemption had expired; and (5) it was issued before the expiration of the time for redemption. The validity of the deed from the state to defendant is also assailed on the grounds that it was issued before a valid deed to the state had been filed with the controller as required by section 3897, Pol. Code, and it is not executed in accordance with the provisions of section 14, art. 5, of the Constitution of the state. The questions raised on this appeal are all substantially answered by the opinions of the Supreme Court in the case of *Baird v. Monroe* (Cal.) 89 Pac. 352, and the recent cases citing and approving that case. *Carter v. Osborn* (Cal.) 89 Pac. 608; *Fox v. Wright*, (Cal.) 91 Pac. 1005; *Fox v. Townsend* (Cal.) 91 Pac. 1007; *Bank of Le-moore v. Fulgham* (Cal.) 90 Pac. 936.

It is contended, further, by appellant that the validating act of 1903 does not apply to the tax deed in this case, because it appears upon the face of the tax deed that "five years have not elapsed between the date of sale of the property to the state for nonpayment of taxes and the date of the execution of such deed." The tax deed is dated June 28, 1901, and contains the following recital: "And, whereas, the certificate stated that, unless the said real estate was redeemed within five years from the date of the sale to the state, the purchaser thereof would be entitled to a deed thereof, on the 27th day of June, 1901, that said certificate of sale bears date the 22d day of August, 1896, the day of said sale." The certificate of sale is dated August 22, 1896, and certifies that the sale of the property was made "on the 27th day of June, 1896," and that "the purchaser thereof will be entitled to a deed thereof, on the 27th day of June, 1901." Sections 3776 and 3777 of the Political Code, which provide for the execution and recordation of a certificate of sale for taxes, were not in force at the time of making of the sale here under consideration. Those sections were repealed on February 25, 1895 (St. 1895, p. 19, c. 11), and re-enacted April 1, 1897 (St. 1897, p. 432, c.

287), in an amended form. An attempt to amend these sections after their repeal in 1895 at the same session of the Legislature (St. 1895, pp. 327, 328, c. 218) was ineffective. In so, far, then, as the objection rests upon the certificate of sale, it may be disregarded (*Carter v. Osborn*, supra), and it becomes immaterial when the certificate of sale was made, whether upon the date of sale or at some other time. Any ambiguity in the recital in the deed of what the certificate of sale contained or stated was also immaterial. As the law did not require a certificate of sale at all, the provision that the recitals in the certificate should be embodied in the deed became inoperative and a compliance therewith unnecessary. *Fox v. Townsend*, supra. This ambiguity eliminated, there is no doubt as to the application of the act of 1903 to the tax deed here under consideration. It was made on the 28th day of June, 1901, and shows by its recitals that the tax sale was made on June 27, 1896, and the finding of the court is that five years had elapsed between the date of sale and the date of the execution of the deed. All of the objections to the validity of the tax deed may therefore be summarily disposed of in favor of respondent on the authority of the cases cited above, and applying the act of 1903 to that deed.

Appellant contends that the cases mentioned do not cover all the objections made to respondents' title; that, admitting that their application to the case at bar disposes of the questions of the validity of the deed to the state, and the constitutionality of the act empowering the tax collector to execute, in the name of the state, deeds conveying property acquired by the state in the enforcement of the revenue laws, there is another question necessary for this court to determine before it can affirm the judgment of the lower court that was not decided by the cases cited nor either of them. Appellant's position, stated in full, is as follows: The property was sold to the state June 27, 1896, the deed to the state was made June 28, 1901, the deed from the state to defendant bears date January 14, 1902, and the validating act, which took effect immediately, was approved February 28, 1903. The act purports to confirm, validate, and legalize the tax certificates and deeds to the state only. At the time the deed was made from the state to defendant, the defective tax proceeding had not been cured and the deed of January 14, 1902, could and did convey such title, and only such title, as the state then had to the property in question; that any additional title acquired by the state by virtue of the act of 1903 did not feed the void title acquired by the defendant by the deed from the state. In none of the cases cited was this question directly presented and urged. In the case of *Baird v. Monroe* it appears from the language of the opinion that it was expressly admitted that the de-

defendant regularly succeeded to whatever title the state acquired by virtue of the tax proceedings. From the opinion in this case we derive the principles upon and the rules by which the Supreme Court considered the act in question. It is said of the act of 1903: "It is essentially a curative act, intended to give effect to past acts or transactions which are ineffective because of neglect to comply with some requirement of law." It was intended to operate retroactively. 89 Pac. 354. Again: "At the time of the execution of the deed, the five years from the date of sale within which the owner had the absolute right of redemption having expired (section 3780, Pol. Code), the state was entitled to the deed from the tax collector, and it was then the duty of the tax collector to execute such deed in the manner prescribed by law. *The state was then equitably the owner of the property.* [The italics are ours.] * * * The deed to the state provided for by the statute, though designated a 'deed,' is nothing more, in effect, than formal written evidence of the various facts essential to vest the property in the state. * * * It is the evidence, primary in some particulars, and conclusive in others, of those facts from which the vesting of the title to the property in the state necessarily follows as a matter of law, and prima facie operates as a muniment of title. Political Code, §§ 3786, 3787." Page 355. In other words, given a valid assessment of his property and a reasonable opportunity to pay his taxes, it is the duty of the property owner to do so. Failing to do this for five years after a sale in accordance with the statute has been made, his property passes to the state. The recitals in the deed are but evidence that the steps provided by law have been followed, and it is the acts themselves which vest the title in the state. From the opinion in *Fox v. Wright*, 91 Pac. 1005, we quote: "At the end of this five years the deed to the state is made, and the title of the state becomes absolute. * * * We are unable to see why the state may not obtain a title free from all equities in the former owner at the expiration of five years as may a private citizen after foreclosure upon the mortgage when the period of redemption following such foreclosure has passed." In *Fox v. Townsend*, 91 Pac. 578, it is said: "No reason is discernible why the state, like a private individual, may not obtain a proper correction deed for the betterment of the title to property which it has conveyed, and, if this be done after conveyance, why, as in the case of an individual, it should not serve to perfect the title granted." It seems to us the cases mentioned fully cover the question, and that no further authorities need be cited to show that the curative act operated to make good the tax deed as of the date it was made. The state, at the end of the five-year period of redemption, acquired an absolute title to

the property by a deed which was subsequently confirmed and made valid. There was no right or property taken away from the appellant or his predecessor in title, as the absolute right of redemption expired at the end of the five-year period. Taking the view, however, that the curative act operated to make good only the title to the state as of the date of its passage, such additionally acquired title went to feed and validate the title of defendant.

Judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

KAW CITY MILL & ELEVATOR CO. v. PURCELL MILL & ELEVATOR CO.

(Supreme Court of Oklahoma. Sept. 5, 1907.
Rehearing Denied Oct. 12, 1907.)

SALE—ACCEPTANCE OF OFFER.

An offer of sale of personal property and its acceptance must receive a reasonable construction, and the proposer is bound by its acceptance in that sense. Immaterial variances between the offer and its acceptance will be disregarded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 42.]

(Syllabus by the Court.)

Error from Probate Court, Kay County: R. L. Howsley, Judge.

Action by the Purcell Mill & Elevator Company against the Kaw City Mill & Elevator Company. Judgment for plaintiff. Defendant brings error. Affirmed.

J. F. King, for plaintiff in error. Sam K. Sullivan, for defendant in error.

HAINER, J. This was an action brought by the defendant in error, plaintiff in the court below, against the Kaw City Mill & Elevator Company, to recover damages for the nonperformance of a contract alleged to have been entered into between said parties for the purchase of a quantity of corn for a stipulated price. From a judgment for the plaintiff in the court below, the defendant appeals.

There is but one question for determination by this court, and that is whether the facts, as shown by the evidence, were such as to constitute a contract between the parties. The evidence upon this point is presented by an agreed statement of facts, which is as follows: "It is hereby stipulated and agreed by and between the said plaintiff and the said defendant, as facts in said cause: That on the 11th day of January, 1904, the said plaintiff sent the following telegram from its place of business in Purcell, I. T., to the defendant, which was delivered to said defendant, in due course at its place of business in Kaw, Okla., on that date: 'Purcell, I. T., Jan. 11, 1904. To Kaw City M. & E. Co., Kaw City, O. T.

Accept affright mixed chronic basis Kaw rush same forward confirm. Purcell Mill & Elevator Co.' And which telegram was in what is known as 'Robinson's Code,' used among grain men and elevators, and interpreted into the English language is as follows: 'Accept four cars, mixed ear corn 34½ cts. per bu., basis Kaw, rush same forward, confirm.' That the words 'basis Kaw,' in this telegram, mean that the plaintiff will pay freight on said corn equal in amount to the freight thereon from Kaw, Okl., regardless of where said corn might be shipped from. That on the same date, and upon receipt of said telegram by it, and in reply thereto, a telegram was sent by the defendant to the plaintiff in the same code, a copy of which is as follows: 'Kaw City, Jan. 11, 1904. To Purcell M. & E. Co., Purcell: Confirm affright, ear corn, chronic f. o. b. Burbank. Kaw City M. & E. Co.' Which telegram was on the same date received by plaintiff, and which being interpreted is as follows: 'Confirm, four cars ear corn 34½ cents per bu. f. o. b. Burbank.' That immediately on the sending of said telegram by plaintiff, and on the same day, the plaintiff wrote to the defendant the following letter: 'Purcell, I. T., Jan. 11, 1904. Kaw City Mill & Ele. Co., Kaw City, Okla.—Gentlemen: We are in receipt of message from our Mr. Orme, stating you offer us four cars mixed corn at 34½¢. We wired you in reply: "Accept four cars mixed ear at 34½¢, basis Kaw rush same forward." If you can get this corn from your Burbank station, it will suit us just as well. Please let same come forward, as we are needing it badly. Respect fully, Purcell Mill & Elevator Co.' Which letter was duly sealed up and addressed to defendant at Kaw, Okl., its place of business and deposited on that date by plaintiff in the post office at Purcell, I. T., postage prepaid and received in due course of mail by the defendant. That immediately on the sending of said telegram by defendant, on the same day, to wit, January 11, 1904, the said defendant wrote to said plaintiff the following letter: 'Kaw City, Oklahoma, Jan. 11, 1904. Purcell Mill & Ele. Co., Purcell, I. T.—Gents: We have your account sales for cars as follows: 20,331, 31,012 and 11,494. But you leave out cars No. 1,172 and 10,340, former shipped Dec. 12, latter Dec. 22, and both prior to the 11,494, which was shipped Dec. 30. Please look this matter up. These are the first cars we have had run short. We now have a new pair of Hopper scales, and will have a positive check in future, but as a rule in the past returns have shown from 10 to 35 bu. overrun. We wired you in reply to yours of to-day, confirming f. o. b. Burbank. While I think rate is the same, still I will not guarantee Kaw rate. Tariffs for Burbank are not thoroughly settled. If you do not want the four cars that way, wire at once on receipt of this. Yours,

Kaw City Mill & Ele. Co.' Which letter defendant sealed up, and addressed the same to said plaintiff at Purcell, I. T., its place of business, and deposited the same on said date, postage prepaid, in the post office at Kaw, Okl., and which letter plaintiff received in due course of mail. That on January 20, 1904, the said defendant wrote to the plaintiff, the following letter: 'Kaw City, Oklahoma, Jan. 20, 1904. Purcell Mill & Elev. Co., Purcell, I. T.—Gents: We had your wire of the 19th offering 37¢ for corn; also have your letter of the 19th before me just now. Your price is not in line at present, so can't sell you any. You speak of us wiring when we have corn. We have corn all the time, when prices are in line. The four cars ear from Burbank we have as yet been unable to get cars. We have one that we expect to be able to get out in a day or two and will have others follow as quickly as we can. Yours truly, Kaw City Mill & Elevator Co., by H. E. Guy.' And on said date sealed said letter up and addressed the same to the plaintiff at Purcell, I. T., and deposited the same, postage prepaid, in the post office at Kaw, Okl., which was received by plaintiff in due course of mail."

We think the trial court was fully justified in holding that the telegrams and letters, as shown by the agreed statement of facts, constituted a contract of sale, and that no other reasonable construction could be placed upon the intent of the parties. The rule is clearly stated in 24 Am. & E. Enc. Law (2d Ed.) 1032, where it is said: "Immaterial variances between the offer and its acceptance may be disregarded. An offer must receive a reasonable construction, and the proposer is bound by its acceptance in that sense." We have carefully examined the authorities cited by plaintiff in error upon which a reversal is asked. These authorities undoubtedly correctly state the law, but they are not applicable to the facts of this case. The undisputed testimony, in our opinion, shows that there was an absolute and unconditional acceptance by the plaintiff in error, and the subsequent letters of the plaintiff in error clearly indicate an intention upon its part to comply with the contract; and we are unable to perceive on what theory it failed to perform the contract, unless it was on account of the fact that the price of corn had advanced between the time of the acceptance of the proposition and the time that cars could be secured in which to make the shipment. We think this is a clear case of the breach of a just, valid, and binding obligation, and that the defendant in error was entitled to recover such damages as it sustained by reason of the nonperformance of the contract.

There is no merit in the contention of the plaintiff in error, and the judgment of the court below is affirmed. All the Justices concurring, except IRWIN, J., absent.

STEUDLE et al. v. TERRITORY.

(Supreme Court of Oklahoma. Sept. 20, 1907.)

1. CRIMINAL LAW—DISMISSAL AS TO ONE DEFENDANT—WAIVER OF OBJECTION.

Where two or more persons are included in the same indictment, the court may, at the request of the county attorney, dismiss as to any defendant for the purpose of making him a witness at any time in the trial before the defendants have gone into the defense; and where this is done after the jury are impaneled and sworn to try the case against all the defendants, and where the other defendants make no objection and save no exceptions, the same cannot be assigned as error in the Supreme Court.

2. SAME—CORRECTION OF VERDICT.

Where a jury in a criminal case have been ordered by the court in case they agree upon a verdict during the recess of the court to have the verdict so agreed upon signed by their foreman, sealed in an envelope and delivered to the foreman, and then are allowed to separate to meet at the convening of court at their jury rooms, and where the jury do so agree upon a verdict, and separate and at the next convening of court bring in a sealed verdict, which, on being opened, is found defective for the reason that it does not name the particular defendants found to be guilty, and where the court has ordered the jury to retire and correct their verdict by inserting the names of such defendants as they find guilty, and the jury do so retire and correct their verdict and return the same into court, such action of the court does not constitute reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2112.]

3. SAME—REVIEW ON APPEAL.

Where there is evidence which reasonably tends to support the verdict of the jury, and such verdict is sustained by the court in refusing to grant a new trial, this court will not reverse the case on a question of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3084.]

(Syllabus by the Court.)

Error from District Court, Washita County; before Justice James K. Beauchamp.

Oscar Steudle and Charles Steudle were convicted of larceny, and bring error. Affirmed.

At the October term, 1905, of the district court of Washita county, Oklahoma Territory, a joint indictment was returned against George Hysaw, Oscar Steudle, John Steudle, and Charlie Steudle, charging them with the larceny of two domestic animals. The defendants were arrested and arraigned under this indictment on the 1st day of November, 1905, and then entered their plea of not guilty. On the 18th day of April, 1906, this case came on for trial under said indictment, the territory and defendant announcing ready for trial. After the jury had been selected and sworn to try the case, the defendant George Hysaw was discharged from the indictment that he might be used as a witness for the territory. Upon hearing the evidence adduced by the territory, the defendants offering none, the jury retired to consider of their verdict, under instructions from the court that, should a verdict be found by them during the hour of adjourn-

ment, such verdict should be signed by the foreman and sealed up and delivered to the foreman, after which the jury could separate until the reconvening of court, at which time the jury should reassemble and return their verdict into court at 9 o'clock a. m. April 19, 1906. The jury arrived at a verdict during adjournment and separated, and returned a verdict at 9 o'clock a. m. on the 19th of April, finding the defendants guilty as charged, but not specifying which of the defendants were found guilty. The trial judge then ordered the jury to again retire and say by their verdict which of the defendants they find guilty, and the jury again retired, and returned into court their verdict, finding the defendants, Oscar Steudle, John Steudle, and Charlie Steudle, guilty as charged in the indictment. Motion for new trial was filed and, upon hearing, the motion was sustained as to the defendant John Steudle, and overruled as to Oscar Steudle and Charles Steudle. Judgment and sentence was pronounced upon the defendants Oscar Steudle and Charles Steudle, to which exceptions were saved, and the case is brought here for review.

S. C. Massingale, J. A. Duff, and L. R. Shean, for plaintiffs in error. W. O. Cromwell, Atty. Gen., Don C. Smith, and J. H. Cline, for the Territory.

IRWIN, J. (after stating the facts as above). The first assignment of error is the court erred in directing the defendant George Hysaw to be discharged from the indictment on the application of the county attorney for the purpose of using him, the said George Hysaw, as a witness for the territory, after the jury had been impaneled and sworn to try the case against all of said defendants, under one joint indictment. As to this assignment of error, the record shows the following facts (pages 9 and 10 of the record): "County Attorney: We desire to dismiss this case as to George Hysaw, one of the defendants. The Court: What is the purpose of that? County Attorney: We desire to use him as a witness. Mr. Massingale: I would like an expression from the county attorney as to the effect now of this dismissal. I understand under the statutes that the rule is where there is a joint indictment under certain circumstances the county attorney might dismiss as to one defendant for the purpose of using him as a witness. The Court: I understand that is what he wants; that is what he stated, to use him as a witness. Mr. Massingale: That dismissal is an acquittal. The Court: Yes, sir; the defendant Hysaw is discharged." Now, no exceptions of any kind or character were saved to this ruling of the court, and, from the foregoing colloquy between the county attorney, the attorney for the defendants, and the court, it would reasonably be infer-

red that this ruling of the court was entirely satisfactory. We think the dismissal was clearly within the power of the court, and was not error, but whether error or not it was not excepted to and exceptions were not saved, and it is not presented to this court in such a way that error could be assigned on it.

The second assignment of error is that after the jury had returned into court a sealed verdict finding the defendants, not naming them, guilty as charged, it was error on the part of the court to have the jury retire to their jury room and find a verdict naming the defendants found guilty. Section 5530, p. 1237, Wilson's Rev. & Ann. St. 1903, provides that the court may order the jury to seal up their verdict where they agree on a verdict during a temporary vacation of the court, and that they shall return their verdict into court at the next convening of court, and also provides that they may separate after so signing and sealing their verdict. Section 5539, p. 1239, Wilson's Rev. & Ann. St. 1903, provides: "If the jury render a verdict not in form, the court may, with proper instructions as to the law, direct them to reconsider it. * * *" This verdict as first returned by the jury found all of the defendants guilty as charged in the indictment. This, of course, could not apply to the defendant Hysaw, who had been, by order of the court, previously dismissed out of the case, but it necessarily found all the other defendants guilty as charged in the indictment. The failure to insert the specific names of the particular defendants in the verdict could at best have been only an irregularity. It could only render the verdict defective in form, and we think it was clearly within the province of the court to order the jury to retire and correct their verdict, and the inserting of the particular names could have worked no hardship to either of the defendants, and is not such an error, if error at all, upon which a reversal could be predicated.

The only remaining assignment of error is that the court erred in refusing to grant the defendants Oscar Steudle and Charles Steudle a new trial for the reason that the evidence was not sufficient to warrant their conviction. We have examined the entire record, and we think there is ample and sufficient evidence to sustain the finding of the jury, and under the well-recognized rule in this court that, where there is evidence reasonably tending to support the finding of the jury, this court will not disturb or reverse the case on a question of fact.

Having examined the entire record, and finding no error therein, the judgment of the district court is affirmed, with directions to the sheriff of Washita county to proceed with the enforcement of the judgment and sentence of the district court.

All the Justices concurring, except PAN-COAST and GARBER, JJ., absent.

TEST OIL CO. v. LA TOURETTE et al.

(Supreme Court of Oklahoma. Sept. 5, 1907.)

1. COVENANTS—CONSTRUCTION—RESTRICTIONS.

Restrictions and prohibitions of the use of real property are not favored in the law, and the terms of such covenants will not be enlarged by implication, but confined to their accepted usage and the clear intention of the parties expressed therein.

2. SAME.

The intention of the parties, being clearly expressed in the terms of a covenant to prohibit the drilling of oil and gas wells upon a certain tract in all deeds for the conveyance of any and all portions thereof, will not be enlarged by implication to include the prohibition in a lease on said tract.

3. SAME—DEED—LEASE.

The following covenant in an oil and gas lease, being a restriction upon the alienation of the land and clearly expressing the intention of the parties, will be strictly construed: "Said first parties hereby further agree that they will in and by any deed hereafter executed by them or either of them for any part of said 'La Tourette's second addition' to said town of Cleveland prohibit any drilling for oil or gas on any land so hereafter conveyed in said 'second addition.'" *Held*, that the general usage and acceptance of the term "deed," in the above clause, clearly expressing the intention of the parties, did not include "lease," and thereby prohibit the first parties from leasing said tract for the purpose of drilling oil and gas wells thereon.

(Syllabus by the Court.)

4. WORDS AND PHRASES—"DEED."

The word "deed," in its common usage and acceptance, undoubtedly means the conveyance of real estate, and a deed of conveyance is a sealed writing, signed by the party to be charged, which evidences the terms of the contract between the parties whereby the title to real property is transferred from one to the other, and this is the more usual, though somewhat restricted, meaning of the word "deed."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1919-1924; vol. 8, p. 7630.]

Error from District Court, Pawnee County; before Justice Bayard T. Hainer.

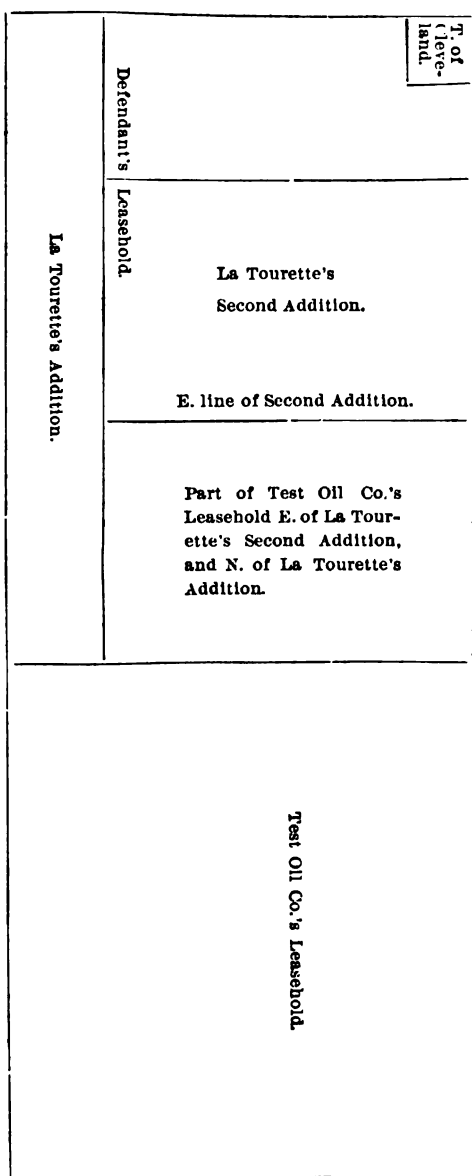
Action by the Test Oil Company against Isaac V. La Tourette and others. Judgment for defendants, and plaintiff brings error. Affirmed.

George & Jullan and Biddison & Eagleton, for plaintiff in error. Sornborger & Williams and Wrightsman & Diggs, for defendants in error.

GARBER, J. On January 27, 1905, the defendants, Isaac V. La Tourette and wife, executed and delivered to John L. Moran what is commonly known and designated as an oil and gas lease upon a certain portion of the N. W. $\frac{1}{4}$ of section 9, in township 21 N. of range 8 E. I. M., which tract, so far as the particular description is relative to this case, lies immediately east of the east line of what is known as "La Tourette's second addition" in Pawnee county, Okl. T. (which tract hereafter will be designated as "Second addition"). On the 6th day of March, 1905, Moran assigned his lease to the plaintiff herein, the Test Oil Company,

and on the 8th day of March, 1905, the lease and the assignment thereof was filed for record in the office of the register of deeds of Pawnee county, Okl. T. On the 8th day of March, 1905, La Tourette and wife executed and delivered a second oil and gas lease to S. W. Lawrence covering a certain tract lying immediately west of the east line of Second addition, excepting certain lots previously sold by La Tourette, but which are not material to description or issue in this case. Subsequently, Lawrence assigned an undivided one-half interest to the defendants M. M. and S. H. Sornborger, as Sornborger & Bro. and to the defendant Melrose Oil Company.

The following diagram fairly represents the location of the lands covered by the leases of the respective parties to this controversy, in so far as they are involved in this cause:



The boundary line between the tract leased to the plaintiff and that leased to the defendants is the east line of Second addition. Plaintiff's lease also includes a small tract in the northwest corner of the tract designated as defendants' leasehold, but in no way affects the issues in this case.

The defendants having proceeded to drill wells for oil and gas on the tract of land covered by the lease known as Second addition, the plaintiff brought this action to restrain and enjoin each and all of them from drilling or attempting to drill or permitting other persons, companies, or corporations to drill any oil or gas wells upon said tract, excepting certain lots therein described, and from taking or marketing any oil or gas from any well or wells that may have been drilled by them, other persons, companies, or corporations under and by virtue of any right which said defendants may have obtained to said Second addition, alleging, substantially, that the tract known as Second addition, excepting lots therein described, was so situated with reference to the tract covered by the lease assigned to the plaintiff that, if any oil or gas well or wells were drilled thereon, or oil or gas taken therefrom, the oil and gas would be drained from under the tract covered by the lease assigned to the plaintiff to its irreparable injury and damage, and that upon the final hearing of this action plaintiff asked that the defendants be perpetually enjoined from drilling upon said tract of land; and that an accounting might be had of any and all damages which the said plaintiff sustained by reason of producing gas or oil wells which the defendants may have drilled. A temporary restraining order granted in the probate court, on motion of defendants, was dissolved in the district court upon the ground that the petition did not state facts sufficient to constitute a cause of action. From the judgment of dissolution, this appeal was taken.

An examination of the petition and motion discloses that the controversy in this case is waged over the construction of plaintiff's lease, and the validity of a certain clause therein. For perspicuity and intelligible construction, we incorporate the lease entire, which reads as follows, omitting acknowledgments, assignments, and recording memoranda thereon:

"Oil and Gas Lease.

"Agreement, made and entered into on the 27th day of January, A. D. 1905, by and between Isaac V. La Tourette and his wife, Armeta H. La Tourette of the town of Cleveland, county of Pawnee and territory of Oklahoma, parties of the first part, and John L. Moran, of Bartlesville, in the Indian Territory, party of the second part, witnesseth: That the said parties of the first part for and in consideration of the sum of sixteen hundred and fifty dollars to them in hand

well and truly paid by the said party of the second part, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained, on the part of the said party of the second part to be paid, kept, and performed, have granted, demised, leased and let and by these presents, do grant, demise, lease and let unto the party of the second part, his heirs, executors, administrators or assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe line and of building tanks, stations and structures thereon, to take care of said products all that certain tract of land situated in Pawnee county, territory of Oklahoma, to wit: east one-half of south one-half of northwest quarter, section 9, township 21, range 8 east, ——— acres, all that part of the west half of the south half of the northwest quarter of section 9, township 21, range 8 east, lying north of La Tourette's addition to the said town of Cleveland and east of La Tourette's second addition to said town of Cleveland, and a tract of land 100 feet north and south and 127 feet east and west lying in the northwest corner of said south one-half of northwest quarter of said section 9, township 21, range 8 east, ——— acres. It is agreed that this lease shall remain in force for the term of one year from this date, and as long thereafter as the above described premises shall be operated for the purpose of producing oil or gas or so long as oil or gas is produced in paying quantities.

"In consideration of the premises the said party of the second part covenants and agrees: (1) To deliver to the credit of the first party, their heirs, assigns, executors and administrators, free of cost in the pipe line to which the wells may be connected, the equal one-sixth part of all the oil produced and saved from the leased premises; (2) to pay one hundred dollars per year for the gas from each and every well drilled on said premises, the product from which is marketed and used off the premises, said payment to be made on each well within sixty days after commencing to use the gas therefrom, as aforesaid, and to be paid yearly thereafter while the gas from the said well is used. In case gas is found in marketable quantities, parties of the first part shall have gas for domestic purposes free by making their own connection. Second party covenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portion of the farm, and well to be begun on said tract above described as 100 by 127 feet within thirty days after the well now being drilled on Jordan lease is completed. And further to complete a well for oil and gas on said premises within ninety days from the date hereof or pay at the rate of twenty-five dollars in advance for each additional thirty days such completion is delayed from the time above mentioned for the completion of such well until a well is completed. Such payment may be made direct to the lessors or by

check mailed to them at Cleveland, Oklahoma Territory, or by check deposited to the credit of Isaac V. La Tourette in the First National Bank in said town of Cleveland. No well to be drilled on said land nearer the section line than a point twenty-five feet from the west line on Breer and Anderson lot. Said first parties hereby further agree that they will in and by any deed hereafter executed by them or either of them, for any part of said La Tourette's second addition to said town of Cleveland, prohibit any drilling for oil or gas on any land so hereafter conveyed in said Second addition. It is agreed that the said second party is to have sufficient water from the premises to run all necessary machinery; at any time to remove all machinery and fixtures placed on said premises; and further upon the payment of one dollar at any time by the party of the second part, his heirs, executors, administrators or assigns, to the parties of the first part, their heirs or assigns, said party of the second part, his heirs, executors, administrators, or assigns, shall have the right to surrender this lease for cease and determine, and this lease become absolutely null and void.

"Witness the following signatures and seals.

"Isaac V. LaTourette. [Seal.]

"Armeda H. LaTourette. [Seal.]

"John L. Moran. [Seal.]

"Witnesses: Tom George.

"Julia Rogers."

An examination of the essential conditions of the above lease discloses that, for and in consideration of the payment of \$1,650, La Tourette and wife leased unto Moran or his assigns a certain tract of land (not including any part of Second addition leased by these defendants), therein described, for the sole and only purpose of mining and operating for oil and gas and of laying pipe lines, and of building tanks, stations, and structures thereon for the purpose of taking care of the products. Said lease was for the period of one year from the date thereof, and thereafter as long as the leased premises should be operated for the purpose of producing oil or gas, or as long as oil or gas was produced thereon in paying quantities. An additional consideration to the lessor, or his assigns, was the delivery in the pipe line to which the wells might be connected the equal of one-sixth of all the oil produced and saved from "the leased premises," and \$100 per year from the gas from each and every well drilled on said premises, the product of which was marketable. An additional rental was "sufficient gas for domestic purposes to the lessor, or his assigns, in case gas was found in marketable quantities." Payment of \$25 for each additional 30 days, after a certain period, was stipulated to be paid "direct to the lessors," or by mailed check, or deposit in First National Bank at Cleveland. Party of the second part, or his assigns, reserved the right to remove all their machinery and

fixtures, and upon the payment of \$1 at any time to "surrender this lease, and this lease to become absolutely null and void." Said lease contained the further covenant, and the one upon which plaintiff relies, that "said parties hereby further agree that they will in and by any deed hereafter executed by them or either of them, for any part of the said La Tourette's second addition to said town of Cleveland, prohibit any drilling for oil or gas upon any land so hereinafter conveyed in said Second addition." It is not alleged that the defendants ever trespassed upon the leased land of the plaintiff, or that they ever drilled, or attempted to drill, wells thereon, or interfered in any way with plaintiff's possession. Plaintiff alleges, however, that the defendants have and will continue to drill oil and gas wells upon the tract leased to the defendants and known as Second addition, and bases its action to enjoin the defendants from drilling upon said tract upon that clause in their lease containing the restriction upon the alienation of any portion of Second addition by deed, and proceed upon the theory that it is a covenant which runs with the land, binding all subsequent purchasers or lessees, and prohibits La Tourette and wife, and all persons claiming through or under them, from in any way exploiting the gas and oil supply which may lie underneath the surface of defendant's leased premises.

As all the agreements between the parties are merged in the written lease, plaintiff's contention must stand or fall upon the construction of its terms. It must be conceded that the fee of the tract known as Second addition, and the right to possession, excepting lots sold remained in La Tourette and wife without restriction, except in case of transfer by deed, and that plaintiff had no lease thereon. They could, if so disposed, drill a thousand wells upon Second addition without violating any of the conditions of plaintiff's lease, and, likewise, could they do so by their agents. The oil and gas beneath the surface belonged to them so long as it remained there and was under their control, but in case it should escape their ownership would cease. If, by reason of wells drilled on plaintiff's leased premises, the oil or gas under Second addition would flow therein and become subjected to the control of plaintiff, it would then become the property of plaintiff; and the same would be true of Second addition in wells drilled by La Tourette and wife, or lessees. It is the subjection to control that determines the ownership. *Westmoreland & Cambria Natural Gas Co. v. Ira De Witt et al.*, 180 Pa. 235, 18 Atl. 724, 5 L. R. A. 731.

Plaintiff claims, however, that La Tourette and wife could not lease Second addition to any one for oil or gas purposes, because the restriction by deed included restriction by lease, and that the restriction was for a valuable consideration, and for their espe-

cial protection. With this construction we cannot agree. It is certainly a natural and warranted deduction from the language of the clause upon which plaintiff relies, and the peculiar situation and relationship of the parties, to say that their intention is clearly expressed in the terms of the covenant limiting the restriction to the conveyance by deed only. Ordinary business precaution would reserve Second addition for La Tourette and wife, and, being interested to the extent of one-sixth of the oil output on plaintiff's leased premises adjoining, it was only natural for the lessee to conclude that interest in the output of the product on both tracts by the lessor would preserve his (the lessee's) interests, and that restriction by deed would prevent the drilling of numerous wells by different lot owners who would not be interested in the amount of production on plaintiff's tract. If this was not the intention of La Tourette and wife, why did they reserve Second addition? The reservation must have been for some purpose, and what would be more natural for them than to reserve Second addition to themselves for their own exploitation, or to await the developments of the oil and gas supply on plaintiff's leased premises? If the lessee desired protection from the business sagacity of the owners to the extent herein demanded by his assignees, he should have leased the entire tract, or conditioned his lease with a covenant that La Tourette and wife should not drill wells on Second addition, or permit others to do so for them, or in case of the leasing of said tract it should be with the same restriction as that provided for in case of conveyance by deed. Not having done so, the court is now called upon to say that because La Tourette and wife covenanted that, in case they should deed any part of Second addition to other parties, they would in such conveyance prohibit their grantee from drilling for oil or gas, they have thereby in legal effect prohibited themselves from drilling on Second addition or leasing the same to others without restricting them from drilling thereon. The terms of the covenant will not permit of such a construction. They are plain, unambiguous, and certain. Even in case of doubt such a construction would be denied. In this country land is one of the chief objects of trade and investment. "Mud and civilization go together." As the latter advances, the transfer of the former becomes more frequent. Just in the degree that the temporary owner of a tract of land is permitted to impress his notions or caprices upon the fee restricting its future alienation, just in that degree does it hamper the freedom and facility of its exchange in trade, and destroy that confidence which has given it the reputation of being the subject of safe and sound investment. Hence restrictions upon the alienation of the fee in land are repugnant to trade and commerce, and are looked upon with disfavor by the law. Noth-

ing will be taken by implication or intendment. New conditions will not be inserted by construction. The expression of the intention of the parties will be gathered strictly from the terms employed, and the inquiry at the close of the examination will be: "Is it so nominated in the bond?"

The law is jealous of a claim to an easement, and the party asserting such a claim must prove his right clearly. It cannot be established, by intendment or presumption. *Minneapolis Western R. Co. v. Minneapolis, etc., Co.*, 58 Minn. 128, 59 N. W. 983; *Polson v. Ingram*, 22 S. C. 541. In *Clark v. De Voe*, 124 N. Y. 120, 28 N. E. 275, 21 Am. St. Rep. 652, it was held that only by the use of plain and direct language on the part of the grantor should it be held that he created a right in the nature of an easement and attached to one parcel of land as the dominant estate and made the other servient thereto. It is contrary to the well-recognized business policy of the country to tie up real estate where the fee is conveyed with restrictions and prohibitions as to its use, and hence, in the construction of deeds containing restrictions and prohibitions as to the use of property by the grantee, all doubts should, as a general rule, be resolved in favor of a free use of property, and against restrictions. *Hutchinson et al. v. Ulrich et al.*, 145 Ill. 336, 34 N. E. 556, 21 L. R. A. 391. Covenants restraining the use of real property, although not favored, will nevertheless be enforced by the courts, where the intention of the parties is clear in their creation, and the restrictions or limitations are confined within reasonable bounds. In construing such covenants, effect is to be given to the intention of the parties as shown by the language of the instrument, considered in connection with the circumstances surrounding the transaction and the object had in view by the parties; but all doubts must be resolved in favor of natural rights and the free use of property, and against restrictions. 11 Cyc. 1077, 1078, and authorities therein cited.

It is conceded that there has been no conveyance by deed of any portion of Second addition to the defendants herein, but that their right to drill wells thereon is by virtue of the terms and conditions of an oil and gas lease from La Tourette and wife to S. W. Lawrence, similar in form to the lease of plaintiff as above set forth. Numerous authorities are cited by counsel as supporting their contention that the term "deed" in the restrictive clause should be construed to prohibit by "lease." Under various statutes, and within its generic sense, the courts have frequently held that the term "deed" included a mortgage, bond, will, and other instruments in writing under seal; but the term "deed" is more frequently used, however, in a more limited sense as meaning a written instrument duly acknowledged by competent parties conveying the title in land. A stipulation to give a deed to land contracted to be

sold would certainly not be fulfilled by the delivery of a lease. Blackstone says that "deeds" serve to convey the property of lands and tenements from man to man, and that they are commonly denominated "conveyances." The word "deed," as used in the contract whereby one of the parties obligates himself to make a deed to the other, imports that the conveyance shall give a sufficient title. *Parker v. McAllister*, 14 Ind. 12, 16. The word "deed" is an apt word to signify the transmission of real estate. *Dunham v. Marsh*, 52 N. J. Eq. 256, 30 Atl. 473, 474. The common usage and acceptance of the term "deed" undoubtedly means the conveyance of real estate, and that was the sense in which it was used in plaintiff's lease. Said first parties agree that they will in and by any deed hereafter executed prohibit any drilling for oil or gas on any land so hereafter conveyed in said Second addition, is the substantial language of the clause. Conveyed in what manner? By "deed," not by "lease."

A deed of conveyance is a sealed writing, signed by the party to be charged, which evidences the terms of the contract between the parties, whereby the title to real property is transferred from one to the other inter vivos, and this is the more usual and specific, though somewhat restricted, meaning of the word "deed." Am. & Eng. Encycl. of Law (2d Ed.) 9th vol., 91; *Bouvier's Dictionary*; *Abbott's Law Dictionary*; *Anderson's Law Dictionary*. In *Eaton v. White*, 18 Wis. 519, it was held that a deed was an instrument in writing duly executed and delivered conveying real estate. In *Lockridge v. McCommon*, 90 Tex. 234, 38 S. W. 33, a deed was held to be the act or instrument by which property in real estate is conveyed. In *Dudley v. Sumner*, 5 Mass. 438, 472, a deed was said to be a method by which the title and possession of real estate is transferred from one person to another. In *Consolidated Coal Company v. Peers*, 150 Ill. 344, 37 N. E. 987, a written agreement by the owner of coal land giving to another the exclusive right to mine coal thereon for a term of years was held to be a "lease." In *Malcomson v. Wappoo Mills (C. C.)* 85 Fed. 907, 908, an instrument which gives the exclusive right to enter upon lands and to dig and mine phosphate, rocks, and other minerals, and to carry them away and sell for his own use for a term of years on a certain royalty, was held to be a "lease." In *Harris v. Ohio Coal Company*, 57 Ohio, 118, 48 N. E. 502, 506, it was said: Where the owner of land, for a valuable consideration, grants the land described to the other party to a contract for the purpose and with the exclusive right of drilling and operating for oil and gas for a certain number of years, the instrument is a "lease" on the land for the purpose and period limited therein. In *Young v. Ellis*, 91 Va. 297, 21 S. E. 480, it was said: The owners of land granted to another the right to enter thereon to test and search for minerals and oil and to mine and quarry thereon;

the second party to have the right to erect buildings and machinery for work in mining, and to pay \$25 per year, if minerals were not mined, and to pay a royalty on all ores shipped. The instrument was termed a "lease" and was to continue 90 years. Held, that the instrument was a "lease."

From the above authorities, which might be multiplied many times, it is clearly seen that the oil and gas lease from La Tourette and wife to S. W. Lawrence and his assigns was such an instrument as the courts will hold to be a "lease," as contradistinguished from a "deed," and therefore did not come within the clause restricting the conveyance of any portion of Second addition by deed prohibiting grantees from drilling for oil or gas thereon. The conclusion upon this question being decisive of the case, it is unnecessary to determine whether or not the clause in plaintiff's lease is such a restriction upon the conveyance of land as would be void as against public policy, or whether or not it is such a covenant as would run with the land binding the subsequent owners thereof, or whether or not it was a personal one between the original parties thereto.

The judgment of the lower court dissolving the injunction will therefore be affirmed. All the Justices concurring, except HAINER, J., who tried the cause below, not sitting, and IRWIN, J., absent.

LOUDENBACK v. TERRITORY.

(Supreme Court of Oklahoma. Sept. 5, 1907.
Rehearing Denied Oct. 12, 1907.)

1. HOMICIDE — INDICTMENT — INSTRUCTIONS — HARMLESS ERROR.

Where one is indicted for murder, but the indictment, although sufficient to charge manslaughter in the second degree, is not a good indictment for either murder or manslaughter in the first degree, and the defendant is put on trial for murder, and the jury return a verdict of manslaughter in the second degree, the defendant cannot complain that he was tried upon the theory that the indictment was a good indictment for murder, unless it appears from the record that the defendant may have been prejudiced thereby; and prejudice will not be presumed from the fact alone that the prosecution and the court proceeded upon the theory that the indictment was a good indictment for murder.

2. CRIMINAL LAW — APPEAL — HARMLESS ERROR.

Where one is on trial for a crime which is divided into degrees, and the court commits error in instructing the jury upon the law applicable to the higher degree of such crime, but properly instructs the jury as to the lower degree, and the jury returns a verdict of guilty of the lower degree, the defendant cannot complain. One can only complain of errors which may have affected his rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3160, 3161.]

3. SAME—EVIDENCE—CONVERSATIONS.

A prosecution may, on a trial, show by the testimony of other witnesses a conversation between a defendant and another party; and it may prove the statements made by both the defendant (which are in the nature of admissions

against his interests) and by the other party to the defendant. But it is for the jury to say, from all of the conversation, as to whether or not the statements made by the defendant are admissions against his interests.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 918, 919, 936.]

4. SAME—EVIDENCE.

A verdict will not be set aside, for lack of evidence, where the evidence reasonably supports it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3084.]

(Syllabus by the Court.)

Error from District Court, Logan County; before Justice Jno. H. Burford.

Ella Loudenback was convicted of manslaughter, and brings error. Affirmed.

Lowry & Lowry and Lawrence & Huston, for plaintiff in error. W. O. Cromwell, Atty. Gen., Don C. Smith, and J. H. Cline, for the Territory.

BURWELL, J. The defendant, Ella Loudenback, was indicted and tried for murder, and convicted of manslaughter in the second degree.

It is first insisted that the indictment fails to charge the crime of murder. The offense is charged in two counts, and it is clear that the second count of the indictment is insufficient to charge murder; and it is doubtful if the first would stand the test, when measured by the law applicable thereto. Neither of the counts charges manslaughter in the first degree. The language used purports to charge murder, and the theory of the prosecution is that manslaughter in both degrees is included in a charge of murder; and this is true as a general rule. But an indictment for murder includes the charges of manslaughter only when such indictment is a sufficient indictment for murder, unless the language used in the indictment is sufficient to charge manslaughter, independent of the charge of murder. The indictment in question sufficiently charges manslaughter in the second degree, and the rule is, if the language used in the indictment charges one of the degrees of manslaughter in such form and manner as to meet the requirement of the statute, it will be sufficient as to that degree of homicide, and the mere fact that the indictment purports to charge murder is immaterial.

But it is insisted that the defendant was tried for murder, when the indictment did not charge that offense. That fact cannot avail, as she was not prejudiced thereby, and, conceding for the sake of argument that the instructions of the court regarding murder were erroneous, the defendant was not convicted of murder. The jury rejected every theory of murder and of manslaughter in the first degree, and no complaint is made against those instructions which relate to manslaughter in the second degree. So far as the defendant is concerned, the effect is the same as though the indictment had been

sufficient to charge murder. If the defendant can be said to have been prejudiced, it can only be claimed upon the theory that the defendant was tried for a higher degree of homicide than that of which she was found guilty. No one would claim that that fact alone prejudiced her. If so, then it would prejudice a defendant to charge him with murder, if the evidence on the trial only established manslaughter. Such is not the law. The rule is that where one is on trial for a crime which is divided into degrees, and a court commits error in instructing the jury upon the law applicable to the higher degree of such crime, but properly instructs the jury as to the lower degree, and the jury returns a verdict of guilty of the lower degree, the defendant cannot complain. One can only complain of error which may have affected his rights. The following cases support the law as stated: *State v. Grote*, 109 Mo. 345, 19 S. W. 93; *State v. Keeland*, 2 Mo. 337, 2 S. W. 442; *People v. Nichol*, 34 Cal. 211; *Gant v. State*, 115 Ga. 205, 41 S. E. 698; *State v. Castello*, 62 Iowa, 404, 17 N. W. 605; *State v. Richardson*, 47 S. C. 18, 24 S. E. 1028; *Jackson v. State*, 91 Wis. 253, 64 N. W. 838. In 12 Cyc. p. 931, it is said that error in instructions as to a higher degree of crime is harmless, where the defendant is convicted of the lower degree. To the same effect are the following cases: *Colvin v. Commonwealth*, 22 Ky. Law Rep. 1407, 60 S. W. 701; *Stephenson v. State* (Tex. Cr. App.) 24 S. W. 645; *Blackwell v. State*, 33 Tex. 278, 26 S. W. 397; *Rutledge v. State* (Tex. Cr. App.) 33 S. W. 347; *McCarty v. State* (Tex. Cr. App.) 58 S. W. 77; *State v. Stockwell*, 106 Mo. 36, 16 S. W. 888; *State v. Gates*, 130 Mo. 351, 32 S. W. 971; *People v. Boling*, 83 Cal. 380, 23 Pac. 421.

It is next insisted that the trial court erred in admitting in evidence testimony regarding a conversation between the defendant and her daughter after the homicide. The testimony was that the witness heard the defendant say that she shot the deceased, and the defendant's daughter asked her mother why she killed the deceased, to which the defendant replied that she had to, and the daughter then said to her mother, "No, mamma, you didn't have to." The record fails to show that the defendant made any reply to this statement. The jury were entitled to have the whole conversation, and then determine, from the whole of it as to whether or not any portions of it were admissions on the part of the defendant against her interest. The counsel for the defendant could have shown any reply which the defendant may have made to the statement of her daughter, but they did not see fit to inquire further as to the conversation. It was properly admitted.

The evidence supports the verdict and the judgment is hereby affirmed. All of the Justices concurring, except BURFORD, C.

J., who presided at the trial, below, not sitting, and IRWIN and GARBER, JJ., absent.

SPAULDING MFG. CO. v. KENDALL,
Treasurer, et al.

(Supreme Court of Oklahoma. Sept. 5, 1907.
Rehearing Denied Oct. 12, 1907.)

1. TAXATION—PROPERTY SUBJECT.

Personal property, assessed in another state on January 1st of a given year, and brought in and acquiring a situs in this territory prior to the 1st day of March of the same year, is assessable and liable for taxes for that year in Oklahoma.

2. SAME.

The territory has the right to tax property brought into the territory for the same year that it has paid taxes in another state or territory. (Syllabus by the Court.)

Error from District Court, Roger Mills County; before Justice Clinton F. Irwin.

Action by the Spaulding Manufacturing Company against W. D. Kendall, treasurer, and S. A. Elliott, sheriff. Judgment for defendants, and plaintiff brings error. Affirmed.

D. B. Welty, for plaintiff in error.

BURFORD, C. J. On the 1st day of March, 1905, the Spaulding Manufacturing Company, of Grinnell, Iowa, was the owner of a stock of vehicles, buggies, and carriages in Sayre, Roger Mills county, Okl., and said property was assessed for the year 1905 in that county. By the laws of the state of Iowa such property is assessable for taxation as of the 1st day of January of each year. The property in question, with other property, was assessed in Poweshiek county, Iowa, for the year 1905, before it was removed to Oklahoma, and at the time of the trial the first half of the taxes had been paid for 1905 in the state of Iowa. The plaintiff in error claims exemption from taxes on its property in Oklahoma for the year 1905, for the reason that it has been assessed and is liable for taxes on the same property for the same period in another state. This is the sole issue in this case. The district court of Roger Mills county held that the property was liable for taxes, and rendered judgment against the plaintiff in error for costs; hence this appeal.

Our revenue laws (section 5931, Wilson's Rev. & Ann. St. 1903) require that "all taxable property, real and personal, shall be listed and assessed each year in the name of the owner thereof on the 1st day of March of each year, as soon as practicable on or after the first Monday in March, including all property owned on the 1st day of March of that year." Under this statute the property in question was assessable for the year 1905 in Roger Mills county, and there liable for taxation. Counsel for plaintiff in error contends that, if the property in question

is at all liable for taxes in Oklahoma, it must be under section 5919, Wilson's Rev. & Ann. St. 1903, which is a part of what is known as the "transient property act" of 1895, and herein lies the error of his position. That law only includes transient property which is brought into the territory after the 1st day of March and before the 1st day of September of any year; that is, after the time for assessment under the general law has expired. This property was in the territory and had acquired a situs prior to the 1st day of March of the year in which it was assessed, and comes within the provisions of the regular revenue laws. In the case of Collins et al. v. Green, 10 Okl. 244, 62 Pac. 813, Mr. Justice Burwell, speaking for the court, said: "A state or territory has the right to tax property brought into it, even though such property may have been taxed for the same year in the state or territory from which it came. The proposition is too well settled by decisions and text-writers to admit of discussion." This is the established law, and is applicable to this case, and decisive of it under the facts appearing in the record. The questions argued and authorities cited by counsel in his brief have no application to the case made by his proof.

The judgment of the district court is affirmed, at the costs of the plaintiff in error. All the justices concur, except IRWIN, J., trial judge, not sitting.

MOULDIN v. RICE et al.

(Supreme Court of Oklahoma. Sept. 5, 1907.
Rehearing Denied Oct. 12, 1907.)

VENUE—ACTION TO RECOVER REAL ESTATE.

By virtue of section 10 of the organic act of this territory, an action to recover the possession of real estate must be instituted in the county where the defendants or either of them reside or may be found.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, § 7.]

(Syllabus by the Court.)

Error from District Court, Logan County; before Justice John H. Burford.

Action by L. M. Rice and others against George W. Mouldin. Judgment for plaintiffs. Defendant brings error. Affirmed.

Devereux & Hildreth, for plaintiff in error. Cotteral & Hornor, for defendants in error.

PER CURIAM. This was an action brought in the district court of Logan county by L. M. Rice, S. T. Rice, and Estalla Bradford against George W. Mouldin, a resident of Logan county, to recover the possession of a quarter section of land situated in Garfield county, Okl. To this petition the defendant interposed a demurrer, on the ground that the court had no jurisdiction of the subject-matter of the action, and because the petition failed to state facts sufficient to constitute a cause of action. This demurrer was

overruled, to which action the defendant at the time duly excepted, declined to plead further, and elected to stand upon the demurrer. Thereupon the court entered judgment upon the pleadings in favor of the plaintiff and against the defendant to recover the possession of the land, as prayed for in the petition, from which ruling and judgment, the defendant brings the case here for review on a certified transcript of the record.

There was no error in overruling the demurrer to the petition, since the court had jurisdiction of the subject-matter of the action, and the petition stated facts sufficient to constitute a cause of action for the recovery of real estate under our Code. On the question of jurisdiction of the subject-matter of the action, the case of *Burke v. Malaby*, 14 Okl. 650, 78 Pac. 105, is decisive, in which case it was held that "an action affecting an interest in real estate in this territory, where the real estate is situated in one county and the defendant resides in a different county, must be instituted in the county where the defendant resides." In this case the defendant resided in Logan county, and the right of the plaintiffs' action depended upon the interpretation of an antenuptial marriage contract.

We therefore hold that the court had jurisdiction of the subject-matter of the action, and that the petition stated facts sufficient to constitute a cause of action, and the defendant's demurrer was therefore properly overruled.

The judgment of the court below is affirmed.

BURFORD, C. J., who presided in the court below, not sitting. All the other Justices concurring, except IRWIN, J., absent.

COOPER v. TERRITORY.

(Supreme Court of Oklahoma. Sept. 20, 1907.)

1. CRIMINAL LAW—TESTIMONY OF ACCOMPLICE—CORROBORATION.

One accused of a crime cannot be convicted upon the uncorroborated testimony of an accomplice, and the corroboration required must be the proof of substantial facts tending to incriminate the accused, aside from and without the aid of the testimony of the accomplice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1124-1123.]

2. SAME—WEIGHT OF EVIDENCE.

Where there is competent corroborating evidence tending to connect the accused with the commission of the crime charged, the weight of such evidence is a matter for the jury; but, where the corroborating evidence is of such an uncertain and unsatisfactory character as not to warrant a reasonable inference of guilt, the court should set aside the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1713-1721.]

(Syllabus by the Court.)

Error from District Court, Comanche County; before Justice Frank E. Gillette.

Charlie Cooper was convicted of horse stealing, and brings error. Reversed and remanded.

Al J. Jennings, for plaintiff in error. P. C. Simons, Atty. Gen., and Don C. Smith, Asst. Atty. Gen., for the Territory.

BURFORD, C. J. The plaintiff in error, Charlie Cooper, was charged by indictment jointly with Harry Cooper, Dave Ellis, and Richard Ellis with the crime of horse stealing. The defendants Harry Cooper, Dave Ellis, and Richard Ellis pleaded guilty to the charge, and the plaintiff in error pleaded not guilty. He was tried to a jury, a verdict of guilty returned, and sentenced by the judgment of the court to three years' imprisonment in the penitentiary.

The contention of plaintiff in error is that he was convicted upon the uncorroborated evidence of accomplices. The defendants were all boys residing in Comanche county, where the crime was committed. The horses stolen belonged to a German farmer named Andrew Zach, and were kept in a pasture near his house. On Sunday night, November 13, 1904, two of the horses were stolen from the pasture, and were traced to near Foss, in Washita county, and there found in the possession of John Pruitt and Robert Ellis. The evidence for the prosecution consisted of the testimony of Andrew Zach, the owner of the horses, John Pruitt, who testified that he participated in the larceny, and had not been indicted, Dave Ellis, a codefendant, who pleaded guilty to the crime, C. R. Saunders, the officer who made the arrest of the plaintiff in error, Albert Dillon, a neighbor of Zach's, and John Ellis, the father of the Ellis boys who were implicated in the crime. The witness Zach testified only as to the loss and recovery of the horses. He gave no testimony as to the parties charged with the crime. John Pruitt testified that on the Sunday the horses were stolen he and Charlie Cooper, Harry Cooper, Dave Ellis, and Richard Ellis entered into an agreement to steal some horses, and that, pursuant to this agreement, they went to the pasture of old man Zach after night, and stole the two horses in question; that Charlie Cooper was present and assisted in catching the horses and in taking them out of the pasture, and on the road they were turned over to him and Robert Ellis to take away and dispose of. He also stated that he and Charlie Cooper and Robert Ellis rode together to the place where the horses were stolen, while Dave Ellis and Harry Cooper went another direction to look for some Indian ponies, but met them again and they all were at the pasture when the horses were taken from the pasture. He also testified that Charlie took off his belt and put it on the neck of one of the horses, and the belt was dropped and lost. This lost belt was found by Mr. Zach, and was produced at the trial, but there was

a disputed question as to whose belt it was. He also testified that Charlie Cooper wore boots on the night of the larceny with tacks in the soles. Dave Ellis testified to substantially the same state of facts, admitted that he and Harry Cooper went away from the Cooper place first, and afterwards met the other three, Charlie Cooper, John Pruitt, and Robert Ellis, and went together to the Zach pasture, and stole the horses. He also testified that a glove which was found at the place of the larceny was dropped by Harry Cooper. Albert Dillon testified that he lived about three-fourths of a mile south of the Zach place, and that he saw Harry Cooper and Dave Ellis pass his place, going south, about dark. Charles R. Saunders testified that he was deputy sheriff and made the arrest of the plaintiff in error; that on Tuesday after the larceny he went to Zach's place, and made an examination of the pasture and the fences; that he found where a post was broken down and found horse tracks, and the track of a person at the point where the post was down; that in the tracks of the person there were the imprints of nails in the sole of the shoe or boot; that the bottom was full of nails or tacks; that the track was about the size of a six or seven shoe; that two or three weeks later he arrested Charlie Cooper at his home, and that the boots he was wearing were boots that would make about the sized track as the one found in the Zach pasture, and that he had the bottom of his boots full of nails. He made no measurement of either the boots or the tracks, but estimated the size by putting his own foot in the tracks. John Ellis, father of Robert and Dave, testified that he had seen Charlie Cooper frequently, and that he usually wore a belt, but that he had seen him wear different ones, and he would not state whether the one exhibited was his or not. He also testified that his son Robert was then in the penitentiary for this same offense, and David was present as a witness for the territory.

Upon this testimony the territory rested. The defendant then went upon the stand in his own behalf and testified: That Pruitt, the two Ellis boys, and his brother Harry left his father's house about 12 or 1 o'clock p. m. on Sunday, and that he did not go with them. That he stayed at home until about 4 o'clock, when he went to Mr. Richardson's, and stayed until about dark. He then returned directly home, and went to bed with his brother George, who was in bed at the time. That he had an intimation that these boys were getting his younger brother, Harry, into some difficulty, and after Harry Cooper and Dave Ellis left he ordered Pruitt and Robert Ellis off his father's place. That he found out they were going to do something, but did not know what it was, and had no knowledge of the larceny until after it became public. He also stated: That at the

time of the larceny he was wearing boots with tacks in the bottoms, that no one ever examined his boots after he was arrested. Harry Cooper testified that he was 14 years of age, a brother of the accused; that he had pleaded guilty to the charge in the indictment. That he, Dave Ellis, John Pruitt, and Robert Ellis stole the horses from the Zach pasture, and that his brother, Charlie, was not present. That the belt and glove found in the pasture were his, and that he was wearing them at the time of the larceny. That he had nails in the bottoms of his shoes, and made the tracks testified about. He exhibited the shoes worn at the time, with tacks in the soles. That he and Dave Ellis left the Cooper home about 12 o'clock on Sunday afternoon, and rode north to see about some Indian horses. That, when they returned they met John Pruitt and Robert Ellis about a mile north of the Cooper place with three horses, leading one and riding two. Robert Ellis had left the horse he rode away in the afternoon, and was riding a gray horse. He left the others about 11 o'clock and returned to his home and got there about 12 o'clock. It is seven miles to the Zach place, where the horses were stolen. George R. Cooper testified that he is a brother of the defendants, and lived with his father at the Cooper home. He left home on Sunday morning and went to visit an uncle six miles away, and remained until about dark; that he went to bed early and his brother Charlie came in about 8 or 9 o'clock and went to bed with him; that the brother Harry and Dave Ellis came in after he had been asleep three or four hours—he was unable to give the time, but it was very late. He also identified the belt in evidence as belonging to his brother Harry. W. A. Richardson testified that he is a farmer and lives in the Cooper neighborhood; that Charlie Cooper came to his place on Sunday, the 13th of November, about 3 o'clock in the afternoon, and remained there until about dark or until a little after. Edward Isbell testified that he lives about 1½ miles from Cooper's place; that he saw Charlie Cooper at Richardson's place on the afternoon of Sunday, the 13th of November, between 5 and 6 o'clock. He also testified that Charlie Cooper's reputation for truth and honesty was good in the neighborhood. Mrs. S. J. Fulcher testified to the good reputation of Charlie Cooper for truth and honesty. William Naggs, a neighbor of the Coopers, testified to the good reputation of Charlie for truth and honesty. The foregoing testimony embraces all the substantial facts in evidence. No witness for the prosecution, other than the confessed accomplices, have in any way connected the accused with the commission of the crime, and no witness has put him in company with them at any time or place after they left the Cooper home. The only facts relied upon as corroboration of the accomplices are the belt and tack prints in the tracks. The belt was not shown

to be his by any of the witnesses, and there was positive testimony to the effect that it was not his, while the tack prints could have as easily been made by some of the guilty criminals.

The law forbids the conviction of one accused of crime upon the uncorroborated evidence of accomplices, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. To warrant a conviction upon the testimony of an accomplice, there must be corroborating evidence tending to incriminate the accused aside from and without the aid of the testimony of the accomplice. The corroboration will not be sufficient if it tends merely to raise a suspicion as to the guilt of the accused. *People v. Ames*, 39 Cal. 403; *People v. Warren*, 39 Cal. 661; *People v. Thompson*, 50 Cal. 481. This court said, in *Hill v. Territory*, 15 Okl. 212, 79 Pac. 757: "In a prosecution for burglary, where the evidence of an accomplice is corroborated by other evidence which tends to connect the defendant with the commission of the offense, the weight of such corroborating evidence is a matter for the jury. After verdict found based upon such evidence, this court will not disturb the judgment." It must be understood that what was there meant is that there is some substantial evidence corroborating the accomplice and tending to connect the accused with the commission of the offense; but, where the corroborating evidence is of such a slight, uncertain, and unsatisfactory character as not to warrant a reasonable inference of guilt, the court should not permit a verdict to stand. We think the corroborating evidence in this case is of this character, and it was error to overrule the motion for new trial.

The judgment of the district court is reversed and cause remanded, with directions to the district court of Comanche county to grant a new trial.

All the Justices concur, except GILLETTE, J., who tried the case below, not sitting, and PANCOAST and GARBER, JJ., absent.

METROPOLITAN RY. CO. v. MARTIN. (Supreme Court of Oklahoma. Sept. 20, 1907.)

1. APPEAL—REVIEW—QUESTIONS OF FACT.

Where there is evidence in the case which reasonably tends to support the special findings of the jury and the general verdict, the decision will not be reversed on a question of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3923.]

2. SAME—INCONSISTENT FINDINGS.

Where there is a reasonable theory, deducible from the evidence in the case, upon which the special findings of the jury and their general verdict are sustained, the court will not disturb the general verdict, because another theory may be drawn from the evidence with which the special findings and the general verdict are inconsistent. The court will not examine the evidence with a view to ascertaining if

it is possible to evolve from the evidence a theory upon which an inconsistency may be discovered between the special findings and the general verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3755-3761.]

(Syllabus by the Court.)

Error from District Court, Oklahoma County; before Justice B. F. Burwell.

Action by J. T. Martin against the Metropolitan Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This was an action begun by J. T. Martin against the Metropolitan Railway Company in the district court of Oklahoma county on December 16, 1903. The petition claims damages for personal injuries received by the plaintiff by being thrown from a car of the defendant by the negligence of the defendant in running their car at an unusual high rate of speed around a curve, and running by the usual stopping place for passengers after the signal had been given to stop, and that in consequence of such high rate of speed at that point, and the running by the usual stopping place, and the fact of the car going around a curve, caused the plaintiff to be thrown from the car and injured. To this petition defendant filed an answer, said answer containing a general denial of the allegations of the petition, and also allegations of contributory negligence on the part of the plaintiff, to which answer the plaintiff filed a reply of general denial. Upon these pleadings the case was tried to a jury, and a verdict rendered for \$1,250 in favor of the plaintiff. Motion for new trial was filed in due time, overruled, and exceptions saved, and judgment pronounced on the verdict, and the case is brought here for review.

Shartel, Keaton & Wells, for plaintiff in error. S. A. Byers and Grant & McAdams, for defendant in error.

IRWIN, J. (after stating the facts as above). The first assignment of error urged by plaintiff in error for a reversal of this case is that special findings Nos. 2 and 4 are not supported by any evidence in this case. Special finding No. 2 is: "Was the car on which plaintiff was riding operated at a dangerous rate of speed at or about the time of the accident? Answer: Yes." Special finding No. 4 is: "Was there any more swaying or jarring of the car at or about the time of plaintiff's injury than was incident to operating the same in the usual or ordinary manner on approaching the curve near Seventeenth street? Answer: Yes." But it is contended by plaintiff in error that there is no evidence tending to support either one of these findings. Under the well-recognized rule of this court, if an examination of the record does show that there is evidence which reasonably tends to support the find-

ing of the jury, the same will not be disturbed on a question of fact. At page 10 of the record, in the testimony of the plaintiff, Martin, he testifies that after passing Sixteenth street he rang the bell, giving the signal to the motorman to stop at the next stopping place. He then, on approaching Seventeenth street, went out on the platform and told the conductor he wanted off. The conductor gave the motorman the signal to stop. He testified the place where he asked to be allowed to get off was where he had often been permitted to get off the car. He testified the car did not stop at the usual place, Seventeenth street, but ran by at full speed, and that the place where he was thrown from the car was on a curve, and that the stopping place was on a curve. The witness Davis, at page 67 of the record, testified that the car was going at about the usual rate of speed. Now we think a fair inference to be drawn from the testimony of Davis that they were going about the usual rate of speed would mean the usual rate of speed between stopping places, and not mean the usual rate of speed on approaching a stopping place, particularly where that stopping place was on a curve. Now we think it will not be seriously contended that if this car, at the time of the accident, was approaching a stopping place, and was on a curve, and was running at full speed, as testified to by Martin, this would not be negligence on the part of the company. As against this proposition, and the testimony of Martin and Davis, is the testimony of the motorman and conductor in charge of the car. Now it was the province of the jury to determine from this evidence, which was conflicting and contradictory, as to where the burden of proof was. They had a right to take into consideration, and no doubt did take into consideration, the appearance and demeanor of the witnesses on the stand, their interest in the result of the suit, and, from all the circumstances surrounding the testimony, determine on which side was the burden of proof. They had a right to take into consideration and no doubt did, the fact that if this car was run in a negligent manner, and injury was the result of negligence, it was the negligence of either the motorman or conductor; and, with this conflict of testimony before the jury, we are not prepared to say there was no evidence which reasonably tends to support the finding of the jury.

We have, in addition to the testimony of these two witnesses, Martin and Davis, other physical facts developed by the evidence which tend to corroborate Martin as to the rate of speed at which the car was running. Martin testified that he was dragged not less than 30 yards from where he first fell from the car to where he was jerked loose from it, and where he lay until he was picked up unconscious. Livingston swears that it was from 40 to 50 yards from where he

was lying to where the car was finally brought to a stop. Davis swears that it was from 40 to 50 yards from where plaintiff was found on the ground to where the car was brought to a full stop. Now, if we add this distance to 30 yards the distance Martin was dragged before he was jerked loose from the car, it would make 70 or 80 yards from the time he was thrown from the car until the car came to a full stop. The testimony of Colt, who testified that he had formerly been a conductor on defendant company's cars, and was familiar with the running of cars, was that from 20 to 25 yards from the time the motorman got the signal would be sufficient distance to stop the car if running at the ordinary rate of speed. Then he was asked this question on cross-examination by counsel for plaintiff in error: "Suppose you are not slowing up, suppose you are running on schedule, like that University line, for which the time is 12 miles an hour." Answer: "Well, I think a man could stop a car in 25 yards." Now, if this testimony is reliable, and the motorman could stop a car running at the rate of 12 miles an hour in the distance of 25 yards from the time he got the signal, then we think it is some evidence which the jury had a right to consider as to the rate of speed that this car was traveling, when it was not stopped in less than 60 to 80 yards after the man was thrown from the car, because the testimony of the conductor is that he saw him when he jumped or was thrown from the car, or, as plaintiff said, "jerked from the car," and the presumption is that he would stop the car as soon as possible. It seems to us this was a circumstance that would warrant the jury in finding that the car at the time of the accident was being operated at an unusual and dangerous rate of speed.

Now, as to the fourth special finding, that there was more swaying or jarring of the car at the time the plaintiff was injured than was incident to operating the car in the usual or ordinary manner, while there is possibly no satisfactory and direct testimony as to this proposition, we think that the jury had a right, from their common knowledge and experience as men, to find that, where a car was run at a high and dangerous rate of speed around a curve, there would be more swaying and jarring of the car than would occur if the car was operated in the usual and ordinary manner, and with usual and ordinary care.

The second assignment of error is: The special findings are inconsistent with the general verdict under the court's instructions. We have examined the record carefully, and are unable to say that this assignment of error is tenable. In fact, we think it is not borne out by the record. It is true, counsel for plaintiff in error indulge in what seems to us a fine-spun theory, under which theory

it might be presumed there was a certain inconsistency between the general verdict of the jury and certain special findings. They do this by limiting and fixing the place of the accident at a few feet south of the usual stopping place of the car, and insist that, because the evidence does not show the injury occurred at the exact and precise point of stopping, it is inconsistent with the instructions of the court on this proposition. We think the court's instructions clearly and correctly define the law governing this class of cases, and the testimony of the plaintiff, if believed by the jury, would establish a case of negligence against the company, as his testimony was that he took his position on the platform, after the signal had been given to stop, and while they were approaching the stopping place, with the thought in his mind that they would stop at the usual place of stopping after they had been signaled to stop, and after he had notified the conductor that he wanted to get off, but that they run by the usual stopping place at a full speed, and that it was in consequence of the speed of the car going around the curve at or near the stopping place and the jarring of the car that threw him from the car; that he grabbed at the railing to save himself, and was dragged some distance by the car, and thus sustained his injury. This, it is true, is disputed by the conductor, who testifies that, in place of being thrown from the car, he voluntarily jumped from the car after he had been warned not to do so. This statement of the conductor is expressly denied by the plaintiff, and it was clearly a question of fact, which was the sole province of the jury to determine. They have determined that fact in favor of the plaintiff. The instructions of the court clearly and distinctly informed the jury that, before the plaintiff could recover, the jury must believe, from all the circumstances and all the evidence showing his station on the car, that he was using reasonable care and caution to avoid injury. They were expressly instructed that if the jury believed, from the evidence showing his situation on the car, that he was negligent, and that the negligence contributed to his injury, he could not recover. They were also expressly instructed that, if a recovery was had against the company, it must be upon evidence showing the negligence of the company. On the whole, we think the instructions of the court were fully as liberal to the defendant as the law would warrant or the defendant had a right to expect.

Having examined the entire record, and finding no error therein, the judgment of the district court is affirmed, at the costs of the plaintiff in error. All the Justices concurring, excepting BURWELL, J., who, having tried the case below, took no part in this decision, and PANCOAST, J., absent.

GULLEY v. TERRITORY.

(Supreme Court of Oklahoma. Sept. 5, 1907.
Rehearing Denied Oct. 12, 1907.)

1. PHYSICIANS AND SURGEONS—LICENSE TO PRACTICE—REVOCATION—DISTRICT COURTS—JURISDICTION.

The district courts have exclusive jurisdiction to hear and determine the question whether a license to practice medicine was fraudulently obtained.

2. SAME—REVOCATION OF LICENSE—ACTION.

The territory is not only a necessary party, but it is the proper party to institute such an action.

3. SAME.

A license to practice medicine procured through the presentation of a pretended diploma from a fraudulent medical college, without an examination, will be revoked and canceled in a proper proceeding in the district court.

4. JURY—RIGHT TO JURY TRIAL.

An action to cancel a license upon the ground that it was fraudulently obtained is an equitable proceeding, and the licensee is not entitled to a jury trial as a matter of right.

(Syllabus by the Court.)

Error from District Court, Logan County; before Justice Jno. H. Burford.

Action by the territory against Calvin D. Gulley. Judgment for the territory, and plaintiff brings error. Affirmed.

This was an action brought in the district court of Logan county by the territory of Oklahoma against Calvin D. Gulley, plaintiff in error, and defendant in the court below, to cancel a license to practice medicine issued on February 11, 1902, by the then superintendent of public health to the plaintiff in error, upon the ground that the license was procured by fraud and deception. The material averments in the petition are as follows:

That on the 8th day of February, 1902, the defendant, Calvin D. Gulley, being desirous of obtaining a license from the superintendent of public health, for the purpose of enabling him, under the provisions of law in force at that time, to engage in the practice of medicine and for the purpose of obtaining a license from the superintendent of public health, executed a certain application in writing, which was duly verified, and which, among other things, stated as follows: "I, Calvin D. Gulley, now of Guthrie, county of Logan, Oklahoma territory, being first duly sworn, state on my oath that I graduated from the Independent and Metropolitan Medical College located in the city of Chicago, state of Illinois, in 1896, and that I am the identical Calvin D. Gulley to whom a diploma of graduation was issued by the aforesaid college of medicine on the fourth day of November, 1896, which diploma I now have in my possession." That thereupon said application was duly presented to the superintendent of public health, and that the said superintendent of public health, acting upon and relying upon the statements and representations contained therein, issued and delivered to the applicant on the 11th day of

February, 1902, a license to practice medicine and surgery in said territory, and registered the said applicant, as required by the laws then in force in said territory. That under the laws of the territory of Oklahoma in force and effect at the time of making and presenting said application and affidavit by the defendant, it was provided that no person should be permitted to practice medicine, in any of its departments, in this territory, unless he were a graduate of a medical college, or unless, upon examination before a board composed of the superintendent of public health and two other physicians to be selected by the territorial board of health, such person should be found proficient in the practice of medicine. And it was further provided that: "Any person possessing the qualifications mentioned in this section shall, upon presentation of his diploma, or proof thereof by affidavit, if the same is lost or destroyed, and upon the affidavit of two reputable citizens from the county where he resides that such applicant possesses the qualifications of a physician, as prescribed herein, to the superintendent of public health, together with a fee of two dollars, received from such superintendent of public health, a license, certifying the applicant to be a practicing physician, and having the qualifications for such," etc.

The petition further alleges that there was no medical school in the city of Chicago, state of Illinois, on or about the 4th day of November, 1896, known as the "Independent and Metropolitan Medical College." That there was a pretended institution located in said city at that time known as and pretending to operate under the name of the "Independent Medical College," but that said institution was not, in fact, a medical college, and was not engaged in the business of conducting an institution of learning where personal attendance of students is required and where the study of medicine and surgery is taught by a faculty of instructors composed of qualified physicians and surgeons or teachers learned in the art of medicine and surgery. But, on the contrary, said institution was merely a "diploma mill," doing business under the cloak of its corporate name, and engaged in advertising and selling diplomas and conferring degrees as a means of profit, and as an assistance to individuals to enable them to engage in the practice of medicine, regardless of the question of their competency. That the said pretended medical college had no prescribed fixed time during which applicants for degrees or diplomas should pursue the study of medicine, or that required the students to take any fixed or certain course of study, or for any length of time, and that said institution was wholly conducted for pecuniary profit, and that it conferred degrees and issued diplomas for parties without regard to the qualification or

fitness of the applicant to practice medicine. That diplomas and degrees could be purchased from said pretended medical college by any person who was willing to pay the price asked by the officials of said concern, and that learning and knowledge in the science of medicine and surgery was not made a prerequisite to the issuing of diplomas and conferring of degrees by the said pretended institution. That the said pretended medical college known as the "Independent Medical College of Chicago, Ill.," was organized and chartered on or about the 20th day of October, 1896, and that the pretended diploma issued to the said defendant was dated, according to his statement, on November 4, 1896, being about two weeks after the incorporation of the said pretended medical college. That the defendant never attended said pretended medical college, and did not take any course of study at such institution, that none was required of him, and that he did not personally attend such college, and that said pretended college did not have any regular sessions, and that the statements made and contained in the application and affidavit of the defendant, to the effect that the Independent Medical College and the Independent and Metropolitan Medical Colleges were located in the city of Chicago, and were medical colleges, were false and untrue, and that the statements contained in said application and affidavit that he had attended the regular sessions of said college were false and untrue. That the said defendant made said statements knowing them to be false and untrue, and for the express purpose of deceiving the superintendent of the territorial board of health, and with the fraudulent intent and purpose of causing the territorial superintendent of health to rely upon and believe said statements, and in reliance thereupon, and believing the same, to issue to the said defendant a license to practice medicine and surgery in the territory of Oklahoma. That said statements were material and were the basis and foundation of the official action of the superintendent of the territorial board of health in issuing said license, and that the said superintendent of the territorial board of health did rely upon said statements and representations so made in said application and affidavit aforesaid, and in reliance thereupon, and believing the same, by reason of the representations of the defendant, did, pursuant thereto, issue him a license and permit, as provided by the laws of the territory of Oklahoma, to practice medicine and surgery therein. That upon the issuance of said license the defendant proceeded to locate in said territory and to engage in the practice of medicine and surgery, and is now engaged in the practice of medicine and surgery, and holds himself out to the public as a physician and surgeon, and advertises himself as a medical doctor, and solicits business as a physician in the treatment of the

sick and infirm, and represents that he is qualified and authorized to pursue said profession and business. That by reason of the premises above stated the said defendant practiced a fraud and deceit upon the superintendent of the territorial board of health, and upon the territory of Oklahoma, knowingly, intentionally, and purposely, for the purpose of procuring a license to enable him to practice medicine and surgery in Oklahoma, when in truth and in fact he was not entitled to such license, and could not have procured the same except for the false and fraudulent statements made by him in his application and affidavit. Wherefore the plaintiff prays that the license issued to the defendant on February 11, 1902, be revoked, canceled, annulled, and held for naught, etc.

To this petition the defendant interposed a demurrer on the ground that the court had no jurisdiction of the subject-matter of the action, that several causes of action were improperly joined, and that the petition failed to state facts sufficient to constitute a cause of action. This demurrer was overruled and exception noted. Thereupon the defendant filed an answer, which admits that on the 8th day of February, 1902, he filed his application as required by the statutes of Oklahoma, and that a license was issued to him upon said application and affidavit, and without the taking of an examination; that he denies all other material allegations contained in said petition, and specifically denies that there was any fraud, deception, or misrepresentation in the procuring of said license. The plaintiff replied to all the new matters set up in the answer and upon the issues joined the cause was tried to the court, without a jury, and the court found the issues in favor of the plaintiff and against the defendant, and entered judgment revoking, canceling, and annulling the license issued to the defendant on the 11th day of February, 1902, to which finding, ruling, and judgment of the court the defendant duly excepted, and brings the case here for review.

Calvin D. Gulley, in pro. per. Cotteral & Hornor, for plaintiff in error. W. O. Cromwell, Atty. Gen., Don C. Smith, Asst. Atty. Gen., and P. C. Simons, for the Territory.

HAINER, J. (after stating the facts as above). It is contended by the plaintiff in error that the territory of Oklahoma is not the proper party to institute this action, and that the court had no jurisdiction of the subject-matter of the action. There is no merit to these contentions. The latter part of section 14 of chapter 8 of the statutes of Oklahoma of 1893 (section 352), in force at that time, contains the following provision: "The district court shall, upon the complaint of any member of the territorial board of health or the county board of health where he resides have power to cancel any license that may be issued to any person to practice medi-

cine where such license was fraudulently obtained, or where the person to whom such license was issued has been guilty of violating any provisions of this act." It will thus be seen that the statute clearly confers upon the district court the power to cancel a license issued to any person to practice medicine, where such license was fraudulently obtained. Hence the court clearly had jurisdiction of the subject-matter of the action.

But it is contended that the action should be instituted by the territorial board of health, or some member thereof. We do not think the statute is susceptible of such a construction. It provides that, upon complaint of a member of the territorial board of health, the action may be instituted in the district court for the cancellation of the license. This does not mean that the action shall be instituted in the name of the territorial board of health, or any member thereof. The record discloses that the action was instituted upon the complaint of the territorial board of health, and upon the direction of the Governor of the territory, and we think that this fully satisfies the requirements of the statute. Manifestly, the territory of Oklahoma is not only a necessary party, but it is the proper party to institute such an action.

It is also contended that the evidence is insufficient to sustain the finding and judgment of the court below. In our opinion the evidence fully sustains the allegations of fraud and deception in the procurement of the license, and we think that no other reasonable or just conclusion could have been reached by the trial court. The record discloses a flagrant case of fraud, deception, and misrepresentation in the procurement of the license. And this is not all. The applicant knew, at the time he made his application and verified the same, under oath, that he was not a graduate of a reputable medical college, within the meaning of this statute. He knew that the pretended diploma which he held from the college was a mere sham and fraud, well calculated to mislead and deceive the territorial board of health. He knew that the obtaining of the diploma was a mere pretense and fraud, and he knew that the Supreme Court of the state of Illinois had, long prior to his application for license to practice in this territory, forfeited the charter of this pretended medical college, and declared "that the corporation is a mere diploma mill, designed wholly for issuing diplomas to practice medicine, for a consideration, to persons wholly unqualified for such practice."

In the case of *Independent Medical College v. People ex rel. Akin, Attorney General*, 182 Ill. 274, 55 N. E. 345, the right of this medical college to transact business in the state of Illinois was directly involved, and this is the college from whence the plaintiff in error represented that he was a graduate. The action was "a proceeding by informa-

tion in the nature of a quo warranto, brought in the circuit court of Cook county, February term, 1898, by the people, on the relation of the Attorney General, against the Independent Medical College, a corporation of Chicago, to forfeit its franchise or charter. The corporation was chartered in 1896, having as its object the establishment of 'an institution of learning,' and 'for the purpose of promoting mental and physical culture,' and for teaching branches taught in medical colleges generally, with power to grant diplomas and confer degrees. The information charged that the corporation was conducted for pecuniary profit; that it conferred degrees and issued diplomas for a price, without regard to the qualifications or fitness of the applicant to practice medicine; that in some cases no examination whatever was required, and degrees were conferred upon persons wholly unfit and incompetent; that in one case, specifically alleged, a diploma or license to practice medicine and surgery was granted for the price of \$25; the applicant never having been a student of medicine or surgery. It was further charged that the corporation was a diploma mill, designed wholly for issuing diplomas to practice medicine, for a consideration, to persons wholly unqualified for such practice. The respondent filed a plea to the information, denying its general allegations, and averring that it had not resorted to wrongful or unlawful methods in conferring degrees as a means of profit to its incorporators, and that it has not issued diplomas to persons wholly incompetent to practice medicine. To this plea the Attorney General filed a replication, averring that the defendant 'has usurped and misused, and does now usurp and misuse, its liberties, privileges, and franchises,' and tendering issue. Issue being joined, the cause was heard by the court, without a jury, upon the pleadings and evidence taken. The court found the defendant guilty as charged, and rendered judgment that the Independent Medical College be ousted and excluded from the exercise of all its corporate privileges and franchises under its articles of incorporation." From the judgment an appeal was prosecuted to the Supreme Court of the state of Illinois, and in affirming the judgment, the court said: "Without an extended analysis or weighing of the testimony introduced upon the trial as it appears in this record, we have no hesitancy in saying that it fully justified the finding and judgment of the court below. In fact, it is sufficient to establish the guilt of the defendant, as charged in the information, beyond a reasonable doubt, and would have justified, not only the forfeiture of the charter, but the infliction of a fine upon the parties guilty of the abuses."

In *Illinois Health University v. People*, 166 Ill. 171, 46 N. E. 740, the Supreme Court of Illinois, in discussing this question, said: "It is not consistent with the public policy

of a state which enacts stringent laws for the preservation of the public health, and for the protection of its people from quacks and ignorant pretenders to a knowledge of the science of medicine and surgery, to authorize or permit a pretended health university to turn any one, whether known or unknown, qualified or unqualified, into a doctor of medicine, armed with a diploma and degree as one qualified to heal the sick, who may answer its prescribed list of questions and pay its prescribed fee. The charter of a corporation is the full measure of its power, and, if any doubt arises out of the language employed in such charter, such doubt must be resolved in favor of the state. *Mills v. St. Clair Co.*, 2 Gilman (Ill.) 197; *St. Louis J. & C. R. Co. v. Trustees, etc.*, of the Institution for the Blind, 43 Ill. 303; *Northwestern Fertilizing Co. v. Village of Hyde Park*, 70 Ill. 634; *St. Clair Co. Turnpike Co. v. People*, 82 Ill. 174; *Minturn v. Larue*, 23 How. (U. S.) 435, 16 L. Ed. 574. It stands admitted by the demurrer that there was a willful misuser and abuse of the power conferred on this corporation, and a prostitution and perversion of its corporate powers to objects and purposes for which no certificate of incorporation could be properly issued, and which would be against the policy of our laws. It was a clear abuse of the liberal privileges conferred by our incorporation laws for appellant to make use of them for the purposes set forth in the information. And for such abuse and misuser its charter may and should be revoked. *Edgar Collegiate Institute v. People*, 142 Ill. 363, 32 N. E. 494."

In *Dent v. West Virginia*, 129 U. S. 122, 9 Sup. Ct. 233, 32 L. Ed. 623, the Supreme Court of the United States, in passing upon the right and power of a state to exact from parties, before they can practice medicine, a degree of skill and learning in that profession upon which the community employing their services may confidently rely, and, to ascertain whether they have such qualifications, to require them to obtain a certificate or license from a board or other authority competent to judge in that respect, said: "Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the

requisite qualifications. Due consideration, therefore, for the protection of society, may well induce the state to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified."

It is argued by plaintiff in error that the court erred in admitting in evidence the records of the Illinois courts showing the actions brought by the state of Illinois to revoke and cancel the charters of the Illinois Health Institute, and the Independent Medical College, its successor, and the record of the conviction of Armstrong, the head of these institutions, for the fraudulent use of the mails in operating the same. Clearly, this evidence was competent and material, for the purpose of showing that these pretended colleges were fraudulent institutions, and that the pretended diploma was procured from a fraudulent institution.

But one question remains; Did the court err in refusing the defendant a jury trial? This question must be answered in the negative. This is not one of the actions in which the party is entitled to a jury trial as a matter of right. Trial by jury is guaranteed only in those classes of cases where that right existed at common law. The case at bar falls under the well-recognized rules of equity jurisprudence to cancel a license on the ground of fraud, and hence the defendant was not entitled to a jury trial as a matter of right. *McCardell v. McNay*, 17 Kan. 433; *Kimball v. Connor*, 8 Kan. 414.

After a careful examination and consideration of the entire record, and of each of the errors assigned and which have been argued, we are clearly of the opinion that no error was committed by the trial court which would justify a reversal of this cause. It follows that the territory was a proper party to institute this action, upon the complaint of the territorial board of health, and by direction of the Governor; that the court had jurisdiction of the subject-matter of the action; and that the evidence fully establishes the allegations of the petition that the license was procured by fraud and deception.

Believing the judgment of the trial court to be right and just, and in consonance with reason and sound morals, the judgment is affirmed.

BURFORD, C. J., who tried the cause in the court below, not sitting. All the other Justices concurring, except IRWIN, J., absent.

STARK BROS. v. GLASER et al.

(Supreme Court of Oklahoma. Sept. 20, 1907.)

1. JUDGMENT—MOTION TO VACATE—TIME OF DECISION.

Under the statutes of this territory, the district court has power to vacate or modify its own judgments or orders at or after the term at which said judgment or order was made. Where the allegations to vacate a judgment are

based upon division 3 of section 562 of chapter 66 of Wilson's Revised and Annotated Statutes of Oklahoma of 1903, for irregularity in obtaining a judgment or order, and where the motion to vacate the judgment is made at the same term at which the judgment was rendered, a reasonable notice being given to the adverse party or his attorney, the court has jurisdiction to hear the matter, although the motion is not decided until a subsequent term.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 668.]

2. PUBLIC LANDS—HOMESTEAD ENTRIES—EXEMPTIONS.

Lands acquired under the provisions of the United States statute for the homesteading of public lands are not liable for the satisfaction of any debt contracted prior to the issuing of the patent therefor. The terms of this section exempt all lands obtained under the homestead law from liability for any of the debts of the entryman prior to the issuing of the patent, whether the lands are still held by him or by a bona fide purchaser deriving title through him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 377-379.]

Burford, C. J., dissenting.

(Syllabus by the Court.)

Error from District Court, Kay County; before Justice Bayard T. Hainer.

Action by Frank S. Glaser and A. Piffer against Stark Bros. Judgment for plaintiffs, and defendants bring error. Affirmed.

This is an action commenced in the district court of Kay county, Okla., in February, 1904, against the defendant Stark Bros., plaintiffs in error here, to quiet title to the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 15, township 26 N., of range 2 E., of the Indian Meridian, in Kay county, Oklahoma Territory. Plaintiffs in their petition state that they are the owners and in actual possession of said land; that the defendants claim an estate in said lands adverse to these plaintiffs, the nature of said adverse claim being that defendants claim a lien contract made with one Fred Bower, who was the original entryman of said land, and that said lien contract is of record, and is a cloud upon plaintiffs' title. Plaintiffs ask that said cloud be removed. The defendants filed an answer and cross-petition, alleging that on the 21st day of August, 1894, Fred Bower was the owner of and in possession of the said land; that on said date the defendants sold to said Bower a bill of fruit trees for the sum of \$450; that said Bower entered into a written contract with defendants, whereby said Bower gave to these defendants a lien on said land for the performance of said contract, and pleaded a copy of said contract, asking affirmative relief, that the said contract be declared a first lien. The contract is as follows: "This indenture made and entered into on this 21 day of Aug., A. D. 1894, by and between Fred Bower, of K. county (residence one miles N), county of K and of Oklahoma Ter. party of the first part, and Stark Bros. of Louisiana, county of Pike and state of Missouri, parties of the second part; witnesseth: That the said party of the first part in consideration of said parties of the

second part selling and shipping to him in the fall of 1894 to Cross, railroad freight charges prepaid, (—) fruit trees, binds himself, his heirs, and assigns to carefully plant and care for said trees on his farm containing eighty acres, situated in K county, Oklahoma, and more particularly described as follows, to wit: N. $\frac{1}{2}$ N. W. section 15, township 26 range 2 E., boundaries [here give name of adjoining owners] D. Mooney to the west and Thomas Goozdanover on the east and — and to pay to the order of said second parties, their heirs or assigns, as evidence by first party's nine (9) promissory notes to be executed by said first party to second parties when the aforesaid trees are shipped, four hundred & fifty dollars (\$450.00) due and payable as follows: All deferred payments and interest hereafter particularly specified to date from the first day of — 189—, one-tenth when trees are shipped, one-tenth in one (1) year, one-tenth in two (2) years, one-tenth in three (3) years, one-tenth in four (4) years, one-tenth in five (5) years, one-tenth in six (6) years, and one-tenth in seven (7) years, one-tenth in eight (8) years and one-tenth in nine (9) years, with interest at the rate of six (6) per cent. per annum, and if the interest be not paid annually the same is to become as principal and bear the same rate of interest, to the payment of which sums as the same shall become due the party of the first part binds himself, his heirs, assigns and grantees of and to the aforesaid described lands; the right being reserved to the said party of the first part to pay the full amount remaining unpaid and not yet due, together with accrued interest, at any time he may elect within the period of nine years next after date last above written. And the said first party for the purpose of obtaining the aforesaid trees states that the above described real estate is free and clear of incumbrances, and that he claims the same with a perfect homestead.

"In witness whereof, we have hereunto set our hands and seals this the day and year first above written.

"Fred Bower. [Seal.]

"Stark Bros. [Seal.]

"Witnessed by W. E. Morlan.

"Oklahoma Territory, County of K— ss. Be it remembered that on the 22nd day of Aug. 1894, personally appeared before me, Fred Bower, and acknowledged the execution of the above contract.

"In testimony whereof, I have hereunto set my hand and affixed my official seal at my office in Cross, O. T., the day and year first above written.

"G. Q. Branine, Notary Public. [Seal.]

"My term expires Dec. 8, 1897."

Indorsed on back: "Fred Bower to Stark Bros. Fruit Tree Contract. Territory of Oklahoma, K county—ss. Filed for record this 21 day of Sept. A. D. 1894 at 12 o'clock M.,

recorded in Mis. Book 1, page 105. J. C. Jamison, Register of Deeds. [Seal.]"

To this answer and cross-petition plaintiffs filed a reply. In said reply, plaintiff alleges as a defense to said cross-petition that at the time of the execution of said contract Fred Bower, the maker thereof, was and now is a married man and the head of a family, and at the time he was living with his family on said land as a homestead, and at no time did the wife of said Bower sign said contract, or contract for said fruit trees in writing, or otherwise, or consent to the same, and, for this reason, the said contract created no lien against said homestead. For a further defense, plaintiffs allege that at the time of making said contract the title to said land was in the United States government; that the said Fred Bower, who was the maker of said contract, was a homestead entryman on said tract of land, and that no final proof had been made, and no patent issued, and for this reason the said land was not liable for the debt created by the purchase of said fruit trees as evidenced by said contract, and for a further reply and defense plaintiff alleges a failure on the part of the defendant Stark Bros. to perform their part of the contract, and, in said reply, plaintiff asks that said contract be declared by the court not to be a lien on said real estate. On September 7, 1904, plaintiffs filed a motion for judgment on the pleadings. On the 16th of February, 1905, said motion for judgment on the pleadings was overruled. On the 15th of April, 1905, defendants demurred to plaintiff's reply. On the same day the court sustained the demurrer to said reply. On the 17th day of April, 1905, defendants filed a motion for judgment on the pleadings. On the 10th of July, 1905, the court sustains the motion of defendants for judgment on the pleadings, and renders judgment in favor of the defendants, and declares the contract to be a first lien, and directs the issuing of an order of sale. On the 17th of July, 1905, the clerk of the district court of Kay county issued an order of sale. On the 14th of July, 1905, the plaintiffs filed a motion in the district court to set aside the judgment on pleadings in favor of defendants, rendered on July 10, 1905, and on August 31, 1905, the court issued an order staying proceedings upon the judgment of July 10, 1905, and order of sale, upon the plaintiff's filing bond in the sum of \$200. On August 31, 1905, plaintiffs filed bond. On the 12th of September, 1905, the court rendered judgment sustaining the motion to set aside the said judgment in favor of the defendants rendered on July 10, 1905, and reinstated the cause upon the docket of the court for trial, and to which ruling the defendants excepted, and asked for time to prepare and serve a case-made on appeal to the Supreme Court, and are granted 30 days in which to make and serve a case-made, 10 days to suggest amendments, to be signed and settled on 3 days' notice in writing by

either party, after which the plaintiffs made application for leave to file an amended reply, which leave was granted, to which the defendants excepted. The cause was then docketed for trial at the next regular term of this court. On the 12th of September, 1905, defendants in error here, plaintiffs below, filed their amended reply and answer to the cross-petition. On the 19th of September, 1905, defendants filed a motion to require the plaintiffs to separately state and number their defenses. On the 20th of March, 1906, this motion is by the court overruled. On the 21st of March, 1906, said cause comes on for hearing on the motion of plaintiff for judgment on the pleadings, and the motion of defendant for judgment on the pleadings, at which time the following admission was made by the defendants, and the following judgment was rendered by the court: "It is admitted by the defendants, for the purpose of the court passing on the motion of the plaintiffs for judgment on the pleadings, that at the time that Fred Bower mentioned in defendant's cross-petition executed the contract attached to said cross-petition that he was the homestead entryman of the land described in said cross-petition, and was a married man and the head of a family, and that he and his family were residing on said land, and that the final proof for said land had not been made and that the patent from the United States for said land was not issued until about the year 1898 or 1899, about which time patent was issued to said Fred Bower."

Thereupon the court ordered that the motion of the defendants for judgment on the pleadings be overruled, and the motion of plaintiffs for judgment on the pleadings should be sustained. Thereupon the court rendered judgment in favor of the plaintiffs, declaring the contract in evidence to be no lien upon the land, and taxed the costs to the defendants, to which the defendants excepted, and the case is brought here for review.

Cline & Duval, for plaintiffs in error. A. H. Myer and Doyle & Cress, for defendants in error.

IRWIN, J. (after stating the facts as above). Three grounds of error are assigned by plaintiffs in error for a reversal of this case; but we think it will only be necessary to discuss two of them.

The first one is it is insisted that "the court has no power to set aside a judgment rendered during another term of court, except it be set aside for the reasons and in the manner provided by law. The proceedings in this case, if there were any grounds to set aside said judgment, should have been by petition verified by affidavit, on which summons should have issued and been served the same as in the commencement of an action, neither of which was done in this case; and the court was there-

fore without jurisdiction." In support of this contention, plaintiff in error purports to quote from the record. He says the "record in this case shows that on a day set by the Supreme Court of the Territory of Oklahoma as a day for the district court of Kay county, Okl. T., to wit, July 10, A. D. 1905, judgment was rendered by the trial court in this cause in favor of the plaintiffs in error, for the sum of \$834.32, which said amount was decreed a first and prior lien on said land, and said land was ordered sold as provided by law to satisfy the same. [See pages 21 and 22 case-made.] And that thereafter, to wit, July 17, 1905, the clerk of the district court of Kay county, Okl. T., issued an order of sale as provided in said decree, which order of sale was later recalled by the judge of the district court, and that long after the adjournment of said court, and on the first day of the succeeding term of said court, to wit, September 11, 1905, the defendants in error filed their motion to vacate said judgment [see page 27 case-made], which said motion was sustained on September 12, A. D. 1905, and the aforesaid judgment theretofore rendered on July 10, 1905, was vacated and set aside." While it is true the case-made at page 27 does show that a motion to vacate this judgment was on that day filed by the plaintiff, the case-made also shows on page 23 a motion to vacate the judgment of the court rendered on July 10, 1905, in favor of the defendants, on the pleadings, was filed on July 14, 1905. The only way we can account for this apparent discrepancy in the record is that the motion to vacate the judgment was filed on July 14, 1905, as set forth in the record, and, by inadvertence of the clerk, the same motion was refiled on September 11th, as shown by the case-made at page 27. If this case-made is correct, and speaks the truth, this can be the only theory upon which this apparent conflict can be reconciled, because the record clearly states that this motion was filed on July 14, 1905, and the record gives the motion, together with the signature of the attorneys. This motion must have been filed or its record would not appear in the case-made, and it might be, and probably was, the fact that this filing was overlooked by the clerk, and it was refiled, as shown on page 27, on September 11th. This being true, that the motion to vacate the judgment was filed during the same term at which the judgment was rendered, and within four days from the time the same was rendered, we think confers jurisdiction upon the court, provided notice was given to the opposite party or his attorney, and the fact that the court may have continued the hearing on the motion until a subsequent term would not deprive the court of jurisdiction. It is apparent from the record that the attorneys for the defendant did have notice of the filing of his motion to vacate the judgment, as it is found by the court in the order

staying the proceedings on the judgment and order of sale as contained in the case-made at page 24 this language is used: "Now, on this 30th day of August, 1905, comes the plaintiff above named by Thomas H. Doyle, one of their attorneys, and the defendants appearing by W. S. Cline & Duval, and this cause coming on to be heard before the undersigned judge of the Fourth judicial district at chambers in the city of Perry, at the hour named in the notice given by plaintiffs to defendants upon a judgment rendered in the above-entitled cause on the 10th day of July, 1905, and it appearing that defendants have had reasonable notice of this application, and it further appearing that said plaintiffs have filed a motion duly verified to set aside the judgment so rendered and order of sale decreed in the above-entitled cause by reason of irregularities in obtaining said judgment and order of sale, and by reasons alleged that said judgment was rendered and said order of sale was made before said action regularly stood for trial." This language of the court in his journal entry staying the judgment and order of sale is material for two purposes in this case, as it shows that the adverse party or his attorney has had notice of the filing of the application to set aside the judgment, and it shows the further fact that said motion to vacate and set aside the judgment must have been filed at an earlier date than the date mentioned in the case-made at page 27, to wit, September 11, 1905, because this order staying the judgment was made on the 30th day of August, and it recites the application is on file, and tends to corroborate the position of defendants in error that their motion to vacate the judgment was filed July 14, 1905, as shown by the case-made at page 23. Running section 4760 (section 562, c. 66, Wilson's Rev. & Ann. St. Okl. 1903) provides "that the district court shall have power to vacate or modify its own judgments or orders at or after the term at which said judgment was made. * * * Third, for mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order. * * *" Running section 4761 (section 563, c. 66) provides: "The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order shall be by motion, upon reasonable notice to the adverse party or his attorney in the action. * * *" Running section 4762 (section 564 of the same chapter) provides the proceedings to vacate or modify the judgment or order on the grounds mentioned in subdivisions 4, 5, 6, 7, 8, and 9 of section 562 shall be by petition, "verified by affidavit, * * * and also providing for a summons." But we think a reading of the motion in this case and the journal entry of the court sustaining said motion will show that this motion was based on the third subdivision of section 562, to wit, irregularity in obtaining the judgment or order, and being such, and the

motion being filed four days after the rendering of the judgment, to wit, July 14, 1905, and being at the same term at which the judgment was rendered, and the court having found by his journal entry that the opposite party or his counsel had due notice of the filing, we think it brings it clearly within the provisions of section 563, and was sufficient to give the court jurisdiction of the same. Now, we think the mere fact that the court, from pressure of business, or from any other reason, allowed the matter to go over until the next term, would not deprive the party of his right to be heard. He had filed his motion in apt time, had given the legal notice required by the statute, and had placed his motion on the docket of the court, and did all he could do, and all he was required to do, to bring the case within the jurisdiction of the court, and we think the fact that the motion itself was not heard until a subsequent term would not deprive the court of jurisdiction. Hence we think on this point the entire argument of counsel for plaintiff in error is based on an erroneous interpretation of the record.

Another reason why we think the court had full and complete jurisdiction to vacate the judgment rendered in favor of the plaintiff in error on July 10, 1905, is that the statutes of this territory (Wilson's Rev. & Ann. St. § 563, c. 66) provides: " * * * A motion to vacate a judgment because of its rendition before the cause regularly stood for trial can be made only in the first three days of the next succeeding term." The record in this case (page 51), shows that this hearing and decision of the court to vacate the judgment was had on September 12th, which was the second day of the succeeding term of the court after the rendition of the judgment sought to be vacated, and was clearly within the time prescribed by statute. The same section fixing the time as the first three days of the next succeeding term provides it shall be by motion.

There remains but one other assignment of error unanswered to be considered. In the second assignment of error counsel for plaintiff in error say: "The defendants in error purchased the land involved with full knowledge of the existence of the lien of the plaintiffs in error, and are estopped from denying the validity of the said lien, or the power and authority to make and execute the same. If the contract in question is defective for the reason that the same was not executed by the wife of Fred Bower, the same could only be avoided by her. The fact that at the time of the execution of said contract the land was Government land, the title to which was in the United States, made it unnecessary for the wife to join in any conveyance relating thereto, as the laws of Oklahoma relating to the conveyances of the homestead do not apply." In this statement of his assignment of error, counsel for plaintiff in error overlooked one very material legal

proposition; and that is that lands acquired under the homestead laws of the United States is not liable for any debts contracted by the entryman prior to the issuing of his patent. Now it is conceded, in this case (record, p. 60), by the admission of the parties, that at the time of the contracting of the debt evidenced by this contract Bower was a homestead entryman; that he was living upon the government land with his family as a homesteader; that final proof had not been made; and that the patent was not issued and did not issue for at least four years after this instrument was made. This admission brings it clearly in our judgment within the provisions of the United States homestead law, and exempts it from any debt or liability created prior to the issuing of the patent. But it is contended that as the plaintiffs in this case were the grantees of Bower, who was the homestead entryman, that the right of Bower of having this land held to be free from the lien of any debt created prior to the issuing of the patent would not extend to them, but would be personal to Bower. But various courts who have had this question before them for adjudication have held to a contrary doctrine, and have laid down the rule to be that: "The terms of this section [referring to the homestead law] clearly exempt all lands obtained under the acts of which it is a part from liability for any of the debts of the entryman incurred prior to the issuance of the patent, whether the lands are still held by him or by a bona fide purchaser deriving title from him." *Russell v. Lowth*, 21 Minn. 167, 18 Am. Rep. 389; *Dickerson v. Cuthburth*, 56 Mo. App. 647; *Smith v. Steele*, 13 Neb. 1, 12 N. W. 830; *Baldwin v. Boyd*, 18 Neb. 444, 25 N. W. 580; *Clark v. Bayley*, 5 Or. 343. These authorities, in our judgment, settle this contention in favor of the defendant in error.

The assignments of error alleged by counsel for plaintiff in error for a reversal of this case should not be considered by this court, for the reason that nowhere in the record does it appear that any motion for a new trial was presented to the court, or the attention of the court called, by motion for new trial, to the errors complained of, and no motion for new trial was made and ruled upon by the court and excepted to and assigned as error. This court in the case of *Boyd et al. v. Bryan*, 11 Okl. 56, 65 Pac. 940, says: "Error of law occurring at the trial and excepted to by the party making the application will, when embraced in the motion for new trial, present to trial court any objection or exception properly made and saved during the progress of the trial." In the case of *Osborne & Co. v. Case et al.*, 11 Okl. 479, 63 Pac. 263, this court says: "This court has repeatedly held, in fact it is the settled rule of this court, that alleged errors occurring during the trial not raised in the trial court or set forth in a motion for a new trial will not be considered for the first time on ap-

peal." In *Hardwick et al. v. Atkinson*, 8 Okl. 609, 58 Pac. 748, this court says: "Alleged errors occurring in the trial not raised in the trial court or set forth in the motion for a new trial will not be considered for the first time in this court." In *Glaser v. Glaser*, 13 Okl. 389, 74 Pac. 944, it is said: "All matters occurring on the trial which are proper causes for a motion for new trial will be deemed to be waived unless presented by motion for new trial, and this court will not consider them after having been once waived." In *High v. United States et al.*, 14 Okl. 399, 78 Pac. 100, it is said: "A case-made which does not contain a copy or statement of * * * any motion for a new trial * * * presents no question to this court for review." In the case of *Martin v. Gassert*, the Oklahoma Supreme Court, reported in the 17 Okl. 177, 87 Pac. 586, says: "Where the plaintiff fails to assign as error the overruling of the motion for new trial in the petition in error, no question is properly presented to this court to review error alleged to have occurred during the progress of the trial in the court below." A reading of the contract relied on by plaintiff in error for a lien against the land in question will show, we think, that it is very doubtful whether the language employed in that contract would be sufficient to create a lien in any event. It certainly would not be held sufficient in a mortgage, and this contract would be somewhat in the nature of a mortgage. Nowhere in the contract is it made expressly a lien upon the land. The most liberal construction for the plaintiff in error that could be made of the contract would be that the party making the contract bound himself and attempted to bind whoever might be the grantee of the land, but he did not, in express terms, make the contract a lien upon the land, and we are inclined to the opinion that the language used is too vague and uncertain to be considered by this court as a lien against and running with the land. But however that may be, for the reasons herein expressed, we are of the opinion that the decision of the district court in rendering judgment in favor of the plaintiff on the pleadings was correct, and is sustained by the authorities.

The decision of the district court is affirmed, at the costs of the plaintiffs in error. All the Justices concurring, excepting HAIN-ER, J., who having tried the cause below, took no part in this decision, and BURFORD, C. J., who dissents.

BURFORD, C. J. (dissenting). The law as stated in this opinion is in direct conflict with the well-considered opinion in *Stark et al. v. Duvall et al.*, decided by this court in 1898, and reported in 7 Okl. 213, 54 Pac. 453, and no reference is made to said cause. See, also, *Farriss et al. v. Deming Investment Co.*, 5 Okl. 496, 49 Pac. 926, and *Flanagan v. Forsythe*, 6 Okl. 225, 50 Pac. 152. In my opinion the contract in question constitutes

a lien created by contract of the owner, and comes within rule stated in *Melnhold v. Walters*, 102 Wis. 393, 78 N. W. 574, 72 Am. St. Rep. 888; *Fuller v. Hunt*, 48 Iowa, 163; *Dickerson v. Bridges*, 147 Mo. 235, 48 S. W. 825; *Orr v. H. Ulyatt*, 23 Nev. 134, 43 Pac. 916; *Lang v. Morey*, 40 Minn. 396, 42 N. W. 88, 12 Am. St. Rep. 748; *Forgy v. Merryman et al.*, 14 Neb. 513, 16 N. W. 836; *Weber v. Laidler*, 26 Wash. 144, 66 Pac. 400, 90 Am. St. Rep. 726; *Newkirk v. Marshall et al.*, 35 Kan. 77, 10 Pac. 571; *St. Louis Mining & Milling Co. v. Montana Co.*, 171 U. S. 656, 19 Sup. Ct. 61, 43 L. Ed. 320.

GUSS v. FEDERAL TRUST CO.

(Supreme Court of Oklahoma. Sept. 4, 1907.
Rehearing Denied Oct. 12, 1907.)

1. CONTRACTS—LEGALITY—PUBLIC POLICY—RAILROADS—SUBSCRIPTION IN AID.

A railroad company, for the purpose of aiding in the construction of its line of road, may accept and enforce an obligation payable to it, conditioned that the note shall become due and payable when the line of road is built and put in operation to a point named therein; and such a note is not void or against public policy.

2. SAME—ON WHOM BINDING.

One who is not a party to a contract cannot be bound thereby against his consent, to his detriment; nor can he claim the benefit of any of its favorable provisions.

3. TRIAL—DIRECTING VERDICT.

It is the duty of a trial court to direct a verdict for a party, when the evidence is such that, if a verdict were returned by the jury for the other party, the court under the law would be required to set the same aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 370-380.]

(Syllabus by the Court.)

Error from District Court, Logan County; before Justice John H. Burford.

Action by the Federal Trust Company against U. C. Guss. Judgment for plaintiff, and defendant brings error. Affirmed.

Cotteral & Hornor, for plaintiff in error. Dale & Blerer and Hoyt, Dustin & Kelley, for defendant in error.

BURWELL, J. The Ft. Smith & Western Railroad Company contemplated building its line of road from a point about 40 miles west of the city of Ft. Smith, in the state of Arkansas, to the city of Guthrie, Okl.; and the company, through its representatives, proposed that if the people of Guthrie would execute and deliver to it their respective notes, of the aggregate value of \$50,000, the line would be built to Guthrie. Notes were executed amounting in all to about \$54,000 face value. The defendant executed and delivered his note, which was as follows: "\$500.00. Guthrie, O. T., Feb'y 1st, 1902. The undersigned promise to pay to the order of Ft. Smith & Western Railroad Company, five hundred & no/100 dollars at the office of said company in Guthrie, Oklahoma. Provided, always, that this note becomes due and payable when said railroad company shall have in opera-

tion a line of railroad from the present terminus of its line in the Indian Territory to the city of Guthrie, Oklahoma Territory. [Signed] U. C. Guss." The road was built on its own right of way to a point about 200 or 300 yards north of the corporation boundary of the city, and from there its trains ran over the tracks of the Santa Fé Railway Company to the passenger depot of that company, which the Ft. Smith & Western Railroad uses in common with such company. The note in question was transferred to the Federal Trust Company, and, payment having been refused by Mr. Guss, it commenced this action in the district court of Logan county, which resulted in a judgment in its favor, and the defendant has prosecuted this appeal.

The pleadings, the evidence, and the briefs cover a very wide range and present many supposed issues, which at first blush tend to impress one with the idea that the questions involved are difficult of solution; but when we take the facts as disclosed by the evidence, and apply to them a few simple, well-established principles of law, the complications are imaginary, and not real. We have examined the record and briefs with a view of determining, if possible, what advantage, if any, was taken of the appellant in this transaction, but are forced to the conclusion that the real defense is the usual one of "ought not to pay," under the assignment of error "that the obligation runs to a railroad company and public policy prohibits a railway company from accepting aid in the building of its road." That a note or contract of the character involved in this case is not against public policy has been declared by this court after full consideration. The question is no longer an open one. *W. B. Piper v. Choctaw Northern Townsite & Improvement Company*, 16 Okl. 436, 85 Pac. 965. In the case of *McGuffin v. Coyle & Guss*, 16 Okl. 648, 85 Pac. 954, 86 Pac. 962, decided some months prior to the case just referred to, this court recognized the validity of such contracts, where made for the benefit of the railroad company, but by a divided court denied recovery in that particular case, for the reason that the contract on its face ran to an officer of the company, holding that that fact was sufficient to authorize the inference that the contract was made for the benefit of the officers of the company, and not for the benefit of the railroad company itself. By the terms of the contract in this case the appellant agreed to pay to the Ft. Smith & Western Railroad Company \$500 when that company (using the language of the contract) "shall have in operation a line of railroad from the present terminus of its line in the Indian Territory to the city of Guthrie, Oklahoma Territory." The road was built and in operation before this suit was commenced. It is true that it is insisted that the company had not built its line of road into the city; but it did not agree to do so. It agreed to

build to the city of Guthrie, and the spirit of the contract is that the road should be built so as to afford the people of the city of Guthrie and those living in that community the advantages of such road as an independent line. Under the record this has been done. The contract has been substantially complied with. If it was the desire of those giving aid to the railroad company that it build and maintain separate and independent depot and terminal facilities, they should have so provided in their contracts. Under the record there has been a reasonable compliance with the contract on the part of the railroad company, and the appellant should pay the note, unless he can show some other defense.

But it is insisted that this and other notes were executed under the terms of another contract in writing, entered into between the railroad company and the citizens of Guthrie, through and in the name of the Guthrie Club, of Guthrie, under date of February 20, 1902. The contract is as follows:

"Guthrie, Okla., Feb. 20, 1902.

"Contract and Agreement by and between the Ft. Smith & Western Railroad Company and the Guthrie Club of Guthrie, Oklahoma. This contract and agreement, entered into this 20th day of February, A. D. 1902, by and between the Ft. Smith & Western Railroad Company, duly organized, incorporated, and doing business under the laws of the state of Arkansas and the Indian Territory and Oklahoma Territory, and for convenience hereinafter designated the party of the first part, and the citizens of the city of Guthrie, Oklahoma Territory, acting by and through the Guthrie Club, of Guthrie, Oklahoma, an organization duly incorporated under the laws of Oklahoma Territory, having for its primary purpose the development of the business interests of the city of Guthrie, and which said Guthrie Club, of Guthrie, Oklahoma, is for convenience hereinafter designated the party of the second part, witnesseth, that

"Whereas, said first party did on the 24th day of January, 1902, submit to the citizens of the city of Guthrie, Logan county, Oklahoma Territory, a proposition wherein and whereby said first party proposed and offered to extend its line of railway from its present terminus in the Indian Territory to the city of Guthrie, Logan county, Oklahoma Territory, provided the citizens of said city of Guthrie would make, execute, and deliver their promissory notes to said first party of the value of fifty thousand dollars (\$50,000.00), and also secure for the use and benefit of said first party the passage by the mayor and council of the city of Guthrie such ordinances as should in the opinion of said first party be necessary and essential for the use of said first party in the construction and operation of its line of railroad in said city; and

"Whereas, said proposition as in substance above set forth was by the citizens of said

city of Guthrie in a public meeting duly accepted, and in compliance therewith the citizens of the city of Guthrie have executed and caused to be executed promissory notes to the amount, as shown by their face, of approximately fifty-four thousand dollars (\$54,000.00), and have the same now ready for delivery, and the mayor and common council of said city of Guthrie have by the passage of ordinances permitted said first party to construct and operate its line of railway into and through the city of Guthrie, as requested by said first party; and

"Whereas, there being a question involved as to whether or not the promissory notes above and herein referred to are of the full value of fifty thousand dollars (\$50,000.00), in lieu of additional subscriptions and in payment by said first party of the sum hereinafter designated, the major and common council of said city of Guthrie have by resolution duly enacted, passed, approved, and directed a contract to be entered into between the city of Guthrie and said first party herein named, whereby the said city of Guthrie shall, for a period of five (5) years from the 1st day of January, 1903, furnish a supply of water for the use of locomotives, yards, and terminals of said first party; and

"Whereas, said first party, for the purposes of convenience and to enable it to more readily carry out its purposes in building its line of railway as proposed and understood between the parties hereto, did on the 14th day of February, 1902, file articles of incorporation in the office of the Secretary of the territory of Oklahoma and thereafter receive a charter under the name of the 'Ft. Smith & Western Railroad Company in Oklahoma,' permitting the construction of a line of railroad, from the east line of Lincoln county in said territory to the city of Guthrie therein, which line of railroad, when constructed, is to connect with and become a part of the present line of railroad now being operated and constructed and owned by said first party, and which said last-mentioned line will, when completed, be operated from Ft. Smith, in the state of Arkansas, to the western boundary of the Creek Nation in the Indian Territory, and there connect with, and become a part of, the line of railroad to be constructed and operated in Oklahoma Territory as hereinbefore described and set forth:

"Now, therefore, for the purpose of fully carrying out and expressing the purposes and intention of the parties hereto, and in consideration of the surrender to said first party of the promissory notes hereinbefore mentioned, and in further consideration of the ordinances enacted and resolutions passed by the mayor and council of the city of Guthrie, and the further promise upon the part of said second party to cause the passage and enactment of such other ordinances upon the part of said mayor and council as may be found necessary for the construction and operation of said line of railroad in said city

of Guthrie, said first party hereby stipulates and agrees to and with said second party that it will within ninety (90) days from the 1st day of February, 1902, begin the work of grading for its line of railroad as above described between the city of Guthrie and a point on the St. Louis & San Francisco Railroad, between the city of Chandler, Oklahoma, and a point five (5) miles west of the city or town of Wellston in said territory; that its entire grade for its line of railroad from the present terminus of its line in the Indian Territory to the city of Guthrie, Oklahoma Territory, shall be completed within fifteen (15) months from February 1, 1902; and that said line of railroad from the terminus above named in the Indian Territory shall be constructed and in operation within eighteen (18) months from said 1st day of February, 1902.

"The party of the first part hereby executes the above and foregoing contract this 20th day of February, 1902.

"The Ft. Smith & Western Railroad Company,

"By Geo. Hayden, Its President.

"The party of the second part hereby executes this contract this 20th day of Feb., 1902.

"The Guthrie Club, of Guthrie, Oklahoma,

"By C. M. Barnes, Its President.

"Attest: Frank B. Lucas, Secretary. [Seal.]"

The appellant has misapprehended the scope of this contract. So far as the \$500 contract is concerned, it has absolutely nothing to do with this contract, and the appellee's rights to recover are found entirely outside of any of the provisions contained in the one just quoted above. The appellant's contract for the payment of the \$500 is a contract direct with the railroad company, and its terms cannot be enlarged or restricted by anything found in the contract between the railroad company and the Guthrie Club. The appellant's contract is conditioned upon the performance of two things: First, that the road be built; and, second, that it be put in operation. There is not even any time stated when these things shall be done. The most that can be said is that the railroad company could bind the appellee only upon compliance with the terms of the contract within a reasonable time. That is not true with the contract with the Guthrie Club. It fixes a time in which the railroad company shall perform the things named therein. Perhaps it will be well to analyze its provisions briefly.

The first statement is that the contract is between the Ft. Smith & Western Railroad Company and the Guthrie Club, of Guthrie, Oklahoma. In the next sentence it recites the contract is with the Ft. Smith & Western Railroad Company and the citizens of the city of Guthrie, Oklahoma Territory, acting by and through the Guthrie Club, of Guthrie, Oklahoma, having for its primary purpose the development of the business interests of

the city of Guthrie. The question at once arises: Who is meant in the contract by "the citizens of the city of Guthrie"? The position that it refers to those who signed the notes is not tenable; for, if those contracting intended to protect the interests of that class alone, they would have said so in plain and unambiguous words. And, again, that class had individually contracted with the railroad company direct. They had not appointed the Guthrie Club as their agent, and the club did not assume to act for them. They claimed to represent the citizens of Guthrie—those who had not contributed, as well as those who had. The club was not acting for those who gave their notes, but was looking after the building up of the city, and with that object in view it made a contract with the railroad in its own name; for it could not contract on behalf of the people as a whole in the name of the citizens of Guthrie, because the entire people can contract only through their duly elected or appointed officers. We shall not at this time attempt to express any opinion as to the legality of this contract with the Guthrie Club, and shall discuss its provisions only in so far as it appears necessary to determine its bearing upon the contract executed by the appellant. However, the more the contract is examined, the more unsound appears the appellant's contention.

We come now to a consideration of the substance of the contract itself. It provides that, "whereas, the railroad company proposed and offered to extend its line of railway from its present terminus in the Indian Territory to the city of Guthrie, provided the citizens of that city would make, execute, and deliver their promissory notes of the value of fifty thousand dollars to the railroad company, and also secure for the use and benefit of the railroad company the passage by the mayor and council of the city of Guthrie such ordinances as should in the opinion of the railroad company be necessary and essential for the use of the company in the construction and operation of its line of railroad in the city." The contract then recites that the citizens of Guthrie at a public meeting accepted the proposition of the railroad company, and that the ordinances permitting the company to construct and operate its road into and through the city of Guthrie had been passed, and notes of the face value of fifty-four thousand dollars had been executed and were now ready to be delivered. Here is where we come to the vital portions of the contract—those portions which show what the parties had in mind at the time and the considerations which led to the making of the contract. A doubt had arisen in the minds of the parties interested as to whether the notes that had been executed, although of the face value of \$54,000, were in fact worth \$50,000, and instead of securing more notes the city of Guthrie, by its mayor and common council,

passed a resolution whereby the city, for a period of five years from the 1st day of January, 1903, were to furnish a supply of water for the use of locomotives, yards, and terminals of the railroad company. The language of this particular clause of the contract is as direct and positive as it is possible for language to make it. Let us read it in this connection: "Whereas, there being a question involved as to whether or not the promissory notes above and herein referred to are of the full value of fifty thousand dollars, in lieu of additional subscriptions and in payment by said first party of the sum hereinafter designated, the mayor and common council of said city of Guthrie have by resolution duly enacted, passed, approved, and directed a contract to be entered into between the city of Guthrie and said first party herein named, whereby the said city of Guthrie shall, for a period of five (5) years from the 1st day of January, 1903, furnish a supply of water for the use of locomotives, yards, and terminals of said first party." Then follows the last clause of the contract. It says: "Now, therefore, for the purpose of fully carrying out and expressing the purposes and intentions of the parties hereto, and in consideration of the surrender to said first party of the promissory notes hereinbefore mentioned, and in further consideration of the ordinances enacted and resolutions passed by the mayor and council of the city of Guthrie, and the further promise upon the part of said second party to cause the passage and enactment of such other ordinances upon the part of said mayor and council as may be found necessary for the construction and operation of said line of railroad in said city of Guthrie, said first party hereby stipulates and agrees to and with said second party that it will, within ninety (90) days from the 1st day of February, 1902, begin the work of grading for its line of railroad as above described between the city of Guthrie and a point on the St. Louis & San Francisco Railroad, between the city of Chandler, Oklahoma, and a point five (5) miles west of the city or town of Wellston, in said territory; that its entire grade for its line of railroad from the present terminus of its line in the Indian Territory to the city of Guthrie, Oklahoma Territory, shall be completed within fifteen (15) months from February 1, 1902; and that said line of railroad, from the terminus above named in the Indian Territory to the city of Guthrie, in Oklahoma Territory, shall be constructed and in operation within eighteen (18) months from the 1st day of February, 1902." Then the contract is signed: "The Ft. Smith & Western Railroad Company, by Geo. Hayden, Its President," and "The Guthrie Club, of Guthrie, Oklahoma, by C. M. Barnes, Its President. Attest: Frank B. Lucas, Secretary. [Seal.]"

The Guthrie Club had in its possession these notes for \$54,000. It had also secured

the passage of certain ordinances, and agreed to secure the passage of others if they became necessary; and in consideration of these ordinances and the delivery of these notes the railroad company agreed to complete its road and have it in operation within a certain time. These notes, however, were to be delivered as they were originally executed and as they then existed. The contract nowhere attempts to modify the terms and conditions of the notes, and the contention of the appellant that this contract with the Guthrie Club is void as against public policy, in that it is agreed therein to secure legislation from the city council, may, for the sake of argument (but for that purpose alone at this time), be conceded, and still the appellant is bound on his note. Although this contract recites in one place that it is executed by the Guthrie Club for the citizens of Guthrie, it is apparent, and such is the legal effect, that it executed the contract for and on behalf of itself, and the promise to complete the road and have it in operation within a stated time is a promise to the club, and not a promise to either the city of Guthrie, or its citizens as a municipality, or to the makers of the notes. What consideration flowed from Guss to the railroad company for the promise in this contract that the road should be built and in operation within the time stated therein? It cannot be said to be the \$500, because he had already agreed personally, in the note signed by himself, to pay that when the road was built and in operation, and this note specified no time for the building of the road. If the Guthrie Club had agreed in this contract that the appellant and others giving notes should contribute an additional sum in the event that the railroad company failed to realize \$50,000 on these notes—that is, that he, together with those who were responsible, should increase the amount of their respective notes pro rata and make up the sum which the railroad company failed to collect—would it be presumed that this appellant would not, if sued upon this contract, deny the power of the club to bind him? Of course he would, and no court would hold that the club had such power under the facts disclosed by this record. If the club could not change the terms of his note, so as to increase his liability, it could not by a separate, independent contract, executed without express authority from him, reduce his liability below that to which he had agreed in his note.

The Guthrie Club, after the railroad company failed to complete the road within the time specified in the contract which we have just been considering, made another agreement with the railroad company extending the time for completing the road and putting it in operation. This contract is also discussed at some length by both parties; but it is not necessary to consider it. Having held that Mr. Guss was not privy to the first contract made between the railroad com-

pany and the Guthrie Club, he could have no interest in its subsequent modification.

It is also contended by appellant in his brief, as well as alleged in his pleading, that there was no consideration for the note in question, for the reason that the railroad company had concluded to build the line to Guthrie before the proposition was made by the company's officials that it would do so if the citizens of Guthrie would give notes of the value of \$50,000. Even if this were true, it would not defeat recovery, unless representations were made which deceived the appellant, and without which representations he would not have given the note in controversy. We have read appellant's evidence carefully, and are fully satisfied that he was not deceived. In fact, he does not claim that he was deceived.

From these observations it necessarily follows that the judgment of the lower court should be affirmed. In the business world nothing is more sacred than the right of contract; and one of the highest duties of courts is to compel obedience to their terms by those who make them, when there exists no valid reason for relieving either of the parties from the performance of the conditions thereof. And in these times, when much is being done to enforce railroads to conform to the law and respect their obligations, care should also be exercised to the end that, through passion and prejudice, they be not deprived of that to which they are lawfully entitled. The evidence in this case discloses that the appellant is a man of experience, and that he has in the past been interested in making contracts of a similar character to the note in controversy. He has offered absolutely no legal excuse why he should not pay this note. Therefore the law, through its agencies, will compel him to do so. The trial court properly directed a verdict for plaintiff. A judgment for the defendant, under the evidence, could not have been sustained.

The judgment of the lower court is hereby affirmed. All of the Justices concurring, except BURFORD, C. J., who presided at the trial below, not sitting, HAINER, J., not sitting, and IRWIN and GARBNER, JJ., absent.

ENID & ANADARKO RY. CO. v. KEPHART.
(Supreme Court of Oklahoma. Sept. 6, 1906.
Rehearing Denied Oct. 12, 1907.)

1. PUBLIC LANDS—GRANT IN AID OF RAILROADS—RIGHT OF WAY.

A railroad company appropriating land for its right of way across a tract of land covered by the homestead entry of another becomes an unlawful trespasser, and obtains no right either in law or equity to the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 244-246.]

2. SAME — HOMESTEAD ENTRY — RAILROAD RIGHT OF WAY.

A homestead entry, valid upon its face, constitutes such an appropriation and withdrawal

of the land as to segregate it from the public domain, and precludes it from subsequent appropriation for right of way for railroad purposes under the act of 1875, granting right of way to railroad companies through the public lands of the United States.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 244-246.]

3. SAME — CANCELLATION OF ENTRY — EFFECT ON RIGHT OF WAY.

Where A. has a homestead entry upon a tract of government land subject to homestead entry, and B. enters thereon while said entry is intact, and makes settlement, and a railroad company enters and appropriates a strip 100 feet wide across said tract for its right of way, having filed its articles of incorporation and profile maps with the Secretary of the Interior, and the same having received his approval under the act of 1899, providing for condemnation proceedings and payment; and thereafter B. by contest proceedings in the United States Land Office secures the relinquishment of A. to be filed in the United States Land Office, and immediately thereafter makes homestead entry for said tract under a preference right as successful contestant, and complies with all the provisions of the law to preserve said entry—*held*, that the cancellation of A.'s entry did not cause a reversion of the right of way to the railroad company under the act of 1875, granting right of way to railroad companies through the public lands of the United States.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 244-246.]

Burford, C. J., and Burwell and Pancoast, JJ., dissenting.

(Syllabus by the Court.)

Error from District Court, Comanche County; before Justice F. E. Gillette.

Action by James A. Kephart against the Enid & Anadarko Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

On the 29th day of January, 1903, the defendant in error, James A. Kephart, brought this action in the district court of Comanche county to recover damages from the plaintiff in error, Enid & Anadarko Railway Company, a corporation, for the wrongful and unlawful invasion, appropriation, and occupancy of a certain portion of his land for railroad purposes. The case was tried to the court upon an agreed statement of facts, resulting in a judgment for plaintiff in the sum of \$575, and defendant brings the case to this court, alleging error.

In his petition the plaintiff below alleged, substantially, that he is the homestead entryman, occupant, and claimant for the N. W. ¼ of section 10, in township 2 S. of range 11 W. I. M., in Comanche county, Okl. T., having made homestead entry No. 10,324 on the 31st day of July, 1902, at the United States Land Office at Lawton, Okl.; that he now resides thereon, and is in the lawful, exclusive, and peaceable possession thereof, save and except for the wrongful acts and trespasses of the defendant, plaintiff in error herein; that the defendant wrongfully and unlawfully entered upon said tract of land without the consent, and over the express objection, of plaintiff, and by excavation and fill, constructed a railway embankment

and grade, running and extending through and across said tract of land in a diagonal direction from the north to the south line thereof, and thereby occupied, and forcibly excluded plaintiff from a strip of valuable land 100 feet in width through and across the most valuable portion of said tract, to the damage of the plaintiff in the sum of \$1,900. In the amended answer, relied upon by the defendant, and upon which the cause was submitted, the defendant admitted that it was a corporation, and, in addition to a general denial, alleged that on the 6th day of February, 1902, and prior to the date of plaintiff's homestead entry, and prior to his settlement upon the land, it filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, and located its line of railway, and within 12 months after making said location, and prior to the settlement and entry of plaintiff, caused to be filed with the register of the Land Office at Lawton, Okl. T., in the land district in which the land was situated, a map and profile of its road showing a section thereof 30 miles in length, and as constructed and operated through said tract of land; that said map and profile was duly approved by the honorable Secretary of the Interior in the month of February, 1902, and prior to said settlement and entry, and prior to the time that the rights of the plaintiff, if any, had been acquired or attached to said land, subject to the right of way of the railway company; that the defendant entered upon the tract of land, described in plaintiff's petition, and constructed a continuous line of railway grade and road through and across said land, and occupied, for railway purposes, a strip of land 100 feet in width through and across said tract; that the defendant completed its 30-mile section of the road within one year after its said location; and that the land of the plaintiff at the time of the location of the defendant's railway line, and the filing of said maps and plats, was a part of the public lands of the United States. Plaintiff replied denying each allegation of said answer not admitted by the petition or reply, and alleged that on the 3d day of September, 1901, William Gillies made homestead entry for said land; that on or about February, 1902, and prior to the attempted occupancy and appropriation by the defendant, plaintiff made settlement on the tract of land to establish his residence thereon, and has resided on the land ever since; making it his home to the exclusion of any home elsewhere, with the intent to acquire title thereto under the homestead laws of the United States; that on March 4, 1902, plaintiff filed a contest against the entry of Gillies, charging speculation, and abandonment, which was the only valid pending contest against said entry at the time when Gillies filed his relinquishment; and that by virtue of such pending contest plaintiff acquired a preferred right

to make homestead entry on said tract under the act of Congress, approved May 14, 1880, 21 St. 140, c. 89, and under the rules and regulations and decisions of the Department of the Interior of the United States; and that on the 31st day of July, 1902, Gillies filed his relinquishment in the Land Office at Lawton, in and for the district in which said tract of land was located, and on the same day that plaintiff made his homestead entry for said tract.

The agreed statement of facts upon which the cause was submitted is as follows:

"It is hereby stipulated and agreed by and between the parties hereto that the following statement of facts shall be taken and considered upon the trial by the court as facts proven on the trial of the above-entitled action, and the same are now hereby admitted to be true by the parties hereto, respectively, to wit: First. That on the 3d day of September, 1901, at the United States Land Office at Lawton, Okl. T., William Gillies made homestead entry under the homestead laws of the United States, of the N. W. $\frac{1}{4}$ of section numbered 10, in township numbered 2 S., of range numbered 11 W. of the Indian Meridian, in Comanche county, Okl. T., being the identical tract of land over which the right of way is in controversy in this action, and that from and after said September 3, 1901, said tract was so covered by the valid and subsisting homestead entry of said William Gillies up to the time that he relinquished on July 31, 1902. Second. That plaintiff, Kephart, made settlement and established his residence on said land on or about February 10, 1902, and has resided on said land ever since. Third. That plaintiff on March 4, 1902, filed a contest against said homestead entry of William Gillies, charging speculation and abandonment, which was the only valid pending contest against said entry at the time of the filing of Gillies' relinquishment. Fourth. That on July 31, 1902, relinquishment of said William Gillies for said claim was filed in the United States Land Office at Lawton, Okl., and immediately thereafter, and on the same day plaintiff, Kephart, made homestead entry for the said land under a preference right as successful contestant, and has resided thereon as homestead claimant ever since. Fifth. That plaintiff has never made any conveyance or agreement for conveyance of any portion of said land to defendant, or for its use, and has never been paid or proffered payment for right of way over said tract by defendant. Sixth. That defendant is a corporation, as alleged in plaintiff's petition, and that it entered upon said tract of land and constructed over and across the same a continuous line of railroad grade and roadbed, and occupied for said purposes a strip of land 100 feet in width through and across said tract of land. Seventh. That on the 6th day of February, 1902, and prior to said plaintiff's homestead entry describ-

ed in his petition, and prior to his settlement upon the said land, defendant filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, and on or before the 6th day of February, 1902, located its line as afterwards constructed and operated to, over, and across the said lands, and within 12 months after making said location, and on the 27th day of February, 1902, caused to be filed with the register of the United States Land Office at Lawton, Okl. T., and of the land district in which said lands were situated, a map and profile of its said road showing a section of 30 miles in length, running over and across the land herein described, and constructed and operated through and across said tract; that said map and profile were afterwards approved by the honorable Secretary of the Interior after July 31, 1902; that said defendant commenced the construction of said road across the said land on the — day of February, 1902, and completed the said road within one year after the said location.

"It is further agreed between the parties hereto that if the rights of the plaintiff in and to the lands hereinabove described were prior and superior to the rights of the said defendant through, over, and across the same, the said plaintiff is by virtue of that fact entitled to recover as the value of his interest in the lands taken, and as damages as to that portion of the said lands not taken for right of way of the said railway company to the sum and amount of \$575, and no more. And that in the event of final decision in favor of the said plaintiff, judgment shall be entered for the said plaintiff for said sum, provided, however, that nothing contained in this stipulation shall deprive either party of a right to do any act necessary to secure a review of the decision of the district court or any other court herein, on any question of law by any other court having competent jurisdiction. It is further stipulated and agreed that this cause shall be determined by the district court of Comanche county, Okl. T., and a judgment rendered therein upon the foregoing statement of facts without other or additional evidence.

"In addition to the facts stated in the above statement, it was agreed by the plaintiff and defendant: That in the month of February, 1902, the defendant filed in the office of the Secretary of the Interior a true copy of the map and profile described in the said agreed statement, which map was certified by the president and chief engineer of the defendant, as follows:

"State of Illinois, County of Cook—ss.: W. E. Dauchy, being duly sworn, says that he is the chief engineer of the Enid & Anadarko Railway Company; that the survey of route of said road from a point on the line of the Chicago, Rock Island & Pacific Railway, forty-six (46) feet east and three hundred and thirty-eight (338) feet north of the

southwest corner of section thirty-two (32), township two (2) north, range eleven (11) west of the Indian Meridian, and ending at a point one hundred fifty-five (155) feet east, and fifteen hundred eighty (1,580) feet north of the southwest corner of section six (6), township three (3) south, range ten (10) west of the Indian Meridian, in the territory of Oklahoma, a distance of twenty (20) miles, was made under his direction as chief engineer of the company and under its authority, commencing on the 1st day of September 1901, and ending on the fifteenth day of December, 1901; and that such survey is accurately represented on this map. W. E. Dauchy, Chief Engineer.

"Sworn and subscribed to before me this 14th day of Jan., 1902. Frank Stewart, Notary Public. [Seal.] My commission expires Sept. 22, 1902.

"I, M. A. Low, do hereby certify that I am the president of the Enid & Anadarko Railway Company; that W. E. Dauchy, who subscribed the foregoing affidavit, is the chief engineer of the said company; that the survey of line of route of the company's (road), as accurately represented on the accompanying map, was made under authority of the company; that the said line of route so surveyed and as represented on the said map was adopted by the company by resolution of its board of directors on the thirty-first day of December, 1901, as the definite location of its road from a point on the line of the Chicago, Rock Island & Pacific Railway, forty-six (46) feet east, and three hundred thirty-eight (338) feet north of the southeast corner of section thirty-two (32), township two (2) north, range eleven (11) west of the Indian Meridian, and ending at a point one hundred fifty-five (155) feet east, and fifteen hundred eighty (1,580) feet north of the southwest corner of section six (6), township three (3) south, range ten (10) west of the Indian Meridian, in the territory of Oklahoma, a distance of twenty (20) miles; that the map has been prepared to be filed for the approval of the Secretary of the Interior, in order that the company may obtain the benefits of the act of Congress approved March 2, 1899, entitled "An act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes." I further certify that the said railroad is to be operated as a common carrier of passengers and freight. M. A. Low, President of the Enid & Anadarko Railway Company. Attest: F. C. Marshall, Secretary. [Seal.]

"That said map and profile were approved by the said secretary through Thomas Ryan, acting secretary, in the following language indorsed thereon on the date borne by the same, to wit: 'Dept. of the Interior, February 6, 1902. Approved, subject to the provisions of the act of March 2, 1899 (30 Stat. 990), and subject also to any prior, valid,

existing rights and adverse claims. Thos. Ryan, Acting Secretary.'

"It is also agreed that the railway line through, over, and across the described land was constructed under contract by a contractor from the said company, who in turn employed subcontractors to grade the same, and they in doing such grading placed some earth excavated on said line more than 50 feet from the center line of said railway as located and constructed. That previous to July 31, 1903, defendant, through its agent, had conversation and negotiations with plaintiff as contestant on said land, and with his attorney, for the purpose of right of way through said land, but that defendant hesitated to make purchase and payment, and declined to do so, because of the unsettled condition of the title; there being several contests and adverse claims to said land."

M. A. Low, Blake, Blake & Low, and W. C. Stevens, for plaintiff in error. Black & Trosper, for defendant in error.

GARBER, J. (after stating the facts as above). From the agreed statement of facts in this case it appears that one William Gillies, on the 3d day of September, 1901, made a valid homestead entry on the N. W. $\frac{1}{4}$ of section 10, in township 2 S., of range 11 W. L. M., in Comanche county, Okl. T., being the tract of land in controversy in this action; that from and after said date said tract of land was covered by the homestead entry up to, and including, the 31st day of July, 1902; that the plaintiff, Kephart, made actual settlement and established his residence on said land on the 10th day of February, 1902, and has since resided thereon; that on March 4, 1902, he filed a contest against the homestead entry of Gillies, which contest was pending in the United States Land Office on the 31st day of July, 1902; that on that date, the said Gillies, as the result of said contest, relinquished his homestead entry, and thereupon the plaintiff, Kephart, immediately made his homestead filing thereon under a preference right as successful contestant; that the plaintiff, Kephart, never made any conveyance to, or any agreement for a conveyance of any portion of said land to, the defendant company, and has never been paid for the right of way over the same; that the defendant company entered upon said land and constructed its grade and roadbed, and has occupied the same for the purposes of its railroad on a strip 100 feet in width through and across said tract; that it filed with the Secretary of the Interior a copy of its articles of incorporation on the 6th day of February, 1902; that on that date had located its line as afterwards constructed over and across said land, and on the 27th day of February, 1902, caused to be filed with the register of the United States Land Office at Lawton, Okl. T., the same being the land district in which said tract is situate, a map and profile of its said road

running over and across the land described therein; that the said map and profile were approved by the Secretary of the Interior on February 6, 1902, and the defendant commenced the construction of its road across said land some time during the month of February, 1902, and completed the same within one year thereafter. In this case we do not hesitate to approve the reasoning and conclusion expressed in the written opinion of the learned trial judge as a conclusive exposition and a correct statement of the law in the case, and which in our judgment remains wholly unanswered by the exhaustive briefs of counsel for plaintiff in error.

Plaintiff in error relies upon Act March 3, 1875, 18 Stat. 492, c. 152 [U. S. Comp. St. 1901, p. 1568], which provides:

"That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road. Also the right to take from the public lands adjacent to the line of said road material, earth and stone, and timber necessary for the construction of such railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station to the extent of each station for each ten miles of its road."

"Sec. 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands within twelve months after the survey thereof by the United States, file with the register of the Land Office for the district where such land is located, a profile of its road, and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office, and thereafter all such lands over which right of way shall pass shall be disposed of subject to such right of way, provided that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such completed section of said road."

The line of definite location of the railroad which determines the rights of the company to the right of way under the above act is definitely fixed within the meaning of the act by the filing of a profile map showing its location, with the Secretary of the Interior, and upon his approval the public lands over which such right of way shall pass shall be disposed of subject to such right of way.

And it is held that the construction of the company's roadbed is sufficient notice, to those who take subsequently, that the company has taken its right of way under the act. The act of 1875 grants the right of way to railroad companies only through the public lands of the United States. Was the tract in question public land at the time of the approval of the company's profile plat by the Secretary of the Interior, viz., February 6, 1902? The authorities without conflict determine that question in the negative. The homestead entry made by Gillies on September 3, 1901, segregated the tract from the public domain, and the company obtained no right under the act by filing its profile plat, or by its occupancy, for the reason that it was not public land at the time; and for the same reason the plaintiff, Kephart, secured no right to the tract by his settlement. In fact, both were mere trespassers upon the land, and remained such until the cancellation of the homestead entry of Gillies on July 31, 1902.

It is insisted by counsel for the plaintiff in error that, since the plaintiff alleges that he contested Gillies on the ground of abandonment and speculation, the court should take judicial notice of the fact that plaintiff could only contest Gillies by filing an affidavit showing that he had abandoned the land, and if, as a matter of fact, the land had been abandoned by Gillies, he had no claim upon the railroad company, and the land had, by such abandonment become subjected to the company's rights without compensation to him. That a homestead entry, valid upon its face, constitutes such an appropriation and withdrawal of the land as to segregate it from the public domain, and preclude it from subsequent homestead entry or settlement, or right of way, until the original entry is canceled or declared forfeited, is supported by all the authorities, and may now be regarded as one of the fundamental principles underlying the land system of this country. *Chotard v. Pope*, 12 Wheat. (U. S.) 586, 6 L. Ed. 737; *Wilcox v. McConnell*, 13 Pet. (U. S.) 498, 10 L. Ed. 264; *Carroll v. Stafford*, 3 How. (U. S.) 441, 11 L. Ed. 671; *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210, 18 L. Ed. 339; *Pacific R. R. Co. v. Dunnmeyer*, 118 U. S. 629, 5 Sup. Ct. 506, 28 L. Ed. 1122; *Hastings & Dakota R. R. Co. v. Whitney*, 182 U. S. 357, 10 Sup. Ct. 112, 38 L. Ed. 863; *Sturr v. Beck*, 138 U. S. 541, 10 Sup. Ct. 350, 38 L. Ed. 761; *Sioux City & Iowa Falls v. Griffey*, 143 U. S. 40, 12 Sup. Ct. 362, 36 L. Ed. 64; *Whitney v. Taylor*, 158 U. S. 85, 15 Sup. Ct. 796, 39 L. Ed. 906; *McMichael v. Murphy*, 12 Okl. 155, 70 Pac. 189; *Hodges v. Colcord*, 12 Okl. 313, 70 Pac. 383; *Holt v. Murphy*, 15 Okl. 12, 79 Pac. 265. The Land Department has repeatedly held that an entry segregates the land covered thereby, and so long as such entry exists it precludes any other disposition of the land. *Whitney v. Maxwell*, 2 Land Dec. Dep. Int. 98; *Schrotberger v. Arnold*, 6

Land Dec. Dep. Int. 425; *Allen v. Curtius*, 7 Land Dec. Dep. Int. 444; *Faulkner v. Miller*, 16 Land Dec. Dep. Int. 130.

It is conceded by plaintiff in error that the location and construction of its road did not at the time of said location and construction create a right in the company which would prevent Gillies from securing just compensation for the appropriation of his land for the right of way had his inceptive right continued; but it is insisted that the land had always been a part of the public domain, subject, however, to the homestead rights of Gillies which had attached; that the cancellation of Gillies' entry was not needed to restore it to the public domain, but terminated the claim of Gillies, and at the time of relinquishment the company had filed with the Secretary of the Interior due proofs of the location of its line across the tract, together with a map and profile of the same, which map and profile were on file in the United States Land Office at Lawton, the same being in the land district in which the said tract was located; that it had commenced the construction of its road, and, in short, had complied with all the provisions of the act to entitle it to take its right of way thereunder prior to the time that Kephart filed his contest, viz., March 4, 1902, and prior to the relinquishment of Gillies; and that by reason thereof the right of the company to the right of way attached prior to the rights of Kephart. The law of the case will not warrant the conclusion. The land was not a part of the public domain at the time the company filed its profile map with the Secretary of the Interior and took possession of the land. That the company recognized this, and that it could not take its right of way under the act of 1875, is shown in the certificate of the president of the company, written upon the maps themselves, setting forth the purposes and object of their filing, and designating the act under which it sought to obtain benefits. The latter part of the certificate, stating the object and act under which the company proceeded, reads: "This map has been prepared to be filed for the approval of the Secretary of the Interior in order that the company may obtain the benefits of the act of Congress approved March 2, 1899, entitled 'An act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands and Indian allotments, and for other purposes.'" The approval of the acting Secretary was made subject to the provisions of the act of 1899, and is as follows: "Department of the Interior, February 6, 1902. Approved subject to the provisions of the act of March 2, 1899 (30 Stat. 990, c. 374 [U. S. Comp. St. 1901, p. 1581]), and subject, also, to any prior valid existing right and adverse claims. Thomas Ryan, Acting Secretary." The act of 1899, referred to, required condemnation proceedings and payment for right of way, and it is admitted that

the company paid neither Gillies nor Kephart. It is also admitted that, had the inceptive right of Gillies continued, the defendant company would have had no right to the land, not even a germ of right that could possibly ripen into tangible fruition, without the relinquishment of the rights of Gillies; that it was a trespasser without legal excuse, and would have had to pay Gillies for its right of way; but, notwithstanding these admissions, it is insisted by the company, without blush or embarrassment, that it was upon the land in a receptive attitude, and when the rights of Gillies were terminated by the contest proceedings of Kephart, it received the benefits of the act of 1875 eo instante automatically, before Kephart could legally seize the fruits of his own efforts. It might be as consistently argued that Kephart was also upon the land in a receptive attitude. He was there before the company was, but the receptivity of the respective parties was impotent to create a right in either. Something had to be done to change the legal status of things; legal proceedings to be brought requiring aggressive action as well as the assumption of the attitude of legal receptivity. The railroad company did nothing. Kephart assumed the aggressive. He acted; he instituted the only legal proceedings authorized by law to secure the cancellation of the homestead entry of Gillies. The fourth clause of the agreed statement of facts reads: "That on July 31, 1902, relinquishment of said William Gillies for said claim was filed in the United States Land Office at Lawton, Okla., and immediately thereafter, and on the same day, plaintiff, Kephart, made homestead entry for the said land under a preference right as successful contestant, and has resided thereon as homestead claimant ever since." In the case of *Hodges v. Colcord*, 12 Okla. 313, 70 Pac. 383, the Supreme Court of this territory, said: "The filing of Gayman, being regular and valid upon its face until canceled in a proper proceeding and by the proper authority, segregated the land from the public domain. Therefore the settlement of Hodges could avail him nothing until the filing by Gayman was canceled, and the only way to cancel Gayman's entry was by proper and authorized proceedings." Act May 14, 1880, c. 89, § 2, 21 Stat. 141 [U. S. Comp. St. 1901, p. 1392], entitled "An act for the relief of settlers on public lands," and under which the plaintiff claims his right to recover in this action, reads: "In all cases where any person has contested, paid the Land Office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the Land Office of the district in which such land is situated, of such cancellation, and shall be allowed 30 days from date of such notice to enter said lands." Kephart began the proper and authorized proceedings, which resulted in the termination of the rights of Gillies and a preference right to himself as a successful

contestant. Should he now be required to surrender his preference right which the law gives him, or any portion of it, to the railroad company? Why should the rights of the company be superior to those of Kephart? It represented to the Land Department and the public that it would pay for the land under the provisions of the act of 1899, and after occupancy and possession, and the successful contest of Kephart, it now claims a portion of the fruits of Kephart's victory under the act of 1875. It was a trespasser and wrongdoer ab initio, and shall it now be permitted to profit by its own wrong, and reap where it has not sown? Of what value to Kephart is the preference right of making his homestead filing upon the land, if by reason of his successful contest he finds the land, or a valuable interest therein, has passed ipso facto to the railroad company? Should he not be permitted to enjoy the fruits of his victory?

This whole subject has been very carefully considered and appropriately discussed by Mr. Justice Miller in his opinion in the case of *Kansas Pacific Railway Company v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122, wherein he says: "It is argued by the company that, although Miller's homestead entry had attached to the land, within the meaning of the excepting clause of the grant, before the line of definite location was filed by it, yet when Miller abandoned his claim, so that it no longer existed, the exception no longer operated, and the land reverted to the company—that the grant by its inherent force reasserted itself and extended to or covered the land as though it had never been within the exception. We are unable to perceive the force of this proposition. When the line was fixed, which we have already said was by the act of filing the map of definite location, then the criterion was established by which the lands to which the road had a right were to be determined. No attempt has ever been made to include lands reserved to the United States, which reservation afterwards ceased to exist, within the grant, though this road and others with grants in similar language have more than once passed through military reservations for forts and other purposes, which had been given up or abandoned as such reservations, and were of great value. Nor is it understood that, in any case where lands had been otherwise disposed of, their reversion to the government brought them within the grant. Why should a different construction apply to lands to which a homestead or pre-emption right had attached? Did Congress intend to say that the right of the company also attaches, and whichever proved to be the better right should obtain the land? The company had no absolute right until the road was built, or to that part of it which came through the land in question. The homestead man had five years of residence and cultivation to perform before his right became abso-

lute. The pre-emptor had similar duties to perform in regard to cultivation, residence, etc., for a shorter period, and then payment of the price of the land. It is not conceivable that Congress intended to place these parties as contestants for the land with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the government as to the performance of their obligations. The reasonable purpose of the government undoubtedly is that which is expressed, namely, while we are giving liberally to the railroad company, we do not give any lands we have already sold, or to which, according to our laws, we have permitted a pre-emption or homestead right to attach. No right to such land passes by this grant. No interest in the railroad company attaches to this land, or is to be founded on this statute." If, as is said by Justice Miller, "no right to such land passes by this grant," how can it be claimed that a right of way stands upon any higher or better ground? It is true that was a land grant case, but, if the grant of the whole of the land did not give the railroad company any right to the land, under like condition, why should the grant of merely the right of way inure to the benefit of the company to any greater extent?

In the case of *Hodges v. Colcord et al.*, 12 Okl. 313, 70 Pac. 383, it was held: "Where A. has a homestead filing upon a tract of government land that is subject to homestead entry, and B., while said homestead filing is intact, enters thereon and makes settlement, and one day after the settlement of B., C. files a contest, in the local land office, charging that A. is disqualified to hold the land covered by his filing and from obtaining title thereto under the homestead laws by reason of having entered the territory during the prohibited period, and claims a preference right, and, subsequently, and while said contest is pending, A. relinquishes his filing to the government, and the Land Department holds the relinquishment to be the result of the contest of C., held, that the preference right of C. is not defeated or impaired by the adverse settlement claim of B. acquired subsequent to the entry of A." If a private citizen cannot by his prior occupancy defeat the preference claim and right of the successful contestant, how can it be said that a railroad company should be permitted to do so?

The case of *Jamestown & Northern Railroad Company v. Jones*, 177 U. S. 125, 20 Sup. Ct. 568, 44 L. Ed. 698, cited and relied upon by defendant, determines only that the construction of the railroad is equivalent to the filing of its map and profile with the Secretary of the Interior, so far as notice to set-

tlers upon land traversed by its roadbed is concerned. In this case the line of the railroad was located October 30, 1880, and the road was built in 1882. No homestead entry was made on the land until after the construction of the road, and the final proof of defendant in error, Jones, was not made until about 10 years afterwards, when he procured the relinquishment of a homestead entry of one Ella Sharp, made March 7, 1883. It will be seen that neither the right of Jones as a homestead entryman or any right he may have acquired through the relinquishment of Ella Sharp reached back to the date of the construction of the road, and the Supreme Court holds that the actual construction of the road was notice to the homestead entrymen, which precluded them from acquiring any title by homestead entry to the right of way occupied by the railroad company. The decision in that case does not take into consideration two pre-emption contests made on the land prior to the construction of the road, probably because the defendant in error, when he made final proof, was not a successor in interest to either of them, and the right of such pre-emption entrymen had expired under his homestead entry. Under these circumstances, the determination of the Supreme Court that the railroad company's title to its right of way was superior to the title of Jones, under his homestead entry, is not an authority applicable to the facts of the case under consideration.

The case of *Bonner v. Rio Grande R. R. Co.*, 31 Colo. 446, 72 Pac. 1065, has no application to the facts in the case at bar, for the reason that the original locators of the mining claim had granted to the railroad a right of way across the claim, and afterwards abandoned the claim. The case only determines that after the abandonment, and after the construction of the railroad, a relocation of the claim was subject to the railroad easement. There was no contest in reference to the mining claim, but, if there had been, it could have made no difference with the result, because of the grant of the right of way by the original locators, and because there is no provision of law granting the preference right to the successful contestants of a mining claim over any other occupant of the land.

In the case of *Alexander v. K. C., Ft. Smith & Memphis Company*, 138 Mo. 464, 40 S. W. 104, the right of way had been purchased from Simpson: "The defendant company acquired a right of way of Simpson, and entered and built its road; but Simpson never perfected his title to the homestead, and never obtained his patent, but abandoned the land, according to the weight of the evidence, some time in 1882, after the com-

pany had built its railroad and was operating it as a part of a great interstate system between Kansas City and Birmingham, Ala. The map showed that the railroad was located over the land in controversy, and plaintiff had been on the land, employed and aided in building defendants' railroad thereon. He, of all men, could not be ignorant of the location of the road and the claim of defendant. After Simpson's homestead entry was canceled in March, 1884, this plaintiff made a homestead entry of this land with full knowledge of the construction and operation of the railroad thereon."

The case of *Kinion v. K. C., F. S. & M. R. Co.*, 118 Mo. 577, 24 S. W. 636, is not applicable to the case at bar, for the reason that the court expressly found that: " * * * It is an undisputed fact that plaintiff knew the road had been located across this land, the right of way acquired, and the work of the construction of the road commenced, when he made his homestead entry. He therefore made his entry subject to all of the rights of the company."

In the case of *Roberts v. Northern Pacific Railroad Company*, 158 U. S. 9, 15 Sup. Ct. 756, 39 L. Ed. 873, the company acquired title by purchase, and expended large sums of money upon the land. The court held: "The railroad company having acquired title from the owner, a subsequent purchaser from the owner, long after the company had entered upon visible and notorious possession under a valid contract, for a valuable consideration, could not maintain either trespass or ejectment; nor would he, as such purchaser, be entitled to recover damages for the occupation of the land, because, under the present claim, the benefit would go to a private party who bought with the knowledge of the county's previous sale, and who admits that he secured his own grant for a grossly inadequate consideration because of the fact of such previous sale."

A careful examination of the authorities cited discloses material and controlling facts in each case which do not exist in the case at bar. As the successful contestant, Kephart, secured a preference right to the land, and his admitted compliance with all the requirements of the law to preserve that right, precludes the company from taking its right of way under the act of 1875, and it must now respond in damages to the plaintiff.

For the reasons above stated, the judgment of the district court will therefore be affirmed.

HAINER and IRWIN, JJ., concurring.
GILLETTE, J., having tried the case below, not sitting. BURFORD, C. J., and BURWELL and PANCOAST, JJ., dissenting.

RUMPING v. RUMPING.

(Supreme Court of Montana. Oct. 21, 1907.)

1. APPEAL—REVIEW—WANT OF JURISDICTION IN TRIAL COURT.

The objection that a complaint does not allege a fact essential to confer jurisdiction may be urged for the first time on appeal.

2. DIVORCE—JUDICIAL REMEDY—STATUTES.

The power of courts to grant a divorce is statutory.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 1.]

3. SAME — JURISDICTION — RESIDENCE OF PLAINTIFF.

Where the Legislature declares that a divorce must not be granted unless plaintiff has been a resident of the state for a specified time next preceding the commencement of the action, the trial court must inquire into the jurisdictional facts, and be governed accordingly.

4. SAME—PLEADING.

Under Civ. Code, § 176, providing that a divorce must not be granted unless plaintiff has been a resident of the state for one year next preceding the commencement of the action, the fact of plaintiff's residence is jurisdictional, and must be alleged in the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 287.]

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

Suit by John H. Rumping against Eva Rumping. From a decree for plaintiff, defendant appeals. Reversed and remanded.

Edward Horsky, for appellant. O. F. Goddard, for respondent.

SMITH, J. This is an action for divorce, appealed from the district court of Yellowstone county. The cause of action is based on the alleged desertion of the plaintiff by the defendant. The complaint fails to allege that the plaintiff has been a resident of this state for one year next preceding the commencement of the action, as required by section 176 of the Civil Code. The only pleading on the part of the defendant is an answer, in which she denies generally all of the allegations of the complaint, except those of marriage and birth of issue. The defendant failed to appear at the trial. Evidence was offered by the plaintiff, whereupon the court found all of the allegations of the complaint to be true and entered a decree dissolving the marriage. Defendant appeals.

The cause was presented to this court without argument, and we have received no assistance from the briefs of counsel; the appellant submitting the bald statement that the judgment should be reversed, and the respondent contending that it should be affirmed. The question involved is a new one in this jurisdiction, and not as easy of decision as the failure of counsel to examine the same would seem to indicate. It is also an interesting one from a lawyer's standpoint. Section 176 of the Civil Code, *supra*, reads as follows: "A divorce must not be granted unless the plaintiff has been a resident of the state for one year next preceding the com-

mencement of the action." If the allegation of plaintiff's residence is jurisdictional in its nature, the objection can, of course, be urged for the first time in this court. Our research has discovered the case of *Dutcher v. Dutcher*, 39 Wis. 651, which appears to be authority for the action of the trial court in holding that the pleadings do not raise the issue of plaintiff's residence. The opinion is by Chief Justice Ryan, and for that reason is entitled to the respectful consideration of courts, and, viewed in the light of the rules of both common-law and Code pleading, seems unanswerable on that point. The divorce statute of Wisconsin at the time read as follows: "No divorce shall be granted unless the petitioner or plaintiff shall have resided in this state one year immediately preceding the time of exhibiting the petition or complaint," etc. Rev. St. Wis. 1858, c. 111, § 12. The court said: "But the question remains whether the pleadings raise the issue of her [plaintiff's] residence. Her want of residence under the statute is clearly a personal disability, not affecting the present right of action, but only the present right to prosecute the action, a disability which might be cured; clearly matter of abatement, not of bar." Story's Equity Pleading, § 708, is then quoted as follows: "All declinatory and dilatory pleas in equity are properly pleas, if not in abatement, at least in the nature of pleas in abatement, and therefore, in general, the objections founded thereon must be taken *ante litem contestatam* by plea, and are not available by way of answer, or at the hearing." And 1 Chitty's Pleading, 446, as follows: "Whenever the subject-matter of the defense is that the plaintiff cannot maintain any action, at any time, whether present or future, in respect of the supposed cause of action, it may and usually must be pleaded in bar; but matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should in general be pleaded in abatement." The court then proceeds: "So Lord Redesdale distinguishes pleas 'that the plaintiff is not entitled to sue by reason of some personal disability,' and that 'the plaintiff has no interest in the subject, or no right to institute a suit concerning it,' from pleas in bar, and calls them pleas to the person of the plaintiff. And the distinction is not one of form merely, but of substance; for generally judgment for the defendant on pleas in abatement abates the action only, on plea in bar, bars the cause of action everywhere and forever. In the present case judgment against the respondent for want of residence within the statute should not operate to bar another action here, if she should have acquired a residence, or elsewhere, at any time or under any circumstances. * * * If certain matters in abatement are apparent in the complaint, they are ground for demurrer under the Code. But if matter in abatement, not apparent in the complaint,

be relied on as a defense, it must be specially pleaded in the answer. A general denial is a plea in bar, not broader at least than the general issue at common law, and cannot raise any defense by way of abatement. * * * Judgment for the defendant upon a general denial is a general judgment—a bar to all future actions for the same cause. And it would be a cruel abuse that it should go upon a defense in abatement concealed in gremio. The Code intended no such perversion of justice. And it is well settled in this court that matter in abatement, not apparent in the complaint, must, like other special defenses, be specially pleaded in the answer. * * * The appellant contends that the defense here is in the nature of a plea to the jurisdiction. We do not think so, but need not discuss the point; for, by all the authorities, the rule equally applies to pleas to the jurisdiction, which, if not strictly pleas in abatement, are in the nature of pleas in abatement. * * * The defense, therefore, that the respondent was not a resident of the state, though well founded in fact, was inadmissible under the pleadings in this case." However, notwithstanding the foregoing conclusion, the court reversed the judgment on grounds of public policy, saying, among other things: "It concerns the public welfare that the state should not be made a free mart of divorce for strangers, and that, amongst her own people, divorce should not become matter of free will as much as marriage—a personal right independent of public right and inconsistent with public welfare. Divorces without the letter and spirit of the statute in fact, but made to look within it by design or mistake or accident, are frauds upon the statute and offenses against public policy. And it is the duty of the courts ex officio to look closely into actions for divorce, and to direct inquiries into the facts, when necessary, and finally to deny all divorces which would be abuses of the statute." If we found it requisite, in order to protect the interests of the state, to reverse this case on grounds of public policy, it would not be necessary to go beyond the decision of this court in the case of *Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6, where the subject is reviewed very thoroughly in an opinion by the present Chief Justice.

There is, however, in the books another line of cases, which hold that a failure to allege and prove the residence of the plaintiff within the statute renders the decree a mere nullity, for the reason that the court has no power to grant a divorce unless this provision of the statute is complied with. We are inclined to think this the better and more satisfactory line of authorities upon which to rest our judgment, and to hold that statutes such as ours were designed to and do abrogate any rule of pleading in conflict with the statutory prohibition. It is elementary, of course, that neither courts of law or equity have any inherent power to dissolve marriage. The power to decree a divorce is pure-

ly statutory. *Irwin v. Irwin*, 3 Okl. 186, 41 Pac. 369. When, therefore, the Legislature, in conferring upon courts the jurisdiction to grant divorces, says, in the same statute, that a divorce must not be granted unless the plaintiff has been a resident of the state for one year next preceding the commencement of the action, we believe it meant just what it said, and that trial courts, as Chief Justice Ryan remarked, should ex officio inquire into the jurisdictional facts, and be governed accordingly. In *Gredler v. Gredler*, 36 Fla. 372, 18 South. 762, the court said: "The complainant had wholly failed to allege in his bill, or to prove, that he had resided in this state for two years prior to the exhibition of his bill. * * * The fact of the applicant's prior residence for two years in this state was necessary both to be alleged in the bill and established by proof, before the courts were authorized to grant a divorce under our statute." The Supreme Court of California, in *Bennett v. Bennett*, 28 Cal. 600, used this language: "But over and beyond this, residence is palpably within the mischiefs against which it was the object of the statute to guard, and therefore it must be proved. Should the judgment in this case be affirmed, the affirmance would be but a letter of invitation to the married, domiciled abroad, who have, with or without reason, become emulous of divorce, to take a trip, one or both, to this state for the purpose of avoiding delays, or yet more serious impediments at home, with the intention to return thereto as soon as the purpose of their coming shall have been hurried to accomplishment by the aid of an accommodation answer admitting the averment of a six months' residence on the part of the applicant. Against this prostitution of the judicial power, the statute interposes the only available barrier by requiring, as we construe it, not only that the causes of divorce should be proved to the court, but the residence of the applicant also, as the sole ground on which it can take cognizance of the question." In *Powell v. Powell*, 53 Ind. 513, it was held that, where the residence of the petitioner was not proved as required by the statute, the court had no power to decree a divorce. Under a statute very similar in its phraseology to our own, the Supreme Court of Minnesota held, in *Thelen v. Thelen*, 75 Minn. 433, 78 N. W. 108, that the fact of the plaintiff's residence was jurisdictional, and must be alleged in the complaint. In *Luce v. Luce*, 15 Wash. 608, 47 Pac. 21, the plaintiff was unable to prove his residence for the statutory period of time, and the court held that he had failed to prove a fact necessary to entitle him to any relief. The Supreme Court of Texas, in *Haymond v. Haymond*, 74 Tex. 414, 12 S. W. 90, said: "When the facts required to exist by our statutes are not established by the evidence, a decree of divorce should be refused." See, also, *Pearce v. Pearce*, 132 Ala. 221, 31 South. 85, 90 Am. St. Rep. 901;

Johnson v. Johnson, 95 Mo. App. 329, 68 S. W. 971; Hopkins v. Hopkins, 35 N. H. 474; 14 Cyc. 663.

The decree entered in this case by the district court of Yellowstone county is reversed, and the cause remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.

McCAULEY v. DARROW et al.

(Supreme Court of Montana. Oct. 21, 1907.)

1. TRIAL—INSTRUCTIONS—CONSTRUCTION OF CHARGE AS A WHOLE—BILLS AND NOTES.

In an action on a note, instructions that, if the preponderance of the evidence showed that the note had not been paid, plaintiff could recover, and that, if it appeared in the same way that payment had been made, the verdict should be for defendant, were not improper as placing the burden on plaintiff to show nonpayment, and for failing to instruct what the jury should do if the evidence were evenly balanced, where other instructions stated that the burden was on defendant, and that plaintiff's possession of the note was prima facie evidence of nonpayment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-717.]

2. BILLS AND NOTES—PAYMENT—EVIDENCE.

Where an action on a note was defended on the ground it was discharged, with other debts, by a conveyance to plaintiff, made in pursuance of an agreement for discharge in this manner, evidence as to the value of the property, offered to show the reasonableness of defendant's claim, could not be a basis for a partial recovery for plaintiff, if the jury found that the value of the property did not equal the full amount of the note, but only a part thereof.

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

Action on a note by Julia E. McCauley against M. B. Darrow and another. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Affirmed.

Blackford & Blackford, for appellant. O. W. Belden and H. L. De Kalb, for respondents.

BRANTLY, C. J. This action was brought to recover the amount due upon a promissory note for the sum of \$2,000, made and delivered by the defendants to the Bank of Fergus County on September 11, 1903, due four months after that date, with interest at the rate of 10 per cent. per annum, with reasonable attorney's fees, and assigned to plaintiff. Inter alia, the complaint alleges that no part of the principal sum or interest due upon the note has been paid, except the sum of \$266.63, which discharged the interest due up to January 11, 1905. Judgment is demanded for the principal sum and for interest due thereon from the last-mentioned date, and for \$200 as reasonable attorney's fees. The defendants, answering, admit the execution and delivery of the note to the bank and its assignment to plaintiff, deny all the other al-

legations of the complaint, and then allege that on or about the 3d day of March, 1905, the note was fully paid, satisfied, and discharged. Upon this allegation there was issue by reply. At the trial counsel for plaintiff, after having it identified, introduced in evidence the note, with the indorsements thereon, showing payments of interest to the amount of \$266.63, and, upon stipulation with counsel for defendants that the question of attorney's fees should be determined by the court, rested. Thereupon the defendants introduced evidence tending to show that prior to March 3, 1905, the defendant M. B. Darrow and the plaintiff and her husband, N. M. McCauley, had had several business transactions with each other, during the course of which defendant Melinda E. Darrow and McCauley became owners as tenants in common of residence property in Lewistown, Fergus county, for which they had paid \$6,500. In this transaction of purchase Melinda E. Darrow had become indebted to McCauley for borrowed money to pay in part for her interest in the property to the amount of \$1,250, represented by a promissory note bearing 10 per cent. interest. Darrow himself was indebted to McCauley to the amount of \$2,740 for borrowed money. This was also represented by a promissory note bearing 10 per cent. interest. Darrow and his wife were further indebted to the plaintiff in the sum of \$2,000, represented by the note in suit. Interest was due on these various obligations amounting to several hundred dollars. Darrow and his wife had been occupying the property in Lewistown, but had paid no rent to McCauley. In the meantime they had expended about \$1,000 in the way of repairs and improvements. On March 3, 1905, the defendant M. B. Darrow and the McCauleys had a settlement of their affairs, the result of which, it is admitted by all parties, was a conveyance by the Darrows to McCauley of the Lewistown property, in consideration of the cancellation by the McCauleys of all the mutual indebtedness between the parties, with a release of the securities held for the \$1,250 and the \$2,740 notes, except the note in suit. The controversy in the evidence at the trial was whether this note was also included in the settlement, and thus discharged; the defendants claiming that it was, but that it had not been surrendered by plaintiff because it had been left by her at the Bank of Fergus County for safe-keeping. According to their contention, she was to cancel and surrender it as soon as she could get it from the bank. The defendants had verdict and judgment. The plaintiff has appealed from the judgment and an order denying her a new trial.

The only question submitted is whether the court erred in its charge to the jury. Paragraphs 3 and 4 are the following: "(3) The issue for the jury in this case to decide is whether or not the said promissory note was paid. If you believe from a preponderance

of all the evidence that the note has not been paid, it will be your duty to find a verdict for the plaintiff in the sum of \$2,000, with interest thereon from the 11th day of January, 1905. If, on the other hand, you believe from a preponderance of the evidence that the said note has been paid by the defendants to the plaintiff, it will then be your duty to find for the defendants. (4) The gist of this action is the question whether or not, on or about the 8d day of March, 1905, the plaintiff entered into an agreement with the defendant M. B. Darrow that the promissory note for \$2,000, on which this action is based, should be included in the agreement made between N. M. McCauley and the defendants on that date, and should be satisfied by the conveyance to the said N. M. McCauley of an undivided one-half interest in the residence situated at the corner of Main street and Eighth avenue, in Lewistown, Mont. If you believe from a preponderance of all the evidence that this note was included in the said agreement, and was to be satisfied by the said conveyance, then it is your duty to find for the defendants in this action. If on the other hand, you believe from a preponderance of the evidence that the said note was not included in the said agreement, and was not satisfied by the said conveyance, then it is your duty to find for the plaintiff."

It is argued that, while it was necessary for the plaintiff to make the allegation of nonpayment in order to show a breach of the contract, it was not incumbent upon her to prove this negative averment, but that the burden of pleading and proving payment rested upon the defendants. The complaint is that these instructions are erroneous, in that they cast the burden of proving nonpayment upon the plaintiff. Counsel support their contention by reference to several cases which discuss the question whether it is incumbent upon the plaintiff to allege in his pleading the fact of nonpayment and sustain it by proof at the trial, or whether the defendant must plead payment as a special defense and sustain the burden of proving it. We shall not venture upon an examination of this question. Under the view we take of the case, it is not necessary, for, assuming that plaintiff's contention is sustained by the weight of authority, we think the court clearly and distinctly cast the burden of proof upon the defendants. Whether they sustained it is a question not before us, for the reason that no complaint is made that the evidence was not sufficient to justify the verdict.

The instructions quoted state correct abstract propositions of law, for, if it appeared by a preponderance of the evidence that payment had not been made, the plaintiff was entitled to recover. On the contrary, if it appeared in the same way that payment had been made, the defendants were entitled to a verdict. If the charge had stated nothing further, the jury might possibly have in-

ferred that the averment of nonpayment in the complaint must have been established by a preponderance of the evidence, and that in case of an equipoise on this issue the defendants should recover. But in instructions 7 and 8 the court distinctly told the jury that the only issue in the case was whether the note had been included in the settlement of March 8, 1905, and thus discharged, and that the burden was upon the defendants to establish this fact by a preponderance of the evidence; otherwise they should find a verdict for the plaintiff. And in the ninth instruction the jury were further told that plaintiff's possession of the promissory note sued on was to be considered by them as prima facie evidence that it had not been paid. In view of this condition of the instructions, and in view of the further fact that the verdict was for the defendants, we do not think that the jury was misled by instructions 3 and 4, either because of the form of the statement therein, or because the court omitted to state what the jury should do in case they found the evidence to be evenly balanced on the issue of payment.

During the course of the trial, the defendants introduced evidence tending to show the value of the property in Lewistown; the purpose being to furnish foundation for an inference that the claim of the defendants that the settlement by which this property was conveyed to McCauley, in consideration of the cancellation of all the claims held by McCauley and the plaintiff against the defendants, was a reasonable one, under all the circumstances. Upon the effect that they should give to this evidence, the court instructed the jury as follows: "This testimony has been admitted, and should be considered by you, only so far as it relates to the reasonableness or unreasonableness of the agreement alleged by the defendants to have been entered into by and between them and the plaintiff on or about the 3d day of March, 1905." Instruction No. 6. It is argued that this instruction is erroneous in thus limiting the effect of this evidence. It is said that, if it appeared from this evidence and that offered in rebuttal on the same subject by the plaintiff, that the value of this property was not equal to the full amount of all the notes with interest, but was sufficient to pay them in part only, the court should have instructed the jury to find a verdict for such part of the amount of the note in suit as was not paid by the conveyance of the property. In this contention there is no merit. The contention of the defendants was that the note was fully paid off and discharged by the conveyance; it having been so agreed by the parties at the time. There was no middle ground, or any reason for consideration of the question whether there was any agreement that the conveyance should operate as a partial payment. There was no such issue made by the pleadings.

Finding no prejudicial error in the record,

we are of the opinion that the judgment and order should be affirmed. It is so ordered.

Affirmed.

HOLLOWAY and SMITH, JJ., concur.

JUDITH INLAND TRANSP. CO. v. WILLIAMS.

(Supreme Court of Montana. Oct. 21, 1907.)

1. ACTION—NATURE—ACCOUNTING.

An action was one at law for the recovery of money, and not a suit for accounting, where plaintiff sued to recover a balance collected by defendant as its agent and retained after plaintiff's demand for the "payment of all moneys belonging to" it, and to recover money defendant collected for, but failed to remit to, others, which plaintiff was compelled to pay, and where the answer did not allege that an accounting was necessary, and none was asked; full payment of plaintiff's claim being pleaded, and judgment in a fixed amount demanded by way of counterclaim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 124, 125.]

2. PRINCIPAL AND AGENT—RECOVERY OF MONEY FROM AGENT—PLEADING—DEMAND.

A complaint, in an action to recover from plaintiff's agent a balance collected by him and retained after plaintiff "demanded from the defendant the payment of all moneys belonging to this plaintiff," and to recover money collected for, but not paid to, others, which plaintiff was compelled to pay, and which defendant has not paid to plaintiff, "though frequently requested by plaintiff so to do," sufficiently alleges a demand for payment before suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 169.]

3. SAME—NECESSITY FOR DEMAND.

Where an agent claimed he had fully paid his principal all moneys collected for it by him, and that, instead of being indebted to it, it was indebted to him, no demand upon him was necessary before suit by the principal to recover the sums due it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 169.]

4. TRIAL—INSTRUCTIONS—EVIDENCE TO SUPPORT.

An instruction not supported by evidence is properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

Action by Judith Inland Transportation Company against C. H. Williams. From a judgment for plaintiff, and an order overruling a motion for a new trial, defendant appeals. **Affirmed.**

H. L. De Kalb, E. W. Mettler, and O. W. Belden, for appellant. J. C. Huntoon and E. G. Worden, for respondent.

SMITH, J. The nature of this action is put in issue in this court, although there seems to have been no such question raised by counsel in the court below. The defendant now claims that this is an equitable action for an accounting, while plaintiff con-

tends that it is an action at law, to recover a money judgment, fixed in amount, as set forth and demanded in the complaint. The first cause of action pleaded is to recover the sum of \$1,748.31, being a balance of moneys collected by the defendant, while acting as plaintiff's agent, which defendant has failed to pay over, after plaintiff had "demanded from the defendant the payment of all moneys belonging to this plaintiff." By its second cause of action plaintiff seeks to recover the sum of \$105, being the amount collected on several C. O. D. packages by defendant, which amount he failed to forward to certain express companies, as was his duty, and which amount of \$105 plaintiff was compelled to and did pay to the said express companies. Defendant by his answer avers that he has paid over to the plaintiff all moneys collected by him, except the sum of \$96.38, which is still in his hands; and by way of counterclaim alleges that plaintiff is indebted to him in the sum of \$922.81, balance due him as commissions on the business transacted by him for plaintiff, and demands judgment for that sum. The allegations of this counterclaim are all put in issue by the reply. Plaintiff had a verdict for \$1,853.31, with interest, and from a judgment entered thereon, and an order overruling his motion for a new trial, defendant appeals.

We have carefully examined these pleadings. The cause was tried to the court sitting with a jury, to which all the issues were submitted. Defendant's counsel proposed certain instructions to the court to be given to the jury, and took exception to the action of the court in refusing them. There is no allegation in the answer that an accounting was necessary in order to arrive at the amount due the plaintiff, nor to ascertain how the accounts between the parties stood, and no accounting was asked for in the answer. Full payment of plaintiff's claim was pleaded, and judgment in a fixed amount demanded by way of counterclaim. We are clearly of opinion that this is an action at law to recover a money judgment, ascertained and certain in amount, clearly set forth in the complaint, and that the same was so regarded at the trial by counsel for the defendant, notwithstanding a remark of the learned trial judge, as shown in the record, that this is a suit for an accounting.

At the close of plaintiff's case, the defendant interposed a motion for a nonsuit, as follows: "If the court please, at this time the defendant moves for a nonsuit on the ground that the plaintiff fails to allege in his complaint any sufficient demand having been made, and he fails wholly to allege that a refusal to pay has been entered up by Mr. Williams, and for the further reason that the evidence in the case fails to cure this in this particular. There has been no definite amount mentioned by Mr. Mears demanded of Mr. Williams. Now, we take it that in a

case of this kind those things are essential—are essential and necessary.” By the phraseology of this motion the defendant’s counsel shows that he regarded this as an action at law. In his brief the defendant argues that this motion should have been granted, because “there was no allegation of demand for a general accounting, and because no proof was introduced of any demand for a general accounting, or, indeed, proof of any sufficient demand to support a cause of action for a money judgment, by a principal against an agent.” It will be readily seen from the wording of the motion that it contains no reference to a general accounting. And, in so far as it relates to a demand for money, it is only necessary to say that the motion for a nonsuit refers generally to both causes of action, and in its second cause of action plaintiff alleges “that the defendant has not paid said sum of \$105, or any part thereof, to this plaintiff, although frequently requested by plaintiff so to do.” We think the complaint sufficiently alleges a demand in each cause of action. An examination of the testimony offered by the plaintiff discloses that there was some evidence of a demand under each cause of action, before suit brought. This disposes of the motion for a nonsuit.

But was a demand necessary? This brings us to a consideration of the instructions refused by the court. They are as follows: Instruction No. 4, requested by the defendant: “The jury are instructed that it is a material allegation of the complaint that the plaintiff demanded the amount sued for of the defendant before the institution of this action, and, unless you find by a preponderance of all the evidence that the plaintiff did make a demand of the defendant and apprise him of the amount due at the time of making such demand, then it will be your duty to find for the defendant.” Instruction No. 3, refused by the court: “You are further instructed, if you find from all the evidence that the plaintiff made such demand, then you are instructed that it was incumbent upon him to specify substantially the correct amount due at the time of making such demand, and that a demand from him of a materially greater amount than he claims to be due in its complaint in this action would vitiate such demand.” The testimony shows that the plaintiff company was engaged in the express and passenger business between Lewistown and Harlowtown, and that defendant was its agent at Lewistown. John L. Mears was the general manager of the plaintiff, and one Frank McKechnie was an employé of the defendant, Williams, and seems to have had general charge, as such employé, of the transportation company’s business, with the knowledge and consent of Mears. McKechnie kept the books of the agency. There is testimony tending to show that, when Williams’ agency terminated, he failed to pay over to plaintiff the balance re-

maining in his hands of moneys collected by him. Williams’ agency terminated about the middle of April, 1902, and this action was begun on March 25, 1903. It clearly appears from the testimony of the defendant himself that he has always claimed that he had fully paid plaintiff all moneys collected for it by him, and that, instead of being indebted to plaintiff, the plaintiff was indebted to him. He pleaded this in his answer, and attempted to prove the same at the trial. Under these circumstances, no formal demand upon him was necessary.

In the case of Walradt v. Maynard, 3 Barb. (N. Y.) 584, the court said: “The legitimate object of a demand is to enable the party to discharge the liability agreeably to the nature of it, without a suit at law. If he denies the liability, or the right of the other to call upon him, a demand must be as unnecessary as it would be useless.” In the case of Wiley v. Logan, 95 N. C. 564, the court said: “A demand previous to bringing an action for money collected by an agent is to enable the latter to pay it over without incurring the cost of suit, for the principal must seek him, and not he the principal. But a demand is not required where the agency is denied, or a claim set up exceeding the amount collected, or the agent’s responsibility is disputed in the answer.” See, also, Ayer v. Ayer, 16 Pick (Mass.) 327, and Mechem on Agency, § 531. Our own court has passed upon the principle herein involved. In the case of Christiansen v. Aldrich et al., 30 Mont. 446, 76 Pac. 1007, the court uses this language, in a case involving the specific performance of a contract: “It is said that the complaint is defective for failing to show a tender of the balance of the purchase money before the action was brought. It is undoubtedly the general rule that, if a part of the purchase price is still due and payable, the plaintiff seeking to have the conveyance compelled must allege and prove a tender of it, and bring it into court. But the rule is not invariable. An exception to it is where it is apparent from the pleading that a tender would be useless. ‘Where the vendor claims to have rescinded, repudiates, and denies the obligation of the contract, placing himself in such a position that it appears that, if the tender were made, its acceptance would be refused, then no tender need be made by the vendee.’” The appellant has directed our attention to the case of Anderson v. Hulme, 5 Mont. 295, 5 Pac. 865, in which it was held, in effect, that, in an action for money had and received by an agent or attorney for the use of the plaintiff, it is necessary to allege a demand and refusal to pay before recovery can be had, and such demand will not be presumed. The question in that case did not arise upon the evidence, which was not in the record; but the defendant contended that the complaint did not state a cause of action because of the absence of an allegation of demand before suit brought.

It appears from the report of that case that the question as to the necessity of pleading a demand, in view of the allegations of the answer, was not called to the attention of the court. In the case at bar, however, the question before the trial court was, not whether the complaint stated a cause of action, but whether, in view of the issues made by the pleadings and the testimony as presented to the jury, any demand was necessary. We are of opinion that the trial court was clearly correct in refusing to give to the jury any instructions on the question of demand.

The only other point urged by appellant is that the court erred in refusing the following instruction, requested by him: "You are instructed that if you find, from all the evidence in the case, that Mr. McKechnie was employed by the defendant, Williams, as subagent, with the express or implied assent thereto of the Judith Inland Transportation Company, through its managing agent, J. L. Mears, then if you further find from all the evidence in the case that the accounts and collections testified to were handled and attended to in a negligent manner, or the affairs of the business were by him improperly conducted, and the amount sued for was lost to the plaintiff occasioned by such negligence or misconduct of McKechnie as such subagent, after such assent being expressly or impliedly given, then you are instructed that the defendant is not liable to the plaintiff for such acts of McKechnie as his subagent. The assent of such appointment may be given either expressly, by word of mouth, or by implication. Assent may be implied by conduct of the plaintiff, the usage of trade, or the nature of the business to be conducted." The court, in lieu thereof, instructed the jury as follows: "You are instructed that the agent is responsible for the acts of his subagent connected with the carrying out of the agency, and the court instructs you further that, if you believe from the evidence that the moneys belonging to the plaintiff were collected by the defendant or his subagent, McKechnie, and were not turned over to the plaintiff, the Judith Inland Transportation Company, through the fault or negligence of the subagent, McKechnie, that fact, if you find it to be true, does not in any way relieve the defendant from his liability to pay such money so collected to the plaintiff, and you will, accordingly, find for the plaintiff for any such money so collected and not turned over or paid out for the plaintiff within the scope of the defendant's agency." It is sufficient answer to this contention to say that there is no evidence in the record to show that any one has suffered any loss by reason of the fact that the accounts and collections were handled or attended to in a negligent manner, or that the amount sued for was lost to plaintiff by reason of negligence or mismanagement on the part of McKechnie, or anybody else. The evidence, as

we read it, shows that an examination of the accounts disclosed that defendant had failed to turn over to plaintiff all moneys received by him, and that he himself was so ignorant of the real state of the accounts that he was unable to know whether he was indebted to plaintiff or not.

The judgment of the court below is affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

WALTER v. COX.

(Supreme Court of Montana. Oct. 21, 1907.)

JUSTICES OF THE PEACE—CIVIL JURISDICTION —COUNTERCLAIMS.

Code Civ. Proc. § 601, providing that a counterclaim must tend to diminish plaintiff's recovery and be a cause of action arising out of the contract or transaction set forth in the complaint, or be connected with the subject of the action, or in an action on contract any other cause of action on contract existing at the commencement of the action, has no application in determining whether a cause of action may properly be pleaded as a counterclaim in an action in a justice's court; but section 1524, providing that an answer, in an action in a justice's court, may contain a general denial, and also a statement of any other facts constituting a defense or counterclaim, on which an action might be brought by defendant against plaintiff in a justice's court, and section 1525, providing that if defendant, in an action in a justice's court, omit to set up a counterclaim, he cannot afterward maintain an action against plaintiff thereon, are exclusive, and plaintiff, having failed in an action in a justice's court against him by defendant, to set up as a counterclaim a cause of action of which a justice's court had jurisdiction, he could not thereafter maintain an action thereon against defendant.

Appeal from District Court, Flathead County; J. E. Erickson, Judge.

Action by James S. Walter, Jr., against L. A. Fox, in justice's court, and brought to the district court by appeal. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Affirmed.

McIntire & Kendall, for appellant. C. H. Foot, for respondent.

BRANTLY, C. J. This action originated in a justice of the peace court, and was brought into the district court by appeal. It was brought to recover damages alleged to have resulted to the plaintiff from the burning of certain grain and straw of the plaintiff, through the negligence of defendant while threshing for plaintiff. It is alleged that the negligence of defendant caused a loss to the plaintiff of 160 bushels of grain, of the value of \$107.20, and of straw of the value of \$15. Judgment is demanded for \$122.20. The answer, among other defenses, contains the following: "(1) That at the time of the commencement of said action another action was pending in said court, wherein this defendant was plaintiff and said plaintiff was defendant, wherein the defend-

ant herein sought to recover of said plaintiff as defendant a judgment for the sum of \$100.28. (2) That thereafter and on the 2d day of January, 1906, a judgment was duly given and made in said action, wherein this defendant was plaintiff and said plaintiff was defendant, against said plaintiff and in favor of this defendant. (3) That at the time of the commencement of the above-entitled action the pretended cause of action set forth in plaintiff's complaint herein existed against this defendant, if it existed at all, and if the plaintiff had a cause of action against this defendant it was a counterclaim against the cause of action set forth by this defendant in his complaint against said plaintiff, and as such should have been set up as a counterclaim in said action. (4) That plaintiff wholly failed, neglected, and refused to set up such counterclaim in said action of this defendant against said plaintiff, and that therefore under sections 1524 and 1525 of the Code of Civil Procedure of the state of Montana said plaintiff cannot maintain an action against this defendant for the amount, or any part thereof, or upon the cause of action, or any part thereof, set forth in plaintiff's complaint herein." During the hearing of plaintiff's evidence, the facts set forth in this special defense were admitted by the plaintiff and his counsel. When the plaintiff rested, the defendant interposed a motion for nonsuit on two grounds: First, that the evidence submitted did not sustain the allegations of plaintiff's complaint; and, second, that it appeared therefrom that the action was barred by reason of the fact that the plaintiff, having a cause of action against the defendant of which the justice's court had jurisdiction at the time the defendant had brought his action, as set forth in the answer, had failed to set it up as counterclaim. The court sustained the motion and directed judgment for the defendant. The plaintiff has appealed from the judgment and an order denying his motion for a new trial.

We are of the opinion that the motion was properly granted on the second ground. It is admitted by plaintiff's counsel that, if the cause of action stated in the complaint was such that it might have been set up as a counterclaim in the former action between the parties, it should have been so alleged and settled in that action. He insists, however, that this course could not have been pursued, because it is apparent that the cause of action as stated could not properly have been pleaded as a counterclaim, under the rule declared by section 691 of the Code of Civil Procedure. The provisions of this section have no application. The rules governing actions in justices' courts in this particular are found in sections 1524 and 1525 of this Code, and are exclusive. They are clear and explicit, and demonstrate that it was the policy and purpose of the Legislature in enacting them that all petty claims

existing between the parties and falling within the limited jurisdiction of justices' courts, as declared in section 66 of the same Code, should be adjusted in one action. Section 1524 declares what defenses may be made. These are: (1) A general denial of plaintiff's cause of action, and (2) "a statement, in plain and direct manner, of any other facts containing a defense or counterclaim, upon which an action might be brought by the defendant against the plaintiff in a justice's court." It will be noted that the only limitation upon the defense of counterclaim is that it must be one upon which an action might be brought in a justice's court. It makes no difference whether it meets the requirements of section 691, *supra*, or not. If the defendant fails to set it up and have it adjudicated, neither he nor his assignee can thereafter maintain an action thereon. Section 1525. That this is the purpose and effect of these provisions is clear from the fact that it is no ground of objection to the answer that counterclaims have been improperly joined therein. Section 1526.

Since this point is conclusive of the case, it is not necessary to consider other matters argued in the briefs of counsel.

Let the judgment and order be affirmed.
Affirmed.

HOLLOWAY and SMITH, JJ., concur.

MACKEL v. BARTLETT.

(Supreme Court of Montana. Oct. 21, 1907.)

1. BANKRUPTCY—ACTIONS BY TRUSTEE—EVIDENCE—SUFFICIENCY.

Evidence held to show that a surety on a note of a bankrupt, in making payment of the note with funds furnished by bankrupt, was without reasonable cause to believe that by such payment the bankrupt intended to give him a preference over other creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 255, 256.]

2. SAME—FRAUDULENT TRANSFERS.

Mere grounds of suspicion on the part of the creditor that the debtor is in failing circumstances or is insolvent is insufficient to avoid a payment to such creditor, though it gave him a preference over other creditors; but the creditor must have known, or had reasonable ground to believe, that the debtor was insolvent and that he intended to prefer him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 255-256.]

3. SAME—INSOLVENCY—WHAT CONSTITUTES—PREVIOUS DECISIONS.

Though insolvency, as used in Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], has a meaning different from what the same term had in the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), yet decisions by the courts on questions arising under the act of 1867 are applicable, in so far as they announce a rule of law for determining whether a creditor receiving a preference had reasonable cause to believe that his debtor was insolvent.

Appeal from District Court, Silver Bow County: Geo. M. Bourquin, Judge.

Action by Alexander Mackel, as trustee

in bankruptcy of the estate of Frederick A. Bartlett, against Henry R. Bartlett, to recover as to an alleged preference made to defendant by bankrupt. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

John A. Shelton, for appellant. John J. McHatton, for respondent.

HOLLOWAY, J. On February 4, 1899, and for some time prior thereto, Frederick A. Bartlett was engaged in the mercantile business in Butte. On February 4th he sold his entire stock of goods to Ras Rochester. At that time he was indebted to the First National Bank of Butte in the sum of \$1,500, which indebtedness was evidenced by a promissory note upon which his brother, Henry R. Bartlett, this defendant and respondent, was surety. Immediately after the sale Frederick A. Bartlett gave Henry R. Bartlett a check, signed by Rochester, for something over \$1,530, with directions to pay the indebtedness to the bank, and such payment was made on February 6th, and the balance received from the check, over and above the amount of the indebtedness to the bank, was deposited in the name of Frederick A. Bartlett or his wife. For the purposes of this appeal it may be said that this payment to the bank was made at the instance and request of Henry R. Bartlett, though there seems to be some controversy as to this fact. On February 8th Frederick A. Bartlett filed a petition asking that he be adjudged a bankrupt, and upon such adjudication the plaintiff herein was selected as trustee, qualified as such, demanded of Henry R. Bartlett that he turn over to the plaintiff an amount equal to the amount paid to the bank, and, upon his refusal to do so, this action was commenced. The complaint alleges that the payment made to the bank was made with the intent to prefer Henry R. Bartlett over the other creditors of Frederick A. Bartlett, and that the defendant had reasonable cause to believe that such preference was intended. These allegations were denied in the answer. Upon the first trial the district court excluded certain evidence offered by the plaintiff, and then granted defendant's motion for a nonsuit, and entered judgment in his favor. Upon appeal this court held that the ruling of the trial court in excluding the offered evidence was erroneous, and remanded the cause for a new trial. *Mackel v. Bartlett*, 33 Mont. 123, 82 Pac. 795. Upon retrial the district court found that on February 6th Frederick A. Bartlett was insolvent, but that Henry R. Bartlett was "without reasonable cause to believe * * * that by payment of said note as aforesaid Frederick A. Bartlett intended to give to him, Henry R. Bartlett, a preference over other creditors of said Frederick A. Bartlett." As a conclusion of law the court held that plaintiff was not entitled to recover, and entered judg-

ment in favor of the defendant, from which judgment, and an order denying his motion for a new trial, the plaintiff appeals.

Appellant's specifications of error raise only the question of the sufficiency of the evidence to justify the finding and the conclusion of the court. There is some conflict in the evidence; but appellant insists that the testimony discloses facts and circumstances sufficient to have put Henry R. Bartlett upon inquiry, which, if pursued, would have led him to but one conclusion, viz., that it was intended to give him a preference over the other creditors of Frederick A. Bartlett. And it is true that some facts are disclosed by the testimony which, if standing alone, would seem to justify appellant's contention; but, when the testimony is considered as a whole, the conclusion of the district court seems to be fully sustained. The liabilities of Frederick A. Bartlett listed in his petition in bankruptcy, exclusive of the Joseph A. Hyde claim, which the bankrupt testified he did not owe, amounted to \$4,734.48, and, including his indebtedness to the bank, his liabilities did not exceed \$6,264.48, while the bill of sale from Frederick A. Bartlett to Rochester, offered in evidence by the plaintiff upon this trial, recites that the consideration for the sale was \$6,344.25; and, in another action by this plaintiff against Rochester, plaintiff himself alleged that the stock of goods sold by Frederick A. Bartlett to Rochester exceeded in value the sum of \$8,563. In view of what appears to have been a studied effort on the part of counsel for plaintiff to avoid asking Frederick A. Bartlett, while on the witness stand as a witness for plaintiff, what amount in fact he actually received from the sale of his stock of goods to Rochester, and the testimony of the defendant that he considered the stock of goods of a value greater than the amount of his brother's liabilities, that he advised his brother to sell, pay his debts, and start in business anew, that he did not know that his brother was in failing circumstances, that he believed he had money sufficient from the sale to pay his debts, and knew nothing of his contemplating bankruptcy proceedings until after the petition was filed, the finding and conclusion of the court attacked upon this appeal seem fully warranted.

Mere grounds of suspicion on the part of the creditor that the debtor is in failing circumstances, or is insolvent, is not sufficient to avoid a payment to such creditor, even though it has the effect of giving him a preference over other creditors. In order to succeed in his action, it was incumbent upon the plaintiff to prove that the defendant had reasonable cause to believe that his brother intended to give him a preference over other creditors, and this necessarily involves proof upon the part of plaintiff that defendant knew, or had reasonable cause to believe, that Frederick A. Bartlett was in fact insolvent when

the indebtedness to the bank was paid. *Bank v. Jewelry Co.*, 123 Iowa, 432, 99 N. W. 121; *Barbour v. Priest*, 103 U. S. 293, 28 L. Ed. 473. While "insolvency," as used in *Bankr. Act* July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], has a meaning different from what the same term had in the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), still decisions by the courts upon questions arising under the act of 1867 are applicable, in so far as they announce a rule of law for determining whether a creditor receiving a preference had reasonable cause to believe that his debtor was insolvent. A leading case upon this subject is *Grant v. Bank*, 97 U. S. 80, 24 L. Ed. 971, wherein, among other things, it is said: "It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further, he may feel anxious about his claim and have a strong desire to secure it, and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by law." *Stucky v. Bank*, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640. See, also, *In re Eggert*, 102 Fed. 735, 43 C. C. A. 1, where the cases are reviewed at length.

Finding no error in the record, the judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and SMITH, J., concur.

(77 Kan. 850)

STATE v. BAILEY.

(Supreme Court of Kansas. Oct. 5, 1907.)

CRIMINAL LAW—CONTINUANCE—ABSENT TESTIMONY—DILIGENCE.

Due diligence required accused to prepare in advance of the trial, to rebut the evidence which a witness, whose name presumably was indorsed upon the information, might give of a transaction which accused knew occurred in the presence of such witness and another person; and, in the absence of diligence to procure the attendance of the other person as a witness, accused was not entitled to a continuance for his absence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1335-1341.]

Appeal from District Court, Allen County; Oscar Foust, Judge.

William Bailey was convicted of violating the prohibitory liquor law, and he appeals. Affirmed.

Ewing, Gard & Gard, for appellant. F. S. Jackson, Atty. Gen., and C. L. Evans, for the State.

PER CURIAM. The appellant was convicted in the district court of Allen county of a violation of the prohibitory liquor law. The appeal is based entirely on an alleged error of the court in overruling the appellant's motion for a continuance. The affidavit filed in support of the motion fails to show diligence in an effort to obtain the desired evidence. The evidence was desired to dispute a witness for the state, whose name, it is to be presumed, was indorsed upon the information. Due diligence required the appellant to prepare, in advance of the trial, to rebut the evidence which such witness might give of a transaction which the appellant knew, as shown by the affidavit, occurred in the presence of the absent witness and the witness who testified for the state.

The judgment is affirmed.

(76 Kan. 424)

STATE v. FORD.

(Supreme Court of Kansas. Oct. 5, 1907.)

INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE.

In a prosecution upon a charge of keeping a place where intoxicating liquors were sold in violation of law, where evidence has already been introduced tending to show that the defendant was in control of the premises in question, it is not error to permit the state to show that a number of bills for liquor and other goods found there at the time of the arrest, apparently relating to the business there carried on, were made out in his name, as a circumstance tending to show that he was the proprietor.

(Syllabus by the Court.)

Appeal from District Court, Allen County; Oscar Foust, Judge.

Lyman Ford was convicted of an illegal sale of liquor, and appeals. Affirmed.

Ewing, Gard & Gard, for appellant. F. S. Jackson, Atty. Gen., and C. L. Evans, for the State.

MASON, J. Lyman Ford was arrested upon the charge of being the keeper of a place where intoxicating liquors were sold in violation of law. It was shown at the trial, in addition to other evidence tending to connect him with the management of the place, that at the time of his arrest there were found in a cash register in use there several bills or statements purporting to show the sale to him of liquors, ice, and other goods. No effort was made by the state to prove by whom these documents were made, or any fact in regard to them, except as has already been stated, and the defendant, upon an appeal from a conviction, contends that they were not competent as evidence against him, and that their admission was erroneous.

The fact that bills found in Ford's presence upon the premises, and apparently relating to the business there carried on,

were made out in his name, certainly had some tendency to establish, not perhaps that any specific items therein named had actually been sold to him, but that he was the proprietor of the place. Such evidence is admissible upon much the same principle by which, upon an issue of ownership, it is permissible to show that the accused assumed to be in control of the place in question (*State v. Skinner*, 34 Kan. 256, 8 Pac. 420), or that his name appeared upon the sign (*Commonwealth v. Intoxicating Liquors*, 122 Mass. 36), or that his initials were marked upon casks containing liquor which were delivered there (*Com. v. Jennings*, 107 Mass. 488). In the case last cited, it was said: "Couch further testified, without objection, that he made a seizure at the tenement in October, 1870, when the defendant was not present; and that some kegs stood near the door, with bright and fresh express tags attached to them. The district attorney asked how the kegs came there, and the witness said he did not know, except what the tags said. The district attorney asked what was on the tags, and the defendant objected. The judge overruled the objection, and admitted the evidence to show that the tenement was kept and used by the defendant at the time alleged in the indictment; and the witness answered that the tags were marked 'J. J.' and also with the name of the express from Ware. No further evidence was given as to these tags, and all the testimony in relation to them was excepted to by the defendant. * * * The testimony as to the tags was admissible. It constituted a part of the description of the kegs found at the tenement in question, and in connection with the evidence of the defendant's continued presence there, and acts of control, had some tendency to show that he was still keeping the tenement. It was for the jury to say whether the kegs were thus marked with his knowledge." More closely in point upon the facts is the case of *Commonwealth v. Jacobs*, 152 Mass. 276, 25 N. E. 463. The scope of the decision is indicated by the last paragraph of the syllabus, which reads: "Upon an indictment for maintaining a place used by a club for illegally selling, distributing, and dispensing intoxicating liquors, books, and papers relating to the business of the club, and found lying about the premises, of which the defendant had charge, as well as of such business, are admissible in evidence against him." The character of the documents there referred to, and the theory upon which they were admitted in evidence, are shown by these extracts from the statement and opinion: "A paper found in an unlocked locker, on one of the occasions above referred to, which was a printed form of receipt for 'initiation fee' and 'monthly dues' to the Warren Club, and a book also found on the top of a locker, in plain sight, projecting over and beyond the top, containing memoranda of

purchases of ice, sugar, and lemons, and of express charges on liquors paid by the Warren Club, averaging over \$10 per day, were admitted in evidence, against the defendant's objection, and the defendant excepted." "The paper and the book, to the admission of which in evidence exception was taken, were on the premises of which the defendant had the care, and where he might have seen them. They pertained to the business of which he had charge, and were rightly admitted." A recent case to the same effect is *Reynolds v. State* (Fla.) 42 South. 373; the first paragraph of the syllabus reading: "Under the rule that indirect, collateral, or circumstantial evidence is admissible when it tends to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth, it is proper, in a prosecution for illegally selling liquor, to admit in evidence jugs which smelled as if they had had whiskey in them, found at defendant's place of business when he was arrested under the charge. Upon the same principle, papers acknowledging the receipt of orders for whiskey, and a letter, offering commissions on sales of liquor, found at his place of business a few days after his arrest, are admissible in evidence; their probative force and effect to be determined by the jury in connection with other evidence."

The judgment is affirmed. All the Justices concurring.

(76 Kan. 416)

STATE v. CORN.

(Supreme Court of Kansas. Oct. 5, 1907.)

1. INTOXICATING LIQUORS—PUBLIC NUISANCE—EVIDENCE.

Bills and accounts, found in a place alleged to be a public nuisance, are admissible in evidence against a defendant charged with being the keeper of such nuisance, without any further evidence connecting him therewith, for the purpose of showing the kind of business conducted at such place.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 284.]

2. SAME—EVIDENCE.

Evidence in this case examined, and found to be sufficient to sustain a conviction of the defendant for being the keeper of such a nuisance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 300-322.]

(Syllabus by the Court.)

Appeal from District Court, Allen County; Oscar Foust, Judge.

Jim Corn was convicted of maintaining a public nuisance, and appeals. Affirmed.

Ewing, Gard & Gard, for appellant. F. S. Jackson, Atty. Gen., and C. L. Evans, for the State.

GRAVES, J. On July 20, 1906, an information was filed in the district court of Allen county, charging the appellant, Jim Corn, with keeping, maintaining, and assisting in

maintaining a public nuisance, in violation of the prohibitory law. He was subsequently tried, convicted, and sentenced for such offense. From that judgment, he has appealed to this court, and asks that it be reversed on the grounds that the district court erred in admitting improper testimony, and that the evidence was insufficient to establish the guilt of the appellant.

The only witnesses for the state were the sheriff, Assistant Attorney General for that county, and a dealer in ice. The defendant rested upon the testimony of the state. In substance it was shown that: The place alleged to be a nuisance was a two-story brick business building in the city of Iola. It was 25 feet wide at the sidewalk, and extended back 100 feet. The first floor was divided into three rooms by thin board partitions. The front room contained a counter, shelving, and other fixtures usually found in a small restaurant and cigar store. In the other rooms were ice chests containing bottled beer packed in crushed ice, meat, milk, vegetables, and other eatables, a gas cooking stove, tables, chairs, about 13 full cases of beer, and furniture and fixtures. July 14, 1906, the Assistant Attorney General for Allen county, with the sheriff, went to this building for the purpose of arresting the keeper thereof, and to seize whatever liquors and other property might be there. The warrant under which they acted was issued against John Doe. At that time the building was locked, but, hearing considerable noise inside, apparently occasioned by the moving of furniture, they entered the building through a window. Inside they found the defendant, Jim Corn, with a colored man, and a boy 15 or 16 years old. The colored man was carrying cases of beer into the cellar. Jim Corn did nothing while the officers were there, and denied being the owner of the property taken; but, in view of the whole situation, the sheriff regarded him as the keeper of the place. When removing the ice chests, the defendant requested that one of them be left "to keep his meats, cooking materials, and such stuff in there"; that otherwise he would have no way to keep them. On one of the shelves behind the counter in the front room some bills and a book of accounts were found and taken, whereupon the defendant said: "You are not going to take all the papers, too, are you?" The bills were made in the name of "Titus & Corn, Dr.," and indicated the purchase by them of liquors by the case, in pint and quart bottles, from "Pabst & Budweiser," "Schlitz," and "Blatz" to the amount of \$49.07 during the months of June and July, 1906, and to the amount of \$73.36 in June and July, the year not being stated. The admission of these bills and accounts in evidence is assigned as error. Nothing was shown to connect the defendant therewith except as above stated. We think this evidence was admissible, at least for the purpose of showing the kind and character of the business conducted at that place. Bottles,

kegs, liquors, or anything found in the building which tends to give character thereto is admissible in evidence for the purpose of showing whether the place is a public nuisance or not. We find no error, therefore, in the ruling of the court permitting this evidence to go to the jury.

We also think the testimony sufficient to justify the verdict. The defendant was locked in the building, and was apparently in charge and possession of the property and business. That this place was a common joint, run behind the ordinary mask of a pretended lunch counter and cigar stand, can hardly be doubted. Defendant kept his provisions and cooking materials in an ice chest where more than a full case of bottled beer was packed in crushed ice. Evidently he was either the proprietor or a person who was actively aiding and assisting another in maintaining a nuisance. In either case, he was guilty of the offense charged. No other reasonable conclusion can be drawn from the facts and circumstances shown. He was properly convicted.

The judgment is affirmed. All the Justices concurring.

(76 Kan. 419)

STATE v. MCKINNEY.

(Supreme Court of Kansas. Oct. 5, 1907.)

1. CRIMINAL LAW—FORMER ACQUITTAL.

Where the court sustains defendant's objection to proceeding further with a criminal trial in which testimony had been taken because of the failure of the court to admonish the jury before a separation and discharges the jury, such discharge will be deemed to be made with the defendant's consent and will not operate as an acquittal nor bar a further prosecution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 335.]

2. LARCENY—POSSESSION OF STOLEN PROPERTY.

The possession of property recently stolen does not warrant the inference that the person in whose possession such property is found is guilty of larceny. It is the unexplained possession which constitutes prima facie evidence of the offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 170-178.]

3. SAME—EVIDENCE.

The evidence examined, and *held* to be insufficient to sustain a conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 149-178.]

Johnston, C. J., and Mason and Burch, JJ., dissenting.

(Syllabus by the Court.)

Appeal from District Court, Finney County; Wm. Easton Hutchison, Judge.

G. H. McKinney was convicted of larceny, and appeals. Reversed.

Miller & Foster, for appellant. F. S. Jackson, Atty. Gen., and Albert Hoskinson, for the State.

JOHNSTON, C. J. This is an appeal from the conviction of G. H. McKinney for the

larceny of a mule. He was brought to trial before the court and jury on June 14, 1906, and when the testimony was concluded at 11:30 o'clock in the forenoon the court adjourned until 1:30 in the afternoon, but overlooked the duty of admonishing the jury as to their conduct during adjournment. When the court reconvened the defendant objected "to any further proceedings in this case for the reason that at the adjournment by this court at 11:30 this day the court failed to admonish the jury as required by the statute in such case made and provided." The court sustained the defendant's objection and discharged the jury because of mistrial. The case was then set down for trial on June 19, 1906, when the defendant raised the question of former jeopardy because of the first proceedings, but it was decided against him, and upon a trial of the merits there was a verdict of guilty. He insists on this appeal that when the jury were impaneled and testimony taken jeopardy attached, that no necessity for the discharge of the jury was shown, and that the discharge of the jury operates as an acquittal.

It is true that the discharge of a jury after the trial has begun without an overruling necessity or without the consent of the defendant will ordinarily operate as a bar to further prosecution. Here, however, there was consent, or the equivalent of consent, by the defendant, and it is well settled that if a jury is discharged at the instance of the defendant himself he cannot set up that fact as a bar to a subsequent prosecution. It is argued by defendant that he only interposed an objection and did not express any consent or intend to waive any of his rights. He objected, however, to proceeding further in the case because of a disqualification of that jury. The discharge of the jury was the necessary result of sustaining his objection, and he has no right to complain that the court took the action which he invited. In a similar case in Ohio, a question arose as to the qualification of a juror after the beginning of the trial, and the defendant objected to proceeding further before that jury, specifically stating that he did not intend to waive any of his rights, but it was held that "the discharge of the jury first impaneled was the necessary result of sustaining the objection interposed by the defendant himself and so did not take place without his consent, but was an act done at his own instance and would not therefore operate as an acquittal nor bar a further proceeding." *Stewart v. State*, 15 Ohio St. 155. In *People v. Gardner*, 62 Mich. 307, 29 N. W. 19, a defendant objected to a jury before whom he stood in jeopardy and coupled with the objection a statement that he did not intend to waive any of his rights. When the jury was discharged, at his instance, he claimed that the discharge operated as an acquittal, but the court ruled that his action amounted to consent, saying that: "There were but two pos-

sible courses for the court to pursue at the time the objection was made by the respondent; one was to go on against the respondent's objection and try the case before the jury then impaneled, and the other was to accede to the objection made and discharge the jury. The discharge of the jury under the circumstances of the case must be deemed to have been upon the request of the respondent and with his consent. He has no right to complain that his objection was sustained, and the discharge of the jury, with his consent, cannot be set up as an acquittal." See, also, *Mercer v. McPherson*, 70 Kan. 617, 79 Pac. 118; *State v. Hibbard* (just decided) 92 Pac. 304; *Commonwealth v. Sholes*, 13 Allen (Mass.) 554; *Peiffer v. Commonwealth*, 15 Pa. 468, 53 Am. Dec. 605; *Hughes v. State*, 35 Ala. 351; *State v. Davis*, 80 N. C. 384; *State v. Coleman*, 54 S. C. 282, 32 S. E. 406; *Arcia v. State*, 28 Tex. App. 198, 12 S. W. 569; *Commonwealth v. Cook*, 6 Serg. & R. (Pa.) 577, 9 Am. Dec. 465; *Rex v. Stokes*, 6 Q. & P. 151; and *Kinlock's Case*, *Foster* 16.

It is next argued that the evidence does not support the conviction. It seems that the testimony offered in behalf of the state is singularly meager, less, it appears, than was produced on the first hearing. There was little, if any, testimony connecting the defendant with the offense than his possession of the animal soon after it was stolen. It was shown that the mules had been kept in a pasture in Finney county. Mr. Williams, the owner, saw them in the pasture April 8, 1906, and when he visited the pasture again on April 11, 1906, he observed that they had been taken out. On April 12, 1906, the mule was in the possession of the defendant in Sherman county, more than 100 miles from the pasture. The animal was not found by Williams until April 20, 1906, and then was in the possession of a man named Stevens in Wallace county. There was no attempt to show that the defendant had been in Finney county or had even been absent from his home at the time of the larceny. No incriminating circumstances were shown, unless they are to be found in his statements explaining his possession of the mule. Recent possession alone does not warrant an inference of guilt. It is the unexplained possession which constitutes *prima facie* evidence of a larceny, and here there was an explanation, which, read from the record, appears to be consistent with honesty. The presumption of guilt arising from the recent possession of the stolen property by the defendant is weakened to some extent by the lapse of time, as it appears that four days elapsed after the mule was last seen in the pasture before it was shown to be in the possession of the defendant. Just when it was taken from the pasture does not appear from the testimony. Looking at the testimony of the defendant explaining how he came into possession of the mule, and measuring it as

testimony is ordinarily measured, we cannot say that the recent possession of the stolen property was unexplained, nor that the scant testimony offered in behalf of the state is sufficient to uphold a verdict.

The verdict will therefore be reversed, and a new trial awarded.

SMITH, PORTER, GRAVES, and BENSON, JJ., concur. BURCH, J., dissents.

JOHNSTON, C. J. (dissenting). I am unable to concur in the conclusion that the testimony is insufficient to support the verdict of the jury and the judgment of the trial court. The conviction, it is true, rests mainly upon the recent possession of the animal by the defendant, but there is coupled with it the inferences to be drawn from the explanations made by the defendant with reference to his possession of the mule. He stated to Williams and testified at the trial that he purchased the mule by lamp light, at 8:30 o'clock in the evening of April 12, 1906, from a stranger. He described the appearance of this man, but testified that he did not ask him where he came from, or where he was going. Neither did he ask him any questions as to where he obtained the mule. He made the further statement that the stranger prepared a formal bill of sale, signing and delivering it to the defendant. Then there was the additional circumstance of the sale of the mule within three or four days after he acquired it. But if it could be said that the only matter for the jury to consider was the unexplained recent possession of the stolen property, the verdict cannot well be overturned. It has frequently been decided that the unexplained possession of property found to have been recently stolen is evidence from which a jury may infer that the person in whose possession such property is found is guilty of larceny. *State v. Cassidy*, 12 Kan. 550; *State v. Ingram*, 16 Kan. 14; *State v. Henry*, 24 Kan. 457; *State v. Hoffman*, 53 Kan. 700, 37 Pac. 138.

Here the possession was recent, only four days after the mule was last seen in the pasture by Williams and within a day of the time that he missed it. This much without explanation made a prima facie case from which the defendant's guilt might be inferred. Explanations were made by the defendant, but evidently the jury did not credit them. How much credence should be given to his statements was for the jury to decide. They were not compelled to accept his statements as true, and his appearance and manner in testifying may have been such as to have led them to the belief that his explanations were untrue. It would be an invasion of the province of the jury to hold that the prima facie case, established by the state, had been overcome by the defendant's testimony which the jury must have found was unworthy of belief. The jury were properly instructed upon the rule of recent posses-

sion of stolen property and were informed that a conviction could not rest upon the recent possession of stolen property unless it was unexplained. The verdict, which was approved by the court, means that the defendant failed in his explanation. His claim that the mule was purchased by lamp light from a stranger with so little inquiry or information as to his coming or going, or how the mule had been obtained, as well as the early sale to another may have seemed peculiar to the jury and in some measure led them to discredit his explanation. It may be admitted that the verdict would have been more satisfactory if there had been more direct and positive testimony of the larceny, but that which was offered seems to have been sufficient to satisfy the understanding and consciences of the jury that the defendant was guilty, and since it had a better opportunity to determine the truth than this court has I think that the verdict should not be overthrown.

MASON, J., joins in this dissent.

(76 Kan. 392)

FIRE ASS'N OF PHILADELPHIA v. TAYLOR.

(Supreme Court of Kansas. Oct. 5, 1907.)

1. INSURANCE—POLICY—CONSTRUCTION.

A policy of insurance, being an instrument prepared by the insurer, should, in case of doubt as to its provisions, be strictly construed against the insurer and liberally in favor of the insured. The object of the contract being for indemnity against loss, it will be so construed, in case of doubt, as to support rather than defeat the indemnity; as, however, in contracts jointly prepared by the parties thereto, if the terms of a policy are clear and unambiguous, they will be taken in their plain and ordinary sense and no construction is necessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 292, 294, 295.]

2. SAME—CONSTRUCTION BY PARTIES.

If the parties to an ambiguous contract have subsequently acted upon it in such manner as to indicate their mutual intent therein or understanding thereof, a court, in construing such contract, should as a rule adopt the construction indicated by such action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 315.]

3. SAME—LOSS—ADJUSTMENT BY AGENT.

When property upon which there is insurance is destroyed by fire, and the insured informs the insurer thereof, and soon thereafter a person appears at the scene of the fire and adjusts and pays the loss and takes from the insured a receipt for the payment, in the name of the insurer, it will be presumed that such person is the agent of the insurer, and that the insurer had notice and knowledge of such facts as came to the notice and knowledge of such agent affecting the business so done by the agent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1412.]

(Syllabus by the Court.)

Error to District Court, Morris County; O. L. Moore, Judge.

Action by S. E. Taylor against the Fire Association of Philadelphia. Judgment for

plaintiff, and defendant brings error. Affirmed.

The policy sued on in this case in consideration of \$6 was issued for a term of three years, first insuring \$600 upon plaintiff's dwelling house "situated on lot fourteen in block one, village of Helmick, Kansas." The insurance began April 1, 1903. For a further consideration of \$7 other insurance (\$700) was provided for the same term. When the additional \$700 was arranged, instead of preparing a new policy, a form or printed slip was attached to the policy of April 1st, embodying the additional items insured together with the dwelling. This form thereafter with the printed policy constituted the insurance contract held by plaintiff. So far as is material to the questions now involved, the policy abridged then read as follows:

"The Fire Association of Philadelphia, in consideration of the stipulations herein named and of \$6.00 (and \$7.00) does insure S. E. Taylor for a term of three years from the first day of April, 1903, at noon, against all direct loss or damage by fire, except as hereinafter provided. To an amount not exceeding \$600 (and \$700) to the following described property, while located and contained as described herein and not elsewhere, to wit:

\$600.00	On his dwelling house situate on lot 14, in block 1, village of Helmick, Kansas.
\$100.00	On household furniture while contained therein.
\$ Nothing	On
\$ 75.00	On frame, board-roof barn, situated on lots 12 and 13, block 1.
\$450.00	On horses.
\$ 75.00	On vehicles, robes, horse and carriage equipments and garden tools and harnesses.
\$ Nothing	On hay, grain, and feed; all only while contained in above described barn
	To be attached to Policy No. 267686 of the Fire Association of Philadelphia.

"If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations."

August 5, 1904, a fire damaged part of the property insured. Settlement was made, and plaintiff appears to have given a receipt and attached to it the policy, which reads as follows: "\$84.50 Helmick, Kan., Aug. 24, 1904. Received of Fire Association of Phil., Pa., through agent at ———, the sum of eighty-four 50-100 dollars, it being in full payment and compromise settlement of all claims and demands for loss and damage by fire, which occurred on the 5th day of August, 1904, as

set forth in accompanying proof of loss, under policy No. 267686, issued at the Council Grove, Ks., agency of said company, and in consideration of said payment, the sum insured is reduced in that amount leaving the sum of third item cancelled. Fifth item reduced \$9.50 only, now in force under said policy covering proportionately and in the same manner on the various items named therein, and the amount of loss thereon bears respectively thereto. S. E. Taylor, Assured." The fire of August 5th destroyed the barn described in the policy and insured under its third item. The horses described in item 4 were not burned, and after said barn had been destroyed, plaintiff moved them to another barn on land he owned, but not on either of the lots described in the policy, but across a public street or road and the right of way of the Missouri Pacific Railway therefrom. January 15, 1905, this other barn, so located on other land, and situated on the opposite side of a street and railroad right of way from the first, was burned, and with it several horses. Plaintiff made claim for the loss of these as property insured under the policy described, and instituted suit therefor and obtained judgment for \$450, with interest and costs.

Fyke & Snider, for plaintiff in error. Nicholson & Pirtle, for defendant in error.

SMITH, J. (after stating the facts as above). It is agreed in the briefs of the parties that the only question for our determination is whether the horses burned were covered by the policy of insurance in the location where they were burned, or whether the contract limited the liability of the association for loss by fire on this property while the horses were contained in the barn described in the policy, and were not elsewhere. The only evidence set forth in the record is the following stipulation: "It is stipulated and agreed in this case that the following are the facts in the case: It is agreed by the parties hereto that the horses that were burned were of the value of \$450; that at the time the horses were burned they were in a barn on the opposite side of the street, or road, and not on either one of the lots described in the policy, but on the premises belonging to the plaintiff; that the right of way of the Missouri Pacific Railroad is between the lots described in the policy and the place where the barn was located when the horses were burned, but that the property where the horses were burned was the property of the plaintiff. It is further agreed that, when the barn upon the premises described in the policy was burned, the plaintiff will testify the adjuster appeared upon the ground and adjusted the loss of the barn and other property contained in the barn, and that at the time he so adjusted the loss of this property he inquired where the horses were that were included in the policy, and was told that they were across the road and right of way of

the railroad company, in the barn on the other side, and that he took a receipt from the plaintiff for the money paid for the loss on the barn destroyed, and the property therein contained, and did not offer or tender to the plaintiff the premium or any portion of it." The stipulation should be, and, of course, was, regarded as if the plaintiff below had been placed upon the witness stand, and had testified to the facts therein cited, and, there being no contradictory evidence, the recitals were accepted as true. There is also an implication from the language used that the stipulation embraced all the controverted facts. If so, the plaintiff's ownership of the horses burned should be accepted as alleged. The reply brief of the association seems to acquiesce in the statement in the answer brief that nothing is in issue but the construction of the contract, and we will so regard it as the court below evidently did. Otherwise this material allegation is entirely unsupported by evidence, and the judgment must be reversed. Surely neither the learned court nor the counsel could have considered this allegation in issue. The very object of the stipulation seems to have mutually been to strip the case of all other controversies except this: Were the horses which were burned covered by the insurance policy in question at the time and place they were destroyed?

In the absence of fraud and duress, parties competent to contract may make any contract for a lawful purpose which they may agree upon, and, if the terms used in the making thereof are unambiguous, there is nothing for the courts to do, in the enforcement thereof, but to give effect to the plain recital. Neither party will be heard, in such case, to say that his understanding of the contract on his meaning thereby was other than the language used indicates. Where, however, the language used is susceptible of two or more meanings, it devolves upon the court to ascertain, by considering the situation of the parties, the purpose to be accomplished by the contract and all the surrounding circumstances what the actual intent of the parties was, and to give it effect. If the parties acted upon a contract ambiguous in any way, and such action indicates their mutual understanding as to its ambiguous provisions, the courts will usually adopt such interpretation as most likely to accord with the original intent. The contention of the association is that the horses were insured only while they remained in the barn located as described in the insurance policy. On the other hand, Taylor contends that the horses were insured wherever they might be, or, at least, were insured while in the barn where they were when destroyed. It cannot be said that the policy is unambiguous. In the statement of facts the printed slip for the items insured which was attached to the original policy is reproduced as near as may be. The first item insured is the dwelling

house. The second item is furniture, etc., "while contained therein." The third item in full is: "\$Nothing on ———." The fourth item is the barn, describing material of same and location. The fifth item is \$450 on horses, without specifying where kept or to be kept. The sixth item is \$75 on vehicles, etc., without location. The seventh item is in full: "\$Nothing on hay, grain and feed; all while contained in above described barn." Each item constituted a full sentence, and is punctuated as indicated. The question is whether the last clause of the seventh item clearly modifies the two preceding items. That the association so intended is probably true. Is it so clear that he who runs may read or that the insured reading the item "\$450 on horses" must be held to drop down two items below to an item which insures nothing, and on its face has no reference to horses, to find a qualification upon the insurance on his horses? The form for the seventh item was prepared for a risk to be assumed on hay, grain, and feed and the qualifying clause may limit the place where these products are to be kept or as contended it may include the two preceding items. It is then ambiguous. The general rule seems to be that a policy of insurance, being an instrument prepared by the insurer, should in case of doubt be construed strictly against the insurer who prepares it, and liberally in favor of the insured, even though the intent of the company may be otherwise. The object of the contract being to afford indemnity, it will be so construed, in case of doubt, as to support rather than defeat the indemnity provided for. If there is any doubt or uncertainty under the terms of the policy as to the intent of the parties, it is to be resolved in favor of the insured, or, if a policy is susceptible of two constructions, that construction is to be adopted which is favorable to the insured. See 19 Cyc. 656, and authorities there cited; also *Chandler v. Insurance Co.*, 21 Minn. 85, 18 Am. Rep. 385.

Much has also been said in regard to the nature of the property insured, whether animate or inanimate, and as to the contemplated use thereof, in determining whether the parties to the insurance contract contemplated that the property should only be insured while it remained in the place referred to in the policy; but the qualifying clause in this policy, if it applies to the insurance upon the horses at all, restricts the insurance upon them to the time "only while contained in above described barn." Rather than upon any general rule of construction, we prefer to arrive at the intent of the parties by their own interpretation of the policy as shown by their actions. The policy was issued in April, 1903. In August, 1904, a fire occurred which entirely destroyed the barn, and only while the horses were within it were they insured, according to the claim of the association. Nineteen days after this fire, and 14 days after the 5 days' extension

of insurance, in case of necessary removal occasioned by fire, the association paid the indemnity for the loss of the barn and for a partial loss on the fifth item, and took a receipt from the insured which expressly recognized the fifth item as reduced by the payment as still in force, and by necessary implication recognized all the other items, including the one on the horses, as in full force. The barn where the horses were afterwards burned was then pointed out as the place where they were then kept, and the association did not then offer to return any unearned premium nor did Taylor demand the same. They each treated the policy as in force on the dwelling and contents therein insured and on the horses and on the vehicles, etc., as reduced by the payment of the partial loss. It cannot be assumed that at the time of this adjustment Taylor intended to donate the unearned premium for nearly 20 months on \$450 insurance; neither that the association intended to keep the unearned premium without any consideration therefor. It is more in accord with business dealings to presume that both parties intended to maintain the insurance on the horses as well as on vehicles, which was specified in the receipt, although the barn was not in existence, and hence could contain neither of these items. The latter was evidently the conclusion of the court below.

But it is said no authority is shown in the person called the adjuster to represent the association. After a loss by fire has occurred to insured property, and the insurer has been notified thereof, and soon thereafter a man appears upon the scene of the fire and adjusts the loss and pays the indemnity, and takes a receipt therefor in the name of the insurer, it will be presumed that he acts as the agent of the insurer in transacting such business, and it will further be presumed that the principal is informed and knows of all such facts as the agent is informed of and knows affecting such business. This is not regarded as a waiver of any condition of the policy or as the making of any new contract, but as a mutual interpretation by the parties thereto of the meaning of the original ambiguous and uncertain contract; which meaning the court below properly adopted.

The judgment is affirmed. All the Justices concurring.

(76 Kan. 411)

STATE v. PORTER et al.

(Supreme Court of Kansas. Oct. 5, 1907.)

1. INTOXICATING LIQUORS — MAINTAINING NUISANCE—INJUNCTION—CONTEMPT.

A decree of a district court, which is of record in the office of the clerk of said court in the county where rendered, and which enjoins the defendants in the action and all other persons whomsoever from keeping or maintaining a nuisance, as defined by the prohibitory liquor law of the state, in a certain building upon certain described real estate in said county, is a restriction, in the nature of an incumbrance,

upon the use of such building of which all subsequent owners, tenants, or occupants thereof must take notice at their peril.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 414.]

2. SAME—KNOWLEDGE OF ORDER.

In the prosecution of a subsequent tenant or occupant of such building for contempt, in the violation of such decree, no actual knowledge or notice of such order of the court is requisite to conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 414.]

(Syllabus by the Court.)

Appeal from District Court, Montgomery County; Thos. J. Flannelly, Judge.

Jack Porter and John Cummings were charged with violation of an injunction restraining the maintenance of a liquor nuisance, and on conviction they appeal. Judgment is affirmed.

On December 16, 1904, in an action then pending in the district court of Montgomery county, in which the state of Kansas, on the relation of Anna F. Fruits, was plaintiff, and John Hebrank, Fay Lovejoy, Ed Heckman, and Harry Robinson were defendants, a judgment of perpetual injunction was rendered enjoining the defendants, "their agents, employes, successors, and assigns and all persons associating, combining and conspiring with them and all persons whomsoever" from keeping and maintaining a nuisance in a certain brick and frame building on lot 16, block 42, in the city of Independence, in said county and state. Thereafter, on July 21, 1906, the county attorney of Montgomery county by affidavit, filed in said action, charged John Hebrank and the appellants with a violation of the injunction. On presentation of this affidavit to the judge of the court, the judge ordered an attachment to be issued for the arrest of the persons charged, and also ordered the county attorney to file a formal accusation against them, which was done. The appellants were arrested and appeared with their attorney before the judge at chambers, and, after motion to quash the complaint had been overruled, answered thereto. A hearing was had, and appellants were adjudged guilty of contempt of the order of injunction and to pay a fine of \$500 each and to be confined in the county jail for six months and to pay the costs of the proceeding, including the sum of \$100 as a fee to the county attorney.

T. H. Stanford, for appellants. F. S. Jackson, Atty. Gen., Thos. E. Wagstaff, and J. R. Charlton, for the State.

SMITH, J. (after stating the facts as above). The principal contentions of the appellants have been decided adversely to them in this court: The proceeding to punish for a violation of the order of injunction, is a part of the injunction suit, and not another independent action. *State v. Thomas* (Kan.) 86 Pac. 499; *State v. Forner* (Kan.) 89 Pac.

674. The accusation need not possess the formalities of an indictment or information; also, the court will take judicial notice of the order of injunction. *Id.* It is hardly necessary to say that, in the exercise of a jurisdiction conferred upon him by statute, a judge at chambers will take judicial notice of all the facts which the same judge in exercising the same jurisdiction, sitting as a court, would take. A judge at chambers, then, will take judicial notice of his former orders made when he sat as a court. The judge has not the general jurisdiction of the court, but in the exercise of powers expressly conferred by the Constitution or statutes of the state his jurisdiction is as ample in everything necessarily incident to the exercise thereof as is the jurisdiction of the court in the exercise of like powers. It was therefore unnecessary to formally plead or to prove the issuance of the order of injunction. *State v. Thomas, supra.*

It is contended that, as the appellants were not parties to the injunction action, they could not be convicted of a violation of the order therein, unless they were proven to have had notice or actual knowledge thereof. The appellants were jointly charged with John Hebrank, the owner of the building, and who was a party to the injunction action, with a violation of the order therein. And, although it appears Hebrank was not arrested or tried for the contempt, there is probably sufficient circumstantial evidence to justify a finding that appellants had knowledge of the order and conspired with Hebrank to evade and violate it. Upon what evidence or presumption the judge based his decision we are not advised by the record. No evidence that they had actual knowledge of the order was necessary. They admit they had possession of the building in which, but a few months before, the owner, his codefendants, "and all other persons whomsoever," were enjoined from maintaining just such a nuisance as they were maintaining. In willfully embarking upon an unlawful business they might well be presumed to have scanned every possible source of danger and to have not overlooked so public a proceeding as the injunction action. It is more probable they thought they had cunningly evaded it. It matters not. The proceedings of the courts for the maintenance of order and the enforcement of law are not thus to be trifled with. The decree of injunction was against the defendants in that action and in a sense was *ad rem* against the property, or rather against a certain illegal use of the property. It cut off perpetually the use of the property for any of the purposes which the prohibitory liquor law of this state denounces as a nuisance. Thereafter not only the parties to that action, but all persons using the property for any of such unlawful purposes, do so at their peril. The judgment is a limitation upon the use of the property of which all subsequent owners or occupants must take

notice. It is well said, in *Silvers v. Traverse*, 82 Iowa, 52, 47 N. W. 888, 11 L. R. A. 804: "The decree was against plaintiff's lessor, who was the defendant in the suit. It affected his right and interest in the property; that is, it limited and cut off his power to use the property for the unlawful keeping and sale of intoxicating liquors. The decree was a restriction upon the use of the property which followed it as a burden, and, as it were, an incumbrance. Surely the plaintiff, in taking the property, took it subject to this restriction and burden. In our opinion, these conclusions are based upon familiar doctrines applicable to all actions and proceedings in the courts. If the rule we announce be not recognized, the attempt to enforce injunctions to abate nuisances of all kinds would be vain. The defendant perpetrating the nuisance could wholly defeat the law by leasing or transferring the property to one who had no notice thereof. He could only be enjoined by a new action, and when so enjoined he could in a like manner transfer the property, and so on indefinitely, defeating the law, to the scandal of public justice, and the oppression of the people."

The only other question it is deemed necessary to especially notice is the allowance of \$100 as attorney's fees for the county attorney without evidence being introduced as to the value of the services rendered by the attorney. Where attorney's fees are allowed to be taxed as costs, as in the statute under which this action was brought, it would seem the better practice for the state to offer evidence of the extent and value of the services performed, that the defendant might cross-examine the witnesses and offer rebuttal evidence. In this case, however, it is apparent that the judge was fully conversant with the extent of the services, and he will be presumed to know the value thereof. *Nofztger v. Moffett et al.*, 63 Kan. 354, 65 Pac. 670; *Bentley v. Brown*, 37 Kan. 14, 14 Pac. 434. Evidence however, was offered of the judgment of injunction rendered by the court, and all the papers prepared by the county attorney in the subsequent proceeding for contempt were brought to the attention of the judge at chambers by the application for the attachment of appellants, the motion to quash the accusation, etc. The examination of the witnesses and all the details of the trial had also transpired before the judge. The papers prepared by the county attorney were the affidavit and application for the attachment and the accusation upon which the trial was had. The sufficiency of each of these documents was challenged by appellants' counsel and was defended by the county attorney. The attention of the judge was thereby challenged to these matters, as it must also have been to the response of the county attorney to various other motions and objections made by appellants. It also appears from the record that the county attorney actively represented the state in the introduction of all the evi-

dence and the examination of all the witnesses produced on the trial. The record justifies the statement that all the services rendered by the county attorney were before the judge and could not have escaped his attention, and the judge is presumed to know the value thereof. *Noftzger v. Moffett*, supra. No evidence is requisite of facts which transpire in the presence of the tribunal. In many lawsuits the more burdensome part of the lawyer's duties are discharged out of court and beyond the observation of the judge, and in such cases evidence would be required therefor in court. In this case it is evident that his own senses and observation were the best witnesses possible to the judge, and this court is able to say from the record that the sum allowed as fees was not unreasonable for the services rendered of which the judge had official cognizance.

The judgment is affirmed. All the Justices concurring.

(50 Or. 204)

REEDER et al. v. REEDER.

(Supreme Court of Oregon. Oct. 22, 1907.)

1. DEEDS—CAPACITY OF GRANTOR—EVIDENCE—SUFFICIENCY.

In a suit to set aside a deed on the ground of the incapacity of the testator, evidence examined, and held to show that she understood the nature and effect of the transaction, rendering the deed valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 638-640.]

2. SAME—DELIVERY TO THIRD PERSON.

A grantor delivered her deed to a third person to be held by him until her death, and then to be delivered to the grantee. All control of the deed was passed from her at the time of its delivery to the third person. Held a sufficient delivery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 130-134, 140-141, 298.]

Appeal from Circuit Court, Multnomah County; John B. Cleland, Judge.

Suit by F. B. Reeder and others against J. L. Reeder. From a decree for defendant, plaintiffs appeal. Affirmed.

T. G. Halley and A. R. Mendenhall, for appellants. Wallace McCamant, for respondent.

BEAN, C. J. This is a suit brought by F. B. Reeder and six other heirs of Catherine Reeder, deceased, to cancel and annul a deed from the latter to her son, J. L. Reeder, for 140 acres of land in Multnomah county. About 1855 Catherine Reeder and her husband, S. M. Reeder, settled upon a donation claim of 320 acres on Sauvie's Island, and afterwards completed the required residence and cultivation, and received a patent, in which the south half of the claim was designated as inuring to the husband, and the north half to the wife. Mrs. Reeder and her husband continued to reside upon the claim until their death, rearing a large family, of which defendant is the eldest. About

1878 defendant married, and built a dwelling house on the north half of the claim, about a quarter of a mile from the family residence, in which he continued to live until 1894, when his house was destroyed by a flood. He thereupon built another dwelling, with the consent of his parents, and, as he testified, under a promise by them that, if he would continue to reside on and cultivate the place and look after them during their lifetime, the land should belong to him. He has ever since resided upon and cultivated the land in connection with his father and other members of the family. S. M. Reeder died in 1902, and his wife, Catherine Reeder, continued to live in the family home, with her son F. B. Reeder and her two daughters, Mrs. Godwin and Mrs. Akin, until her death on November 22, 1905. Mrs. Reeder was about 75 years of age at the time of her death, and for some years prior had been in feeble health, but was not confined to her room, except for perhaps a month before her death. About two weeks before she died she executed a deed, conveying her half of the donation claim, except the family home and 20 acres of land surrounding it, to defendant, in consideration of love and affection, and made a will disposing of the remainder of her property. The deed was in the possession of a third person until after her death, when it was delivered to defendant and by him put on record, whereupon this suit was brought by the other heirs to set aside the deed, on the ground that the grantor was mentally incapable of making a valid conveyance.

There is much testimony in the record, principally from interested parties, concerning the mental condition of Mrs. Reeder at the time, prior, and subsequent to the making of the deed, and many witnesses testified that, in their opinion, she was so feeble in mind and body as to be unable to intelligently and understandingly dispose of her property. Others expressed the opinion that her mental faculties were as good as ordinarily possessed by persons of her age, and that she was perfectly competent to transact any ordinary business.

It is unnecessary to refer to the opinion evidence in detail. The uncontradicted testimony of S. H. Haines, who prepared the deed and before whom it was executed, shows beyond reasonable controversy that it was the act and deed of Mrs. Reeder, and that she fully understood and comprehended the nature and effect of the transaction. And this is sufficient to sustain the instrument as a valid conveyance. *Carnegie v. Diven*, 31 Or. 366, 49 Pac. 891; *Dean v. Dean*, 42 Or. 290, 70 Pac. 1039. The defendant, J. L. Reeder, testified that, while on his way to his work, he stopped to see his mother on the morning of the 7th of November, and found her in good spirits. She claimed to be improving, and said she expected to be out in a day or two. She inquired when he

would go to Portland, and he told her as soon as he finished digging potatoes, which would be about 11 o'clock of that day, and she requested him to secure the services of some person to make out some papers for her, the nature and character of which she did not indicate to him. He went to Portland that afternoon, and engaged S. H. Haines, an attorney of this court, to make out such papers as his mother might desire to execute. He and Haines went by boat that afternoon, and the next morning he took Haines over to his mother's house, and introduced him to her, and left them together in the room where the papers were prepared. He was not present at the time and did not know the contents of the papers until after his mother's death. Haines testified that the defendant came to his office in Portland on the 7th of November, and told him that his mother wanted to make out some papers, relative to the final disposition of her property, and inquired if he could go down and attend to the matter for her, and he agreed to do so; that defendant was unable to tell him what character of papers his mother desired to execute, whether a will or deeds, and he, witness, inquired the number of children, and, being told by defendant, took with him a blank will and nine warranty deeds. He reached the Reeder place about 4:30 o'clock in the afternoon, and he remained over night with defendant, and the next morning went with him to Mrs. Reeder's residence. He had never seen Mrs. Reeder and was not acquainted with any of her children, except defendant. When they went into Mrs. Reeder's room, she was lying in the bed, and defendant spoke to her, inquiring after her health, and then introduced witness to her, and told her he had come to prepare such papers and transact such business for her as she might wish or desire, and then left the room. What afterwards transpired is thus detailed by Haines: "I moved my chair up a little closer to the old lady, as I noticed that she was inclined to be a little deaf, and I asked her what I could do for her. She says: 'I want to draw up some papers that should have been [I think she used the words "should have been"] fixed up long ago.' And she says: 'I have waited as long as I am going to, and I want now to straighten out my property.' I asked her whether she wanted to convey her property by will or by deed, and she says: 'I want to make a deed to J. L. Reeder for his home, and will make a will for the balance of the property.' I then took and drew up, I am not certain whether I drew the will up or the deed up first, but my impression is I drew the will up first; and she told me that she wanted to leave the property equally to each of the heirs, excepting J. L. Reeder, who had received his portion by deed. That he was not to share in any of the other property. I drew the will exactly in accordance with her direction. Aft-

er drawing up the will, I then took a deed and filled in the forepart of the deed or commencement of the deed until I got to the description of the property. Then I asked her if she could give me the description of the property she wanted to deed to J. L. Reeder, and she says: 'I want to give J. L. Reeder the north half of the original donation land claim.' I think she said S. M. and Catherine Reeder, that I cannot say, and I wrote the deed in accordance with her description, and she designated the north line thereof to be the north side of a road running east and west across the place and over the slough as being the north boundary line to the property she wanted conveyed to J. L. Reeder. She stated at that time that she wanted the bridge that goes over the slough to be on J. L. Reeder's portion, as he would never block the bridge so that the others could not pass, while she was afraid that the others would prevent him from crossing over, and for that reason she also made the north side of the road the boundary line to J. L. Reeder's portion, so she stated. I wrote the description in the deed just as she dictated it, and she afterwards signed, executed, and acknowledged it before me. Mrs. Reeder's mind at the time was exceptionally good, and she perfectly understood what she was about. In talking over the conveyance she said the reason why she wanted J. L. to have this property was that he had always stayed at home and has spent a good deal of money on the property, in fixing it up, has always assisted pa and I, and always looked after us, and seen that we were properly cared for, and is the only one that has ever taken an interest in the place; that when his house was washed down we told him to build where his present house stands, and that would be his portion of the estate, and that this conveyance is in accordance with the agreement which pa and I had often talked and agreed upon.' After the papers were prepared and I read the will twice aloud to Mrs. Reeder so she understood each and every word, and I also read the deed to her carefully and slowly and she understood it. When I got through, I said: 'Now, Mrs. Reeder, if there are any changes you want to make, now is the time to make them, and, if it is not correct, now is the time to correct them.' And she said they were just as she wanted them. I was very careful in reading the papers to her. She was old and hard of hearing, but not quite as hard of hearing as has been pictured, or did not seem so to me. I sat quite close to her and talked no louder than I am talking now, and she understood each and every word. I had to repeat but very little to her. After the papers were drawn up I said: 'Mrs. Reeder, we have to have a witness. Is there any one around here you know of that can witness the will and deed?' She said there is a Mr. Bonser here, but that some of her family had married into that family or there was

a relation there that she did not care to have mixed up in the deed, as that would tell the contents, and she did not want them to know the contents of her papers. She said: 'Mr. Banks lives right down here, and I think he will witness it'—would I go down and try him? I told her I would, and I looked at my watch and it was then about 12 o'clock. I had been with her from 9 or 9:30, in that neighborhood. I told her it was now lunch time and I would go up to J. L.'s and eat lunch, and would then go and get Mr. Banks, and would come back and she could then sign the papers, and she said very well. I put the papers in my pocket, and went up and got my lunch, and afterwards Mr. Hayes, a son-in-law of Mr. Reeder's, and I, went down to Mr. Banks' place, and got him to come up and witness the deed. When we reached Mrs. Reeder's house, Mr. Banks and I walked up on the porch, and I took hold of the knob and found the door locked. I rang the bell and some one unlocked the door, and pulled it open probably two or three inches, and went into another room. I don't know, I never say, who unlocked the door. And we walked into the room where Mrs. Reeder was. She thereupon executed the will and deed, and Mr. Banks and myself signed as witnesses. After the papers were executed, she talked to us a few minutes, and then we went away. I put the papers in my pocket, and Mr. Banks and I walked up to the orchard of J. L. Reeder, where Mr. Reeder and a force of men were pulling beets in the orchard, and I told Mr. Reeder I had a deed for him, but it was not to be recorded until after his mother's death, and he said: 'You take and keep it then until such time as it is necessary to put on record.' I did not show the deed to him, or show him its contents, unless it was to tell him that it was for his home place." This testimony of Haines is absolutely undisputed, and the witness stands wholly unimpeached, and there is therefore no reason why full credence should not be given to his evidence. It shows that the deed was the voluntary act of Mrs. Reeder, and that she fully comprehended the nature of the transaction in which she was engaged. Under these circumstances and upon such a record the court would not be justified in disturbing her disposition of her property on account of old age, sickness or debility of body.

Some suggestion was made at the argument that the deed was the result of undue influence and fraud. It is doubtful whether the averments of the complaint are sufficient to raise these questions; but, however that may be, there is no testimony whatever to support them.

The point was also made in the brief, though not much relied on at the argument, that there was no such delivery of deed as would pass title. The testimony shows that the deed was delivered by Mrs. Reeder to

Haines to be held by him until her death and then delivered to defendant. All control of the deed passed from her at the time it was delivered to Haines. She thereafter had no right to recall it, and this is a sufficient delivery within the law. *Hoffmire v. Martin*, 29 Or. 240, 45 Pac. 754.

Without further reference to the testimony, it is sufficient to say that from a careful examination of the entire record we are satisfied that the findings of the trial court should not be disturbed, and the decree is therefore affirmed.

FREEMAN v. TRUMMER.

(Supreme Court of Oregon. Oct. 22, 1907.)

1. TRIAL—FINDINGS—REQUISITES.

When an action is tried without a jury, the findings are equivalent to special verdicts and must be as broad as the material issues.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 935, 936.]

2. SAME.

If findings support the judgment and conform to the theory of the prevailing party, they are sufficient.

3. REPLEVIN—FINDINGS—SUFFICIENCY.

In replevin, the findings support a judgment for defendant, where they conform to the new matter averred in the answer and disprove plaintiff's right, though there are no findings conformable to the complaint; no request having been made therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, § 360.]

4. EXCHANGE OF PROPERTY—DISTINGUISHED FROM SALE.

An "exchange," as distinguished from a "sale," is a contract whereby specific property is given in consideration of the receipt of property other than money.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exchange of Property, § 2.]

5. REPLEVIN—NATURE OF REMEDY.

An action to recover the possession of specific personalty, though designated, under B. & C. Comp. § 284, as "claim and delivery," is substantially the ancient remedy of replevin.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, § 1.]

6. SAME—SET-OFF.

Replevin being in the nature of an action *ex delicto*, a set-off of accounts between the parties cannot be settled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, § 106.]

7. SAME—DEFENSES AVAILABLE.

In replevin for a cash register, defendant may show that plaintiff traded cash registers with defendant's bailee, knowing of defendant's ownership, and prevent plaintiff recovering his register until he returns defendant's.

Appeal from Circuit Court, Multnomah County; Arthur L. Frazer, Judge.

Replevin by I. Freeman against Loui Trummer. From a judgment in justice court for defendant, plaintiff appealed, and from a like judgment of the circuit court again appeals. Affirmed.

This action was commenced in the justice's court for Portland district to recover the possession of certain personal property, or the

value thereof in case delivery cannot be had, and damages for the alleged unlawful detention; the complaint being in the usual form. The answer denied, generally, each allegation of the complaint, and for a further defense contains the following averments: "(1) That the defendant was the owner on the 1st day of May, 1905, and entitled to the possession of, and ever since has been and now is the owner of and entitled to the possession of, one National cash register of the value of \$125. (2) That on or about May 1, 1905, during which time the said National cash register was in the possession of one W. M. White, said cash register being situated in the building known as No. 46 Fourth street, in the city of Portland, county of Multnomah, state of Oregon, the plaintiff wrongfully and unlawfully converted said National cash register to his own use, and in place thereof left one certain Hallwood cash register, which is mentioned in paragraph 1 of plaintiff's complaint, and that said Hallwood cash register is now rightfully in the possession of the defendant, and the defendant holds said Hallwood cash register in trust until such time as the plaintiff returns the defendant's aforesaid National cash register, which is now held by plaintiff wrongfully and unlawfully." The reply denied the allegations of new matter in the answer, and, the issue having been tried, the defendant secured a judgment, to review which the plaintiff appealed to the circuit court for Multnomah county, where the cause was tried, by stipulation of the parties, without the intervention of a jury, and the following findings of fact were made, to wit: "(1) That the allegations complained of in plaintiff's complaint are not true, in so far as the plaintiff is entitled to the immediate possession of a certain Hallwood cash register of the value of \$170, located and situated at 46 Fourth street, in the city of Portland, Multnomah county, Or. (2) That the defendant was the owner on the 1st day of May, 1905, and entitled to the immediate possession of, and ever since has been and now is the owner of and entitled to the immediate possession of, one National cash register of the value of \$125. (3) That on or about May 1, 1905, during which time the aforesaid National cash register was in the possession of one W. M. White, said cash register being situated in the building known as No. 46 Fourth street, in the city of Portland, Multnomah county, Or., the plaintiff wrongfully and unlawfully converted said National cash register to his own use, and in place thereof left one certain Hallwood cash register, which is mentioned in paragraph 1 of plaintiff's complaint, and the one for which this action of replevin is brought by the plaintiff, and that said Hallwood cash register is now rightfully in the possession of the defendant, and the defendant rightfully and lawfully holds said Hallwood cash register until such time as the plaintiff returns defendant's aforesaid National cash register, which is now held by

the plaintiff wrongfully and unlawfully. (4) That at the time the plaintiff took the defendant's National cash register from the possession of W. M. White, and replaced the same by a Hallwood cash register, the plaintiff had full knowledge, and knew that the National cash register did not belong to the said W. M. White, but that the National cash register was owned by and belonged to the defendant. (5) That the plaintiff is not entitled to damages or his costs, but that the defendant is entitled to his costs and disbursements." From the foregoing findings of fact, the following conclusions of law were made: "(1) That the defendant now is entitled to the immediate possession of the Hallwood cash register, and that he holds the same rightfully and lawfully. (2) That the plaintiff cannot recover the possession thereof until the plaintiff return to the defendant the National cash register which he unlawfully withholds the possession of from said defendant." Based on such findings, judgment was given for the defendant, from which the plaintiff appeals to this court.

M. B. Meachan, for appellant. John F. Logan and John C. Shillock, for respondent.

MOORE, J. (after stating the facts as above). The only deduction announced by the court that is consistent with the averments of the complaint is the conclusion of law that the plaintiff is not entitled to the immediate possession of the demanded property, and, because no findings of fact were made conformable to the allegations of the plaintiff's primary pleading, his counsel insist that an error was thereby committed. Findings of fact made by a court, when an action is tried without the intervention of a jury, are equivalent to special verdicts, and must be based upon, and as broad as, the material issues involved. B. & C. Comp. § 158; *Moody v. Richards*, 29 Or. 282, 45 Pac. 777; *Daly v. Larsen*, 29 Or. 535, 46 Pac. 143. When a defendant controverts the allegations of a complaint by his answer, and also sets up facts intended to constitute a complete defense to the cause of action stated, he thereby presents a theory of the case that is usually inconsistent with the plaintiff's hypothesis, and the adoption of either legal principle by the court, after a trial of the issue without a jury, necessarily implies a rejection of the theory of the adverse party. If the findings of fact in such a case conform to the proposition, as evidenced by the material controverted averments of either party, and are adequate to uphold the judgment based thereon, the conclusion reached, as the result of a judicial investigation, is sufficient in law, though no findings are made in respect to the theory of one of the parties. *Lewis v. First National Bank*, 46 Or. 182, 78 Pac. 990; *Jennings v. Frazier*, 46 Or. 470, 80 Pac. 1011. When the plaintiff secures a judgment on the trial of an action without a jury, the court's

findings of fact must conform to the controverted material averments of the complaint; but when, in such case, the defendant obtains affirmative relief, the findings of fact must correspond with the essential disputed allegations of new matter in the answer. As the judgment must rest upon the allegations of the complaint or on the averments of new matter in the answer, the findings of fact which correspond with the respective theory assumed as true by the court, after a judicial inquiry, must conform to the pleading which asserts such hypothesis, and as the selection of the theory of one of the parties necessarily implies the exclusion of the legal principle deducible from a statement of facts by the adverse party, constituting the cause of action or defense, no necessity exists for making a finding as to the rejected hypothesis, unless so requested for the purpose of reviewing the judgment. In the case at bar, the court having determined that the defendant was rightfully in possession of the Hallwood cash register, which he was entitled to hold until the plaintiff returned to him the National cash register, which he unlawfully obtained from White, such deduction, though in the nature of a conclusion of law, signifies that the plaintiff is not entitled to the immediate possession of the property in question. The findings of fact, made by the court, conform to the averments of new matter contained in the answer, and as they disprove the plaintiff's right, and no request having been made for findings compatible with the allegations of the complaint, no error was committed, as alleged.

It is also maintained by plaintiff's counsel that the averments of new matter in the answer do not constitute a defense to the cause of action stated in the complaint, and hence the findings of fact, based on such allegations, are insufficient to support the judgment. The abstract fails to show that any demurrer to the answer was interposed. The statute declares that an objection to a complaint, on the ground that it does not state facts sufficient to constitute a cause of action, is not waived by failure to demur or answer. B. & C. Comp. § 72. No such provision has been enacted in respect to an answer. In view of the importance of the question involved, we will consider whether or not the findings of fact uphold the judgment, which might seem tantamount to holding that the section of the statute mentioned was applicable to an answer, a matter which is not intended to be decided. No bill of exceptions accompanies the abstract, and all the facts disclosed are hereinbefore detailed, from which it is impossible legally to determine whether the plaintiff secured the defendant's register pursuant to a contract entered into with White, or obtained it without the latter's consent; but as the court found that the plaintiff knew that the National cash register did not belong to White, but was owned by the defendant, it is fairly inferable that an exchange of registers

was effected by White and the plaintiff. An "exchange," as contradistinguished from a "sale," is a contract by the terms of which specific property is given in consideration of the receipt of property other than money. *Cooper v. State*, 37 Ark. 412. What the conditions of the agreement were that was entered into between the plaintiff and White we have legally no means of knowing. An action to recover the possession of specific personal property, though designated in our statute as "claim and delivery" (B. & C. Comp. § 284), is substantially the ancient remedy of replevin. *Kimball Co. v. Redfield*, 33 Or. 292, 54 Pac. 216. The alleged unlawful taking or detention of the goods or chattels of another, which characterizes the pleading invoking the remedy, makes the judicial means of enforcing the right asserted in the nature of an action *ex delicto*, in which a set-off of accounts, existing between the parties, cannot be settled. In this state a liberal construction has been given to the defendant's pleading in actions of claim and delivery, and it has been determined that whatever demand he has that grows out of the same subject-matter as the plaintiff's claim will be available as a defense, if specially alleged. *Guille v. Fook*, 13 Or. 577, 11 Pac. 277; *Nunn v. Bird*, 36 Or. 515, 59 Pac. 808.

It is inferred from the court's findings that the plaintiff obtained from White, the defendant's bailee, the National cash register, and left in lieu thereof the Hallwood cash register. White having only a qualified right to the property, the legal title thereto did not pass by the exchange, and, if the plaintiff desired to recover the possession of the property in controversy, every principle of justice would seem to demand that, as a condition precedent to the exercise of his right, he should return the register which he received. The plaintiff is, in effect, attempting to rescind his contract whereby he secured possession of the National cash register, and, because he obtained no title thereto, he ought to return such register to the bailor, who has succeeded to White's possessory right to such property, before he is permitted to recover possession of the register in question. The defendant could probably recover from the plaintiff, in a separate action, the National cash register, or its value; but if he is obliged to resort to that remedy, and to surrender the possession of the register which he holds, he would necessarily be liable for the costs and disbursements incurred in this action, which expenses ought not to be imposed upon him, when the loss which he would thus sustain, in consequence of the exchange, is attributable, in part, to the plaintiff's conduct. The demand set out in the answer grows out of, and is connected with, the exchange which forms the basis of the plaintiff's claim, and as the possession of the National cash register was obtained by plaintiff with knowledge of the defendant's rights, the former will not be permitted to take advantage of his own

wrong, but will be compelled to return such register as a condition precedent to securing the possession of the demanded personal property. *Latham v. Davis* (C. C.) 44 Fed. 862.

Believing that the findings of fact are adequate, the judgment is affirmed.

DAVIDSON v. RICHARDSON.

(Supreme Court of Oregon. Oct. 22, 1907.)

1. CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS—JUDGMENTS—DOWER.

A statute enlarging the dower estate is void as to pre-existing debts as withdrawing part of the judgment debtor's property from lien and sale; thus impairing the obligation of a contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 494, 495.]

2. JUDGMENT—ENTRY NUNC PRO TUNC—RETROSPECTIVE EFFECT.

Where, at the time confession of judgment was executed and entered by the clerk, no judgment was entered thereon, but it was entered on the judgment docket and execution was issued and sale had, and afterwards judgment was entered nunc pro tunc as of the date of the confession of judgment, the entry was retrospective, and had the same force as if made at the time when judgment was rendered except as to third persons having intervening rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 525-541.]

3. SAME—EFFECT ON INTERVENING RIGHTS—INCHOATE DOWER RIGHT.

Although a nunc pro tunc entry of a judgment does not operate to create a lien from a date earlier than its actual entry to affect intervening rights of third persons, the possessor of an inchoate right of dower in land of the judgment debtor at the time judgment was rendered who has not changed her condition upon faith in the record has no such interest as entitles her to protection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1334.]

Appeal from Circuit Court, Polk County; William Galloway, Judge.

On rehearing. Former opinion modified. For former opinion, see 89 Pac. 742.

W. M. Kaiser, for appellant. J. K. Weatherford, for respondent.

EAKIN, J. In the original opinion we rested the case exclusively upon the fact that the Legislature has control over the liens of judgments, and that, in this case, the effect of the enlargement of the dower estate was only a withdrawal of property from the lien of the judgment to the extent of the increase of the dower estate. It is insisted, however, that the effect of the amended statute increasing the dower estate is to deprive the defendant of his remedy by execution by withdrawing a portion of the debtor's property from liability, and that this impairs the obligation of his contract; and we must concede that this is the effect of the amendment.

The case of *Watson v. N. Y. Cent. R. Co.*, 47 N. Y. 157, cited in the opinion, holds that the lien is subject to the control of the Leg-

islature, but it was further suggested that, though the Legislature could authorize the appropriation of the land for public use free from the lien, yet the compensation paid therefor was still subject to execution; that is, the Legislature did not put the debtor's property beyond the reach of his creditor. The right to the lien relates to the remedy, but the right of the creditors of a debtor to avail themselves of his property at all events for the satisfaction of his debts is not a question of remedy, but of right. The case of *McCormick v. Alexander*, 2 Ohio, 65, quoted in the opinion, and cases cited thereunder, only hold that the lien is subject to the control of the Legislature, but do not go to the extent of holding that the debtor's property may be exempted from existing debts. *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793, relates to the creation of a homestead exemption, which withdrew the property not only from the lien of judgments, but also from liability to execution, and there it is held to impair the obligation of the contract. This is also the effect of *Gunn v. Barry*, 15 Wall. (U. S.) 610, 622, 21 L. Ed. 212. The facts in the case of *Patton v. Asheville*, 109 N. C. 685, 14 S. E. 92, are parallel with those before us, so far as it affects this question, and it was held that the act of the Legislature enlarging the dower estate impaired the obligation of the contract. In that case there was no lien in favor of the creditor, but under the law at that time the property of a debtor was subject to the payment of his debts, and the statute enlarging the dower, having the effect to withdraw a portion of the debtor's property from levy and sale, was void as to such debts contracted prior to the statute, and we conclude, without reference to the power of the Legislature to modify or abolish the lien of a judgment, if the property of the debtor, or a material portion thereof, is withdrawn from the reach of pre-existing creditors, it thereby impairs the obligation of such contracts. That was the effect of the enlargement of the dower estate before us, and such statute cannot affect defendant's judgment; and the decision of this court heretofore rendered in this case as to the effect of this statute must be set aside.

It appears, however, that when the confession of judgment by Wm. M. Davidson on November 9, 1892, was executed and entered by the clerk, no judgment was entered thereon, but it was entered upon the judgment docket upon that date, and on July 7, 1897, execution was issued thereon and sale of the lands in question was had thereunder on August 14, 1897. Afterwards, on December 5, 1898, by order of the said court, such judgment was entered nunc pro tunc, as of November 9, 1892, and plaintiff insists that such entry of judgment is not retrospective as against plaintiff's interests, and that she is entitled to dower under the statute of 1893. The office of a nunc pro tunc entry is to

record some act of the court done at a former term which was not then carried into the record; and such entry is retrospective and has the same force and effect as if entered at the time when rendered, except as to third parties having intervening rights. *Cleveland Leader Printing Co. v. Green*, 52 Ohio St. 487, 40 N. E. 201, 49 Am. St. Rep. 725; *McNamara v. N. Y., L. E. & W. R. Co.*, 56 N. J. Law, 56, 28 Atl. 813; *Ferrell v. Hales*, 119 N. C. 199, 25 S. E. 821. It was held in *Doughty v. Meek et al.*, 105 Iowa, 16, 74 N. W. 744, 67 Am. St. Rep. 282, that such entry validates all prior proceedings, including the issuing of execution. *Los Angeles County Bank v. Raynor*, 61 Cal. 145; *Emrich v. Gilbert Mfg. Co.*, 138 Ala. 316, 35 South. 322; *Lowenstein v. Caruth*, 59 Ark. 588, 28 S. W. 421. Although such entry validates the execution issued therein, it could not operate to create a lien from a date earlier than its actual entry to affect intervening rights of third parties. *McNamara v. N. Y., L. E. & W. R. Co.*, 56 N. J. Law, 56, 28 Atl. 813. As between *Richardson and Davidson*, the nunc pro tunc entry is retrospective, and has the same force and effect as if entered at the time the judgment was rendered (*Freeman, Judgments* [3d Ed.] § 67), and, unless they have rights intervening prior to the date of such entry, its effect cannot be questioned by third parties.

Plaintiff's interest in the land on December 5, 1898, the date of the entry of the judgment, was not such as to make her an intervening party within the meaning of the law. Her inchoate right of dower was increased by the legislative act, but she did not act upon conditions then existing, nor did she pay value or otherwise change her condition upon faith in the record, but was only a possible beneficiary under the statute. We understand that, to be protected from the effect of the nunc pro tunc entry, plaintiff must have been in the position of a bona fide purchaser for value. *Freeman, Judgments* (3d Ed.) §§ 66, 67; *Leonard v. Broughton*, 120 Ind. 536, 22 N. E. 731, 16 Am. St. Rep. 347, 355. In this case it is held: "It appears, from the fact averred, that the judgments in favor of the appellants were rendered upon pre-existing obligations. Their rights were fixed prior to the rendition of the judgments, and it does not appear that they were misled, or that they parted with anything of value, or acquired any rights during the interval which elapsed between the date the judgment should have been properly entered and the making of the nunc pro tunc entry, except that they acquired a judgment lien; and the rule is that the general lien of a judgment creditor upon lands of his debtor is subject to all equities existing against the lands of the judgment debtor in favor of third persons at the time of the recovery of the judgment." However independent of the effect of the entry of the judgment, the contract between *Richardson*

and *Davidson* is the thing protected by the Constitution, and the act, increasing the dower, is void as to such contract without reference to the entry of judgment or the creation of a lien, and therefore it is immaterial whether plaintiff's inchoate rights under the dower act can be affected by a nunc pro tunc entry or not. Defendant's right antedates the judgment and is such that the Legislature cannot impair it, and plaintiff cannot complain of the nunc pro tunc entry, as the dower statute is without effect as to defendant's contract, regardless of the judgment. *Patton v. Asheville*, 109 N. C. 685, 14 S. E. 92; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 798; *Bronson v. Kinzie*, 42 How. (U. S.) 311, 11 L. Ed. 143; *Gunn v. Barry*, 15 Wall. (U. S.) 610, 21 L. Ed. 212.

Therefore, the decision of this court heretofore rendered must be set aside, and the decree of the lower court is hereby modified as follows: That the plaintiff is entitled to dower in the lands described in the complaint to the extent of one-third part thereof, and the cause will be remanded to the lower court, with directions to proceed with the assignment of such dower in manner provided by law.

(Or. 1)

STATE v. CARMODY.

(Supreme Court of Oregon. Oct. 22, 1907.)

1. INTOXICATING LIQUORS—INDICTMENT—SUFFICIENCY—PURPOSE OF SALE.

Local Option Law, § 15 (*Laws 1905*, p. 48), provides that when an election held under this law has resulted in favor of prohibition, and the county court has made the order declaring the result and the order of prohibition, any person who shall thereafter within the prescribed bounds of prohibition, sell, exchange or give away, with the purpose of evading the law, any intoxicating liquor, shall be subject to prosecution. Held, that an indictment which follows the language of the statute is sufficient, though not averring that the liquor was sold for beverage purposes, since indictments for misdemeanors created by statute are sufficient if they charge the offense in the words of the statute, subject to the qualification that the offense must be set forth with sufficient certainty to apprise the accused of the offense imputed to him.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 29, *Intoxicating Liquors*, § 229; vol. 27, *Indictment and Information*, §§ 280-294.]

2. INDICTMENT—STATUTORY OFFENSES—NEGATIVE EXCEPTIONS.

Exceptions and provisos in a criminal statute need not be negated in indictments charging a violation thereof, unless they be descriptive of the offense or a necessary ingredient in its definition.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 27, *Indictment and Information*, §§ 295-298.]

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

On petition for rehearing. Petition denied. For former opinion, see 91 Pac. 446.

BEAN, C. J. It is claimed that the indictment in this case is insufficient because it is

not averred that the liquor which defendant is charged with having sold was for beverage purposes. Section 15 of the local option law (Laws 1905, p. 48) provides that when an election held under the provision of the law has resulted in favor of prohibition, and the county court has made the order declaring the result, and the order of prohibition, any person who shall thereafter, within the prescribed bounds of prohibition, sell, exchange, or give away, with the purpose of evading the provisions of the law, any intoxicating liquors, shall be subject to prosecution by information or indictment, etc. This is the penal section of the law, and one defining the crime. The indictment in question follows the language of the statute, and it is the settled rule in this state that in indictments for misdemeanors created by statute it is sufficient to charge the offense in the words of the statute subject to the qualification that the crime must be set forth with such certainty as will apprise the accused of the offense imputed to him. *State v. Shaw*, 22 Or. 287, 29 Pac. 1028. Exceptions and provisos in a criminal statute need not be negatived in indictments, unless they be descriptive of the offense or a necessary ingredient in its definition. *State v. Tamler & Polly*, 19 Or. 528, 25 Pac. 71, 9 L. R. A. 853. The indictment in this case conformed to the rule of law above stated, and is, therefore, sufficient.

Petition denied.

JOHNSON et al. v. SAVAGE.

(Supreme Court of Oregon. Oct. 22, 1907.)

1. EXECUTORS AND ADMINISTRATORS — EXPENSES.

If a husband's curtesy estate in the property of his deceased wife gives him possession to the exclusion of the administrator, the expenses of fencing the property, insurance on a building thereon, and other expenses for the benefit of the husband, are not chargeable against the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 437.]

2. FRAUD — REPRESENTATIONS — RELIANCE — FIDUCIARY RELATIONS.

The rule that a person is guilty of negligence in relying on statements or representations of another as a basis of a contract or transaction does not apply to parties occupying the relation of trust or confidence, such as parent and child, or guardian and ward.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 23.]

3. ADMINISTRATORS—FINAL ACCOUNT—VACATION—GROUND.

Where a husband was appointed administrator of his deceased wife's estate and fraudulently induced the heirs to advance their money to maintain the same, to acquiesce in the final account without examination, and withhold their claims against the estate, the heirs were entitled to have the final account vacated and the estate reopened.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 2199, 2200.]

Appeal from Circuit Court, Marion County; William Galloway, Judge.

Action by Annie M. Johnson and another against O. G. Savage. Judgment for plaintiffs, and defendant appeals. Affirmed in part.

Carey F. Martin and Geo. G. Bingham, for appellant. Geo. E. Chamberlain and M. E. Pogue, for respondents.

EAKIN, J. Loretta E. Savage died intestate on the 12th day of December, 1902, leaving the defendant, her husband, and the plaintiffs, her daughters by a former marriage, to survive her. At the time of her death she owned and possessed real estate in Marion county valued at about \$17,000, but no personal property, except about \$400 worth of sheep and goats. A portion of said real estate was subject to a mortgage for \$3,000 in favor of the state land board. Decedent was also indebted to the Capital National Bank on a promissory note for \$1,000, and plaintiffs claim that she was indebted to them in the sum of \$1,296 advanced by them to her in her lifetime. On December 29, 1902, defendant was duly appointed administrator of the estate. At the time of the said administration plaintiffs were young ladies, having just arrived at their majority, and, being inexperienced in business affairs, had theretofore wholly depended on defendant and their mother in such matters, and had implicit confidence in defendant. At that time he represented to them that, in order to avoid sacrificing the lands of the estate for payment of decedent's aforesaid debts and expense of administration, and to preserve their interest in said lands, it would be necessary for them to pay such expenses and debts from their own property. Plaintiffs also claim that he advised them that, as soon as the estate was closed, he would release said real estate to them, free from his claim of curtesy therein; that thereafter, by his advice, plaintiffs converted property of their own into cash and deposited the same, to the amount of about \$2,200, in the Capital National Bank, and gave defendant authority to check against it for payment of said \$1,000 note, held by the bank against the estate; that defendant did draw from said account sufficient money to pay said note, \$1,031.30, and \$436.90 additional. The administration of the estate was closed September 8, 1903. Defendant, in his final account of the estate proceedings, does not give a statement of the amount of debts against the estate, nor of the source from which he received the money to pay them, but in said account states that "such claims as do not appear in above final account have been paid by this administrator out of his individual funds, and no claim therefor is made against the estate," thus giving plaintiffs no credit for the amount of their funds applied thereto. This suit was commenced March 14, 1905, for the purpose of opening the said decree of final settlement of said estate, permitting plaintiffs to present their claim

against said estate for the advancement of \$1,296 to decedent, and requiring that defendant account for rents and profits of said lands; that he return to plaintiffs \$1,500, used by him in settling said estate debts; and that he apply the rents and profits of the land in payment of the \$3,000 mortgage until the same is paid. An answer was filed to this complaint, in which defendant claims the realty as tenant by curtesy free from any liabilities for debts of the estate. A reply denying these allegations was filed, and at the trial much testimony was taken upon the issues raised, from which findings were made by the court in favor of plaintiffs, and a decree rendered thereon.

The principle question for our consideration is whether defendant's conduct in the management of the estate, in obtaining the plaintiffs' money, and in the final settlement of the estate, as against plaintiffs, was such as to constitute fraud upon them. The final account is a very loose and inaccurate report. It should show all sales of personal property, to whom sold, and the price. Property not sold should be listed and shown to be on hand for distribution. If sheep were killed by dogs, it should be shown by a statement of facts in the report, independent of the charge in the statement of the account. It should also show the estate debts, to whom due, and how paid. The evidence in this case discloses that \$118.75 was expended by the defendant for fencing and for insurance on the hop house, paid from the money of plaintiffs, and this is not mentioned in the report. If defendant's curtesy estate gives him possession to the exclusion of the administrator, as he claims in this suit, then such items are not chargeable to the estate at all, but must be paid by the tenant, which is also true as to the expense of drawing the lease, charged against the estate at \$7.50, which was for defendant's sole benefit. In the final account, the administrator also takes credit for the "present value of the estate," \$16,961.50, viz., \$157.50, increased value of the lands over the appraisement, evidently done to make his account balance, and the error for that amount is in his favor. Nor does he account for the whole of the personal property, nor the increase thereof. These errors could not be taken advantage of now simply as errors in the account, but it appears that, on account of the fiduciary relations between the defendant and plaintiffs and his efforts to lull them into inaction, and thus prevent them from discovering these errors, it operates as a fraud upon them. It is also clear that he induced the plaintiffs to advance to him \$1,500 with which to pay debts of the estate and other expenses of administration, with the understanding that upon the close of the administration they would come into possession of the real estate free from his curtesy estate. This is corroborated by his own testimony at page 101 of the transcript, where he says: "And she (Mrs. Reed) spoke about it (a deed

from defendant to plaintiffs) and wanted to know if I didn't think I had better deed the property over to them. I told her her sister had gone to California, and it would be time enough to talk about it when she came back" —showing that he was encouraging them in the belief that they were to have the land. Upon the same influence and inducement and the fiduciary relations existing between them, and plaintiffs' confidence in defendant's statements that it was all right, they were led to allow the final account to be settled without examination thereof, and without consulting any other adviser in regard thereto. At the time of the death of the decedent, plaintiffs were members of the family and household of defendant and decedent, and after the death of the mother they continued members of the family of defendant until the settlement of the estate, except that they were each absent a short time. At all times the most friendly relations continued; plaintiffs evidently leaving all business relating to the estate entirely to defendant. They acted upon his advice or suggestion in all matters relating thereto, and were ignorant of the legal effect of putting their money into the estate and of their rights therein.

The rule that a person is guilty of negligence in relying upon statements or representations of another as a basis of a contract or transaction does not apply to parties occupying a relation of trust or confidence, such as parent and child, or guardian and ward. 14 Am. & Eng. Ency. Law (2d Ed.) 122; Id. 172; *Baldock v. Johnson*, 14 Or. 542, 13 Pac. 434. By reason of these conditions, plaintiffs have been induced to advance their money to the estate, to acquiesce in the final account without examination, and to withhold their claims against the estate, and have thus been deprived of their rights in regard thereto, resulting in a fraud upon them. Therefore we think the decree of the county court settling the final account should be vacated, and the estate reopened, and plaintiffs given an opportunity to present their claims against the same, and such other proceedings as may be proper in the administration of the estate. As to whether the rents of the realty during the administration should go to the administrator, we deem it unnecessary to decide now, and therefore indicate no opinion upon that question.

The decree of the lower court therefore is affirmed in so far as it directs that the estate be reopened and plaintiffs given a hearing therein.

WATERHOUSE et al. v. CLATSOP COUNTY et al.

(Supreme Court of Oregon. Oct. 15, 1907.)

TAXATION — COLLECTION — STATUTORY PROVISIONS.

B. & C. Comp. tit. 30, c. 1-5, relate to assessment, apportionment, and levy of taxes, chapters 6 and 7 govern their collection, and chapter

6 provides for extension of taxes on a transcript of the roll. Laws 1907, p. 453, § 14, relating to levy and collection of taxes, provides for extending the taxes on the original roll, instead of the transcript; and section 80 declares that laws heretofore in force shall continue in force until matters relating to assessment, apportionment, and levy of taxes on the basis of ownership on March 1, 1907, have been fully performed, but the collection of such taxes shall be as in the act provided. *Held*, that the extension of taxes was a part of the collection, and not of assessment, apportionment, or levy; hence it should be done as provided in the new law.

Appeal from Circuit Court, Clatsop County; Thomas A. McBride, Judge.

Action by John Waterhouse and another against Clatsop county and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Gilbert L. Hedges, Dist. Atty., and John O. McCue, for appellants. John H. & A. M. Smith, for respondents.

BEAN, C. J. The question for decision on this appeal is whether the county clerk is required to extend the taxes levied for the year 1907 on the original assessment roll, and deliver such roll, with a warrant for the collection attached, to the tax collector, or whether he shall make a transcript of the original roll, extend the taxes thereon, and deliver the same, with the tax warrant attached, to such officer. Prior to the act of February 28, 1907 (Laws 1907, p. 453), the law required the county clerk to make a certificate of the several amounts apportioned to be assessed upon the taxable property of his county and deliver the same to the sheriff, together with a transcript of the original assessment roll, with the amount of taxes extended and entered thereon, and with a warrant authorizing the collection of such tax attached. B. & C. Comp. § 3090. On February 28, 1907, an act was passed to provide a more efficient system for the levy and collection of taxes. Laws 1907, p. 453. By section 14 of this act the county clerk is to extend the taxes on the original roll in place of on a transcript thereof, as formerly, and deliver such original roll, with the taxes so extended and warrant attached, to the tax collector; and by section 80 it is declared that all laws heretofore in force are to continue in force and effect until all things and acts in and about the assessment, apportionment, and levy of taxes upon the basis of ownership of property on the 1st day of March, 1907, and the assessment, apportionment, levy, and collection of taxes and proceedings incident thereto, made or commenced prior to such date (except as specified in section 55), have been fully and duly performed, but that the taxes levied on the basis of ownership of property on March 1, 1907, shall be collected as in the act provided.

The object of this provision is plain. The assessment for the year 1907 was to be made on the basis of ownership of property on March 1, of that year, and therefore would be

partly completed before the act of February 28th could go into effect. It was consequently provided that such assessment should be made and the taxes apportioned and levied in accordance with the law in force at the time the making of the assessment was commenced. The taxes assessed and levied for the year 1906, and previous years, could not, in the nature of things, be all collected prior to the time the act of 1907 came into effect, and therefore it was provided that as to assessment, apportionment, levy, and collection of such taxes the law under which the same was made should continue in force. But there was no necessity for any such provision as to the collection of taxes levied on the assessment of 1907, and hence it is provided that such taxes shall be collected in the manner provided in the act of February 28, 1907. The extension of taxes on the tax roll and the delivery of the roll, or a copy thereof, to the tax collector, with a warrant attached, is a step in the collection of the taxes, and not in the assessment, apportionment, or levy. The law has always carefully distinguished between the assessment, apportionment, and levy of taxes, and their collection, and the extension of the taxes upon the roll, or a copy thereof, has always been regarded as one step in the collection. Chapters 1 to 5, inclusive, of title 30, B. & C. Comp., relates to the assessment, apportionment, and levy of taxes, while chapters 6 and 7 govern their collection, and the provision for the extension of the taxes on a transcript of the roll and delivery of such transcript to the sheriff is part of chapter 6. The same distinction was recognized by the Legislature of 1907. It passed two acts in reference to assessment and collection of taxes—one to provide a more efficient and equitable system for the assessment of property for taxation (Laws 1907, p. 485), and the other a more efficient system for the levy and collection of taxes, and the provision in reference to the extension of the taxes on tax roll is found in the latter act (Laws 1907, p. 453).

We conclude, therefore, that the extension of the taxes on the tax roll is no part of the assessment, apportionment, or levy of the tax, but is a step in the process of its collection, and the clerk should extend the taxes for 1907 on the original assessment roll, and deliver such roll, with warrant attached, to the tax collector, as provided in act of 1907.

Decree of court below will be affirmed.

(47 Wash. 342)

PAYNE et al. v. WHATCOM COUNTY
RY. & LIGHT CO. et al.

(Supreme Court of Washington. Oct. 19, 1907.)

1. TRIAL—INSTRUCTIONS—FORM.

A court need not give requested instructions in any set form of language; it being sufficient to give their substance, if proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 664, 665.]

2. EVIDENCE—EXPERT TESTIMONY—WEIGHT.

A jury in a personal injury action may base a finding of permanent injury on ordinary testimony, though it is not sustained by the expert testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2395.]

Appeal from Superior Court, Whatcom County; Jeremiah Neterer, Judge.

Personal injury action by Millie Payne and another against the Whatcom County Railway & Light Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Newman & Howard, for appellants. J. O. Allen, for respondents.

DUNBAR, J. This is an action for damages for personal injuries alleged to have been sustained by Millie Payne, one of the respondents, while a passenger on a street car in Whatcom county on the night of July 4, 1905. The injuries were sustained at a switch on the main line connecting the former cities of Fairhaven and Whatcom. The respondent Millie Payne was a passenger on a south-bound open car, with a step or running board extending the length of the car on each side of the seats extending crosswise. All of the seats were occupied, and the respondent Millie Payne, with many other passengers, was standing on the running board, holding onto vertical bars or handholds constructed for that purpose. The north-bound car was an open car of the same character and dimensions. When the south-bound car attempted to pass the north-bound car, which had stopped too close to the switch, the running boards overlapped, and Millie Payne was caught between them and sustained the injuries complained of. The exact relative positions of the cars is not material, for it is admitted that the motormen in control of the two cars were negligent, and that the company was liable for injuries actually sustained by the respondent Millie Payne; but it is denied that she was injured in the sum of \$10,000, the amount sued for, or any other or greater sum than \$100, which amount, together with accrued costs, it tendered into court. The cause was tried by a jury on the 14th of May, 1906, and a judgment rendered in favor of the plaintiffs in the amount of \$5,000. Thereafter defendants moved the court for a new trial, which motion was sustained, providing, however, that if the plaintiffs filed their written consent to a reduction of the amount of the verdict to \$3,000, the motion for a new trial would be denied. The plaintiffs thereafter filed their written consent to such reduction. Judgment was entered in their favor for the amount of \$3,000, and from such judgment this appeal is prosecuted.

It will be seen from the statement that the only questions involved are those which affect the amount of the judgment. The errors alleged are the giving and refusing to give

certain instructions and the rejection of testimony. It is urged that the court erred in refusing to give the following instruction proffered by the appellants: "You are instructed that it is your duty to try this case as fairly and impartially as though it were an action between two private persons, and it is your duty to disregard all appeals made by counsel to you solely with a view to exciting your prejudice against one of the defendants because it is a street railway corporation, if any such have been made, and that, while counsel have a right to criticize the testimony of the witnesses, they have no right to denounce the testimony of any witness as unworthy of credit, simply for the reason that such witness may have been in the employ of the defendant corporation; and such appeals and denunciations, if any such have been made, should be entirely disregarded by you in arriving at a verdict." And the further instruction: "In estimating the amount of the damages which the plaintiffs have sustained, you will not be permitted to award any greater or less sum by reason of the fact that the injuries were inflicted by the plaintiff Millie Payne having been caught between the cars of the defendant company. In other words, in estimating the damages, you should be guided by the extent of the injuries, and not by the cause which inflicted them. The plaintiffs are entitled to recover no more and no less than they would be, had the same injuries been inflicted in an accident in a shingle mill, sawmill, logging camp, or by an individual." It is so well established that it is scarcely worth repeating that a court cannot be compelled to give instructions in any set form of words or language, but that, when the substance of the instructions asked for, if they are proper instructions, is given, the duty of the court is ended.

A recurrence to the instructions actually given by the court shows that the substance of the instructions asked for was given by the court in this case. The court, among other things, said: "You are further instructed that in your deliberations upon this case it is your duty to try this case as fairly and impartially as though it were a suit between two private persons, and it is your duty to disregard all statements of counsel, made to the court in the presence and hearing of the jury upon any objections which may have been made to the introduction of testimony, or upon any argument which may have been made to the court upon any proposition of law, or anything the court may have said in passing upon such a proposition as was then presented, and determine this solely upon the testimony that has been offered and admitted before the court, in pursuance of the instructions which the court gives you upon the law." In answer to objections of counsel for the appellants in relation to statements that were made by counsel for the respondents, the court said: "The court will

again instruct the jury not to be moved in their conclusion in this case by what counsel may say on either side where it is not supported by the testimony, and determine this case solely upon the testimony that was offered, and which the court admitted, and upon the instructions of the court. The jury is not to consider anything that counsel may say, or the court may say, in passing upon a question of law, but must decide this case solely upon the evidence that is presented to you and admitted by the court." It would seem that the instructions of the court in this respect ought to have been satisfactory. The third instruction complained of was given in effect by the court—that the damages should be compensatory, and could only be based upon the actual damages shown and suffering proved.

The objection is also made that the court refused the following instructions: "The court instructs you that these actions for personal injuries are necessarily painful to the feelings, and there is often an inclination, where the feelings are excited by the addresses of eloquent counsel, to give more, perhaps, than in your calmer moments you would undertake to give. You are to bear in mind that your oath calls for your decision according to the evidence, and that extravagant verdicts have to be set aside and the case tried over again." Even if it should be conceded that this was a proper instruction to give, the spirit of the instruction asked was given by the court, as shown by the excerpts which we have produced.

The fifth complaint is that the court erred in refusing to give the following instruction: "You are instructed that it will be the duty of the jury, in arriving at a verdict in this case, to be governed by the evidence in the case and the law as herein given to you, regardless of the condition of the parties hereto financially, or of the effect of your verdict upon the parties, or either of them." What we have said in reference to the instruction of the court as actually given applies also to this instruction offered. Upon all these questions an examination of the instructions impresses us with the fact that the instructions as a whole were particularly clear and fair, guarding the rights of the appellants with as much zeal as the court could be expected to exercise under any circumstances.

It is also contended that the court erred in instructing the jury that it should take into consideration aggravation of a pre-existing disease, or pre-existing injury to the womb. This objection is based upon the idea that there was no testimony tending to show any pre-existing disease; but from the record we are satisfied there was sufficient testimony to go to the jury on this subject. It is also claimed that the court erred in submitting to the jury the question of permanent injuries, and in giving instructions in regard thereto, for the reason that there was no testimony tending to show permanent injuries. The

weakness of this contention lies in the fact that there was some testimony tending to prove permanent injury. It is true that the testimony of the physicians called as expert witnesses probably did not sustain this contention; but the testimony of the plaintiff Millie Payne and her co-respondent, her husband, Thomas Payne, and the testimony of other of the plaintiffs' witnesses, does sustain it. The testimony of expert witnesses is not exclusive, and does not necessarily destroy the force or credibility of other testimony. The jury has a right to weigh the testimony of all the witnesses, experts and otherwise; and the same rule applies as to the weight and credibility of such testimony.

So far as the amount of the verdict is concerned, we are not convinced, from all the testimony, that the injury inflicted was so trifling as contended for by the learned counsel for the appellants, and perhaps not so serious as counsel for respondents paints it. But if the testimony of the respondents' witnesses, who were certainly in a position by reason of their relations with respondent Millie Payne to judge intelligently of her condition, is to be believed, the judgment awarded of \$3,000 is not excessive; and, considered in relation with the fact that this question was passed upon by the trial judge, who saw the witnesses and heard their testimony, we do not feel justified in disturbing the judgment.

There being no error committed in the giving or refusal of instructions, or in the admission or rejection of testimony, the judgment is affirmed.

HADLEY, C. J., and FULLERTON, RUDKIN, ROOT, MOUNT, and CROW, JJ., concur.

(46 Wash. 690)

WITHERILL et al. v. FRAUNFELTER et al. (Supreme Court of Washington. Oct. 19, 1907.)

HUSBAND AND WIFE—SEPARATE PROPERTY—COMMUNITY PROPERTY.

Property in this state, purchased by a married man, domiciled in Pennsylvania, with money accumulated from the profits of a business conducted by himself in that state while residing therein with his wife, was the separate property of the husband, and not community property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 900-902.]

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by John R. Witherill and others against James Fraunfelter and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Harold Preston and Charles E. Patterson, for appellants. E. P. Whiting, for respondents.

PER CURIAM. This is an action brought to quiet the title to certain real property situated in King county. The property in question.

tion was purchased as an investment by one L. B. Lockard, then a married man, domiciled in the state of Pennsylvania, with money accumulated from the profits of a business conducted by himself in that state, while residing therein with his wife. After the purchase the wife died, and Lockard sold the land to the predecessors in interest of the appellants. The respondents claim title as the successors in interest of the heirs of the wife. The laws of Pennsylvania governing the ownership of money acquired as the money invested in this property was acquired is substantially the common law; the money being under the absolute control and dominion of the husband. The single question presented by the record is: Was the real property in question the separate property of Lockard, or the community property of Lockard and wife. If it was the former, the appellants have title; if the latter, title is in the respondents.

This precise question was presented to this court in the case of *Brookman v. Durkee*, 90 Pac. 914, and the property then in question decided to be the separate property of the husband. That case is controlling here, and requires a reversal of the judgment entered by the court below.

The order will be, therefore, that the judgment appealed from be reversed, and the cause remanded with instructions to enter judgment in favor of the appellants for the interest in dispute.

(47 Wash. 369)

CLAUSEN v. LAWRENCE et ux.

(Supreme Court of Washington. Oct. 19, 1907.)

APPEAL — REVIEW — DISCRETION OF COURT — SETTING ASIDE DEFAULTS.

An order setting aside a default judgment will not be disturbed on appeal unless it appears that substantial injustice has been done by an abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3823.]

Appeal from Superior Court, Spokane County.

Action by R. C. Clausen against P. A. Lawrence and wife. From a judgment for defendants, plaintiff appeals. Affirmed.

R. L. Edmiston, for appellant. B. M. Bradford, for respondents.

DUNBAR, J. This is an appeal from a final judgment of dismissal and costs against appellant, and from certain orders made during the trial. This is an action for damages for an alleged breach of contract. The appellant and respondent P. A. Lawrence, in the month of October, 1904, entered into an oral agreement, by the terms of which said P. A. Lawrence was to furnish certain sums for the purchase of a certain tract of land, situated in Idaho, and appellant was to open and maintain a suitable office in the city of Spokane, Wash., for the sale of said land,

and to personally devote his time and best efforts to that end; that Lawrence was to receive the first proceeds of the sales made from said tract of land, until he should be fully reimbursed with all the money invested by him; and that afterwards appellant was to receive one-half of the profits which might be realized over and above the sum to be paid to said Lawrence as aforesaid, in consideration of the services which said appellant agreed to render in opening and maintaining an office, and using his best efforts in selling said described tract of land. The court found from the testimony that, in pursuance of said agreement, Lawrence purchased the said tract of land and performed his part of the agreement; that on or about the 1st day of December, 1904, the plaintiff abandoned the office which he had occupied during the time of the negotiations and making the above-mentioned agreement; that after the sale of a small portion of said land, to wit, on or about January 1, 1905, the plaintiff, voluntarily and without cause or consent on the part of defendants, or either of them, abandoned the said contract and agreement, and entered into and engaged in other business wholly foreign to, and inconsistent with, said agreement, and utterly failed and neglected to open or maintain any office at all for the sale of such real estate, and failed to sell, or make any effort to sell, such tract of land, or any part thereof, and abandoned and wholly failed to perform his part of the agreement, voluntarily and without cause or consent on the part of said defendant; that the defendants were not indebted to the plaintiff in any sum whatever. And concluded as a matter of law that said plaintiff voluntarily abandoned and rescinded the aforesaid agreement on the 1st day of January, 1905, and thereby ended the same, and thereby ended and determined any and all obligations of the said defendants to the end and by virtue of the contract; that there was nothing due from the said defendants to the plaintiff under and by virtue of the contract; and that the defendants were entitled to a judgment of dismissal of the action and for all lawful costs expended. Certain findings of fact, which were essentially opposite in matter of statement to the findings found by the court, were suggested by the appellant and refused by the court.

Judgment in this case had been taken against the respondents by default. This judgment was afterwards vacated on motion of the respondents, and it is strenuously urged by the appellant that the court erred in vacating the default judgment, and granting the defendants permission to answer. A motion of this kind is so particularly addressed to the discretion of the trial court, who is familiar with all the circumstances of the case, that the appellate court will be slow to interfere with the orders of the trial court, unless it should appear that substantial injustice had been done by an abuse of

discretion. Especially is this true where the order of the court does not permanently deprive the plaintiff of any substantial right, but simply has the effect of submitting his case to a trial on the merits. The record convinces us that there was no abuse of discretion in vacating the judgment.

On the merits there seems to be no particular principle of law involved. If the findings of the court are correct, the judgment should undoubtedly be sustained; but, if the findings proposed by the appellant are justified by the evidence, the judgment is wrong. The action is not one for an accounting, as is asserted by appellant, but is an action for damages for breach of contract.

Viewed in either aspect, we are satisfied that the findings of the court are justified by the testimony, and the judgment is therefore affirmed.

HADLEY, C. J., and FULLERTON, RUDKIN, ROOT, MOUNT, and CROW, JJ., concur.

(47 Wash. 315)

ZENT v. SULLIVAN et al.

(Supreme Court of Washington. Oct. 11, 1907.)

1. HUSBAND AND WIFE—NECESSARIES—EXPENSES OF DIVORCE PROCEEDING.

A wife has no implied power to pledge her husband's credit for the expenses of prosecuting or defending a divorce action as necessities, since Ballinger's Ann. Codes & St. § 5722, gives the court power to provide for the wife's expenses, and to compel the husband to pay them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 137.]

2. SAME—AGENCY OF WIFE FOR HUSBAND—NATURE OF RIGHT.

The implied power of a wife to bind her husband for necessities, where it exists, is for her own benefit, and not for the benefit of those with whom she may deal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 121, 122.]

3. SAME—EXPENSES OF DIVORCE SUIT—WIFE'S CONTRACT WITH ATTORNEY—LIABILITY OF HUSBAND.

A contract with a wife for the payment of an attorney fee in a divorce proceeding to be paid in addition to any allowance made by the court shows upon its face that it is the individual obligation of the wife, and no recovery could be had on it against the husband.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 137.]

4. SAME—ACTION FOR ATTORNEY FEES—BURDEN OF PROOF.

In an action against a wife for attorney fees in a divorce proceeding, the burden is upon the attorney of proving that the action was instituted on reasonable and justifiable grounds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 844.]

Appeal from Superior Court, Adams County; W. T. Warren, Judge.

Action by D. W. Zent against Maggie Sullivan and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Zent, Lovell & Hamilton, for appellant. O. R. Holcomb, for respondents.

RUDKIN, J. On the 14th day of January, 1906, the plaintiff entered into a written contract with the defendant, Maggie Sullivan, whereby he agreed to commence and diligently prosecute an action for divorce in favor of said Maggie Sullivan against her husband, John C. Sullivan, her co-defendant herein, and on her part said Maggie Sullivan agreed that the plaintiff should receive for his services in that behalf the sum of \$500, or \$250 in the event that such action should be dismissed before final judgment, such sums to be in addition to any sums allowed or awarded by the court in the divorce proceedings. On the following day the divorce action was commenced by the filing of the complaint and the service of a summons, but the action was thereafter dismissed by consent of the parties before final judgment. This action was thereupon commenced against both the husband and wife to recover the stipulated fee. The plaintiff proved the execution of the contract for the fee by the defendant Maggie Sullivan, the commencement and dismissal of the action for divorce, offered in evidence the contract and the files in the divorce action, and rested. A motion for nonsuit interposed by the husband at this stage was sustained, and, from the judgment of nonsuit, the present appeal is prosecuted.

There is a conflict of authority on the question of the husband's liability for counsel fees incurred by the wife in connection with divorce proceedings, whether she be plaintiff or defendant. In Alabama, Arkansas, Connecticut, Illinois, Indiana, Kentucky, Massachusetts, Missouri, Nebraska, New Hampshire, Vermont, and Wisconsin the rule of nonliability is asserted without qualification. *Pearson v. Darrington*, 32 Ala. 227; *Kinche-loe v. Merriman*, 54 Ark. 557, 16 S. W. 578, 26 Am. St. Rep. 60; *Shelton v. Pendleton*, 18 Conn. 417; *Dow v. Eyster*, 79 Ill. 254; *McCullough v. Robinson*, 2 Ind. 630; *Williams v. Monroe*, 18 B. Mon. (Ky.) 514; *Coffin v. Dunham*, 8 Cush. (Mass.) 404, 54 Am. Dec. 769; *Isbell v. Weiss*, 60 Mo. App. 34; *Yelser v. Lowe*, 50 Neb. 310, 69 N. W. 847; *Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 120; *Wing v. Hurlburt*, 15 Vt. 607, 40 Am. Dec. 695; *Clarke v. Burke*, 65 Wis. 359, 27 N. W. 22, 56 Am. Rep. 631. Thus, in *Shelton v. Pendleton*, supra, decided in 1847, the court said: "This demand of the plaintiffs has no support from any precedent to be found by us in this country or elsewhere." And in *Coffin v. Dunham*, supra, decided in 1851, Shaw, C. J., said: "This action is without precedent in this commonwealth, and contrary to the practice and course of decisions." On the other hand, in the following more recent cases the right of recovery is sustained, with certain qualifications and limitations: *Ottaway v. Hamilton*, 3 C. P. D. 398; *Stock-*

en v. Patrick, 29 L. T. S. 507; Sprayberry v. Merk, 30 Ga. 81, 76 Am. Dec. 637; Porter v. Briggs, 38 Iowa, 166, 18 Am. Rep. 27; Preston v. Johnson, 65 Iowa, 285, 21 N. W. 606; Clyde v. Peavy, 74 Iowa, 47, 36 N. W. 883; McCurley v. Stockbridge, 62 Md. 422, 50 Am. Rep. 229; Langbein v. Schneider, 16 N. Y. Supp. 943, 27 Abb. N. C. 228; Hahn v. Rogers, 69 N. Y. Supp. 926, 34 Misc. Rep. 549; Ceccato v. Deutschman, 19 Tex. Civ. App. 484, 47 S. W. 739; Dodd v. Hein, 26 Tex. Civ. App. 164, 62 S. W. 811; Peck v. Marling, 22 W. V. 708. In Johnson v. Williams, 3 G. Greene, 98, 54 Am. Dec. 491, decided in 1851, the Supreme Court of Iowa said: "We find no case where the husband has been sued and a recovery had upon the ground of necessities." In Porter v. Briggs, *supra*, the court later permitted a recovery by the wife's attorney against the husband, where the wife had been sued for a divorce on the ground of her adultery. And in the still later case of Preston v. Johnson, *supra*, the court seems to recognize the right of the attorney to recover against the husband in all cases, subject to the single requirement that he acted in good faith. It will thus be seen that the clear weight of authority is against the attorney's right of recovery in such cases, and this much the appellant concedes.

It certainly cannot be said as a universal rule that expenses incurred by the wife in obtaining or attempting to obtain a divorce from her husband are for necessities, as that term has been uniformly defined by the courts. On the other hand, if the law made no other provision for the prosecution or defense of such actions by the wife, there would be strong, and perhaps controlling, reasons for holding in some individual cases that the expenses incurred were necessary for the protection of the wife, and that she had implied authority to pledge the husband's credit for their payment. But our statute makes very liberal provision for the wife in such cases. Section 5722, Ballinger's Ann. Codes & St., provides that "pending the action for divorce the court, or judge thereof, may make, and by attachment enforce, such orders for the disposition of the persons, property and children of the parties as may be deemed right and proper, and such orders relative to the expenses of such action as will insure to the wife an efficient preparation of her case, and a fair and impartial trial thereof; and on decreeing or refusing to decree a divorce, the court may, in its discretion, require the husband to pay all reasonable expenses of the wife in the prosecution or defense of the action, when such divorce has been granted or refused, and give judgment therefor." In view of the liberal provisions of this statute we see no possible reason why the wife is under a necessity to pledge her husband's credit for the expenses of prosecuting or defending an action for divorce in this state, or why she should have any implied power in that regard. The divorce court has before it

91 P.—69

the parties, their property, their merits and delinquencies, and can fix the amount of the husband's liability to the wife and her attorney on an equitable basis, without any inquiry into collateral facts; and we are satisfied that the rights of all parties will be best subserved by relegating the question of the husband's liability for the attorney's fees of the wife to that tribunal. It was so held in Clarke v. Burke, *supra*, under similar statutory provisions, and the rule there announced meets our approval. It may be said that such a rule will permit the wife to defraud her attorney, but such a result may happen in any case where the attorney is dependent on the fruits of the litigation for his compensation. Furthermore, the implied power of the wife to bind the husband, if it exists at all, exists for her own benefit and protection, not for the benefit or protection of those with whom she may deal.

There are additional reasons why the judgment in this case should be affirmed. In the first place, the contract in suit shows upon its face that it was and was intended to be the individual obligation of the wife. It provided for the payment of the sums specified, regardless of any allowances made by the court in the divorce proceedings, and the complaint filed on the following day prayed for an attorney's fee of \$500 against the husband. Surely the husband cannot be held liable on such a contract as this. In Sprayberry v. Merk, *supra*, cited by the appellant, the court held that the husband was chargeable with the real value of the services rendered, not with the price which the wife might fix by contract. Again, the courts, which permit a recovery almost without exception, impose upon the attorney the burden of proving that the divorce action was instituted on reasonable and justifiable grounds—not reasonable and justifiable grounds on paper, but reasonable and justifiable grounds in fact. Such proof in actions of this kind would seem indispensable, for in no other way can the necessity for the services or the implied power of the wife be made to appear. No such showing was made in this case.

Inasmuch as the abstract question of the husband's liability in such cases was the only question discussed in the briefs, we preferred not to rest our decision upon these latter grounds alone; but, for the several reasons herein stated, the judgment must be affirmed, and it is so ordered.

HADLEY, C. J. and FULLERTON, CROW, DUNBAR, and MOUNT, JJ., concur.

STATE ex rel. DAVIS v. CLAUSEN, State Auditor.

(Supreme Court of Washington. Oct. 19, 1907.)

STATUTES—NATURE OF AMENDATORY ACTS.

Under Laws 1901, p. 249, c. 119, creating a board of control, each member was allowed

\$2,000 a year. Under an amendatory act (Laws 1907, p. 377, c. 166), this was changed to \$3,000. Laws 1901, p. 250, c. 119, § 3, provides that the board shall assume its duties on April 1, 1901, and shall have the power, etc. Laws 1907, p. 378, c. 166, § 2, begins: "That section 3 of said act [of 1901] be amended to read as follows: 'Sec. 3. The board of control shall have full power,' etc.—giving additional powers, but leaving out the provision as to when the board should assume its duties. Const. art. 2, § 25, article 3, § 25, article 4, § 13, and article 11, § 18, provide that the salaries of public officers shall not be increased during their terms of office. Relator was appointed on the board for six years from April 1, 1905, and was a member thereof when the act of 1907 was passed. Held, that Laws 1907, p. 378, c. 166, § 2, did not repeal the provision of Laws 1901, p. 250, c. 119, § 3, relating to the commencement of the term of office, thereby abolishing the old and establishing a new office, but merely endowed the board with additional powers, and therefore the relator is only entitled to \$2,000 a year during his unexpired term.

Petition by the state, on the relation of J. H. Davis, for a writ of mandamus to compel O. W. Clausen, State Auditor, to issue a warrant for the payment of salary. Writ denied.

Vance & Mitchell, for relator. John D. Atkinson and A. J. Falknor, for respondent.

DUNBAR, J. The plaintiff is a member of the state board of control, having been originally appointed to said office under the Laws of 1901. He was appointed on April 1, 1905, for a full term of six years, and filed his bond and oath of office at that time, and at all times since has been a duly acting and qualified member of the state board of control. The Legislature of 1907 passed an act (Laws 1907, p. 377, c. 166) amending the act of 1901 in relation to the board of control. In said act the salary of the members of the board of control was raised from \$2,000, as it was established under the act of 1901, to \$3,000, per annum. The Governor, acting upon the theory that under the provisions of the act of 1907 there should be a reconstitution of the board, appointed the relator to the office of member of the board of control on the 12th day of June, 1907. The relator deeming that he was entitled to the salary provided for under the act of March, 1907, presented his bill for the amount which would be due him under said act; but the defendant, the State Auditor, has refused to honor the requisition, insisting that he should pay only \$2,000 salary under the old act, by reason of the fact that the relator was a member of the board of control at the time of the passage of the new act.

It is the contention of the relator that that provision of the law of 1901 which prescribed the time at which the term of office begins, having been repealed and not having been brought forward into the amendatory act, is no longer the law, and that consequently the provisions of the new act required a reconstitution of the board by the executive, whose terms take effect from the time of the constitutional operation of the new

law. The facts are undisputed. Section 1, c. 119, p. 249, of the Laws of 1901, is as follows: "The Governor of the state shall, by and with the advice and consent of the Senate, appoint a bi-partisan board consisting of three citizens of the state, not more than two of whom shall belong to the dominant political party, as members of a board to be known as the 'State Board of Control.' The members of said board shall hold office, as designated by the Governor, for two, four and six years respectively and be removable by the Governor in his discretion. Subsequent appointments shall be made as provided and, except to fill a vacancy, shall be for a period of six years. The chairman of the board for each year shall be the member whose term of office first expires. All vacancies that may occur on said board while the Legislature is not in session shall be filled by appointment by the Governor and shall be submitted to the Senate for consideration at the next session following the appointment. Each member of the said board shall receive a salary of two thousand dollars (\$2,000) per annum, and in addition shall be paid for all actual expenses incurred in discharge of his duties, said expenses not to exceed the sum of one thousand dollars (\$1,000) per annum for each member of the said board." Section 1 of the amendatory act is an exact duplicate of section 1 of the original act of 1901, excepting that it provides that each member of the board shall receive a salary of \$3,000, instead of \$2,000. Section 3 of the act of 1901 provides that the board of control shall assume its duties on April 1, 1901. Section 3 of the 1901 act commences as follows: "The board of control shall assume its duties on April 1, 1901, and shall have full power to manage and govern the Western Washington Hospital for the Insane, Eastern Washington Hospital for the Insane, the State Penitentiary, State Reform School, the State Soldiers' Home, and the State School for Defective Youth, subject only to the limitations contained in this act," etc. The amendment is as follows (Laws 1907, p. 378, c. 166, § 2): "That section 3 of said act be amended to read as follows: 'Sec. 3. The state board of control shall have full power to manage and govern the following public institutions'"—and then proceeds to mention the same institutions that are mentioned in the original act; and the provisions of the sections are the same, excepting that the amendatory act gives the board of control the custody and control of the State Capitol buildings and grounds, with certain powers over them that had theretofore been exercised by another state officer, and gives them certain supervision over the University of Washington and the Normal Schools of the state. The other sections amended are in all practical respects the same as the original sections, except in relation to the amount of salaries which are to be paid subordinate officers, and the expenses incurred by the mem-

bers of the board of control, and minor details.

The provisions of our Constitution bearing on this subject are as follows: Section 25 of article 2 provides that the compensation of any public officer shall not be increased or diminished during his term of office. Section 25 of article 3 provides that the compensation of state officers shall not be increased or diminished during the term for which they shall have been elected. Section 13 of article 4 provides that judges of the Supreme Court and judges of the superior courts shall, at stated times during their term of office, receive for their services the salaries prescribed by law therefor, which shall not be increased after their election nor during the term for which they shall have been elected. This provision is not in point, excepting to show the intention of the framers of the Constitution in relation to the changing of the salaries of any kinds of officers in the state. Section 8 of article 11 provides that "the salary of any county, city, town or municipal officer shall not be increased or diminished after his election, or during his term of office." So that it will be seen that it was a positive policy of the Constitution, expressed in every possible way, that the salaries of officers should not be increased during their term of office. This wise provision was no doubt intended to prevent pernicious activity on the part of the office holders of the state being brought to bear upon the members of the Legislature—a wise provision, which must not be construed out of existence or evaded by legislative enactment.

The relator invokes the doctrine announced by Sutherland on Statutory Construction (2d Ed.) § 247, that, where an act is amended, or a section, by the use of the words "so as to read as follows," and the substituted provision is inserted without specification of the changes intended to be made, the parts of the former law left out are repealed, and that, inasmuch as section 3 is amended without providing for the commencement of the term of the office, the legislative intent was clear to abolish the office and establish a new office by the re-enactment. The rule contended for, of course, is the general rule; but the true intent of the Legislature must be gathered from the whole scope of the enactment and the reasons which appear for making the enactment. In this case, instead of the omission tending to show the legislative intent to establish the commencement of the term at some future time, the fact that no future time was mentioned or fixed shows that the Legislature did not intend to create a new office, but understood that it was legislating with reference to an office already in existence and with reference only to certain material changes which it desired to make in the law. The amendment to section 3 shows clearly that the only change intended was the change in regard to salary.

This question has been passed upon by

this court in *Mudgett v. Liebes*, 14 Wash. 482, 45 Pac. 19; and while the contention in that case was the opposite of the one in this, viz., that an officer could be deprived of the salary which attached to his office at the time he was elected by subsequent repealing legislation, the principle announced was the same. In that case Sutherland on Statutory Construction, 134, was cited, where it was said that: "Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal, so far as the old law is continued in force. It operates without interruption, where the re-enactment takes effect at the same time. * * * Offices are not lost, corporate existence is not ended, inchoate statutory rights are not defeated, a statutory power is not taken away, nor criminal charges affected by such repeal and re-enactment of the law on which they respectively depend." And the case of *State ex rel. Blossom v. Horton*, 21 Nev. 300, 30 Pac. 876, was approvingly quoted, where it was said: "The effect of an amendment of a statute made by enacting that the 'act is hereby amended so as to read as follows,' and then incorporating the changes or additions with that portion of the former act that is retained, is not that the portions of the amended act which are merely copied from the original act are to be considered as having been repealed and again re-enacted. The part which remains unchanged is to be considered as having continued to be the law from the time of its first enactment."

The whole amendatory act convinces us that it was not the intention of the Legislature to create a new office, or to abolish in any manner the provisions of the act in relation to the commencement of the term of office, but that it was simply the intention to amend the law in respect to the amount of the salary, and with respect to the added powers and duties which it was deemed wise to impose upon the board of control. We think the case falls plainly within the inhibition of the Constitution in relation to increasing the salary of public officers, and that the Auditor was justified in refusing to issue the warrant.

The writ will be denied.

HADLEY, C. J., and RUDKIN, ROOT, MOUNT, and CROW, JJ., concur.

WILLIAMS et al. v. ERIE MOUNTAIN CONSOL. MINING CO. et al.

(Supreme Court of Washington. Oct. 19, 1907.)

CORPORATIONS—STOCKHOLDERS—INJURY TO CORPORATION—RIGHT TO SUE.

Though, generally, before a stockholder may sue or defend for the corporation, he must show he has exhausted all available means to obtain within the corporation itself redress of his grievances or action conforming to his wishes, where the assets of a corporation have

been fraudulently diverted into the hands of individual shareholders, and the officers are not faithfully discharging their duties, a stockholder may sue without presenting the matter to the corporation for action and without demanding that the corporation or officers sue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 791-796.]

Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by S. M. Williams and others against the Erie Mountain Consolidated Mining Company, George Ilse, and others. From the judgment, defendant Ilse appeals. Affirmed.

Peacock & Ludden, for appellant. Willis H. Merriam and Swanson & Ripley, for respondents.

DUNBAR, J. This action was brought by the plaintiffs, alleging: That they at one time were stockholders in the Erie Mountain Consolidated Mining Company; that afterwards they had their stock transferred into the Erie Consolidated Gold Mining Company, in consideration of a certain agreement between the two companies by which the property of the first company was to be transferred to the second company; that the complete transfer was not consummated by reason of a fraudulent conspiracy between the officers of said company, to wit, G. S. Allison, Rufus Merriam, Willis Merriam, and the defendant George Ilse, to cheat and defraud the second company, the Erie Consolidated Gold Mining Company, in pursuance of which fraudulent conspiracy the property of the corporation was deeded by the first company, the Erie Mountain Consolidated Mining Company, to the defendant Ilse. And other allegations were made in regard to peculations of the defendants. The complaint prays for an appointment of a receiver, the judgment declaring the deed to the property null and void, and that the defendant Ilse be compelled to reconvey to the second company, and for an accounting by Rufus Merriam and Willis Merriam. A demurrer was interposed to this complaint. The important proposition raised in the demurrer, and the only one which merits discussion here, is that the plaintiffs have no legal capacity to sue. The demurrer was overruled by the court, the defendants Merriam and Allison interposed a cross-complaint, and judgment was obtained against Ilse, to the effect that upon the return of the money that he advanced for the benefit of the property he should redeed the same to the Erie Consolidated Gold Mining Company. The cross-complaint, in substance, alleged that the property was deeded to Ilse with the intention that it should be held in trust for the benefit of the corporation for certain reasons alleged in the complaint which it is not necessary to set forth here, and that it was made without other consideration, and because the companies had confidence in him as trustee of the Erie Consoli-

dated Gold Mining Company. The prayer in that complaint is that said Ilse be required to make a deed of transfer of said properties back to the defendant companies.

It is contended by learned counsel for the appellant that the demurrer of the defendant Ilse to the complaint should have been sustained for the reason that there was no allegation showing the matter had been presented to the corporation for it to act upon, and that there was no demand upon the corporation or its officers to bring suit. It may be admitted that as a general rule, before a stockholder can be permitted to sue or defend on behalf of a corporation, he must show that he has exhausted all means within his reach to obtain within the corporation itself the redress of his grievances, or action in conformity to his wishes, and that the managing body of the corporation has refused to sue or defend, as the case may be. This is the rule announced in 26 Am. & Eng. Enc. of Law (2d Ed.) p. 976 (F), and notes. *Ninneman v. Fox*, 86 Pac. 213, a case decided by this court, is also cited by appellant in support of his contention. In that case the general rule was announced as above set forth. But it was especially stated in the opinion in that case that it had no reference to suits brought by a stockholder where the corporate authorities refused to act. It seems to us that the complaint in this case shows a state of facts that is equivalent to a showing that the corporate authorities or those in control refuse to act. It is alleged, concerning the deed which it had been resolved by proper action should be made out to the Erie Consolidated Gold Mining Company from the Erie Mountain Consolidated Mining Company: That Ilse, the president of the Erie Consolidated Gold Mining Company, and Willis H. Merriam, secretary and treasurer, neglected, refused, and failed to place said deed of record with the land registry office, Nelson, British Columbia, and withheld said deed from record for the purpose of cheating and defrauding the stockholders of their rights; that without notice and consent of the remainder of the board of trustees they passed a resolution to deed all of the said property to the said George Ilse, president of the Erie Consolidated Gold Mining Company, and made a conveyance to him of all of the mining property belonging to the said Erie Consolidated Gold Mining Company as an individual, which before had been deeded to the said Erie Consolidated Gold Mining Company; that no consideration was given for said deed; that said deed included all the property belonging to said corporation; that the said Rufus Merriam, Willis Merriam, and George Ilse have neglected and refused to allow the stockholders or their representatives, attorneys, or agents, to inspect or examine any of the books, by-laws, deeds, receipts, or any record whatever of said companies although they have often been re-

quested so to do, and the stockholders have made demand and asked to be allowed to inspect said books; that by reason of such action they were unable to give a description of the property, and unable in any way to intelligently proceed in the matter; and that from time to time they have demanded the right of parties in control of the books to inspect said books in order to know the condition of the affairs of the company, and said right had been refused at all times to them or their legal representatives.

Under this showing, it seems to us that the plaintiffs have brought themselves within the exception to the general rule, and that they are practically helpless so far as any action within the corporation is concerned. The rule as announced in subdivision 8, on page 978, 26 Am. & Eng. Enc. of Law, is as follows: "In the state courts it is generally held that a stockholder may excuse a failure to demand corporate action by showing that the persons charged with the wrongdoing, and who would be parties defendant to the action, are still in control of the corporation as directors, or that the wrongdoers control a majority of the board of directors, or by proof of any other facts which clearly show that a demand for corporate action would have been useless." On page 967, 10 Cyc., it is said: "This right of action arises where the majority of the shareholders in control of the corporation are pursuing a course of action which is plainly oppressive to the minority and in fraud of their rights; where the directors and officers are acting, not in faithful discharge of their trust, but are perverting their official powers to their own personal gain and benefit, and in fraud of the rights of the shareholders; where the managers and a majority of the shareholders are diverting the assets of the corporation from their legitimate purposes to their own use and benefit; where the assets of the corporation have been fraudulently diverted into the hands of individual shareholders." The allegations of the complaint are too numerous to set forth in detail in this opinion, but there is certainly enough to show, if the complaint is true, that the assets of the corporation have been fraudulently diverted into the hands of individual shareholders, and that the officers are not acting in any faithful discharge of their duties, but are performing their official powers to their own personal gain and benefit, and such showing is made here as ought to empower a court of equity to act in the premises. We think the other objections to the complaint are untenable, and that no error was committed by the court in any of the matters complained of. From an investigation of the testimony, we have reached the conclusion that the facts found by the court were justified by the record, and it is immaterial whether the facts found were based upon the testimony offered in support of the original complaint or the cross-complaint.

The judgment rendered metes out substantial justice in the case.

It is therefore affirmed.

HADLEY, C. J., and FULLERTON, RUDKIN, ROOT, MOUNT, and CROW, JJ., concur.

REED v. GORMLEY, County Treasurer, et al (Supreme Court of Washington. Oct. 19, 1907.)

1. COUNTIES—COUNTY BOARD—POWER TO HIRE SPECIAL COUNSEL.

County commissioners have power to employ special counsel, under Ballinger's Ann. Codes & St. § 342, subd. 6, granting them power to prosecute and defend all actions for and against the county, and section 466, providing that they may employ counsel other than the prosecuting attorney when they may deem it for the interest of the county.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 179.]

2. SAME—STATUTORY PROVISION.

Laws 1891, p. 6, c. 5, defining the duties of the prosecuting attorney, does not repeal Ballinger's Ann. Codes & St. § 466, empowering county commissioners to employ other attorneys than the prosecuting attorney when they deem it to the interests of the county.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by R. O. Reed against Matt H. Gormley and others. From a decree for plaintiff, defendants appeal. Reversed and remanded.

Wright & Kelleher and Ballinger, Ronald, Battle & Tennant, for appellants. Kenneth Mackintosh, R. W. Prigmore, and Blaine, Tucker & Hyland, for respondent.

DUNBAR, J. This action arises out of a contract with the board of county commissioners of King county made with one H. H. Eaton, attorney at law, by which Eaton was employed by said board in behalf of the county to conduct any proceedings necessary to secure the escheat of estates. By the terms of the contract, which it is not necessary to set forth in this opinion, Eaton was to have as compensation for his services an amount equal to one-half of the value of the estate which he procured to be escheated. In due course Eaton appeared in behalf of the county in probate proceedings upon the estate of Nellie Lawton, deceased, and secured a decree distributing the estate to the state of Washington. After such decree of distribution appraisers were appointed as provided in the contract, and the real property thus escheated was appraised at \$14,000. Eaton subsequently filed with the county commissioners his claim for \$7,000 pursuant to his contract. Such claim was duly audited and allowed by the county commissioners, and 14 county warrants for \$500 each were issued to him in payment thereof. The plaintiff brought this suit as a taxpayer of King county to enjoin the pay-

ment of the warrants, alleging the invalidity of the acts of the county commissioners. The eleventh finding of fact is as follows: "That before making said contract the board of county commissioners consulted the prosecuting attorney of King county regarding the legality thereof, and were advised by the said prosecuting attorney of King county, W. T. Scott, Esq., in writing, that the said contract was legal, and that the said board of county commissioners, in making the said contract, and in auditing the said claim and instructing the auditor to issue said warrants, acted in good faith." So that, so far as this case is concerned, it must be considered upon the theory that no fraud was perpetrated by the board of commissioners in entering into the contract in question, but that the contract was entered into in good faith, and for the best interests of the county according to the judgment of the commissioners. The court entered a decree enjoining the payment of the warrants in controversy, and from this decree this appeal is taken.

The question upon which this case must be decided is: Did the county commissioners of King county have power to make the contract with Eaton which they did make? The contention of the respondent is that this contract was beyond the authority of the commissioners, the law making it the especial duty of the prosecuting attorney to attend to such business as Eaton was employed to attend to; that the contract of employment could not be made without impinging upon the rights and duties of the prosecuting attorney under the law; and this view of the law was taken by the honorable trial court. An examination of the authorities and of our statutes convinces us that this was a mistaken view, and that the almost universal law in jurisdictions where the statute is similar to ours is to the effect that the county commissioners have authority to bind the county in the employment of special counsel. The announcement in the *American Digest*, vol. 13, Century Edition, p. 1469, § 179, is to the effect that the county board has power to employ counsel other than the official attorney to defend the county's interests in special suits, and many authorities are cited which sustain the announcement. Many other cases might be cited to sustain the same doctrine. In *Lassen County v. Shinn*, 88 Cal. 510, 512, 26 Pac. 365, 366, the court said: "It is settled law that, where a county has legal business to be transacted, its board of supervisors may employ counsel, other than the district attorney, to transact the business, if in the judgment of the board the public interest will thereby be subserved"—proceeding to give many reasons to sustain the rule. In *Ellis v. Washoe County*, 7 Nev. 291, it was said: "The only question to be determined, then, is whether the commissioners possessed the authority so to bind the county. This

particular power is not given in express terms, but the power 'to control the prosecution or defense of all suits to which the county is a party,' which is given in subdivision 12, § 8, c. 1, p. 48, Laws 1871, clearly embraces the power to employ counsel to protect the interest of the county. Litigation can only be controlled by means of attorneys having the authority to appear in the courts; hence, to give full effect to this power, the commissioners must in the very outset have the power to employ counsel. Nor is it any answer to say that the law designates and provides an attorney for that purpose—the district attorney; for it is not unfrequently the case that he may be unable to attend to the business of the county, or its interests in some particular suit may be of such magnitude that the assistance of other counsel would be very desirable, or possibly indispensable."

But, outside of authority and cited cases, we think the question is absolutely determined by the necessary construction to be given to the statute and by the decisions of this court. Section 342, 1 Ballinger's Ann. Codes & St., defines the general powers and duties of county commissioners, and subdivision 6 of such section provides: "To have the care of the county property and the management of the county funds and business, and in the name of the county to prosecute and defend all actions for and against the county, and such other powers as are or may be conferred by law." Under this provision of the statute, under the rule announced by this court in *State ex rel. Whitney v. Friars*, 10 Wash. 348, 39 Pac. 104, *Dillon v. Whatcom County*, 12 Wash. 391, 41 Pac. 174, *State ex rel. Sheehan v. Headlee*, 17 Wash. 637, 50 Pac. 493, *State ex rel. Porter v. Headlee*, 19 Wash. 477, 53 Pac. 948, and *American Bridge Company v. Wheeler*, 35 Wash. 40, 76 Pac. 534, the power must be held to have been granted to the county commissioners to employ counsel when they deem it necessary to subserve the best interests of the county. But, to show conclusively that it was not the legislative intent that this duty should be imposed exclusively upon the prosecuting attorney, section 466, Ballinger's Ann. Codes & St., in enumerating the duties of the prosecuting attorney, provides that: "Each prosecuting attorney shall be the legal adviser of the board of county commissioners for the county for which he was elected; he shall also prosecute all criminal and civil actions in which the state or his county may be a party, defend all suits brought against the state or his county, and prosecute all forfeited recognizances, bonds, and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or his county: Provided, the commissioners of any county may employ other attorneys, when they may deem it for the interest of their county." In *Martin v. Whitman County*, 1 Wash. St. 533, 20 Pac. 590, the power of

the board of county commissioners to make contracts similar in their scope and effect to the contract in question was sustained by this court under the general provisions of section 342.

It is conceded by the respondent that the law as announced in *Martin v. Whitman* County sustains the appellant's contention; but it is insisted that the scope of the law has been changed and limited by the enactment of chapter 5, p. 6, of the Laws of 1891, defining the duties of the prosecuting attorney, which in effect, it is claimed, did away with the proviso attached to section 466 empowering the commissioners to employ other attorneys when they deem it for the interests of their county, and that therefore the case of *Martin v. Whitman* County, which was tried before the enactment of 1891, is no longer the law of the state. In addition to the fact that the case of *Martin v. Whitman* County was not based upon the proviso attached to section 466, we are unable to discover any legislative intent in the enactment of 1891 to repeal in any manner the provisions of section 466. It not appearing that any fraud or collusion was indulged in in making the contract, the county commissioners acted within the powers conferred by law, and the court erred in restraining the collection of the warrants.

The judgment will therefore be reversed, and the cause remanded, with instructions to proceed in accordance with the views expressed in this opinion.

HADLEY, C. J., and FULLERTON, MOUNT, ROOT, and CROW, JJ., concur.

PETERSON v. BULLION-BECK & CHAMPION MINING CO.

(Supreme Court of Utah. Sept. 28, 1907.)

1. LANDLORD AND TENANT—LIABILITY OF LANDLORD—ACTS OF OTHER TENANTS.

A landlord, except for an existing nuisance, is liable to his tenants for his own overt acts of negligence only, and not for mere nonfeasance nor for injuries resulting from the acts of other tenants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 466.]

2. MINES AND MINERALS—LEASES—DUTY OF LANDLORD—ACTIONS—INSTRUCTIONS.

Where plaintiff, defendant's lessee of a lower level of a mine, sued defendant for injuries sustained by the caving of the ground caused by workings of defendant's other tenants at a higher level, and plaintiff based his right to recover on the allegation that defendant, with intent to injure plaintiff, caved the ground on the ore bodies on which plaintiff was working, but the proof showed that the ground was caved through the willful or negligent acts of defendant's tenants of the upper level of which defendant had notice, an instruction that it was defendant's duty to take active measures to prevent such injury was erroneous.

3. LANDLORD AND TENANT—LIABILITY FOR NUISANCE.

To render a landlord liable for a nuisance, the nuisance must be one necessarily arising

from the tenant's ordinary use of the premises for the purpose for which they were let, unavoidable by reasonable care on the tenant's part.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 685.]

Appeal from District Court, Fifth District; Joshua Greenwood, Judge.

Action by Lars C. Peterson against the Bullion-Beck & Champion Mining Company, a corporation. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

Farnsworth & Lund, for appellant. Geo. A. Udall and Powers & Marloneaux, for respondent.

RITCHIE, District Judge. The plaintiff was a lessee of the defendant, and as such went into possession of a portion of the Bullion-Beck mine, described as block 8 on the 300 level, south, and referred to for the sake of brevity as block 8-300. His term of lease began August 14, 1903, and extended over a period of six months from that date. Under various extensions he asserts that his rights under the lease were extended to and included June 14, 1904, and he continued working under it until April 30, 1904. The plaintiff claims that a portion of the mine known as block 8-200, which was situated on the 200 level immediately above the portion of the mine leased to him, could not be worked without causing the ground above to cave in upon his stope, and that the defendant, knowing the conditions, leased the upper block to one Malvy, who, with his partner, Pete Bianconi, began mining work over the plaintiff's stope in November, 1903, and caused the ground to cave in upon the plaintiff's ore and the waste to be thrown down upon him, and that such interference continued for 5½ months; that a large amount of plaintiff's ore was covered up; and that, except for such interference, the plaintiff would have made a large profit in operating his lease. The defendant set up in defense that at the time of the occurrences complained of one John Malvy was in the sole and exclusive possession of the block of ground known as block 8-200, south, under a lease the terms of which bound him to work his block in a good and minerlike fashion with due regard to the safety, development, and preservation of the premises and for the rights of other lessees; and that for all of the matters complained of Malvy alone was responsible; and that all injurious acts of Malvy complained of, if any, were done and performed, if at all, without any knowledge, authority, connivance, or notice whatever, on the part of the defendant; and that the defendant was in no wise responsible therefor. It is claimed by the plaintiff that the evidence proved that the operations of Malvy were known to and in part directed by the defendant's superintendent; that the president and manager of the defendant company knew of the conditions,

and told the plaintiff that the company would protect him; and that one Griffiths, another lessee, under the direction of the superintendent, threw down certain waste upon the plaintiff and covered up his ore. The jury returned a verdict for the plaintiff for \$3,000, upon which a judgment was rendered, and the defendant has appealed.

The defendant complains of the seventh instruction given by the court. It reads, in part, as follows: "You are further instructed that the defendant company, through its agents and servants in charge of its mine, had the authority and power, and it was the defendant's duty, if it knew that other lessors in its mine were mining their blocks of ground in such manner as necessarily to injure the rights of the plaintiff, Peterson, to take some active measures to prevent it." If such a duty rested upon the defendant company, it must have been grounded upon some contract right of plaintiff, Peterson, or upon some legal obligation. In his brief it is urged that: "The defendant recognized the conditions and took covenants with the right of forfeiture reserved for their breach from Malvy and from Griffiths to the effect that the said lessees would, among other things, observe a due regard for the rights and convenience of other lessees," etc. And, further, that: "The company's agents should have the right to prohibit such operations." We do not see how such a stipulation in a contract between the company and other lessees can give the plaintiff, not a party to such an agreement, any contractual right to demand that the company, for his protection, interfere with the other lessees, nor impose any duty upon the company to one in the situation of plaintiff in this case, unless some covenant or stipulation in the plaintiff's own lease with the company gave him the right to invoke the benefit of provisions in the lease to a third party. There is no such stipulation or provision in the leases between the plaintiff and the company.

The plaintiff, however, contends, apparently, that the law imposes a duty upon a lessor in a case such as this. The general rule is correctly stated in the defendant's tenth request for an instruction, which was erroneously refused. It is, in substance, as follows: "That a landlord is not liable to one tenant for an improper use of a part of the premises by another tenant, unless the landlord knowingly lets such part for the purpose of being used in such improper manner, or authorizes or causes such improper use." *Jones on Landlord & Tenant*, § 605. *Rich v. Basterfield*, 4 M. G. & S. 784, 56 E. C. L. 782; *Leonard v. Gunther*, 47 App. Div. 194, 62 N. Y. Supp. 99; *Edwards v. N. Y. & H. R. R.*, 98 N. Y. 245, 50 Am. Rep. 659. It is to be conceded that where premises are let to be used for a particular purpose, which would naturally or necessarily cause an annoyance

to the injury of another tenant, the landlord is liable to such other; but that principle does not go to the length set forth in the instruction complained of. Between two lessees of different portions of a mine situated as were the plaintiff and Malvy in this case in relation to each other, each knows that the only use to which the ground can be put is mining. Each, knowing the exigencies of that business, should bear them in mind when he makes his contract of lease and require from the mine owner, the lessor, such reasonable stipulations as will tend to protect the lessee. Each, knowing the exigencies of the business in which both are engaged, should bear them in mind when he makes his contract of lease, and require from the mine owner, the lessor, such reasonable stipulations as will tend to protect himself. In this case, even though, as alleged by the plaintiff, the operations of Malvy above the plaintiff's ground were found to interfere with the plaintiff's rights in his own premises, yet under the circumstances, as they appear in evidence, surrounding the parties, it is not shown that when the lease was made to Malvy it could have been foreseen that Malvy's operations would necessarily interfere with the plaintiff's ground. It cannot be presumed, merely because one block of ground is above the other, that the working of the upper would injure the lower, and the lessee of the lower should protect his own rights as far as possible in making a contract against the operations of one above him, if the situation requires it, rather than wholly rely upon a supposed duty of the lessor, the mine owner, to protect him at all hazards. The court erred in giving the seventh instruction, and in refusing the defendant's tenth request, and such errors are sufficient to require a reversal.

Error is predicated upon the refusal of the court to give defendant's twelfth request. While it is the general rule that where a lessee is interrupted, or his property injured, by another tenant of the lessor, the lessee's remedy is against the other tenant, and not against the lessor, it is subject to qualifications under some circumstances, and the request, as made, states the rule inaptly and too narrowly, and would have been misleading in this case. The request was therefore properly refused.

It is alleged that the court erred in giving the fifteenth instruction, to the effect that, if the defendant was found responsible for Malvy's acts, it is immaterial whether Malvy acted maliciously or otherwise. This instruction is not addressed to any issue in the case and should not have been given; but, if it were the only error, a reversal could not be directed upon that ground, because the error is entirely harmless.

The refusal of the court to give defendant's second request is assigned as error. In this request the court was asked to instruct "that

the lease of August 14, 1903, is not shown by the evidence to have been extended by the parties, and that it conclusively appears in the evidence that such lease became null and void February 14, 1904." Unless the evidence were so clear as to admit of no controversy, to give such an instruction would clearly be an invasion of the province of the jury. The evidence is not such as to warrant the court in giving it. Whatever controversy there may have been as to the facts involved it was proper to submit to the jury, and it was therefore not error to refuse this request.

Numerous other errors are assigned; most of them taking exception to the admission of evidence. We do not deem it necessary to mention these, because the principles laid down in discussing the matters already adverted to we think will be found sufficient to dispose of all the other assignments of error.

The judgment is reversed, with directions to grant a new trial; appellant to recover costs.

MCCARTY, C. J., concurs in the result.

FRICK, J. (concurring). I concur in the reversal of the judgment, basing my concurrence, however, upon the following grounds, namely:

The plaintiff bases his right of recovery against the defendant as his landlord upon the allegation that the defendant "wrongfully and unlawfully, and with intent to injure and defraud this plaintiff, * * * caved ground upon the said ore bodies and upon the workings of said plaintiff, and therefore prevented him from mining the said property and from extracting the ore therefrom," by reason of which plaintiff alleges that he sustained damages. The action therefore was predicated upon the "wrongful and unlawful" acts of the defendant. The evidence, however, tended to show that the ground was caved through the willful or negligent acts of a co-tenant of plaintiff, and that the defendant had notice of these acts, and could have terminated the co-tenant's lease, and thus prevented him from continuing the injuries complained of by the plaintiff. The instruction set forth in the opinion written by Judge RITCHIE proceeds upon the theory that it was the duty of the defendant to protect the plaintiff against all acts of a co-tenant in case the defendant, through its officers, agents, or servants, had knowledge of such acts. I do not think the law goes to this extent as between a landlord and his tenant for the negligent and willful acts of a co-tenant. Nor was the complaint framed upon this theory.

It may be conceded that, as a general rule, the landlord is liable for injuries resulting

from his own negligence, but not those that result from that of his tenants. The landlord, except for an existing nuisance, is liable to his tenants for overt acts only, and not for mere nonfeasance. *Gordon v. Peltzer*, 56 Mo. App. 599; *White v. Montgomery*, 58 Ga. 204; *Taylor on L. & T.* (8th Ed.) 199. The evidence in this case does not support the allegations of the complaint, but is clearly to the effect that the acts complained of were caused by the negligent or willful acts of the co-tenant of plaintiff. The instruction referred to above therefore was not proper under either the allegations of the complaint or the evidence, and hence was erroneous. Counsel for plaintiff, however, seek to sustain the judgment upon the doctrine that the landlord is liable for a nuisance existing upon the premises which causes injury to a third person. While this doctrine is well established, the proof does not establish the fact that the working of the mine immediately above the ground leased to plaintiff constituted a nuisance per se. Indeed, as I have already pointed out, it appears from the evidence that the injuries of which the plaintiff complains were caused through the negligent or willful acts of plaintiff's co-tenant. The principle of law upon which the landlord is held liable in cases of nuisance is well and tersely stated in *Taylor on L. & T.* (8th Ed.) 195, 196, in the following language: "But to render him (the landlord) liable the nuisance must be one that necessarily arises from the tenant's ordinary use of the premises for the purpose for which they were let, and not to be avoidable by reasonable care on the tenant's part. If it (the injury) is produced only by the act of the tenant, he alone is responsible."

If, therefore, the plaintiff had alleged and proved facts showing that the condition of the upper workings of the defendant's mine leased to the co-tenant of plaintiff was such that the mere ordinary use thereof with reasonable care would necessarily have resulted in the injuries complained of by the plaintiff, then he would have brought himself within the principle he invokes; but, having failed to do this, he cannot be permitted to sustain the judgment upon that ground. Nor can the plaintiff recover in view of the allegations of the complaint, unless he establishes facts from which the jury may find some overt act or acts which constitute negligence on the part of defendant or its officers or authorized agents or servants; or that the defendant, through its officers or agents, as aforesaid, committed some act or acts, or in effect directed others to do such as were injurious to the plaintiff. In such event, however, the instructions should harmonize with the allegations of the complaint and the evidence given in support of them.

(6 Cal. App. 266)

PEOPLE v. McPHERSON. (Cr. 58.)(Court of Appeal, Second District, California.
August 23, 1907.)**1. CRIMINAL LAW—APPEAL—RECORD—FILING OF PAPERS CONSTITUTING RECORD.**

Under the express provisions of Pen. Code, §§ 1207, 1246, on appeal from a conviction, the clerk must transmit to the appellate court the indictment or information, a copy of the minutes of the plea or demurrer, a copy of the minutes of the trial, the written instructions given, modified, or refused, with the indorsements thereon, a certified transcript of the court's charge, and a copy of the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2782-2802.]

2. SAME—REVIEW—APPEAL FROM JUDGMENT ALONE.

An appeal from the judgment alone, without a bill of exceptions, brings up the judgment roll and presents for review the sufficiency of the indictment or information, any errors declared in the minutes, and the propriety of the instructions.

3. SAME.

Under the express provisions of Pen. Code, § 1259, upon an appeal by defendant from the judgment, the court may review any intermediate order or ruling involving the merits or which may have affected the judgment.

4. FORGERY—ELEMENTS OF OFFENSE.

The essential elements of forgery are a false making of some instrument, a fraudulent intent, and that, if genuine, the writing might injure another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, §§ 1-7.]

5. SAME—INFORMATION—ALLEGATIONS — EFFECT OF FORGERY.

Where a forged instrument is valid on its face, it is not necessary to allege in the information matters aliunde to show in what manner the person alleged to have been injured could be affected by the forgery, nor to show that he owned property that would be affected thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, §§ 77-81.]

6. SAME—SUFFICIENCY OF INFORMATION.

In a prosecution for forgery, an information is not defective because it cannot be determined therefrom whether the charge is for forging a fictitious deed or signing a person's name to a deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, §§ 66-73.]

7. SAME—STATUTORY PROVISIONS.

An information for forging a deed is properly brought under Pen. Code, § 470, respecting the forgery of conveyances, and not under section 476, on the passing or uttering of fictitious bills.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, §§ 2, 10, 14.]

8. SAME—SUFFICIENCY OF ALLEGATIONS—OWNERSHIP OF PROPERTY.

It is not necessary to allege, in an information for forging a deed, that the person whose name was forged to it was the owner of the property described in the deed at the time of the forgery; that being a matter of evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, § 81.]

9. CRIMINAL LAW—LIMITATION—COMPUTATION OF TIME.

For the purpose of testing the sufficiency of an information for forgery under the statute of limitations, the date of the commission of

the offense alone can be considered; the date of the forged instrument being immaterial.

10. SAME—TRIAL—ADMISSIBILITY OF EVIDENCE—EVIDENCE OF ANOTHER CRIME.

On a forgery trial, evidence that accused procured the return of the forged instrument to him under an assumed name was not rendered inadmissible because it tended also to show that he was guilty of the crime of impersonating another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 823.]

11. SAME—TRIAL—RECEPTION OF EVIDENCE—REOPENING CASE—DISCRETION OF COURT.

The court acted within its discretion in reopening the case for further evidence in a prosecution for forgery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1619-1627.]

12. SAME—INSTRUCTION ASSUMING FACTS NOT IN EVIDENCE.

On a forgery trial, an instruction which assumes that an expert witness had been paid for his services, in addition to the fees allowed ordinary witnesses, was properly refused; there being no evidence thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1754-1764.]

13. SAME.

On a forgery trial, an instruction which calls an expert a "hired witness" was properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1889-1894.]

14. SAME—INSTRUCTIONS NOT SUSTAINED BY EVIDENCE.

On a forgery trial, an instruction dealing with witnesses who were "persons interested in or employed to find evidence against accused" was properly refused, where there was no evidence that such witnesses had testified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1980-1985.]

15. SAME.

On a forgery trial, an instruction that the same rules applicable to persons interested in or employed to find evidence against accused, when witnesses should be applied to detectives, was properly refused; there being no evidence to show that a detective who testified as an expert was a hired witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1980-1985.]

16. SAME—APPEAL—MATTERS NOT APPARENT OF RECORD.

On appeal in a criminal prosecution, matters not shown by the record, but only appearing by statements of counsel in argument, cannot be considered by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2953.]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

C. F. McPherson was convicted of forgery, and appeals. Affirmed.

Wallace W. Wideman, Benj. C. Welch, and J. C. Crouch, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Appeal from a judgment upon conviction of forgery, and from an order of the trial court denying defendant's motion for a new trial.

The information is attacked by demurrer, and the same objections are urged upon motion in arrest of judgment. The other errors

assigned by appellant, and upon which he bases his appeal from the order denying his motion for a new trial, are: (1) The introduction of evidence tending to show that the defendant had committed another and different crime; (2) the reopening of the case to permit the prosecution to introduce additional evidence after the people had rested and the defendant moved to dismiss the action; and (3) the refusal of the court to give certain instructions requested by defendant.

The Attorney General objects to the consideration of the ruling of the court on the demurrer to the information, because no bill of exceptions appears in the record preserving the exceptions to the ruling and identifying the papers used upon the hearing. This objection is based upon the decision of the Supreme Court in *People v. Long*, 121 Cal. 494, 53 Pac. 1097, subsequently followed by the Appellate Court in two cases. *People v. Druffel*, and *People v. McPherson*, 86 Pac. 907. These were all appeals by the people from orders sustaining demurrers to indictments. In such cases, as said in the opinion in the leading case, there is no provision for a judgment roll or record of any kind, and, if the matter be heard by an appellate court at all, it must be upon a bill of exceptions under sections 1172 and 1174 of the Penal Code.

When a judgment is rendered against a defendant, upon conviction the clerk of the trial court is required (within five days) to "annex together and file the following papers, which constitute a record of the action: (1) The indictment or information, and a copy of the minutes of the plea or demurrer; (2) a copy of the minutes of the trial; (3) the written instructions given, modified, or refused, with the indorsements thereon, and the certified transcript of the charge of the court; and (4) a copy of the judgment." Section 1207, Pen. Code. An appeal being taken, the clerk must transmit to the Appellate Court, among other matters, the foregoing record. Section 1246, Pen. Code. The appeal from the judgment alone, without a bill of exceptions, brings up the judgment roll (called in section 1207 "a record of the action"), and presents for review the sufficiency of the information, any errors disclosed in the minutes, and the propriety of the instructions given, and refused. *People v. Clark*, 121 Cal. 634, 54 Pac. 147.

"Upon an appeal taken by the defendant from a judgment, the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment." Section 1259, Pen. Code. We have before us in the transcript, among the papers properly transmitted by the clerk, the information, and the minutes of the demurrer. These show the ruling of the court and defendant's exception to the ruling upon the information. It is apparent from an examination of these that the information is suffi-

cient. The essential ingredients of the crime of forgery are: A false making of some instrument; a fraudulent intent; and, if genuine, that the writing might injure another. *People v. Frank*, 28 Cal. 514; *Ex parte Finley*, 66 Cal. 263, 5 Pac. 222. Whatever the character of the writing, the true test is the intent to defraud. *People v. Munroe*, 100 Cal. 664, 35 Pac. 326, 24 L. R. A. 33, 38 Am. St. Rep. 323. If the forged instrument be valid on its face, it is not necessary to allege matters aliunde to show in what manner the person alleged to have been injured could be affected by the forgery, nor show that he owned property that would be affected thereby. *People v. Todd*, 77 Cal. 464, 19 Pac. 883; *People v. Bibby*, 91 Cal. 474, 27 Pac. 781; *People v. Leonard*, 103 Cal. 203, 37 Pac. 222.

The information is not defective because it cannot be determined therefrom whether the charge is for forging a fictitious deed or signing the name of James Wallace to the deed. The information is to be considered with reference to the provisions of section 470 of the Penal Code, and not section 476. It is not necessary to allege that James Wallace was the owner of the property described in the deed at the time of the alleged forgery. This was a mere matter of evidence.

Equally untenable is the position taken by appellant upon the oral presentation of the case. The crime is alleged by the information to have been committed on or about the 7th day of June, 1906. The instrument said to have been forged is set out in the information in extenso and bears date of March 18, 1889. It is urged that the prosecution is barred by the statute of limitations, because the information was not filed within three years after the date of the deed. In other words, the contention is made that by judiciously dating the forged instrument more than three years prior to its utterance the forger may protect himself from prosecution for the crime. To state the proposition is sufficient reason for refusing to adopt it. For the purpose of testing the sufficiency of the information the date of the alleged commission of the offense (June 7, 1906) alone can be considered, and the date of the forged instrument is immaterial.

The evidence of the witness Green, introduced to show that the defendant procured the return to him of the forged deed under the name of Ben M. Bell, was properly admitted. That it tended also to show that he was guilty of another crime, that of impersonating another, did not affect its admissibility. *People v. Sanders*, 114 Cal. 216, 230, 46 Pac. 153; *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

The reopening of the case for further evidence was within the discretion of the trial court, and the record here discloses no abuse of that discretion. This has been held to be the rule even after the defendant has closed his case. *Cousins v. Partridge*, 79 Cal. 228,

21 Pac. 745; *People v. Lewis*, 124 Cal. 551, 57 Pac. 470, 45 L. R. A. 783.

The testimony for the prosecution included that of an expert on handwriting, and that of a police detective. The court gave the usual general instruction as to how the credibility of a witness is to be determined, to wit: "By his character and conduct, his manner on the stand, his relation to the controversy and to the parties, if any, his hopes or his fears, his bias or impartiality, the reasonableness or unreasonableness of the statement he makes, the strength or weakness of his recollection, viewed in the light of all the other testimony and facts and circumstances in proof in the case." No special instructions were given in relation to expert or detective testimony. Six instructions along this line were requested by defendant, but were refused. Most of these were framed upon the theory that the testimony showed, or tended to show, that the expert had been paid. The only testimony bearing upon this question appears in the cross-examination of the witness Lackey, the handwriting expert, who testified that he had no contract to be paid for testifying in the case, but expected to be paid for it; that no price was set; he didn't know what his bill would be; and hadn't given the matter any consideration. There is no direct evidence in the record that he expected anything more than his witness fee. Had the court been requested to give the jury properly framed instructions embodying the law of evidence applicable to expert and detective testimony, it would have been its duty to do so, notwithstanding it had given a general instruction relative to the consideration of the bias, interest, and impartiality of the witnesses and their relations to the parties, and controversy, but we do not think any error was committed by refusing to give the instructions the refusal of which is assigned as error by appellant.

Instruction "No. 2" assumes that it was shown that the expert had been "paid for his evidence"; "No. 3" that he had been paid for his services in addition to the legal fees allowed ordinary witnesses; "No. 4" contains the same assumption; "No. 5" deals with a "hired witness" in general; "No. 6" with "persons interested in or employed to find evidence against the accused"; and "charge 7" instructs the jury to apply the same rules above stated to the testimony of detectives. Without any evidence whatever to indicate that the police detective was in any manner a "hired witness," the court is asked to apply the same rules to him. For the court to assume for the purpose of instructing the jury that because a person who acted as an expert testified that he expected to be paid for testifying, that the pay spoken of must of necessity be other than his ordinary witness fees, would, in the absence of evidence to this effect, be unwarranted and improper. So it would also be improper to characterize such a person to the jury as a

"hired witness." There was no evidence that either the expert or the detective, or any one else, was employed to find evidence against the accused in this case. That the detective received a regular compensation for discharging his duties as a public officer might be assumed, and in so far as he aided in securing the evidence upon which the conviction rested he was employed to find evidence but instruction No. 6 was not framed on that theory. Charge 7 is too vague and indefinite, and must stand or fall with the foregoing instructions, which were properly refused.

On the oral presentation of this case, it was urged, in support of the appeal, that the defendant was imprisoned in the jail of Los Angeles county upon this charge and not indicted, at the time the grand jury of the county were in session, and that body failed to inquire into the case, as provided by section 923 of the Penal Code. The transcript contains no reference to this matter, and we cannot accept the oral statement of facts by counsel in argument, in lieu of the printed or written record required by the rules of this court. If it were a matter that might be considered upon a proper record, it is not before us now.

We find no prejudicial error in the record, and the judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

CARHART v. MCGARVEY.

(Supreme Court of Colorado. Oct. 7, 1907.)

APPEAL—REVIEW—FINDINGS — CONCLUSIVE-NESS.

A finding upon conflicting evidence should not be disturbed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

Appeal from San Miguel County Court; J. M. Wardlaw, Judge.

Action by Ellen McGarvey against W. S. Carhart. From a judgment for plaintiff, defendant appeals. Affirmed.

L. C. Kinnikin, for appellant. Fitzgarrauld & Brown, for appellee.

STEELE, C. J. Action was brought against the defendant to recover \$162, alleged to be due and owing to the plaintiff from the defendant for the rent of certain premises in the city of Telluride. The defendant admitted that he had occupied the premises, but testified that he had paid the rent. There is a direct conflict in the testimony concerning the payment. The court found that payment had not been made, and rendered judgment in favor of the plaintiff. The defendant appealed to the Court of Appeals. The finding and judgment, upon conflicting evidence, should not be disturbed.

The judgment is affirmed.

CASWELL and MAXWELL, JJ., concur.

(41 Colo. 29)

BUTTERFLY-TERRIBLE GOLD MINING CO. et al. v. BRIND.

(Supreme Court of Colorado. Oct. 7, 1907.)

1. MANDAMUS—COMPLAINT—TRANSFERS OF STOCK.

Under Mills' Ann. St. § 480, providing that corporate stock shall be transferable as personality as provided by the by-laws, a complaint in mandamus to compel a corporation to transfer stock to petitioner, which fails to allege that he complied with the by-laws of the corporation as to the transfer of stock, is bad.

2. CORPORATIONS—CORPORATE BOOKS—RIGHT TO INSPECT—STATUTES.

Under Mills' Ann. St. § 508, requiring the officers of every corporation to keep books at the office of the corporation for the inspection of stockholders and creditors and their representatives, etc., only stockholders and creditors and their representatives are entitled to inspect the books.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 674-685.]

Appeal from District Court, Arapahoe County; Booth M. Malone, Judge.

Mandamus by J. Fitz Brind against the Butterfly-Terrible Gold Mining Company and others. From a judgment making the alternative writ permanent, respondents appeal. Reversed.

Edwd. D. Upham, for appellant.

STEELE, C. J. The alternative writ of mandamus issued by the district court of Arapahoe county required the defendants to forthwith allow the petitioner to examine, inspect, and make extracts from the books, accounts, and papers of said corporation, and to forthwith issue and transfer 1,000 shares of stock to and in the name of the petitioner upon the books of said company, and to issue new certificates to him therefor, upon petitioner's request and his surrender of his present certificate for cancellation and transfer. To the alternative writ the defendants demurred upon the ground that it does not state facts sufficient to constitute a cause of action against the respondents, or either of them, and that the petitioner is not entitled to the relief sought to be obtained. The demurrer was overruled, the defendants were given five days in which to plead, and within the time the defendants elected to stand on the demurrer, and thereupon judgment was entered that the alternative writ be made permanent, at the respondents' costs, from which judgment the respondents appealed to the Court of Appeals.

We shall consider but one assignment of error, that which relates to the overruling of the demurrer to the alternative writ of mandamus. The appellants contend that the transfer of stock of a corporation cannot be compelled by mandamus, that the holder of the stock has another remedy, and that he may recover damages for the inexcusable

neglect or refusal of the company or its officers to transfer his stock upon the books of the company. We shall not undertake to determine whether mandamus does or does not lie to compel the transfer. The authorities are conflicting, and there are no authorities of this state to guide us, and we prefer to base our decision upon another branch of the case, which is conclusive of the plaintiff's rights on this appeal. Section 480, Mills' Ann. St., provides that the shares of stock "shall not be less than one dollar nor more than one hundred dollars each, and shall be deemed personal property and transferable as such in the manner provided by the by-laws." Although the complaint alleges that the plaintiff became the purchaser of certain shares of stock in the company, and that he made a demand upon the company and its officers, at the office of the company, to transfer the stock and to issue other stock as he directed, no mention whatever is made by the writ concerning the by-laws of the company, nor is there any allegation that the plaintiff has complied with the by-laws of the company in reference to the transfer of stock. The plaintiff has, therefore, failed to make the essential averments showing that under the by-laws of the corporation he is entitled to the transfer of the stock mentioned.

Section 508, Mills' Ann. St., makes it the duty of the directors and trustees of corporations to keep certain books at the office of the company open during usual business hours for the inspection of stockholders and creditors of the company and their personal representatives, and that such stockholder, creditor, or representative shall have the right to make extracts from such books, etc. The statute further provides that no transfer of stock shall be valid for any purpose whatever, except to render the person to whom it shall be transferred liable for the debts of the company, unless it shall have been entered on the books of the company within 60 days from the date of such transfer, by an entry showing from and to whom transferred. From this it appears very clear that only stockholders and creditors and their personal representatives are entitled to such inspection. What our ruling would be in a proceeding to compel an inspection, where it clearly appears that the assignee is entitled under the statute and the by-laws of the corporation to a transfer of stock and a record thereof on the books of the company, and that the officers willfully refuse to make such transfer and record, we cannot say.

In our opinion, the demurrer to the complaint should have been sustained; and for this reason the judgment of the district court is reversed.

CASWELL and MAXWELL, JJ., concur.

(41 Colo. 68)

LEMMON v. BEATTIE, Sheriff.

(Supreme Court of Colorado. Oct. 7, 1907.)

1. EXECUTION—PROPERTY SUBJECT TO EXECUTION.

The interest of one in personal property, to be subject to levy under execution, must be a vested interest at the time of the levy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 76.]

2. SAME.

An owner delivered sheep to J. and G. as lessees in a lease binding them to return to the owner at the expiration of the lease the sheep received, together with a half of the increase. A year thereafter G. retired, and F. became a lessee with J. A memorandum signed by the parties recited that J. should bear the loss, and receive the gain during the year. *Held*, that J.'s interest for the year was not fixed and vested and was not subject to levy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 76.]

3. REPLEVIN—EVIDENCE—ADMISSIBILITY.

A lessee of sheep agreed to return at the expiration of the term the sheep received, together with half of the increase. *Held*, in replevin by the lessor against the sheriff who had levied on the sheep as the property of the lessee, that evidence was admissible that during the term the interest of the lessee was agreed on, to show that certain sheep were set off to the lessee under the lease, thereby rendering the same subject to levy.

Appeal from District Court, Logan County; E. E. Armour, Judge.

Action by F. F. Lemmon against David Beattie, sheriff of Logan county. From a judgment for defendant, plaintiff appeals. Reversed.

W. L. Hays and Quitman Brown, for appellant. McConley & Burke, for appellee.

STEELE, C. J. The plaintiff and appellant, being the owner of a certain flock of sheep, brought suit against the sheriff of Logan county in an action of replevin to recover the possession of the sheep and for damages for their unlawful detention. The defendant justified under an execution issued from the county court of Logan county against I. M. Johnson for the sum of about \$200. The sheep were worth about \$600. The jury returned a verdict in favor of the defendant, and further found that the value of the interest of Johnson in the sheep, at the time of the taking, was \$205. The judgment was for the return of the sheep, or, in the alternative, that the defendant recover of plaintiff the sum of \$205, from which judgment the plaintiff appealed to the Court of Appeals.

The sheep were owned by the plaintiff, and were delivered to Johnson and one Gooch as lessees on or about the 1st of October, 1901. This condition is contained in the lease: "The same number and the same ages of sheep as received in this lease are to be returned to the party of the first part, with half of the increase, in good condition and free from disease, at the expiration of this lease." The lease also provides that the in-

crease shall be divided at the expiration of the lease. One year after the making of the lease, by the consent of the parties, Gooch was allowed to retire, and Nels Fredericksen became a party to the lease, and lessee with Johnson, and upon the lease the following memorandum, signed by all of the parties, appears: "It is understood and agreed between all parties that now, one year after the making of this lease, Nels Fredericksen becomes a full partner with I. M. Johnson in this lease until expiration thereof, October 15, 1903. Said Johnson agrees to bear all loss, if any, and receives the gain, if any, from the time of the first making of this lease to the present time, October 15, 1902; and said Fredericksen will receive his full share of any gain by reason of the wool clip of 1903, and increase of same season, and will also bear his full share of any loss, if any, during this last year of this lease from October 15, 1902, to October 15, 1903."

The principal controversy arises over the construction of this memorandum of agreement indorsed upon the lease. It is contended, and the court so held, that by this agreement the interest of Johnson in the sheep was vested and determined, and that his interest was subject to the levy. It is not disputed that the interest of Johnson, to be subject to levy under execution, must be a fixed and vested interest at the time of the levy; and the defendant concedes that, unless it shall be determined that Johnson's interest was a fixed and determinable interest, the judgment must be reversed. We cannot place the same construction upon this memorandum as that placed by the trial judge. Our construction of the agreement is that, as between Johnson and Fredericksen, it was agreed that the gains and losses during the period of the lease should be apportioned in the manner stated in the agreement, but that the agreement does not, in any manner, in our opinion, relieve Johnson of the obligation to account to Lemmon, the plaintiff and lessor, for his full share of the sheep, as provided in the lease, during the year from October 15, 1901, to October 15, 1902, out of any interest that he might have in the sheep at the end of the term of the lease. This being true, it follows that Johnson's interest in the lease at the time of the levy was not subject to levy.

Testimony was offered on the part of the defendant tending to show that at or about the time of the change of lessees a division of the sheep was made, and Johnson's interest set off to him by the lessor. This testimony the court declined to receive. In this we think the court erred. It was entirely competent, in our opinion, for the purpose of showing that during the term of the lease the interest of Johnson had been agreed upon and determined. And if, by mutual consent, certain of the sheep were set off to Johnson in the year 1902, in full settlement and satisfaction of the terms of the lease, then

Johnson had a fixed and determinable interest which was subject to levy under execution.

The judgment is reversed.

CASWELL and MAXWELL, JJ., concur.

(41 Colo. 72)

MITCHELL v. MITCHELL.

(Supreme Court of Colorado. Oct. 7, 1907.)

1. APPEAL—REVIEW—HARMLESS ERROR.

Where, in an action to cancel a deed as a forgery, and its record, the court submitted to a jury the question whether plaintiff signed the deed, which was answered in the negative, it is a sufficient answer, to complaints to various rulings as to the evidence, misconduct of the jury, and failure to submit interrogatories, that the court, though it called the jury, was not bound by their findings; it not only having approved the jury's findings, but made its own, that plaintiff's name was a forgery.

2. DEEDS—FORGERY OF SIGNATURE—EVIDENCE.

Evidence, in an action to cancel a deed as a forgery, and its record, held to warrant a finding that the signature to the deed and the certificate of acknowledgment were forgeries.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 615.]

3. CANCELLATION OF INSTRUMENTS—PLEADING—DEFENSE.

It cannot properly be pleaded as a defense, or as ground for affirmative relief, in an action to cancel a deed as a forgery, and its record, that plaintiff held title to the land in trust for defendant, in that defendant paid the purchase money and took title in plaintiff's name as a matter of convenience.

Appeal from District Court, City and County of Denver; P. L. Palmer, Judge.

Action by Nellie Mitchell v. Walter C. Mitchell. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. W. Taylor, for appellant. O'Donnell, Toney & Graham and R. T. McNeal, for appellee.

CAMPBELL, J. Action to cancel a deed. The parties are husband and wife. The plaintiff wife in her complaint says that she has title acquired by tax deed from the county treasurer to certain real estate; that her husband, the defendant, caused to be recorded in the office of the county clerk and recorder an instrument in writing, purporting to be a quitclaim deed signed and acknowledged by her, conveying the same property to him. Plaintiff alleges that she never signed or acknowledged or delivered the deed; that her signature thereto is false and forged, and the certificate of acknowledgment is either a forgery or put to the instrument without her knowledge or consent, and without her having appeared before the acknowledging officer. It further being charged that the alleged forged instrument is still in the possession of the county clerk and recorder, and bears on its face evidence of forgery, the plaintiff prays that the officer be restrained from delivering

it to defendant, and defendant from receiving it, and that, upon final hearing, it be canceled, and its record held for naught. The answer denies the material averments of the complaint, and in the original answer, large portions of which were, on plaintiff's motion, stricken, and in the amended answer, which met with a similar order, the defendant sets out, as a defense and also by cross-complaint, that the tax-title deed to the plaintiff and under which she claims, and whatever interest she has in that and other property, is held in trust for the defendant, resulting from the fact that he paid the purchase money and expenses and took title to all such lands in plaintiff's name as a matter of convenience. Defendant prays to have plaintiff's action dismissed, and as affirmative relief to have the lands in question, as well as other lands, declared to be trust property, and that she be ordered to convey the same to him. The findings were in plaintiff's favor, and a decree passed canceling the record of the deed. Defendant appeals.

1. The cause of action is equitable in its nature. The court called to its aid a jury and submitted to it but one question—whether the plaintiff had signed the deed purporting to convey away her title to the defendant—which was answered in the negative. The defendant complains of various rulings of the court in relation to the evidence, to alleged misconduct of the jury, and failure of the court to submit interrogatories tendered by him. A sufficient answer is that the court, although it might, as, in fact, it did, call to its aid a jury, is not bound by their finding, but might, if it saw fit, disregard the same and make findings of its own. The court, however, not only approved the jury's finding, but made one of its own, that plaintiff's name was forged to the deed and certificate of acknowledgment. There is no merit in defendant's assignments upon this branch of the case.

2. The principal objection to the decree which the defendant urges on this review is that there was not sufficient evidence of the forgery charged. An examination of the record discloses that the evidence, upon the assumption that the court believed the plaintiff's witnesses, is abundantly sufficient to a moral certainty to show that plaintiff's name was forged to the deed.

3. It is also argued that the proof is likewise defective, in that it was not made sufficiently to appear that the certificate of acknowledgment was forged. The proof should be decisive, explicit, and clear upon this point. Plaintiff positively denies that she ever signed or acknowledged the deed, or authorized any one to do either act for her, and several experts declared that her signature was forged. The defendant and one of his own witnesses, in testifying to the alleged act of plaintiff in signing the deed, do not

claim that the notary was then present, though the certificate says that the acknowledgment was taken at that time. Indeed, defendant makes no contention, except in argument, that the plaintiff ever acknowledged the deed. No such issue seems to have been raised at the trial. Besides, it appears in the defendant's pleading that, in such business transactions between him and his wife, it was customary for him to produce for her signature blank deeds to which certificates of acknowledgment had theretofore been prepared, and afterwards to insert in the body of the deed a description of the property intended to be conveyed. The court was fully warranted in finding that the signature to the deed and the certificate of acknowledgment were forgeries.

4. There is no merit to the point that the tax deed was not delivered to plaintiff. Defendant himself says that he received the deed and caused it to be recorded, but for the purpose considered in the next assignment.

5. This assignment is that the court struck from defendant's pleadings, and refused his offer of proof to show, not only as a defense, but as new matter entitling him to an affirmative decree, that plaintiff held title to this and other property in trust for his benefit. The object of the action is, not to establish plaintiff's title to lands, or to quiet it, but to cancel the record of a forged deed purporting to convey it. The cause of action is based upon defendant's wrong, on a tort committed by him against her, not on a breach of contract. The matters set up which the defendant claims to be a defense, and also to entitle him to equitable relief, did not grow out of the transaction set up in the complaint. No cause of action arising out of contract is alleged in the complaint; hence, any other cause of action, arising also upon contract and existing in favor of the defendant at the time of the commencement of the action, was not proper to be inserted in the answer, either as a defense, or as ground for affirmative relief. The only effect of the decree is to cancel the record of the forged deed. It would be a novel doctrine to hold that one who is the equitable owner of property, the legal title to which is in another, may, in order to get the legal title in himself, forge the name of the legal owner to a deed purporting to convey it. If the plaintiff holds this and other property of defendant in trust, the defendant is at liberty to establish, if he can, his rights in the proper forum and in an appropriate, but not in the pending, action.

The conclusions which we have reached seem so fundamental and elemental that we have not cited cases in their support. Perceiving no prejudicial error in the record, the judgment is affirmed.

Affirmed.

STEELE, C. J., and GABBERT, J., concur.

LIPP v. GOOD et al.

(Supreme Court of Colorado. Oct. 7, 1907.)

ASSIGNMENT—MONEY DUE—RIGHTS OF ACTION—PARTNERSHIP CLAIM.

Where the assignment to plaintiff by J. and O. of a claim of a partnership designated as J. & O., and composed of J., O., and plaintiff, against the defendants, was made in good faith and not to avoid Laws 1897, p. 249, c. 65, providing that any partnership doing business in the state under any name except the personal names of its members, which fails to file an affidavit with the county clerk giving the names of all composing the firm, could not prosecute any suit for the collection of its debts, the claim became thereby the individual property of plaintiff, who may sue thereon as an individual to recover from defendants.

Error to Gilpin County Court; Flor Ashbaugh, Judge.

Action by A. Lipp against George S. Good and others. From a judgment for plaintiff, defendants bring error. Affirmed.

H. A. Hicks and Wm. C. Matthews, for plaintiffs in error.

STEELE, C. J. It was shown at the trial or admitted by the pleadings that the defendants were and are contractors engaged in the construction work upon a railroad known as the "Denver, Northwestern & Pacific Railroad"; that the plaintiff was a member of the copartnership of Jones & O'Brien, consisting of plaintiff, Lee Jones, and Robert O'Brien, and that they were subcontractors under said defendants; that on the 19th of June, 1903, the plaintiff, acting for and on behalf of the copartnership, had a settlement with the defendants of all indebtedness, and that the said defendants at that time agreed that they would pay to the said firm of Jones & O'Brien \$300 on the 25th of June, 1903, and \$734.37 on July 25th; that on the same day Lee Jones and Robert O'Brien assigned to the plaintiff all their right, title, and interest in and to the sum of \$300 and in and to the sum of \$734.37 mentioned in the said agreement; and that on the same day the defendants paid to the plaintiff the sum of \$300, and gave him a written obligation to pay the sum of \$734.37. The plaintiff showed the written contract of settlement, the assignment to him of the claim against the defendants by the other members of the firm, and showed an agreement in writing on the part of the defendants to pay him the sum of \$734.37, and testified that the said sum had not been paid. At the close of the plaintiff's testimony defendants moved for a nonsuit, which was denied. The defendants offered no testimony, and the court instructed the jury to return a verdict for the plaintiff. Thereupon the jury returned a verdict for the plaintiff for the sum of \$734.37 and interest, and judgment was entered thereon, and the case was taken to the Court of Appeals by writ of error.

The points principally relied upon by the plaintiffs in error are that the plaintiff is not entitled to recover, because it does not appear that the firm of Jones & O'Brien ever filed the statement required by Laws 1897, p. 249, c. 65, and, further, that the debt from the defendants was due and owing to the firm of Jones & O'Brien, that they were the real parties in interest, and that the plaintiff cannot maintain the action individually. It does not appear that the assignment from Lee Jones and Robert O'Brien to the plaintiff was for the purpose of evading the statute; but the assignment appears to have been made in good faith by two of the members of the firm to the third member of the firm, and no reason has been stated in the briefs or authorities cited showing why the members of the firm may not in such manner convey to another member of the firm all their right, title, and interest in a debt due and owing the firm. When such assignment is made, it converts firm property into the individual property of the assignee; and it is entirely competent then for the assignee to maintain an action as an individual to recover the debt. The claim of the firm of Jones & O'Brien against the defendants having been assigned, the suit is properly maintainable by the assignee, the plaintiff here.

For the reasons given, the judgment is affirmed.

CASWELL and MAXWELL, JJ., concur.

COULTER v. HAMILTON et al.

(Supreme Court of Colorado. Oct. 7, 1907.)

1. EXCEPTIONS. BILL OF—PRESENTATION BY AFFIDAVIT—NOTICE—NECESSITY.

Under Mills' Ann. Code, § 385, providing that when a judge refuses to sign a bill of exceptions, and it is sought to preserve a bill by affidavits, the opposite party shall have timely notice thereof, a bill so preserved cannot be considered, unless it appears that such notice was served.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, §§ 77, 93.]

2. APPEAL—INSUFFICIENT BILL OF EXCEPTIONS—AFFIRMANCE.

Where there is no proper bill of exceptions, and the assignments of error do not relate to matters determinable from an inspection of the record proper, the judgment must be affirmed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4454.]

Error to Routt County Court; Chas. W. Burnham, Judge.

Action by Fred Hamilton and another against H. J. Coulter. From a judgment for plaintiffs, defendant brings error. Affirmed.

John A. Coulter and Morrison & de Soto, for plaintiff in error. Wells B. McClelland, for defendants in error.

STEELE, C. J. A judgment was rendered in the county court of Routt county against H. J. Coulter, and within the time fixed by the court for filing a bill of exceptions a bill was tendered to the county judge, who declined to sign it upon the ground that the statement contained in the bill that it contained all the evidence offered was not correct. Thereafter the defendant sought to preserve a bill of exceptions by the affidavits of two disinterested persons who were present at the trial of the cause. Section 385 of the Civil Code (Mills' Ann. Code) authorizes the proving and attesting of a bill of exceptions when the judge neglects or refuses to sign and seal such bill. It also provides that, when it is sought to preserve a bill of exceptions by affidavits, "the opposite party shall have timely notice thereof, and may, within a reasonable time thereafter file counter affidavits, and the Supreme Court shall, upon notice and such proof as may be necessary, determine and settle what is the true bill in that behalf." We cannot consider the bill presented, however, because it does not appear that notice was served upon the opposite party, as required by the Code. There appears attached to the bill a notice, addressed to the attorney for the plaintiff, stating that the bill had been prepared and that the affidavits had been filed; but there is no proof that such notice was ever served.

As there is no proper bill before us, and as the assignments of error do not relate to matters which can be determined from an inspection of the record proper, the judgment is affirmed.

CASWELL and MAXWELL, JJ., concur.

GOODE v. RIO GRANDE SAMPLING CO.

(Supreme Court of Colorado. Oct. 7, 1907.)

FRAUDULENT CONVEYANCES—BANK DEPOSIT—ASSIGNMENT.

Plaintiff having sued certain bank depositors, and being about to garnish the deposit, the depositors ascertained the fact, and, desiring bail on a criminal charge, made a check for \$1,000, which was to have been delivered to B. on condition that he would sign the depositors' bond. This he refused to do, whereupon the depositors, on the day the deposit was garnished, assigned \$1,000 of the deposit to intervenor, antedating the assignment two days, in consideration of his furnishing bond and employing an attorney, etc., to defend them. Intervenor did not furnish the bond, and paid out on the face of the assignment only \$150. *Held* sufficient to show that the assignment was for the benefit of the depositors and a fraudulent attempt to defeat the lien of the judgment and garnishment.

Appeal from District Court, Teller County; Louis W. Cunningham, Judge.

Action by the Rio Grande Sampling Company against George Goode. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank J. Hangs, for appellant. Robert G. Withers, for appellee.

BAILEY, J. On July 1, 1901, the appellee, in an action then commenced against N. J. Stumpf and Frank Myers, caused a writ of attachment to be issued, and certain moneys in the hands of the First National Bank of Cripple Creek, said to belong to defendants in that action, to be garnished. Shortly after the garnishee summons was served, appellant presented to the bank an assignment of account of Stumpf and Myers. The bank refused to acknowledge the assignment because it had been served with a garnishee summons. For some reason the action brought by appellee against Stumpf and Myers was not tried until the 12th day of November, 1902, at which time appellant filed his petition for intervention, claiming that the money had been assigned to him upon the 1st day of July, 1901. Judgment was taken against the defendants by plaintiff, and the writ of attachment sustained. Plaintiff answered the petition of intervention, alleging that the assignment was made by the defendants and accepted by the intervener under the advice of an attorney of defendant and the intervener for the use and benefit of the defendant, and for the purpose of attempting by fraudulent and pretended assignment to defeat the rights of the plaintiff, as well as the lien of the judgment and garnishment, and to obtain money for the use and benefit of defendant, and was not made in good faith. The matter went to the trial court on the plea of intervention and the issue tendered by this defense. The issues were found for plaintiff, and the intervener appealed.

The only question involved in this action is one of fact. It was found by the court adversely to the intervener upon competent testimony, and the judgment must be affirmed. It appears from the testimony that the defendants in the attachment suit had been arrested and were in the custody of the sheriff. They were desirous of securing some person to sign as surety their appearance bond. They made a check to the intervener for \$1,000. This check was to have been delivered to Mr. Burnside upon condition that he would sign the bond. The intervener and his counsel called upon Mr. Burnside, and he refused to sign the bond because he had been informed that the plaintiff was going to attach the money in the bank. Defendants then, upon the advice of their counsel, made the following assignment to the intervener: "Cripple Creek, Colo., June 29, 1901. For and in consideration of the sum of fifty dollars to us in hand paid by George Goode and the furnishing of bond and employing an attorney and other services to be performed by the said George Goode, we hereby sell, assign and transfer to the said George Goode the sum of one thousand dollars now on deposit

in the First National Bank of Cripple Creek, Colorado." This assignment was not made until the parties had learned that plaintiff was preparing to attach the money. The intervener did not furnish the bond as required by the assignment, and paid out, in addition to the \$50 recited in the assignment, the sum of \$100, to the attorney, making a total expenditure of \$150 as a consideration for the assignment of \$1,000. Under these conditions the trial court was justified in finding the issues for the plaintiff, and the judgment will not be disturbed. It will therefore be affirmed.

Affirmed.

STEELE, C. J., and GODDARD, J., concur.

WATT v. LEHR.

(Supreme Court of Colorado. Oct. 7, 1907.)

APPEALS—REVIEW—QUESTIONS OF FACT.

A finding on conflicting evidence will not be reviewed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

Appeal from District Court, City and County of Denver; P. L. Palmer, Judge.

Action by George Watt against Mrs. Elizabeth Lehr. Judgment for defendant, and plaintiff appeals. Affirmed.

W. H. Hunt and E. I. Stirman, for appellant.

GABBERT, J. Appellant, as plaintiff, commenced an action against appellee, as defendant, to recover from her the sum of \$100 upon an express contract which he alleged had been entered into by her through her husband as her agent. The contract in question, as set out in the complaint, was to the effect that defendant, through her agent, agreed with the plaintiff that, if he would secure certain property for her at a sum specified, she would pay him \$100 for his services. An answer was filed, denying the contract. On this issue the finding of the trial court was for the defendant, and plaintiff appeals.

The testimony bearing on this issue and the collateral questions relevant thereto was conflicting, and, under the established rule of this court, will not be disturbed on review. We shall therefore only refer briefly to the material ultimate fact which the court found in favor of the defendant. Plaintiff did not rely upon a personal contract with defendant, but upon one made by her husband, as her agent. With respect to this contract, it appears that the question was whether the agreement alleged to have been made by the husband embraced a promise on the part of the wife to pay the sum sued for, or whether such promise was made by the husband only for himself. This question, as we have stated, was resolved against the plaintiff on conflicting testimony, or, perhaps more accurately

ly speaking, upon testimony of a character from which the trial court was justified in finding that the promise to pay was on behalf of the husband only. It is urged by counsel for plaintiff that, because the defendant purchased the property, she should be held liable because thereby she ratified the contract of her husband. In view of the finding of the court, that question is not involved. By purchasing the property defendant did not become liable to pay any sum which her husband promised to pay as his obligation alone, and by such finding it necessarily follows that her husband never assumed to make any promise for her to pay the plaintiff for his services. Consequently, there was no contract to ratify.

The judgment of the district court is affirmed.

Judgment affirmed.

STEELE, C. J., and CAMPBELL, J., concur.

DIMPFEL v. BEAM.

(Supreme Court of Colorado. Oct. 7, 1907.)

1. STATUTES—RELATION OF AMENDATORY ACT TO ACT AMENDED.

Where a section in an existing law is amended in the mode prescribed by the Constitution, it ceases to exist, and the section as amended supersedes the original.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 311.]

2. TAXATION—TAX DEED—STATUTES—REPEAL OF SECTION AMENDED.

2 Mills' Ann. St. § 3900, authorizing the issuance of a tax deed to a county upon demand of the county clerk, was superseded by Laws 1893, p. 428, § 1, whereby the right of a county to take a tax deed was taken away, and providing that tax sale certificates be assigned upon conditions specified, and hence, a tax deed, showing on its face that it was made to Hinsdale county several months after the law of 1893 went into effect, was a nullity.

3. SAME—ACTION TO QUIET TITLE—LIMITATIONS—VOID TAX DEED.

Where one holding a tax deed, void on its face, sues to quiet the title, and defendant answers that he is the owner in fee under a conveyance to him from the patentee of the government and seeks to recover on a cross-complaint the value of ore hauled from the premises by the plaintiff, the statute of limitations is no bar to the cross-complaint, since the statute does not apply where a deed is void on its face.

4. SAME—SET-OFF AND COUNTERCLAIM.

Where one holds possession under a voidable tax deed, rents and profits may be offset against taxes paid by him.

Appeal from District Court, Gunnison County; Theron Stevens, Judge.

Suit to quiet title by Thomas L. Beam against W. O'Sullivan Dimpfel. From a decree for plaintiff, defendant appeals. Reversed and remanded.

This is an action by appellee, as plaintiff, to remove a cloud from the title to the Bourbon County lode mining claim situate in Hinsdale county, Colo.; he claiming title thereto through and by virtue of a certain

tax deed. The appellant, defendant below, claims title to the premises under a conveyance from the patentee of the government which vested in him the fee title to the premises. The facts disclosed by the record that are pertinent to the inquiry presented for our consideration, are as follows: The property was subject to taxation for the year 1888, and the taxes assessed thereon for that year remaining due and unpaid on the 31st day of July, 1889, the county treasurer offered the property for sale, and struck the same off to the county for the amount of taxes due thereon. The property being unredeemed from such sale for more than three years, the county treasurer executed a deed to the county on the 10th day of October, 1893, reciting as a consideration therefor the tax of 1888, and the subsequent taxes on said property to the amount of \$32.37. On the 15th day of January, 1902, the county commissioners, in their individual names, executed a deed to the appellee for the premises for and in consideration of the sum of \$60 by him then and there paid. No taxes were assessed against this property from 1893 until the year 1902. In 1903 the appellant paid this tax, and also the tax for the year 1903. The appellee testified that he went upon the property for the first time about July or August, 1903, and took out and shipped 17,920 pounds of ore, of the value of \$21.48 per ton, and gathered up five or six tons more from the surface, and that he had not been on the property since. The appellee attempted in his replication to plead the five-year statute of limitation. Mills' Ann. St. § 3904.

S. S. Sherman and Ben Griffith, for appellant. G. D. Bardwell, for appellee.

GODDARD, J. (after stating the facts as above). The controlling question is whether the tax deed issued to the county is valid, and vested the title to the premises in the county. Upon the trial below, the defendant objected to the introduction of the deed because of its invalidity for several reasons appearing upon its face, among them the want of power in the county to take or receive the same. In the view we take of this particular objection, it becomes unnecessary to consider whether the other objections were well taken or not. By the statute enacted in 1885 (Sess. Laws, p. 323; 2 Mills' Ann. St. § 3900), the issuance of a tax deed to a county was authorized upon demand of the county clerk at any time after three years from the date of sale, and in pursuance of a certificate of purchase for land bid off by the county. This statute was amended by an act approved April 8, 1893, whereby the right of a county to take a tax deed was taken away, and in lieu thereof the county treasurer was authorized to assign the tax sale certificate upon payment of the amount of the tax with the interest and penalties called for by such certificate, or for such sum as the board of county commissioners at any regu-

lar meeting may decide. Sess. Laws 1893, p. 428, § 1; 3 Mills' Ann. St. § 3900. *Lovelace v. Tabor M. & M. Co.*, 29 Colo. 62, 66, 66 Pac. 892. "It is firmly settled that where a section in an existing law is amended in the mode prescribed by the Constitution it ceases to exist, and the section as amended supercedes the original." *Walsh v. State ex rel. Soules*, 142 Ind. 357, 41 N. E. 65, 33 L. R. A. 392. The tax deed shows on its face that it was made to Hinsdale county on the 10th day of October, 1893. The statute, as amended, was in force for several months before this date. The deed therefore was a nullity; the statute having taken away not only the right of the county to receive the deed, but also the power of the county treasurer to make a deed to the county. The deed being void, it follows that the statute of limitations, if well pleaded, would have constituted no bar to the relief the appellant was entitled to under the allegations of his cross-complaint; it being well settled that the statute of limitations does not apply where the deed is void on its face. *Crisman v. Johnson*, 23 Colo. 264, 268, 47 Pac. 296, 58 Am. St. Rep. 224; *Gomer v. Chaffee*, 6 Colo. 314, 317. As was said in the latter case: "It is difficult to see how the statute of limitations can avail a defendant holding a void deed. There was nothing for the statute to operate upon; nothing for it to run in favor of or against; nothing to set it in motion. The deed was void; it did not give him constructive possession nor the right of actual possession." In the circumstances of this case, the appellee was not justified in entering upon the property and removing the ore therefrom, and the proceeds of the ore taken by him therefrom should be offset to the extent of the taxes paid by him. One holding possession under a voidable tax deed, rents and profits may be offset against taxes paid by him. *Longworth v. Johnson et al.*, 66 Kan. 193, 71 Pac. 259.

The judgment is reversed, and the cause remanded, with directions to the court below to enter a decree in favor of appellant upon his cross-complaint, declaring null and void the tax deed from the county treasurer of Hinsdale county to said Hinsdale county, and canceling the same of record, and declaring the pretended deed from Hinsdale county to appellee null and void, and canceling the same of record.

Reversed and remanded.

STEELE, C. J., and BAILEY, J., concur.

CRIPPLE CREEK TUNNEL, TRANSPORTATION & MINING CO v. MARSHALL.

(Supreme Court of Colorado. Oct. 7, 1907.)

PRINCIPAL AND AGENT—EVIDENCE OF AGENCY—WEIGHT AND SUFFICIENCY.

In an action for work and labor performed by plaintiff's intestate and three others, where defendant contended that the agency of

W., who employed them to do the work, had been previously terminated, evidence held sufficient to sustain the finding that the agency of W. had not terminated at the time of the employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 41.]

Appeal from District Court, Teller County; Louis B. Cunningham, Judge.

Action by Fred Marshall, as administrator for Walter Marshall, deceased, against the Cripple Creek Tunnel, Transportation & Mining Company, to recover for work and labor performed. From a judgment for plaintiff, defendant appeals. Affirmed.

Champlon & Blunt, for appellant. C. E. Brady, for appellee.

GODDARD, J. This is an action to recover for work and labor performed by plaintiff's intestate and three others for the appellant, defendant below, in what is known as the "Standard Tunnel," upon the property of the appellant. The services were performed during the months of August, September, and October, A. D. 1898, under an employment by one E. L. White, and consisted in running a drift in said tunnel, and work upon the machinery, track, and other property belonging to the company.

The ground upon which appellant relies to escape liability is that White was not authorized to employ the men in behalf of the company to do this work at the time they were employed, although he was theretofore the authorized and acting representative of the company in the management of its property, claiming that his agency was terminated in the month of February preceding. The evidence as to when his agency terminated is conflicting. Mr. Wallace, the president of the company, testified that in February, 1898, he (White) was discharged by the company. Mr. White testified that he was not discharged at that time, but that he continued to act as agent in the management of, and was in charge of, the company's property, as its agent, during the months aforesaid and until December, 1898. There is evidence tending to corroborate Mr. White's testimony. In these circumstances the finding of the court below must be accepted by us as conclusive upon this controlling question of fact, and its judgment must be affirmed.

Affirmed.

STEELE, C. J., and BAILEY, J., concur.

INNES v. BOGAN, GAINES & CO.

(Supreme Court of Colorado. Oct. 7, 1907.)

BROKERS—COMPENSATION—OBTAINING PURCHASER.

Where a broker brought a prospective purchaser before the owner of land, and the prospective purchaser, upon being told the price, left without taking any action, the broker was not entitled to a commission, since he had not

furnished a purchaser ready, able, and willing to buy on the seller's terms.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 75-81.]

Appeal from District Court, Mesa County; Theron Stevens, Judge.

Action by Bogan, Gaines & Co. against Joseph Innes. From a judgment for plaintiffs, defendant appeals. Reversed.

S. N. Wheeler, for appellant. Carnahan & Van Hoorebeke, for appellees.

BAILEY, J. The defendant entered into the following agreement with plaintiffs: "I hereby agree to pay Bogan, Gaines & Co., real estate dealers of Grand Junction, Colorado, a commission of 10% if they furnish me a purchaser for my 160 acres located 2½ miles E. of Fruita. The term 'furnish a purchaser' shall include all parties who they refer to me, either through introduction or otherwise, or to whom they show my property. The selling price and terms shall be named by me, and I agree to pay said commission out of the first payment made by their purchaser. [Signed] Owner, Joseph Innes." Plaintiffs instituted this action upon the contract, alleging that the defendant named as the selling price for the land the sum of \$5,000, and that they found a purchaser, one William Eppert, who was ready, willing, and able to purchase the land at the price named by the defendant. The plaintiffs produced two witnesses; the first being Eppert, the prospective purchaser, who testified, so far as the making of the contract was concerned, as follows: "We met Mr. Innes, according to the agreement, in Grand Junction, at Mr. Gaines' office. Mr. Gaines was present. We went into the office, and I asked Mr. Innes what he would take for the land—what was his best price? He said \$4,750 net to him. We did not do anything about it. We got his price and left. I was willing to pay \$5,000 for the property." Upon cross-examination he said that he never told Innes that he was willing to buy the place on those terms, and that he never authorized the plaintiffs to make any proposition upon the place whatever. The testimony of Gaines, one of the plaintiffs, so far as it related to the price of the property as named by Innes, was as follows: "I met Innes on the street, and told him that Eppert was ready to buy the place at \$5,000. Mr. Innes came into the office, and went back into the room where Mr. Eppert was, and I sat down on the south side of the desk, and Mr. Innes near the door, and I said: 'Now, Mr. Eppert is ready to buy that place, and would like to know your best price.' He says: 'I want \$4,750 net to me.' There wasn't very much said. Innes got up and left the room." Upon cross-examination Gaines testified that the only price that Innes fixed was in the office, at \$4,750 net to him, and that Eppert did not say that he would take the place at that price; that the witness informed Innes that Eppert would take it at \$5,000. In addition

to this the proof shows that, very shortly after the conversation in the office of the plaintiffs, defendant sold the property to a man named Sharp, who subsequently sold it to Eppert; the consideration named in the deed from defendant to Sharp being \$5,000.

At the close of plaintiffs' testimony defendant moved that the jury be instructed to return a verdict for the defendant. This motion was overruled, but it should have been granted. Under the terms of the contract the defendant had the right to name the price for which the land was to be sold. The only price that he named was \$4,750 net to him, and the proposed purchaser was not willing to take it at that price. There is nothing in the contract prohibiting the defendant from selling the property himself. There is no testimony showing any collusion or fraud between Sharp and the defendant. Before the plaintiffs could be entitled to a judgment, it was necessary for them to furnish a purchaser who was ready, able, and willing to buy on the terms of the seller. Having failed to do that, the court should have directed a verdict. The following authorities support the foregoing proposition: Mechem on Agency, 967; Wylie v. Marine Natl. Bank, 61 N. Y. 416; Hanrahan v. Ulrich, 107 Ill. App. 626; Kilham v. Wilson, 112 Fed. 565, 50 C. C. A. 454; Brown v. Keegan, 32 Colo. 463, 76 Pac. 1056; Colburn v. Seymour, 32 Colo. 430, 76 Pac. 1058; and many authorities cited in the foregoing.

For the reasons above stated, the judgment of the district court will be reversed.

Reversed.

STEELE, C. J., and GODDARD, J., concur.

YOUNG et al. v. PLATTNER IMPLEMENT CO.

(Supreme Court of Colorado. Oct. 7, 1907.)

1. CORPORATIONS — CORPORATE EXISTENCE — DENIAL — ESTOPPEL.

Where defendants signed a note, sued on, reciting that the payee was a duly organized corporation, defendants were estopped to deny the corporation's legal existence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 84-90.]

2. SALES—IMPLIED WARRANTY — KNOWLEDGE OF FITNESS.

The rule that, where a seller contracts to supply an article to be applied to a particular purpose, the buyer trusting the dealer's judgment or skill, there is an implied warranty of fitness, does not apply where the purchaser has equal means of knowledge with the seller as to the fitness of the thing sold for the purpose intended, or where the seller informs the buyer that he has no personal knowledge of the article purchased.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 762-764.]

Appeal from County Court, City and County of Denver; Albert S. Frost, Judge.

Action by the Plattner Implement Company against John S. Young and another.

From a judgment for plaintiff, defendants appeal. Affirmed.

Thomas W. Lipscomb, for appellants.
Brown, De Lappe & Sackman, for appellee.

MAXWELL, J. This appeal is from a judgment of the county court, rendered upon an appeal from a justice court. The suit was to recover the amount of a promissory note given by appellants to appellee in payment of a farming implement. At the close of plaintiff's evidence defendants moved a nonsuit, which was denied. This ruling is assigned as error. The abstract of record does not embody this motion, so that we are unadvised as to the grounds upon which it was based, except as we gather the same from appellant's brief, from which it seems that it was upon the ground that the incorporation of plaintiff had not been proved. The note sued upon was introduced in evidence, which recited "The Plattner Implement Company, a corporation duly organized under the laws of Colorado," as payee. A witness testified that he was an officer of the Plattner Implement Company and saw the defendants sign the note. If the court erred in overruling the motion for a nonsuit, based upon the failure of the evidence to establish plaintiff's cause of action, which we do not decide, such error cannot avail appellants upon this appeal, for the reason that both appellants testified to the execution of the note, which recites that it was payable to "the Plattner Implement Company, a corporation duly organized under the laws of Colorado." *Horn v. Reittler*, 15 Colo. 316, 25 Pac. 501; *D. & R. G. Ry. Co. v. Henderson*, 10 Colo. 1, 13 Pac. 910; *Well v. Nevitt*, 18 Colo. 10, 31 Pac. 487. The case, therefore, falls within the rule that defendants, having dealt with plaintiff in its corporate capacity, are estopped from denying its legal existence. *Holmes F. & F. Co. v. Com. Nat. Bank*, 23 Colo. 210, 47 Pac. 289, and cases cited.

The defense was the failure of consideration, in that there was a breach of warranty of the implement sold, for which the note was given. The abstract of the record contains no evidence of an express warranty. The rule of implied warranty relied upon is: "It is believed that the weight of authority sustains the rule that where a dealer contracts to supply an article in which he deals, to be applied to a particular purpose, so that the buyer trusts to the judgment or skill of the dealer, there is an implied warranty that it shall be reasonably fit for the purpose to which it is to be applied." 15 A. & E. Ency. (2d Ed.) 1235. In the same paragraph of the citation, at page 1236, an exception is thus stated: "This rule, of course, does not extend to cases where the purchaser and the seller have equal means or knowledge as to the fitness of the thing sold for the purpose for which it is sold, or where the dealer informs the buyer that he has no personal

knowledge of the article purchased." There is ample evidence in the record to warrant the court in finding that the case came within the exception.

Perceiving no error in the record, the judgment will be affirmed.

Affirmed.

The CHIEF JUSTICE and CASWELL, J., concur.

DENVER LIVE STOCK COMMISSION CO. v. PARKS.

(Supreme Court of Colorado. Oct. 7, 1907.)

1. REPLEVIN—DEMAND—TIME.

In replevin, a demand, made after the beginning of the action, but prior to the execution of the writ, is sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, §§ 83-85.]

2. SAME—NECESSITY FOR DEMAND WHEN DEFENDANT CLAIMS OWNERSHIP.

In replevin, no proof of demand is necessary where the defendant claims ownership and right of possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, § 88.]

3. JUSTICES OF THE PEACE—APPEAL—PRESERVATION OF OBJECTIONS.

In replevin, where defendant gives a redelivery bond, procures a change of venue, and contests the case on its merits before the justice of the peace, he cannot urge want of demand for the first time in the county court on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 513.]

Appeal from Larimer County Court; J. Mack Mills, Judge.

Action by the Denver Live Stock Commission Company against Cash Parks. From a judgment for defendant in the county court on appeal from a justice court, plaintiff appeals. Reversed and remanded.

This is an action in replevin commenced before a justice of the peace, and involves the right to the possession of a span of mules and a set of harness under the provisions of a chattel mortgage given to secure a promissory note executed by the appellee, defendant below. The note was due and payable on April 1, 1903. The action was commenced on the 22d of April, 1903, and a writ of replevin issued. On April 23d demand for possession of the property was made on appellee. The demand was refused, whereupon the writ was served and possession of the property taken by the constable. On April 24, 1903, a redelivery bond was approved, and the property redelivered to appellee. On motion of appellee for change of venue, the cause was transferred to Hiram R. Smith, another justice of the peace, before whom the cause was tried on its merits to a jury, and verdict rendered in favor of appellee "that he was entitled to the property," and judgment was entered accordingly. From this judgment appellant appealed to the county court. On March 3, 1904, a trial was had in the county court to a jury. The appellant, after prov-

ing the due execution thereof, by the appellee, introduced in evidence the note and chattel mortgage and offered to prove, among other things, that upon the trial of the case in the justice's court the defendant appeared personally and by attorney and contested the case upon its merits, and then made no objection that no demand for the possession of the property was made by, or on behalf of, the appellant prior to the commencement of the action, but set up title to the property in himself. Upon objection of counsel for appellee, this evidence was rejected. Upon the conclusion of appellant's testimony the appellee offered no testimony, but moved the court to direct the jury to return a verdict for the defendant, "for the reason that the evidence does not show that the plaintiff made a demand upon the defendant for the property in question in compliance with the law, viz., before the commencement of the suit." The motion was sustained, and a verdict directed, whereupon the jury returned the following verdict: "We, the jury in the above-entitled action, find issues herein joined for the defendant." A motion for a new trial was overruled, and judgment entered in accordance with the verdict. To reverse this judgment appellant prosecutes this appeal.

Arthur Ponsford, for appellant.

GODDARD, J. (after stating the facts as above). The action having been commenced before a justice of the peace, there are no written pleadings. We must therefore resort to the proceedings before the justice of the peace, as disclosed by the record, in order to determine whether the action of the court in directing a verdict was permissible, and the defendant entitled to the verdict rendered; it being conceded that no demand for the possession of the property described in the chattel mortgage was made upon appellee until after the writ was issued and in the hands of the constable. The authorities are not uniform upon the question when demand is necessary; many of the cases holding that, where chattels came lawfully into the possession of a defendant, there must be a demand and refusal or proof of conversion before suit is brought, while others hold, for reasons that seem to us sound and persuasive, that a demand, made after the bringing of the action, but prior to the execution of the writ, is sufficient, for the reason that a refusal to surrender the property upon such demand is convincing proof that, had a demand been seasonably made, it would have been unavailing. Among them, see *Morris v. Pugh*, 3 Burr, 1241; *Rodgers v. Graham*, 36 Neb. 730, 733, 55 N. W. 243; *O'Neil v. Bailey*, 68 Me. 429; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Grimes v. Briggs*, 110 Mass. 446. We think these cases state the better rule, not only for the reasons above

stated, but also because, as stated in section 372 (2d Ed.) of Wells on Replevin: "The only reason why demand is necessary in any case is to give the defendant an opportunity to surrender without being put to costs; and, while this is eminently proper, the object of the rule is fully accomplished, and the plaintiff sufficiently punished for his neglect, by judgment against him for costs, without being compelled to surrender his goods."

Furthermore, the appellee having given a redelivery bond, procured a change of venue, and contested the case on its merits before the justice of the peace, was not in a position to urge the want of a demand before the action was commenced, for the first time in the county court on appeal. *Lamping v. Keenan*, 9 Colo. 390, 12 Pac. 434. It is well settled that, when the defendant claims the ownership of the property and the right of possession, no proof of demand is necessary. *Lamping v. Keenan*, supra; *Howard v. Braun*, 14 S. D. 579, 586, 86 N. W. 635; Wells on Replevin (2d Ed.) § 374.

In either view, the court erred in directing a verdict, and the verdict and judgment rendered were clearly unwarranted. The judgment is therefore reversed, and the cause remanded for trial upon the merits.

Reversed and remanded.

STEELE, C. J., and BAILEY, J., concur.

HEISTAND v. BATEMAN.

(Supreme Court of Colorado. Oct. 7, 1907.)

1. CUSTOMS AND USAGES—REQUISITES IN GENERAL.

Custom or usage relating to a particular business, in order to be available for the purpose of determining the rights of parties, must be uniform, notorious, and reasonable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs and Usages, §§ 1, 2.]

2. SAME—SUFFICIENCY OF EVIDENCE.

In an action to recover commissions on a sale of goods by defendant to a person brought to defendant's store by plaintiff, evidence that dealers engaged in the same business as defendant had been in the habit of paying 10 per cent. commissions to hack drivers, such as plaintiff, on sales made to parties brought to their stores, where such sales were in the amount usually made to such persons, that such sales were ordinarily in small amounts, and that in a few instances the commission has been paid on sales amounting to \$75 and \$200, but above the latter sum, and usually the former, the amount of commission paid was the subject of special agreement, was insufficient to establish a custom to pay 10 per cent. commission on a sale in the sum of about \$4,500.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs and Usages, § 46.]

3. SAME—PRESUMPTIONS.

Evidence of custom may be resorted to for the purpose of ascertaining the meaning and intent of parties to a contract, where the terms employed are general in their nature; and hence, when such a contract becomes the subject of litigation, the presumption is indulged, if the parties have not expressed a contrary intention,

that they intended to incorporate therein a usage known to them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs and Usages, §§ 30–33.]

4. PLEADING—ISSUES AND PROOF.

Where, in an action to recover commissions on the sale of goods, plaintiff relied on a custom regulating the amount of the commission, he was precluded from also relying on a special agreement to pay a stated amount.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1333–1335.]

Appeal from District Court, El Paso County; Louis W. Cunningham, Judge.

Action by G. E. Bateman against J. G. Heistand. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Lunt, Brooks & Willcox and M. B. Hurley, for appellant. Arthur Cornforth, for appellee.

GABBERT, J. This is an appeal from a judgment rendered in an action brought by appellee, as plaintiff, to recover from appellant, as defendant, commissions to which plaintiff claimed he was entitled by reason of a sale of a case of specimens by defendant to a person brought to the store of defendant by plaintiff. The proximate amount of such sale was \$4,500. Plaintiff was a hack driver, and conveyed the purchaser to the store of the defendant. He bases his right to a commission of 10 per cent. of the amount of the sale upon two grounds: First, on the general custom at that time existing in the town of Manitou, among the merchants dealing in the same line of goods that defendant was, and where defendant was then engaged in business, to pay hack drivers 10 per cent. on all purchases made by persons from merchants to whose stores they conveyed such persons; second, on an agreement, made several years previous, whereby the defendant agreed he would pay him a commission of 10 per cent. on such sales. The jury returned a verdict for plaintiff for 10 per cent. of the sum for which the defendant sold the specimens in question, with interest, less the sum of \$50, which he acknowledged having theretofore received. From a judgment accordingly the defendant appeals, and, in support of the errors assigned, contends that the evidence was insufficient to justify submitting the case to the jury on either custom or agreement.

There is testimony to the effect that it was the custom of a considerable number of dealers in articles generally purchased by tourists to pay hackmen a commission on goods sold to tourists whom they brought to their stores, and that such sales were usually small; but it does not appear from the testimony that a commission of 10 per cent. was ever paid on sales exceeding \$75, or possibly, in one or two instances, \$200, and that on those in excess of that sum the amount paid depended upon special agreement. Custom or usage relating to a particular business, in order to be available for the purpose of determining

the rights of parties, must be uniform, notorious, and reasonable. *Savage v. Pelton*, 1 Colo. App. 148, 27 Pac. 948; *Leach v. Perkins*, 17 Me. 462, 35 Am. Dec. 268. The testimony, as applied to the facts of this case, wholly fails to establish these essential requisites of a custom which entitles the plaintiff to recover the commission sued for. As above stated, it was to the effect that dealers engaged in the same line of business in Manitou as defendant appear to have been in the habit of paying 10 per cent. commission to hack drivers on sales made to tourists brought to their stores, where such sales were in the amount usually made to such persons; that such sales were ordinarily in small amounts, or in the sum of a few dollars each; that in a few instances this commission had been paid on sales amounting to \$75 and \$200, but above the latter sum, and usually the former, the amount of commission paid was the subject of special agreement. This is far from establishing a custom to pay 10 per cent. commission upon a sale in the sum of several thousand dollars, or upon purchases by tourists far in excess of the usual amount made by them.

With respect to the agreement relied upon, plaintiff testified that "Mr. Heistand told me personally that he would pay 10 per cent. commission on everything that people bought that I brought there, and he has paid it to me lots of times. He was paying that commission to other hackmen." He says this contract was entered into five or six years previous to the transaction in question. The custom relied upon by plaintiff defeats his right to recover under this agreement. Evidence of custom may be resorted to for the purpose of ascertaining the meaning and intent of parties to a contract, where the terms employed are general in their nature. Experience has taught that men of affairs, in making contracts, are not always careful to express themselves with completeness and particularity, and that in dealing with one another they leave part of their intention unexpressed, in silent reliance on the usages mutually understood, to enter into and form a part of their agreement. 29 Enc. Law, 422. Hence it follows that, when such a contract becomes the subject of litigation, the presumption is indulged, if the parties have not expressed a contrary intention, that they intended to incorporate therein a usage known to them; and evidence of such is admissible, not to vary or contradict the terms of the contract, but to interpret it, as it was understood by the parties at the time it was made. *Id.* 423 et seq. Certainly, in the light of the testimony as to what the parties had in mind when the contract in question was entered into, it could not be successfully contended that defendant thereby intended to obligate himself to pay plaintiff a 10 per cent. commission on a valuable piece of real estate in Colorado Springs, or a mine in Cripple Creek, which he might sell to a person

brought to his place of business by the plaintiff, but, on the contrary, that the parties had in mind a commission on the usual and ordinary sales to tourists of articles peculiar to the locality purchased of the defendant in the usual and ordinary amount, which it appears, was generally in small sums.

It is insisted by counsel for plaintiff that the question of custom was injected into the case by the defendant. The record does not bear out this assertion. It is true that on cross-examination plaintiff was asked regarding custom; but that, as we have seen, was proper, for the purpose of interpreting the contract upon which he relied. Besides, we find that plaintiff introduced witnesses in chief to prove custom.

It is also insisted on behalf of plaintiff that defendant cannot complain of the action of the court in submitting the question of custom, because instructions similar to those given on the subject were asked on his behalf and refused. It is not necessary to determine this question. It appears that the court, without objection on the part of plaintiff, submitted the case to the jury upon the question of custom, and also upon the agreement. It was clearly error, for the reasons given, to instruct the jury that plaintiff was entitled to recover, if it appeared from the testimony that defendant had theretofore specifically agreed with the plaintiff to pay him the commission in controversy. As we cannot say that the jury did not find for plaintiff under this instruction, the question of whether or not the defendant is in a position to contend that the court erred in submitting the case to the jury on the question of custom is immaterial.

The judgment of the district court is reversed, and the cause remanded for a new trial.

Reversed and remanded.

STEELE, C. J., and CAMPBELL, J., concur.

OLMSTEAD v. PEOPLE, to Use of TOWN OF LITTLETON.

(Supreme Court of Colorado. Oct. 7, 1907.)

1. WORDS AND PHRASES—"FRAME BUILDING."

A frame building is one constructed with a timber frame covered with boards or shingles, and does not include a wooden building covered with corrugated iron.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2929.]

2. MUNICIPAL CORPORATIONS—POLICE POWER—BUILDING REGULATIONS—ORDINANCES.

The erection of a building entirely of timber, except the outside of the end and side walls and the rafters, which were to be covered with corrugated iron, did not violate a city ordinance prohibiting the erection of "frame buildings."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36. Municipal Corporations, § 1387.]

Appeal from Arapahoe County Court; Stephen R. Pratt, Judge.

Elmer Olmstead was convicted of violating a building ordinance, and appeals. Reversed and remanded.

J. A. Fowler, for appellant. Wm. A. Bryans, Jr., and Guy Le Roy Stevick, for appellee.

BAILEY, J. One of the ordinances of the town of Littleton provided that "no frame building, frame shed or other frame structure shall be erected in fire district No. 1 of the town of Littleton, except as herein provided." The appellee instituted an action against appellant for the violation of this ordinance. There is no dispute in the testimony, from which it appears that on September 24, 1903, appellant was constructing, within the fire limits of district No. 1 of the town of Littleton, a building of which the foundation, the sleepers, studding, floors, joists, windows, doors, casings, and frames, and the rafters, were to be of wood. The outside of the end and side walls and the rafters were to be covered with corrugated iron. At the close of the testimony the court instructed the jury to return a verdict finding the defendant guilty of a violation of the ordinance, which was accordingly done, and judgment rendered on the verdict.

In this the court erred. To hold that the defendant was guilty of a violation of this ordinance is to hold that the building described in the testimony is a frame building. In 19 Cyc., at page 1450, it is said that "frame," as applied to a building, means "wooden." The Century Dictionary defines a frame house as being a house constructed with a skeleton frame of timber, covered in with boards, and sometimes with shingles. In the case of Ward v. City of Murphysboro, 77 Ill. App. 540, it appears that the building erected was a wooden frame structure, the south side, ends, and roof of which were covered with wooden sheathing, and the sheathing covered with corrugated iron; the space between the studding being filled with loose brick. As the building was nearing completion the mayor, marshal, and aldermen of the city, assuming to act for the city, tore it down, and appellant brought suit against them, making the city defendant. In that case the third instruction offered by appellants, and refused to be given by the court, was as follows: "In this case the court instructs you that, unless the building erected by the plaintiffs was a wooden building, then the city authorities had no right to tear it down, and your verdict should be for the plaintiffs in such sum as the evidence shall show he has sustained, if any, by reason of tearing down such building." In relation to this instruction the Appellate Court said: "The ordinance prohibits the erection of any 'wooden or frame building.' The words 'wooden' and 'frame' are interchangeable; one having the same meaning as the other. A wooden building is a frame building, and a frame

building is a wooden building. The instruction substantially stated the law correctly, and the court erred in refusing it." So, in this case, where it appears that the building was to be an iron-clad building, as distinguished from a wooden one, it is apparent that the erection of it was not in violation of the ordinance, and the court erred in directing a verdict against the defendant. It should have directed a verdict for the defendant. It may be that buildings of the character of the one described in this case are more dangerous than wooden ones; but their construction is not prohibited by ordinance like the one here presented. If it is desired to prevent the erection of such, or other, frail structures, the ordinances should so provide.

The judgment of the county court will be reversed, and the cause remanded, with instructions to dismiss the action.

Reversed and remanded.

STEELE, C. J., and GODDARD, J., concur.

RIO GRANDE SOUTHERN R. CO. v. COLORADO FUEL & IRON CO.

(Supreme Court of Colorado. Oct. 7, 1907.)

1. COMPROMISE AND SETTLEMENT—AGREEMENT—CONSTRUCTION.

Defendant railroad company, while in the hands of a receiver, compromised with its creditors. Plaintiff, claiming a mechanic's lien for a debt incurred prior to the receivership, was designated as an unsecured creditor; the agreement providing that each unsecured creditor should release the company from all claims on account of principal and interest on payment of a certain per cent. in cash of its indebtedness, together with interest from January 1, 1895, and a delivery of certain promissory notes. Plaintiff signed this agreement on condition that the difference between the amount paid under the compromise and the full amount of its debt should abide the final decree and adjustment in its pending suit to foreclose its alleged mechanic's lien. Held that, such agreement having been fully executed, plaintiff, not having established its lien, was not entitled to recover the balance of the debt.

2. EXCEPTIONS, BILL OF—DEFECTS—WAIVER.

Where plaintiff's counsel O. K'd over his signature defendant's proposed bill of exceptions, before it was signed and sealed by the judge, plaintiff waived the right to object that certain instruments attached to the bill of exceptions and referred to therein as exhibits were not properly incorporated in the bill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, § 77½.]

3. PAYMENT—PLEADING AND PROOF.

Where, in an action for the balance of an account, defendant pleaded payment, an executed compromise and settlement agreement was admissible in support of such defense, though not pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, § 156.]

4. PLEADING—ANSWER—ULTIMATE FACTS.

The office of an answer is to state the ultimate facts on which a defense is predicated, and not the evidence of such facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 31.]

5. APPEAL—CROSS-ERRORS—REVIEW.

Appellee cannot object to the admission of evidence in support of an issue where no cross-error is assigned on the ruling.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3053.]

Appeal from District Court, Arapahoe County; Owen Le Fevre, Judge.

Action by the Colorado Fuel & Iron Company against the Rio Grande Southern Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Wolcott, Vaile & Waterman, W. W. Field, and W. T. Leftwich, for appellant. D. C. Beaman, C. E. Herrington, and Fred Herrington, for appellee.

GABBERT, J. Appellee, plaintiff below, brought an action against the appellant, as defendant, to foreclose a lien claimed on the railroad owned by the latter, for materials furnished in the construction of such road. At the time the action was commenced, the railroad company was in the hands of a receiver; but the indebtedness sued upon had been incurred prior to his appointment. Thereafter, and before the trial of the cause, an agreement was entered into between the defendant and its creditors, to which the plaintiff was a party, the purpose of which was to effect a compromise and adjustment of the outstanding indebtedness of the railroad company, discharge the receiver, and reinvest the railroad company with the possession and control of its property. The trial resulted in a personal judgment against the railroad company for a balance of the account, which was the basis of the lien claimed, but denied the plaintiff any lien for such judgment. From this judgment, the defendant appeals.

The contention of defendant at the trial was that the creditors' agreement, having been fully executed, operated as a discharge and satisfaction of its entire indebtedness to the plaintiff. The trial court did not so construe that agreement, but held that it operated only as a discharge in part, rendering judgment for a balance of the account sued upon, although it appears from the record that the plaintiff did receive the money and obligations contemplated by the agreement. The correctness of the judgment therefore turns upon a construction of this contract. It embraced two sets of creditors of the defendant company, secured and unsecured, and a list of the creditors, among which was plaintiff; it being designated as an unsecured creditor in a sum specified. It provided that each of the unsecured creditors should release the railroad company from all claims on account of principal and interest upon the payment of a certain per cent. in cash of its indebtedness against the railroad company, as shown by the schedule of indebtedness attached to the agreement, together with interest from January 1, 1895, and the delivery of promissory notes of the railroad company,

indorsed by the Denver & Rio Grande Railroad Company. As to the secured creditors, the agreement provided that each should receive payment in cash of one half of 6 per cent. interest on the principal obligation computed up to January 1, 1895, from the date to which interest had theretofore been paid; and for the remaining half of such interest the promissory note of the railroad company, indorsed by the Denver & Rio Grande Railroad Company. Provision was also made with respect to the payment of the principal of the obligations held by the secured creditors, but they are not necessary to a determination of the rights of the parties to this appeal. The plaintiff signed this agreement with this proviso: "The Colorado Fuel & Iron Company has suit pending in the district court of Arapahoe county, Colo., to establish mechanic's lien. It subscribes the foregoing agreement as an unsecured creditor upon the condition that the difference between the amount paid by this compromise and the full amount of its debt abide the final decree or adjustment in said suit for mechanic's lien." As previously stated, the record discloses that the plaintiff, subsequent to the execution of this agreement, and before trial, received the payments and obligations contemplated thereby as an unsecured creditor, subject to the provision attached to the compromise agreement. It is certainly clear from the language employed in this agreement that if the plaintiff failed to establish its lien it should be regarded as an unsecured creditor, and the payment in cash of the per cent. of its indebtedness as specified, with interest thereon from January 1, 1895, and the delivery of the promissory notes mentioned in such agreement, were to operate as a discharge of its account as scheduled. Having received the cash and the obligations as stated in the agreement, and having failed to establish its lien, it was only an unsecured creditor, and could exact nothing more from the defendant in discharge of its account than the payment of the money and the delivery of the obligations contemplated by the agreement.

Counsel for plaintiff say that, if such had been the purpose of the agreement, it would have been an easy matter to have employed language to that effect. True, the terms of the agreement in this respect, so far as the plaintiff is concerned, might have been expressed in different language, but the contract as a whole can receive no other construction than that we have given it. The secured creditors were to receive interest on their respective obligations to January 1, 1895, while the unsecured creditors were only to be allowed interest upon their respective obligations from that date, thus clearly showing that, had the plaintiff established its lien, which would have resulted in making it

a secured creditor when taken in connection with the proviso attached for its benefit, it would have been entitled to interest upon its account against the railroad company from the date such account began to draw interest, instead of from January 1, 1895, if it failed to establish its lien. This conclusion is manifestly correct, because it appears from the agreement, in connection with the complaint in the action to which the proviso refers, that the principal sum claimed in the complaint was identical with that mentioned in the compromise agreement. On this sum interest was claimed from July 11, 1893, so that the only question between the parties at the time the compromise agreement was effected was interest, and that was to be determined by determining whether the plaintiff was a secured or an unsecured creditor.

Counsel for the plaintiff contend that the compromise agreement and the evidence of a compliance therewith on the part of the defendant cannot be considered, because not properly incorporated in the bill of exceptions. These instruments are attached to the bill of exceptions and referred to therein as exhibits and as a part thereof. Conceding, but not deciding, that this is not a strict compliance with the rule with respect to the method by which exhibits must be incorporated in a bill of exceptions as previously declared by this court, the objection on the part of the defendant that it is not waived. It appears that, prior to the date that the bill of exceptions was signed and sealed by the trial judge, it was O. K'd over the signature of counsel for plaintiff. In such circumstances the alleged defect in the bill of exceptions will not be considered.

It is also urged by counsel for plaintiff that the instruments in question should not have been received, because not pleaded. The defendant pleaded payment of the account sued upon, and these instruments were competent to establish that defense. The office of an answer is to state the ultimate facts upon which a defense is predicated, and not the evidence of such facts.

It is further urged by counsel for plaintiff that the creditors' agreement should not have been received in evidence because objected to upon the ground that a copy, instead of the original, was tendered without a sufficient showing upon the part of the defendant of its inability to produce the original. The appellee has assigned no cross-error on this ruling, and consequently the question raised is not before us for consideration.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

Judgment reversed.

STEELE, C. J., and CAMPBELL, J., concur.

ORAHOOD v. CITY AND COUNTY OF DENVER.

(Supreme Court of Colorado. Oct. 7, 1907.)

1. OFFICERS—TERMINATION OF TERM—EFFECT ON SALARY.

The termination of an officer's term necessarily implies the cessation of salary.

2. MUNICIPAL CORPORATIONS—CITY ATTORNEY—RIGHT TO TERMINATE TERM.

Const. art. 5, § 30, providing that, except as otherwise provided in the Constitution, no law shall extend the term of any public officer or increase or diminish his salary after his election, does not restrict the people's power to amend the Constitution; and hence Const. art. 20, § 3, providing that the terms of all officers of the city of Denver should terminate on the consolidation of the county and city, deprived the city attorney of his office and right to further salary, though the term for which he had been elected had not expired.

En Banc. Error to District Court, City and County of Denver; P. L. Palmer, Judge.

Action by Harper M. Orahood against the city and county of Denver. From a judgment dismissing the complaint, plaintiff brings error. Affirmed.

T. E. Watters, W. F. Orahood, and E. W. Hurlbut, for plaintiff in error. H. A. Lindsley and Chas. R. Brock, for defendant in error.

BAILEY, J. Plaintiff's complaint is substantially as follows: That the defendant is a municipal corporation. That on the 2d day of April, A. D. 1901, at the election held in the city of Denver, county of Arapahoe, plaintiff was elected to the office of city attorney in and for said city. That upon the 14th day of April, 1901, he qualified and entered upon the duties of the office, and continued to fulfill and perform such duties for the full term of two years from said 14th day of April. That on the 1st day of December, 1902, the city of Denver and the county of Arapahoe, by and under the provisions of a constitutional amendment, were merged in and became the city and county of Denver, defendant in this case, which succeeded to all the rights, powers, property, and liabilities of the said city of Denver, among which said liabilities was the obligation to pay to the plaintiff the full amount of his salary, as said city attorney, for the full term of two years. The city of Denver paid plaintiff the amount of salary due up to and including the 30th day of November, 1902, and failed and neglected to pay the amount due from December 1, 1902, to April 14, 1903, to wit, the sum of \$1,861.13. That the money to pay the said salary was duly provided for by a tax upon the property of the city of Denver, and that at the time the defendant succeeded to the property, rights, and obligations of the city of Denver the tax had been levied and the money to pay said salary had been provided for by the said city of Denver, and the same by said consolidation, merger, and succession came to and is now held by the

defendant. That the charter of said city of Denver provided that the compensation of said city attorney of said city of Denver should be the sum of \$5,000 per year, and that the term for which said attorney should be elected should be the term of two years. That since the 1st day of December, 1902, the defendant failed and refused to pay the said plaintiff his salary as said city attorney. To this complaint a general demurrer was filed by the defendant and sustained by the court, and judgment rendered dismissing the complaint. The action of the court is assigned as error by plaintiff in error.

Article 20 of the Constitution is the amendment mentioned in plaintiff's complaint. Section 3 of this article provides: "Immediately upon the canvass of the vote showing the adoption of this amendment, it shall be the duty of the Governor of the state to issue his proclamation accordingly, and thereupon the city of Denver and all municipal corporations and that part of the county of Arapahoe within the boundaries of said city shall merge into the city and county of Denver, and the terms of office of all officers of the city of Denver and of all included municipalities and of the county of Arapahoe shall terminate * * * and the district attorney shall also be ex officio attorney of the city and county of Denver." Section 30 of article 5 of the Constitution provides: "Except as otherwise provided in this Constitution, no law shall extend the term of any public officer or increase or diminish his salary, or emoluments after his election or appointment." It is the contention of plaintiff in error that section 30 of article 5 is controlling in this matter, and that the amendment should not receive such a construction as would diminish his salary or emoluments. The plaintiff in error relies somewhat upon the maxim, "The express mention of one thing implies the exclusion of another," and argues that, notwithstanding section 3 of article 20 terminated the right to the office, the right to the salary did not cease, because it was not expressly mentioned. This maxim is not of universal application, and great caution is requisite in dealing with it, lest we destroy the intention of the people in the adoption of the amendment, as discoverable from the instrument itself and the circumstances of the transaction. Broom's Legal Maxims, 653. If the amendment had provided that upon its adoption "the terms of office of all officers of the city of Denver shall terminate and the right of the officers to the salary attached to such offices shall cease," the latter clause would add nothing to the sentence, because "the expression of what is tacitly implied is inoperative" (Broom's Legal Maxims, 670), and the termination of the term necessarily implies the cessation of the salary.

The case of Marquis v. City of Santa Ana, 103 Cal. 661, 37 Pac. 650, relied upon by plaintiff in error, is not in point. In that

case the city relieved the assessor of the performance of his duties and then sought to avoid paying his salary. Under a statute which provided that the compensation should not be diminished during the official term, it was held that the city was bound to pay the salary, even though it had made other provisions for the performance of the duties. Here, by article 20 of the Constitution, the people in their sovereign capacity terminated the term of office of plaintiff in error. *Uzzell v. Anderson*, (Colo.) 89 Pac. 785, 1056. So that plaintiff no longer held the office the salary of which he seeks to obtain. In the case of *County of Cook v. Sennott*, 136 Ill. 314, 26 N. E. 491, which is relied upon by plaintiff in error, it appears that the Constitution of Illinois (section 11, art. 9) prohibits the increase of the compensation of the clerk of the probate court during his term of office, and it was held that an act of the Legislature increasing such salary was void. This does not apply here, because the act complained of was by an amendment to the Constitution itself.

It cannot be asserted that section 30 of article 5 prohibits the people from amending their own Constitution. The section of the Constitution which prohibits the diminution of the salary of any public officer also inhibits the extending of the term or the increasing of the salary. Yet, in the year 1881, an amendment to the Constitution was proposed, and afterwards adopted by the people, which provided for the increase of the salaries of the Governor, his private secretary, the Judges of the Supreme Court and the judges of the district court. Since the time of its adoption each of these officers has been receiving salaries in accordance with that amendment, and those in office at the time of its adoption immediately began to receive such increase. By the amendment to the Constitution proposed in 1901, and adopted by the people in 1902, the terms of office of the district attorneys, county judges, and the various county officers were extended. By the amendment to the Constitution which provides for the consolidation of the Court of Appeals and the Supreme Court, the term of office of one of the judges was extended for a period of one year, and the term of office of two of the judges was decreased for the period of three months. So it is seen that the people have repeatedly exercised the power to do those things prohibited by section 30 of article 5. The inhibitions mentioned in this section are restrictions upon the legislative branch of government, and not against the power of the people to amend the Constitution. In *Taylor & Marshall v. Beckham*, 178 U. S., at page 577, 20 Sup. Ct. 901, 44 L. Ed. 1187, it is said: "Nor does the fact that a Constitution may forbid the Legislature from abolishing a public office or diminishing the salary thereof during the term of the incumbent change its character or make it property. True, the restrictions limit the

power of the Legislature to deal with the office, but even such restrictions may be removed by constitutional amendment."

Plaintiff in error contends that, notwithstanding the fact that by constitutional amendment the people terminated the term of his office, he was still entitled to the salary for the full term for which he was elected. In *State v. Frizzell*, 31 Minn. 460, 18 N. W. 316, the court said: "Public offices, in theory at least, are held and exercised for the benefit of the public, and not of the incumbent. Therefore it is in all cases competent for the people, in their sovereign capacity, to abolish an office or shorten a term, or reduce or take away entirely the salary attached to it, without regard to the interests of expectations of the incumbent as to the prospective compensation. *Cooley*, Const. Lim. *276; *County of Hennepin v. Jones*, 18 Minn. 199 (Gil 182); *Conner v. City of New York*, 2 Sandf. (N. Y.) 355. And when an office, or the term of an office, ceases, the salary ceases." See, also, *Jones v. Shaw*, 15 Tex. 577; *Throop on Public Officers*, § 475; *Alexander v. McKenzie*, 2 S. C. 81.

Inasmuch as the prohibitions contained in section 30 of article 5 cannot restrict the power of the people to amend their Constitution, and inasmuch as the right to the salary ceases when the right to the office terminates, it necessarily follows that the demurrer to plaintiff's complaint was properly sustained. The judgment of the district court will therefore be affirmed.

Affirmed.

CAVANAUGH v. PATTERSON et al.

(Supreme Court of Colorado. Oct. 7, 1907.)

1. CORPORATIONS—REPORTS—FAILURE TO FILE—LIABILITY OF DIRECTORS.

1 Mills' Ann. St. § 491, provided that certain domestic corporations should annually, within 60 days from the 1st of January, make and file with the recorder of deeds of the county where the business was carried on a report stating certain facts, and for a failure so to do the directors should be jointly and severally liable for debts created during the year next preceding when such report should have been filed, and until it was filed, unless the capital has been fully paid in and a certificate filed. Held, that directors, during the period the corporation was in default for failing to file such statutory report, were personally liable for indebtedness incurred during such period.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1460-1467.]

2. SAME.

The fact that a director of a domestic corporation did not become such until after the expiration of the period when the corporation's annual report should have been filed, as required by 1 Mills' Ann. St. § 491, did not relieve him from liability for indebtedness incurred thereafter, during his administration while the corporation continued in default.

3. STATUTES — REPEAL — EFFECT — SAVING CLAUSE.

The general rule that, where a statute imposing a liability is repealed by a subsequent act containing no saving clause, all rights under the repealed statute are lost, was abrogated by

Laws 1891, p. 366, § 1, providing that the repeal of a statute shall not affect any penalty or liability incurred thereunder, unless the repealing act shall so expressly provide.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 368.]

4. CORPORATIONS—MANAGEMENT — REPORTS—STATUTES—REPEAL.

Laws 1891, p. 366, § 1, provides that the repeal of any section of any statute shall not affect in whole or in part any penalty, forfeiture, or liability which shall have been incurred before the repeal, unless the repealing act shall so expressly provide. *Held*, that Laws 1901, p. 121, c. 52, § 11, repealing 1 Mills' Ann. St. § 491, imposing liability on directors of a corporation for failing to file annual reports, etc., without a saving clause, was not in any sense inconsistent with the general saving statute of 1891, and therefore did not preclude an enforcement of liabilities incurred under the repealed section.

5. APPEAL—REVIEW — EXCEPTIONS — NECESSITY.

In the absence of an exception taken at the trial, a finding of fact cannot be reviewed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1538.]

6. SAME—CROSS-ERRORS — ASSIGNMENT — NECESSITY.

An alleged erroneous finding of fact prejudicial to appellee cannot be reviewed unless a cross-error is assigned thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3053.]

7. SAME—DISPOSITION OF CAUSE.

Where, in a suit to charge directors of a corporation for debts because of the failure to file annual reports, there appeared to be merit in the contention of one of them that he did not become a director until after the indebtedness was incurred, the court, on appeal, on reversing a judgment in favor of both, would not direct judgment against them, but would demand the cause for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4599.]

Appeal from District Court, City and County of Denver; Frank W. Owens, Judge.

Action by Edward J. Cavanaugh against Frank G. Patterson and other. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

The question presented by this appeal is the liability of directors of a corporation for indebtedness incurred thereby after the lapse of the period when, in accordance with the provisions of section 491, 1 Mills' Ann. St., such corporation should have filed its annual report. This section, as it existed at the time when such indebtedness was created, provided, in substance, that every such corporation shall annually, within 60 days from the 1st day of January, make and file with the recorder of deeds of the county where its business is carried on a report, stating the amount of its capital and the proportion thereof actually paid in, together with a statement of its existing indebtedness. The section further provides that the failure to file such report within the time specified renders the directors of the defaulting corporation jointly and severally liable for the debts of such corporation created during the year

next preceding when such report should have been filed, and until it is filed, unless the capital stock of the corporation has been fully paid in, and a certificate to that effect filed, as provided in section 487, Id. In 1894, the Fish Creek Gold Mining & Land Company was incorporated under the laws of this state, and on the 8th day of March, 1901, its certificate of incorporation was amended by changing the name to the Freeland Mercantile & Mining Company. No certificate of full paid-up stock was filed, as provided by section 487, nor was the annual report, required by section 491, made and filed. On March 13, 1901, the corporation created an indebtedness of \$1,000. Suit was brought thereon by appellant against the appellees. The court found as a fact, in addition to those above recited, that appellees were directors of the corporation at the time the indebtedness sued upon was created, and, specifically, that Mr. Taggart had been such director from February 5, 1901, and Mr. Patterson from March 8, 1901, but determined as a conclusion of law that the defendants were not liable. The plaintiff appeals.

Skelton & Morrow, for appellant. John R. Smith, for appellees.

GABBERT, J. (after stating the facts as above). The report for 1901 was due 60 days from the 1st day of January of that year. Directors of a domestic corporation during the period it is in default, in failing to file the annual report required by the statute, become personally liable for the indebtedness incurred by such corporation during that period. The statute in question has been so construed in numerous decisions of the Court of Appeals and this court, among which we cite *Colo. Fuel & Iron Co. v. Lenhart*, 6 Colo. App. 511, 41 Pac. 834, and *Austin v. Berlin*, 13 Colo. 198, 22 Pac. 433. New York has a similar statute, and the courts of that state have given it a similar construction. *Boughton v. Otis*, 21 N. Y. 261; *Shaler & Hall Quarry Co. v. Bliss*, 27 N. Y. 297.

From our conclusion under the facts we are considering, both defendants were liable, and the district court erred in holding to the contrary. No certificate of paid-up stock was filed. The annual report required by the statute had not been filed when the indebtedness sued upon was created, and both defendants were directors of the debtor corporation at this time. The fact that Mr. Patterson was not a director until after the expiration of the period when the annual report for 1901 should have been filed did not relieve him from the liability imposed by the statute, for indebtedness incurred thereafter under his administration while the corporation was in default. The duty devolved upon him, when he became a director, to see that the law with respect to the filing of the annual report was obeyed, and, having neglected this duty, he became liable for the

penalties imposed by the statute for this neglect.

April 6, 1901, the General Assembly passed an act providing for a different kind of report than that mentioned in section 491, and by this act repealed that section, without any saving clause as to penalties which had attached thereunder. Laws 1901, p. 121, c. 52, § 11. Counsel for defendant urges that, because there was no saving clause to the repeal of section 491, therefore all rights under this statute fell with its repeal. This is the general rule, but it has been abrogated by statute passed in 1891 (Laws 1891, p. 366), which provides that: "The repeal, revision, amendment or consolidation * * * of any * * * section * * * of any statute shall not have the effect to release, extinguish, alter, modify, or change, in whole or in part, any penalty, forfeiture, or liability, either civil or criminal, which shall have been incurred under such statute, unless the repealing, revising, amending or consolidating act shall so expressly provide. * * *." This act does not attempt to interfere in any manner with future legislation, but provides that the repeal of a statute prescribing a penalty shall not prevent a recovery of such penalty unless the repealing statute so provides. Its purpose was to save the right to penalties incurred when the repealing statute was silent on that question, and hence, by virtue of its provisions, the repeal of a statute imposing penalties under certain conditions, without any saving clause, does not prevent the recovery of such penalties when it appears that the repeal and subsequent statute are not inconsistent with its purpose. *Wilson v. People* (Colo.) 85 Pac. 187; *State v. K. C., Ft. S. & G. R. Co.* (C. C.) 32 Fed. 722. The new act providing for reports of corporations merely goes more into detail as to what corporations shall file such reports, and what they shall contain. It is entirely silent with respect to the effect of repealing section 491 on penalties incurred thereunder, but relates to the same general subject which that section covers, provides penalties for failure to file the reports thereby prescribed, is no sense inconsistent with the general saving statute of 1891, and indicates no intent on the part of the Legislature to interfere with any rights which attached under section 491 prior to its repeal and the enactment of a substitute. We are therefore of the opinion that the right to recover the penalties incurred by the defendants from their failure to file the annual report of the corporation of which they were directors was saved by that statute.

Counsel for appellees challenges the finding of the trial court as to the dates when they became directors. It appears to be conceded that Mr. Taggart became a director on March 5, 1901, and therefore, for reasons already stated, it is immaterial whether he became a director on that date, instead of February 5th preceding, as found by the court.

On behalf of Mr. Patterson, it is contended that he did not become a director until May 1, 1901. Of course, if that is true, under our construction of the statute he would not be liable, because the indebtedness sued upon was incurred before that date (*Austin v. Berlin*, supra); but we are precluded from investigating the question of the date when, according to the evidence, he became a director, because no exception was taken to the finding of the trial court on this issue, nor cross-error assigned thereon. It appears, however, that there may be some merit in the claim, on behalf of Mr. Patterson, that he did not become a director until May 1, 1901, and we therefore decline to direct the trial court to enter judgment against the defendants, as requested by counsel for plaintiff, but shall remand the cause for a new trial as to both defendants.

The judgment of the district court is reversed, and the cause remanded for a new trial.

Reversed and remanded.

STEELE, C. J., and CAMPBELL, J., concur.

GUTHRIE & W. R. CO. v. RHODES.

(Supreme Court of Oklahoma. June 25, 1907.
Rehearing Denied Oct. 12, 1907.)

1. EVIDENCE — PAROL EVIDENCE — WRITTEN CONTRACT.

Under the laws of this territory, the execution of a contract in writing supersedes all the oral negotiations or stipulations concerning its terms and subject-matter which preceded or accompanied the execution of the instrument; hence, where a note is given as subscription to a railroad corporation to aid in the construction and building of said road, any representations made prior to or contemporaneous with the execution of the note are inadmissible to contradict, change, vary, or add to the conditions plainly incorporated into and made a part of said note.

2. BILLS AND NOTES—ACTION—DEFENSES.

In the absence of any proof that the signer of a note or written instrument is unable to read, an answer which admits the execution of a subscription note sued upon, but alleges that the person procuring the note had misrepresented the conditions of the same and the extent of the liability that the defendant would incur in signing the same, where the note is in plain language and unambiguous in its terms, such answer will be insufficient to constitute a defense.

(Syllabus by the Court.)

Error from District Court, Logan County; before Justice John H. Burford.

Action by the Guthrie & Western Railroad Company against W. L. Rhodes. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

This was a civil action, tried in the district court of Logan county, to collect a promissory note executed by the defendant in error to the plaintiff in error, of which the following is a copy: "\$500.00. Guthrie, Okla. January 9, 1900. On completion of the railroads of the Guthrie & Western Railway

Company and the Kingfisher & Guthrie Railway Company from Kingfisher, Oklahoma, from a point on the Chicago, Rock Island & Pacific Railway at or near Kingfisher, to a point on the main line of the Atchison, Topeka & Santa Fé Railway Company at or between the stations of Seward and Guthrie, for value received, in consideration of the construction of said railroads, I promise to pay to the order of the Guthrie & Western Railway Company five hundred dollars (\$500.00) at the Guthrie National Bank, Guthrie, Oklahoma, with interest at 10 per cent. per annum from completion of said railroad. I hereby waive presentment for payment, notice of nonpayment, protest, and notice of protest. If suit be instituted, I agree to pay 10 per cent. additional as attorney's fee, and in case of judgment said attorney's fee to be included in said judgment. [10 cent Int. Rev. Stamp.] W. L. Rhodes." The petition is in the usual form, declaring on the note, and alleging specifically that the plaintiff had fully complied with all the terms and conditions of the contract.

To this petition an answer was filed. The answer pleads, first, a general denial. For a second defense the answer admits the execution of the note, but alleges that the execution was procured by misrepresentation and fraud, and pleads as the facts constituting the fraud that the plaintiff resides in the city of Guthrie, and is a property holder and interested in the growth and development of the city; that at the time the note was given the Atchison, Topeka & Santa Fé Railroad was the only railroad running in or out of said city; that for commercial purposes it would tend to enhance the value of property in the city to get new lines of railroads constructed into it; that at the time the said note was given the Chicago, Rock Island & Pacific Railway Company was operating a line of railway about 35 miles west of Guthrie, and that said railroad had extensive lines of railway, and was of great benefit to cities into which it ran its road; that at the said time property owners in the city of Guthrie were anxious to secure other lines of railroads in addition to the Santa Fé for said city, and were willing to pay money in order to get such lines into the city; that a short time prior to January 9, 1900, public notice was given in Guthrie that there would be a mass meeting for the purpose of hearing a proposition submitted by the Rock Island Railroad to build its line into Guthrie; that said notice was circulated by Henry Asp and J. B. Beadles, and other persons, who acted for the subsequently incorporated plaintiff; that on the evening announced for the meeting the defendant and a large number of citizens assembled, and persons there present, representing the interest afterwards incorporated into the plaintiff, made speeches concerning the purpose of the meeting and laying before the people a proposition to raise money to induce the

Rock Island Railroad to build into Guthrie; that it was stated by Henry E. Asp and several others, afterwards incorporated under the name of the Guthrie & Western Railroad Company, that if the citizens of Guthrie would donate the sum of \$15,000 raised by subscription, the Rock Island would build and operate a line of railway from Kingfisher to Guthrie; that the advantages of such a connection to the city of Guthrie were set forth in those speeches for the purpose of inducing those present and other citizens to subscribe for said bonus; that the speakers claimed to have information that, if the subscription was raised, the Rock Island would build from Kingfisher to Guthrie; that subscriptions were then called for, and various persons subscribed, and that the name of this defendant was called, and he was requested to subscribe \$500, when he said that he would subscribe \$500 if one J. M. Brooks would do the same; that Brooks refused, but that several people at the meeting cried out that Brooks would subscribe the \$500, although Brooks continued to refuse; that defendant does not know whether Brooks subscribed \$500 or not, but that he made his subscription on the condition that Brooks did so subscribe, and that he had the impression that Brooks had subscribed the \$500; that the defendant signed the note set out in the petition in haste, and did not read it, except he saw it was for the sum of \$500, and defendant supposed that the note conformed to the statement which had been made by Mr. Asp and others at the meeting; that it was stated at the meeting that the road might be built under another name, but it really was the Rock Island road; that at the time he signed said note he believed that his subscription was for the purpose of inducing the Rock Island road to build into Guthrie, and that he formed this opinion from what was said at the meeting, and that nothing was said at said meeting which would intimate that the Santa Fé Railway had anything to do with the project, but it was stated that it was not a Santa Fé project, but a Rock Island enterprise; that defendant had no information on the subject, except what he got at the meeting; and that he believed and relied on these representations, and, if the representations had not been made, he would not have signed the note. Defendant further alleges, in this paragraph of his answer, that the Rock Island road has never built into Guthrie, and that in fact the Guthrie & Western Railway is not part of the Rock Island system, but is a branch of the Santa Fé road; that it was well known to the persons who presented the proposition to the people of Guthrie and to the defendant to raise said bonus that the Rock Island road had no intention of building into Guthrie, and that the road intended to be built would be a part of the Santa Fé system, and not of the Rock Island system; that the person making these representa-

tions was the agent of the plaintiff, and made the proposition for and on behalf of the plaintiff, and of the Santa Fé Railway, and misrepresented the facts in order to raise the subscriptions, and that no one would have subscribed said bonus if it had been known that it was a Santa Fé scheme, and, knowing this, the agent of the plaintiff carefully cultivated the impression that it was not a Santa Fé, but a Rock Island, project; that the defendant gave the note in suit solely upon such representation; and that there was no other consideration, save the proposition to get the Rock Island Railroad into Guthrie. Defendant further alleges that said Brooks never subscribed \$500. For a third defense, defendant substantially alleges that the plaintiff and its agent fraudulently represented that the proposed bonus, to which the defendant subscribed, was for the purpose of inducing the Rock Island Railway to build into Guthrie, when in fact the bonus was to be used to build a branch for the Santa Fé, and that the defendant executed the note sued upon, believing that it was to induce the Rock Island road to build into Guthrie. The fourth defense alleges a conspiracy to induce the defendant and others to subscribe by making bogus subscriptions. The fifth defense was that subscriptions largely in excess of \$15,000 were obtained, but there was no evidence offered under this defense. The sixth defense is that the note was void, because under the charter the road would have been built from Guthrie, and not from Seward.

To this answer, and each paragraph thereof, except the general denial, the plaintiff demurred on the ground that the facts stated did not constitute a defense. This demurrer was overruled, to which exceptions were saved. Thereupon the plaintiff replied by a general denial, and the case was tried on these issues. Verdict was returned in favor of the defendant. Motion for new trial was filed and overruled, exceptions saved, and the case is brought here for review.

Green, Martin & Tibbetts and Devereux & Hildreth, for plaintiff in error. Cotteral & Hornor, for defendant in error.

IRWIN, J. (after stating the facts as above). In this case the plaintiff in error relies upon six assignments of error. We think it will only be necessary to consider three: First, the overruling of the plaintiff's demurrer to the amended answer; second, error in admitting testimony for the defendant over the objection of the plaintiff; sixth, that the court erred in overruling plaintiff's motion for a new trial. It will be observed, from a perusal of this record, that the entire subject-matter of the defendant's defense to this note is based upon statements made of promises at a meeting of citizens held in Guthrie, prior to the execution of this note, which meeting was held

for the purpose of raising a bonus to secure a line of railroad from Kingfisher, on the Rock Island, to Guthrie. There is nothing in the record, so far as the proof shows, to indicate that any of the parties making these statements at said meeting were acting for, or authorized to act for, or pretended to be acting for, the holder of this note; and, even if they were, such statements made prior to, or contemporaneous with, the execution of this note, and, being statements which were in direct conflict and contradiction with the plain, unequivocal terms of the note, would not be sufficient to constitute a defense to the note under the plain provisions of our statute. St. Okl. 1893, § 822, reads as follows: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument." This provision of the statute was no doubt designed by the Legislature to preclude the admission of oral testimony to vary, contradict, or change the terms of a written contract, and was in strict accord with the spirit and principles of the common law on this subject. This note, by its terms, sets forth in clear, distinct, and unmistakable language all the terms, qualifications, and conditions attached thereto, and no person of ordinary understanding could read such a note and have any doubt as to its intention, purport, and meaning. The allegations of the answer amount only to a statement that at a public meeting held, not in the name of the payee of this note, not purporting to be held by the authority of the Guthrie & Western Railway Company, but held by the citizens for the purpose of securing a public expression from the resident property owners of Guthrie as to whether it was advisable to raise the bonus necessary to secure this connecting line of road or not, certain representations and statements amounting to promises were made by certain persons in certain public speeches, and in our judgment amount only to expressions of opinion as to the benefits to be derived from securing this line of road.

An examination into the evidence will show that the recollections of the defendant in error as to what took place in that meeting, the expressions that were used, and the promises that were made are very uncertain and indefinite. On page 61 of the record the following appears in the testimony of the defendant in error: "Q. Who made that statement? A. Judge Green, if my memory serves me right. Q. Geo. S. Green? A. Geo. S. Green; yes, sir. Q. You may state what he said. (Objected to, for the reason it is hearsay and irrelevant, which objection was by the court overruled.) Q. Go ahead and state what he said. A. Well—Q. Did he get up on his feet and talk? A. He did. Q. Go ahead and state what he

said. A. He said this meeting was for the purpose of securing a bonus of \$15,000 to secure the Rock Island Railroad for Guthrie. Q. Is that all he said? A. Well, I couldn't tell you. It has been quite a while—four or five years. I can't remember all that he said in regard to it. He made quite an address there, and enthused every one so much as to say— Q. What was the subject of his address? (Objected to, as not binding on the plaintiff company and tending to contradict the terms of the written contract made subsequent to it, which objection was by the court overruled, to which the plaintiff excepted.) A. I don't remember now. Q. You can't undertake to say every word he said, but I want you to undertake to outline his address. A. Judge Green's address? Q. Yes, sir. A. Well, I don't remember all of it—but very little of it—it has been so long. I don't suppose I have thought of it since that time, only just that meeting run through my mind, and who got up there and spoke, but I can't — (Objected to, as to the competency of the witness, which objection was by the court overruled.) A. I think I have given you about all I remember of it, about him making the statement that it would be the Rock Island road, and by securing this \$15,000 they would run the Rock Island road into Guthrie, and by that means secure one of the great trunk lines of the United States. I remember that part of it—great trunk line." On page 90, in Mr. Rhodes' testimony, the following appears: "Q. You have stated, after you came off the stand, that you weren't certain about one proposition, about Lou Beadles, did you? Do you wish to make any other statement in regard to that? (Objected to, as assuming a statement not in evidence, which objection was by the court overruled, to which the plaintiff excepted.) Q. Go ahead. A. Well, now, I stated I thought it was Lou Beadles writing the notes, but since I went off the stand it kind of run through my mind that it was young Geo. Green. Q. You wouldn't be certain about either one? A. No; I wouldn't. It is five years, and I ain't got a very good memory anyway."

Now, in our judgment, these statements and this kind of evidence is not sufficient to warrant the court in receiving it for the purpose of ingrafting a new condition into a written contract. We think, under the authorities and under the plain letter of this statute, parol evidence was not admissible to add a condition to this note, especially when the note itself on its face distinctly informs the defendant that he was to pay the \$500 upon the completion of the railroads mentioned in the note. A contract of this kind is legal and enforceable, as decided by our Supreme Court in the case of *Piper v. Choctaw Northern Townsite & Improvement Company*, reported in 16 Okl. 436, 35 Pac. 965. It will be ascertained from an examination of the evidence that the recollection of the defendant in error as to what

took place at that meeting is somewhat indistinct, from the fact that he says his understanding was he was not to sign this note unless one J. M. Brooks should have first subscribed \$500, that at that meeting Brooks distinctly refused to subscribe, and that he did not know afterwards whether Brooks subscribed or not. This seems to us like a very singular statement, that a man would base his promise to subscribe upon the promise of another, and that he was not to sign the note or pay the bonus except in the event that the other party paid a similar amount, and that he then should sign a note which contained the plain, unequivocal conditions of this note, without first ascertaining whether the other had complied on his part or not. Furthermore, it seems to us that these representations, if any were made at that meeting, were representations as to mere matters of opinion, and as to something that was to transpire in the future. The representations do not refer to past or existing facts, but relate wholly to what may transpire in the future. The most that can be contended for the defendant is an expression of opinion as to what may transpire in the future. While the note in question, it is true, is based upon conditions, yet, as shown by the allegations of the plaintiff and the proof in the case, all of those conditions which were contained in the note had been complied with in both letter and spirit at the time of the commencing of this suit. We take it that the rule is elementary that, to constitute a representation which amounts to a fraud, as the term "fraud" is understood in the law, there must be a statement or representation as to a fact, and must be as to a fact existing in the present or the past. Now, according to the claim of the defendant, it was alleged in that meeting that a certain railroad corporation would build and operate this road. There is nothing to show that any person at that meeting possessed any superior knowledge concerning this matter, or that the representations were made upon any authority of the Guthrie & Western Railway Company, to whom this written obligation was made payable. The most that can be claimed is that it was an expression of opinion as to what would take place in the future, and we think the answer is wanting in all the essential elements which constitute a fraud. It is elementary that the representations made must relate to a present or past state of facts, and that relief as for deceit cannot be obtained for the nonperformance of a promise or other statements looking to the future. In support of this doctrine, see *Bigelow on Frauds*, 11, 12; *Maltby v. Austin*, 65 Wis. 527, 27 N. W. 162; *Prince v. Overholser*, 75 Wis. 646, 44 N. W. 775.

The rule has been repeatedly held that the defendant cannot be relieved on the ground of fraud unless an action can be maintained for deceit, and it has been held in respect to

representations relating to a future fact as a mere expression of opinion that such representation is not fraudulent or actionable if it relates to a future event, and is of the opinion that a railroad will be built and operated by a certain well-known railroad corporation. The rule is laid down in *Gordon v. Butler*, 105 U. S. 553, 26 L. Ed. 1166, by Mr. Justice Field, that an expression of opinion, however fallacious, in regard to property, the value of which depended upon contingencies, is not sufficient to predicate fraud upon. In the case of *Warner v. Benjamin*, 89 Wis. 290, 62 N. W. 179, representations made by a vendor of mining stock that the vendee could not lose upon his investment and that the mines would pay a dividend in the near future, being a mere expression of opinion, or a promise of a future condition of things, will not form a ground of recovery by the vendee on the ground of false representations. In the case of *Sheldon v. Davidson*, 85 Wis. 138, 53 N. W. 161, it was held that a representation by a defendant that the plaintiff could have possession of a certain building on property leased to plaintiff on a certain date, several months after the making of such representation, is not actionable, though such event did not occur, in that it relates to a future, and not to a past or present, event. In the case at bar the defendant seeks to avoid the payment of this note by setting up certain facts or representations with reference to what would take place in the future, and upon these alleged frauds, which he says were practiced upon him, he seeks to avoid the payment of the note which he acknowledged he signed. It is well settled in principle, as well as by authority, that no statement as to what would be done or was intended to be done in the future constitutes a fraud. It was so expressly held in the case of *Milwaukee Brick & Cement Company v. Schoknecht*, 108 Wis. 457, 84 N. W. 838. The Wisconsin Supreme Court said: "But no statement as to what would be done or intended to be done in the future constitutes a fraud. To be such it must relate to a present or past state of facts." See, also, *Patterson v. Wright*, 64 Wis. 289, 25 N. W. 10; *Field v. Siegel*, 90 Wis. 609, 75 N. W. 397, 47 L. R. A. 433. In *McAlister v. Indianapolis & C. R. Co.*, 15 Ind. 11, it was held: "A citizen of a certain town made unconditional subscription to the stock of a railroad company; the company promising that the branch of the road should be made to the town in which the subscriber resided. Held, that such subscriber could not recover the money paid on the ground of fraud in failing to build the road to the town; the promise being no more than the expression of an existing intent to make such branch."

It seems to us there is another essential element lacking in this answer, and that is, there is no allegation as to any damages having been sustained. According to the allega-

tions of this answer the railroad was to have been built and operated in a certain way. Now, if it is conceded, for the purpose of argument, that this is true, it does not appear wherein or in what manner the defendant has been damaged. It is conceded that this line of railroad, connecting the two great trunk lines in the territory, has been built. But it is claimed that, because it is not operated by a certain company, or as originally built by a certain company, or in a certain way to suit the ideas and notions of the defendant, that in that way he has been injured, and relieved of his obligation. In the case of *Parker v. Jewett*, 52 Minn. 514, 55 N. W. 56, it was held: "An answer setting up fraud or deceit as defense to a promissory note should show damage and the extent thereof. The action is upon a promissory note. The answer sets up as a defense that the note was given for mining stock, and that the defendant purchased the same, relying upon certain representations, which he alleges were false and fraudulent. * * * The answer winds up by stating generally that the defendant had derived no benefit in any way, and had received no consideration whatever for the note." The court observed: "It does not appear that the mine in question has not some value, or that the stock is worthless, or of how much less value it was than the amount paid for it; in other words, it does not show what, or how much, damage defendant had suffered. When the basis of the defense to a promissory note given upon the purchase of property—as, in this case, stock—is fraud and deceit, through which the defendant was induced to purchase that which proves to be of no value, or of less value than contracted to be paid therefor, it is obvious that the facts should be pleaded, whether the defense attempted to be made is complete or partial." In the case of *Goddard v. Colorado Springs Live Stock Company*, 4 Colo. App. 14, 34 Pac. 944, it was held that mere expressions of opinion are not false representations. A misstatement, to be actionable, must relate to existing facts peculiarly within the knowledge of the party, and they there cite *Stinson v. Helps*, 9 Colo. 33, 10 Pac. 209; *Adams v. Schiffer*, 11 Colo. 29, 17 Pac. 21, 7 Am. St. Rep. 202; *Cooley on Torts*, 474-486. The rule was stated by Chancellor Kent, in his *Commentaries*, vol. 2, §485: "The common law affords to every one reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or an indifference to the ordinary and accessible means of information."

In this case the note is couched in clear, distinct, and unmistakable language. It is explicit as to all its terms and conditions. There is no evidence that the party signing the same was incapable of reading, or that any artifice or deceit was practiced upon

him to prevent his reading it. The only excuse for not reading it and understanding its terms is that he signed it hastily, presuming it contained all the conditions indicated by the representations made at the public meeting mentioned in his evidence. We take it the rule is well established that in the absence of any evidence of incapacity to read, or any trick or artifice resorted to to prevent his reading it, a party signing a written instrument that is plain and unequivocal in its terms is bound by its express terms and conditions therein contained, and that he cannot set up his own carelessness and his own indolence as a defense, and, because he failed to make use of the faculties possessed by him for determining its conditions, be heard to say that its terms or conditions should be other or different from what they are. In *Mullen v. Beach Grove Park*, 64 Ind. 202, the Indiana Supreme Court say: "An answer admitting the execution of the subscription sued upon, but alleging that the person procuring his signature had misrepresented the contents of the subscription and the extent of liability the defendant would incur by signing it, is insufficient." And we think this is peculiarly true where the evidence fails to show that the party is incapable of reading it, and where it does show that he had full and ample opportunities to investigate and determine its conditions, if he had so desired. In *Fox v. Allenville Co.*, 46 Ind. 31, it is said: "Statements by one procuring subscriptions for a creamery that the profits would be large are mere matters of opinion, and, even if false, do not constitute a defense to an action for the subscription." In *Davis v. Campbell*, 93 Iowa, 524, 61 N. W. 1053, the Iowa Supreme Court say: "A statement, by persons taking a subscription to a railroad, that the road would be completed to a certain point by a certain day, are mere expressions of opinion, which, although not fulfilled, will not defeat a recovery on the subscription." In *Sawyer v. Pickett*, 19 Wall. 146, 22 L. Ed. 105, the Supreme Court of the United States say: "A representation as to the prospects of the railroad, and its probable effect on the value of property through or past which it runs, are matters of opinion, and will not constitute such fraud as will defeat a subscription to the stock of the road."

Nor do we think it can be contended that the evidence of these statements made at this public meeting by the various parties making the speeches there is admissible as statements made by the agents of the company, or that the railroad company to whom this note is payable can be bound by their declarations, because an examination of the testimony of the defendant in error, on pages 90 and 91, will show that he is uncertain as to just who drew these notes, and in fact his final conclusion is that they were drawn by young Geo. Green, and there is nothing in the record or evidence to show that young

Geo. Green made any statement of any kind or character as to who would build this road, or any of the representations which the defendant now claims he relies on as a defense. There is not the slightest evidence in the record to show that this meeting was ever called at the instance of the railroad company; but there is evidence, and all the evidence is, to show that this meeting was called by the citizens themselves to secure a benefit to the town, and we are at a loss to see under what principle of law a written contract, plain upon its face, clear and unmistakable in its terms, and which clearly discloses all its conditions, can be changed, varied, or set aside by proof of statements made by parties which the evidence fails to show had any authority to bind the payee of the note, and when such statements were made, according to the evidence, prior to the signing of such note.

Now, under this condition of the record, we think it was plainly the duty of the court to have sustained the demurrer of the plaintiff in error. It is true that the answer in this case contains a general denial, but this general denial does not constitute a defense to this action for two reasons, at least: First. This is an action upon a promissory note, purported to be signed by the defendant in the court below. The general denial is unverified. This, under our statute, does not place or put in question the signature to the note. The note was competent evidence, without further proof, under such a pleading. Second. While the general denial, if sworn to, would have put the execution of this note in issue, yet the second cause of action alleged is inconsistent with a general denial, in so far as it admits the execution of the note, for the second cause of action expressly admits the execution of the note, and in our judgment the allegations of the answer are not sufficient to constitute a defense in this case, and for this reason the court should have sustained the demurrer filed by the plaintiff in error in the court below. But, having failed to sustain this demurrer, and having submitted the question to a jury, and the jury having found in favor of the defendant, under the record and evidence in this case we think it was clearly the duty of the court to have set aside the verdict and granted a new trial. But, as all the defense is clearly set up in the answer and evidence, we think there is no necessity for a rehearing of the case, and under the law as we understand it the plaintiff in this case should have judgment for the face of the note and interest, and the attorney's fees therein mentioned.

For these reasons, the case is reversed, at the costs of the defendant in error, with instructions to the district court to enter judgment for the plaintiff in accordance with this opinion. All the Justices concurring, except BURFORD, C. J., who, having tried the cause below, took no part in this decision.

**BOSTICK, Co. Atty., v. BOARD OF COM'RS
OF NOBLE COUNTY.**

(Supreme Court of Oklahoma. Sept. 4, 1907.
Rehearing Denied Oct. 12, 1907.)

1. TAXATION—CERTIFICATES OF ERROR—POWERS OF COUNTY COMMISSIONERS.

By section 1, art. 1, c. 31, p. 341, of the Session Laws of 1905, boards of county commissioners of the various counties of Oklahoma are authorized to issue certificates of error to taxpayers upon a proper showing in three classes of cases: First, where the same property has been assessed more than once for taxes of the same year; second, where the property has been assessed in the county for the year to which the same was not subject; third, where the property has been destroyed by flood or tornado to the extent of at least 50 per cent. of its cash value. In no other case or class of cases is there any provision for issuing certificates of error for taxes on property erroneously assessed.

2. SAME—ACTS OF BOARD OF EQUALIZATION.

Where an assessment of property is made, and the board of equalization of the city within which such property is located raises the valuation of such property for the purpose of taxation, the board of county commissioners have no authority under the law to issue to the owner of such property a certificate of error upon the theory or because of the fact that the action of the board of equalization was unwarranted and without authority of law.

3. SAME—REVIEW BY DISTRICT COURT.

Upon an appeal from the board of county commissioners, the district court takes appellate jurisdiction only, which is the jurisdiction that the inferior tribunal had, and none other; and in such case, the district court cannot convert such action into an action of equity, and assume a jurisdiction of equity that the inferior tribunal did not have.

(Syllabus by the Court.)

Error from District Court, Noble County: before Justice Bayard T. Halner.

Appeal by Charles R. Bostick, county attorney of Noble county, from a decision of the county commissioners of Noble county in relation to the taxation of property of the Perry Mill Company. Judgment for the county commissioners, and the county attorney brings error. Reversed.

Charles R. Bostick, in pro. per. S. H. Harris and L. L. Cowley, for defendant in error.

PANCOAST, J. On the 3d day of January, 1906, the Perry Mill Company filed a petition before the board of county commissioners of Noble county, asking for a certificate of error in the amount of \$1,594.62 on the ground that the tax levy for the year 1905 was erroneous and excessive, by reason of a mistake made by the board of equalization of the city of Perry. The petition is as follows:

"Application of the Perry Mill Company for Certificate of Error.

"Comes now the Perry Milling Company, by D. R. McKinstry, and complains to the honorable board of county commissioners that the taxes assessed against him for the year 1905 are erroneous and excessive; that

the original assessment made by the assessor was raised beyond all reason by the city board of equalization, without authority of law and by reason of a mistake made by the city board, as evidenced by Exhibit A, hereto attached and made a part hereof. Your complainant therefore prays that a certificate of error in the sum of \$1,594.62 be issued to said Perry Milling Company by said board of county commissioners:

Amount charged on tax rolls:

Real estate, value \$16,718.00,	
taxes	\$1,504 62
Personal, value \$11,000.00, taxes	900 00
	<hr/> \$2,404 62

Amount as per schedule and Exhibit A:

Real estate and personal, \$10,-	
000.00	900 00

Taxes erroneously charged... \$1,594 62

"[Signed] Perry Mill Company,

"Per D. McKinstry.

"Subscribed and sworn to before me this 2d day of January, 1906. C. L. Ritter, Notary Public. [Seal.] My commission expires May 25, 1909.

"H. L. Boyes, being duly sworn, deposes and says that he has read the foregoing petition, and upon his oath states that the matters and things therein alleged are true as he verily believes.

"[Signed] H. L. Boyes.

"Subscribed and sworn to before me this 2d day of January, 1906. Jas. M. Taylor, Notary Public. My commission expires Sept. 26, 1909.

"Filed Jan. 3, 1906. Joseph E. Dolezal, County Clerk.

"Exhibit A.

"Perry, Okla., Dec. 7, 1905.

"To the Honorable Board of County Commissioners—Gentlemen: Upon reflection, and reviewing the matter, we feel that the assessment made against the Perry Mill Company last spring was a mistake, and by making comparison with other institutions of this city, we feel that an assessment on real estate and personal property for \$10,000.00 is fair and just, and ask that you please give this matter your consideration and make the correction above stated.

"Very respectfully,

"C. S. Minor, Assessor.

"F. M. Busch, Clerk.

"A. E. Smyser, Mayor.

"To Whom It may Concern: This is to certify that to the best of my knowledge and belief our elevator, situated in the city of Perry, Oklahoma, did not contain to exceed ten thousand bushels of wheat on the 1st of March, 1905.

"[Signed] D. McKinstry.

"Subscribed and sworn to before me, a notary public, this 7th day of December, 1905. C. L. Ritter, Notary Public. [Seal.] My commission expires May 25th, 1909."

Said petition was acted upon by the board of county commissioners and a certificate of error was issued as prayed for. On the 20th day of January, 1906, a petition was presented to Charles R. Bostick, county attorney of Noble county, by more than seven resident taxpayers of Noble county, asking that he, as county attorney, appeal to the district court from the aforesaid decision of said board of county commissioners, and on the 22d day of January, 1906, said county attorney filed his notice of appeal with the county clerk and duly perfected the same. On the 24th day of February, 1906, said cause was heard by the district court upon the merits. Some evidence was introduced by the respective parties—the plaintiff contending that the board of equalization had increased the valuation as returned by the assessor, and that such assessment was excessive as returned by the board of equalization, and, further, that no evidence had been heard by the board of equalization, but that the increase of valuation had been made upon information coming from other sources. No evidence was offered on behalf of the Perry Mill Company tending to show that the same property had been assessed more than once, or had been assessed in the county for the taxes of a year to which the same was not subject, or that the property had been damaged by flood or tornado. At the close of the evidence of the plaintiff the county attorney demurred to the same, which demurrer was overruled. The county attorney then attempted to show that the same proposition had been before the board of county commissioners prior to the time of this action, and the relief prayed for had been refused. This evidence was excluded by the court, and the court rendered judgment approving and affirming the action of the board of county commissioners. The appeal was taken from this order. Motion for new trial was filed and overruled.

It is contended by the plaintiff in error that under the statutes of Oklahoma a board of county commissioners has no jurisdiction or power to correct an alleged erroneous assessment upon any other ground than because the same "has been assessed more than once for the taxes of the same year or has been assessed in the county for the taxes of a year to which the same was not subject, or where the property of the complainant has been destroyed by flood or tornado; second, the jurisdiction of the district court, when proceeding upon an appeal from an inferior tribunal, does not extend beyond the jurisdiction of that tribunal from which the appeal arose." The statute referred to by the plaintiff in error is section 5972, Wilson's Rev. & Ann. St. 1903, which is as follows: "The boards of county commissioners of the various counties of the territory of Oklahoma are hereby empowered to correct, either upon the assessment rolls or upon the tax rolls of the county, any double or

erroneous assessment of property for taxation for any particular year, in the manner provided in the next section, and not otherwise: Provided, that this act shall in no wise be construed as a grant of power to boards of county commissioners to equalize valuations of property for taxation, as between individuals." Section 1, art. 1, c. 31, p. 341, Sess. Laws 1905, amending section 5973, Wilson's Rev. & Ann. St. 1903, provides as follows: "That section 5973 of Wilson's Revised and Annotated Statutes of Oklahoma be, and the same is hereby amended to read as follows: 'Section 61. Whenever, at either of the regular meetings of the said boards in January, April, July and October, upon complaint of the person or persons beneficially interested, their agent or attorney, it shall be made to appear, by the testimony of the claimant and at least one reputable witness, borne out by the records of the county, that the same property, whether real or personal, has been assessed more than once for the taxes of the same year, or the property, whether real or personal, has been assessed in the county for the taxes of a year to which the same was not subject; or where the property of the complainant, whether real or personal, has been destroyed by flood, or tornado to the extent of at least fifty per cent. of its cash value, which said damage or decrease in value shall be established by the testimony of at least five reputable witnesses who shall be freeholders and residents of the county in which complainant resides, the said board is hereby empowered to issue to complainant a certificate of error, showing that the complaint has been investigated by the said board; that the said board has been satisfied of the truth of the allegations of the said complaint, and direct the same to the county treasurer of their said county directing the said county treasurer to accept the said certificate as a payment of cash to the amount found by the said board to have been unjustly assessed, or entitled to be refunded, which said amount shall be named in the said certificate, and shall by the treasurer be credited on his tax roll against the tax so found to be erroneous or to be refunded; and the treasurer shall retain the said certificate, and shall be credited with the same, as cash, in his settlement as such treasurer.'" These sections are the only provisions of the statutes of Oklahoma granting the power to a board of county commissioners to correct any kind of an individual tax levy and issue certificate of error therefor. The first empowers the board to correct an erroneous assessment, and the second provides the character of erroneous assessment that may be corrected, and the manner in which the same shall be corrected, and for the issuing of the certificate of error. The character of assessments that may be corrected are: First, a double assessment; second, when the property has been assessed

more than once for the taxes of the same year; third, when the property has been assessed for the taxes of a year to which the same is not subject to assessment; and, fourth, when the property has been damaged by flood or tornado to the amount of 50 per cent. of its value.

It is contended by the defendant in error that the substance of the petition was to suggest to the board of commissioners that a legal assessment on the property of the Perry Mill Company had been made and returned, and that the subsequent act of the board of equalization was entirely without authority of law and not done under any pretense of comparing valuation or adjusting assessments between taxpayers; that, therefore, the board of county commissioners had a right to adjust the matter. It will be noticed by an examination of the record that in the original assessment the valuation of the real estate was \$6,325; that the valuation of the personal property was \$3,000—making a total of \$9,325. By the action of the board of equalization lot 10 was raised from \$2,000 to \$5,000, lot 11 from \$2,000 to \$5,000, lot 12 from \$1,500 to \$3,000, and lot 13 from \$1,000 to \$2,000, and the personal assessment was raised from \$3,000 to \$10,000, making a total raise of \$15,500. By the petition it was conceded that, notwithstanding the original assessment was \$9,825, yet a fair valuation would be \$10,000, and that the commissioners' action was upon a basis of \$10,000, so that it cannot be contended that this action before the board of county commissioners was intended to correct the action of the board of equalization by placing the assessment where it originally stood; that is, by entirely eliminating the action of the board of equalization, so as to leave the assessment where it originally stood. This in effect conceded the authority of the board of equalization to take action in the direction in which it had proceeded, but was in effect to claim that the act of equalization had been erroneous and excessive, and this was in effect asking the board to equalize the valuation of the property for taxation as between individuals, which is specifically prohibited by the first section quoted. There was nothing whatever before the board of county commissioners that would authorize that body to issue a certificate of error upon any ground named in the statute, and there was no pretense of doing so. These sections of the statute above quoted are the only sections pertaining to the power of the board to issue a certificate of error or correct assessments of any character for which certificates of error can be issued.

It is claimed, however, that the action of the board of equalization was void, and, being void, that the board of county commissioners, and also the district court on appeal, could correct the same and do equity between the parties. We cannot agree with this contention. The board of county commission-

ers has only such authority as is prescribed by the statute, and, no matter what relief a court of equity could give in a case of the character under consideration, the board of county commissioners is not clothed with that equitable power, and we cannot conceive upon what principle or upon what authority a board of county commissioners would assume to issue a certificate of error in a case of this character, which is in effect discharging the complainant's property from taxation to the amount named in the certificate. Boards of county commissioners in this territory are given no such jurisdiction, and we think that the withholding of such authority from boards of county commissioners is a wise one. It is well settled that, upon appeal from an inferior tribunal, the appellate court takes only such jurisdiction as the inferior tribunal had, and can only investigate in a given case those propositions which were before the inferior court, and which the inferior court might have investigated and determined. 2 Cyc. 537; *Cooper v. Armstrong*, 3 Kan. 78. Therefore, the board of county commissioners having no power to take the action which they assumed, and the jurisdiction of the appellate court being the same as that of the inferior tribunal, the judgment of the board of county commissioners should have been reversed.

This action, upon appeal to the district court, should not have been so construed as to give the district court the same power and authority which the court would have had in a direct proceeding brought for the purpose of questioning the right or authority of the board of equalization to raise the valuation of the property or to prohibit the correction of the tax which is claimed to have been void by reason of the erroneous action of the board of equalization. There has from time to time been a vast amount of just criticism growing out of the unequal valuation of property, and it would seem that there must have been some reason for the board of equalization to take action in this matter. Whether or not they acted legally and in pursuance of law it is not necessary for us here to determine. If they did, their acts were invalid. If they did not, there was a remedy by action in a court of equity, and the parties aggrieved should seek a remedy in the proper forum, as there, and there only, could the matter properly be investigated. There, and there only, could the full facts be shown. But, be that as it may, the question here presented is only as to the power of the board of county commissioners to make a correction and issue a certificate of error upon the case made to them, and the power of the court upon appeal to assume at this time jurisdiction which the board of county commissioners could not assume.

We are of the opinion, therefore, that the trial court erred in rendering judgment sustaining the board of county commissioners

in their action, and for that reason the case is reversed, with directions that the district court vacate its judgment and enter an order reversing the judgment of the board of county commissioners. All the Justices concurring, except HAINER, J., who tried the case below, not sitting, and IRWIN, J., absent.

NOLAN v. ST. LOUIS & S. F. R. CO.

(Supreme Court of Oklahoma. Sept. 4, 1907.)

1. ATTORNEY AND CLIENT—ADMISSION OF ATTORNEYS—AUTHORITY—JUDICIAL NOTICE.

In this territory, attorneys at law receive their license, and are authorized by the Supreme Court to engage in the practice of the law, and to transact business as attorneys at law, and the courts of the territory will take judicial notice of the fact that one appearing and acting as an attorney is or is not duly authorized.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 1.]

2. SAME—SCOPE OF AUTHORITY.

Any duly authorized attorney may, after the subject-matter has been placed in his hands, give any notice affecting the substantial rights of his client which the client himself might have given, and those affected by such notice must take notice of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 147.]

3. SAME—DISPUTE OF AUTHORITY—BURDEN OF PROOF.

Where notice material to the maintenance of a suit has been given by an attorney, those disputing the authority of the attorney, and who rest their defense, in an action based thereon, upon the fact that they dispute the attorney's authority to give important notices, must maintain such defense in court, for a court of record in Oklahoma will presume that an attorney admitted to the practice is acting, in all matters affecting his client's rights, with authority from the client he represents.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 104.]

(Syllabus by the Court.)

Error from District Court, Grant County; before Justice James K. Beauchamp.

Action by the St. Louis & San Francisco Railroad Company, a corporation, against Thomas Nolan. From a judgment for plaintiff, defendant brings error. Affirmed.

Mackey & Mackey, for plaintiff in error. Flynn & Ames, for defendant in error.

GILLETTE, J. This action was commenced in the probate court of Grant county, to recover possession of a portion of the depot grounds and right of way in the town of Lamont, in said county, which at the time of bringing said action, to wit, June 2, 1905, and from the 28th day of April, 1903, had been occupied by defendant under and by force of a license from the plaintiff, which license provided that it should terminate on 60 days' notice by the plaintiff railroad company, and provided that the defendant on receiving such notice should at once vacate such premises. The license was signed by

both plaintiff and defendant. On the 18th day of March, 1905, the agent of the plaintiff at Lamont served a notice upon the defendant terminating said lease within 60 days from the date of such service, describing the premises, and requesting defendant to remove therefrom and give possession of the same, which notice was signed: "St. Louis & San Francisco R. R. Company, by Flynn & Ames." The defendant failed to vacate the premises at the expiration of 60 days, and on the 27th day of May, 1905, the agent of the company at Lamont served another notice upon the defendant such as required by the statute to be given prior to the commencement of the action of forcible entry and detainer, and which notice demanded the immediate vacation of the premises, or suit for such possession would be commenced within three days, which notice was also signed by the St. Louis & San Francisco Railroad Company, by Flynn & Ames, its attorneys. The defendant continuing the occupancy of the premises notwithstanding the foregoing notices, suit was brought therefor in the probate court of Grant county and tried on the 24th day of June, 1905, resulting in a judgment for plaintiff and for the restitution of the premises above described. Thereupon the defendant appealed said cause to the district court, where the same was retried February 27, 1906, by a jury, resulting in a verdict and judgment in favor of the plaintiff, and defendant brings the case to this court predicated error upon the rule of the trial court, because of the overruling by said court of a motion for a new trial, which motion was upon the ground: First, that the verdict and judgment is not sustained by sufficient evidence and is contrary to law; second, error of law occurring at the trial and excepted to by the defendant.

Only one ground of error is now complained of in the trial of this case. The plaintiff upon the trial offered in evidence the written notice to terminate the lease, to the introduction of which defendant objected, and at the time excepted to the ruling of the court admitting the same; the point being that the notice terminating the lease was signed: "The St. Louis & San Francisco Railroad Company, by Flynn & Ames, Its Attorneys." That at the time said notice was served, and upon the trial of the cause, there was no proof offered that Flynn & Ames were attorneys of the plaintiff and authorized to give the notice. No evidence was offered upon the trial by the defendant, and the record shows that, when notice to terminate the lease was served, he at that time made no objection to the form or sufficiency of the same. No authority bearing upon the point involved is presented by the briefs upon either side, and the writer of this opinion has been unable to find any. The license to the defendant, and by force of which he occupied the premises, provided that it could be terminated by the railroad company on 60 days'

notice. Without notice, therefore, by the railroad company 60 days prior to the bringing of this action, the company had no cause of action against defendant, Nolan. Such notice was, however, served upon the defendant by the company's station agent at Lamont. It was signed: "St. Louis & San Francisco Railroad Company, by Flynn & Ames, Its Attorneys." Was this sufficient, in the absence of specific proof, of their authority to act in this respect? The word "attorney," as used in this case, means an attorney at law, and an "attorney at law" in this territory is an officer of the court, authorized to appear therein, and as such present to the court for its consideration the interests of his client, as well as to appear generally for his client with reference to the transaction of business usually confided to members of the legal profession, and are, before being authorized to appear in court or to do business as an attorney at law, required to prove their qualification and to take an oath that in the transaction of business as attorneys they will do no falsehood or consent that any be done in court, and will not knowingly promote, sue, or procure to be sued any false or unlawful suit. These requirements of the law have given to attorneys, admitted to the practice of the law, a status before the courts, and with reference to business they assume control of, different from that of other agents. A presumption follows their act, when acting for another, that they are authorized by such other to act for him touching the particular subject-matter. Attorneys admitted to the practice in Oklahoma obtain such right through and by reason of the authority of the Supreme Court, and the courts of the territory may therefore properly take notice of the right of an individual to act as an attorney at law, and to presume that in so acting they are not prosecuting any false or unlawful suit. If Flynn & Ames, as attorneys at law, had without authority of the railroad company undertaken to cancel the license by which the defendant held possession of the premises, their act would have been a violation of their oaths as attorneys. The court upon the trial of the cause could not, and would not, assume that they had so acted. On the contrary, it would hold that their authority is presumed until some step was taken which would challenge that presumption. No such step was taken in this case, and we think the court did not err in the admission in evidence, over the objection of counsel for defendant, the notice of the termination of the lease in 60 days, signed, "St. Louis & San Francisco Railroad Company, by Flynn & Ames, Its Attorneys," for the presumption would be in such case that they were the company's attorneys and authorized to act in that respect.

The judgment of the lower court is affirmed. All the Justices concurring, except IRWIN, J., absent.

SHAPEK et al. v. OAK CREEK VALLEY BANK.

(Supreme Court of Oklahoma. Sept. 4, 1907.)

1. PARTNERSHIP—RIGHTS AND LIABILITIES AS TO THIRD PERSONS—NATURE OF PARTNER'S AUTHORITY.

Under the provision of section 3879, Willson's Rev. & Ann. St. 1903, a partnership obligation executed by one partner without the knowledge or consent of the other, binds the firm and each general partner, if the obligation ~~so~~ executed is within the reasonable conduct of the partnership business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 206.]

2. SAME—RENEWAL NOTE.

The execution and delivery of a promissory note as a renewal of a firm obligation already outstanding and due upon which liability is admitted is a transaction within the scope of the business of the partnership.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 242.]

(Syllabus by the Court.)

Error from Probate Court, Garfield County; M. C. Garber, Judge.

Action by the Oak Creek Valley Bank against A. B. Shapek and another, partners. Judgment for plaintiff, and defendants bring error. Affirmed.

Denton & Denton, for plaintiffs in error. McKeever & Walker, for defendant in error.

GILLETTE, J. This action was brought and tried in the probate court of Garfield county, to recover from A. B. Shapek and Frank Hakel, partners as Shapek & Hakel, upon a promissory note indorsed by said partnership and delivered to the plaintiff as a renewal of a former note of the same parties, which had been indorsed and transferred to the plaintiff. From the record it appears that Shapek & Hakel were partners engaged in the mercantile business in the state of Nebraska, and that in December, 1902, such firm was the owner and payee named in a note of \$425 executed by F. T. Stoner and W. B. Van Sandt & Co., which note was not paid at maturity. Upon the execution and delivery of said note, it was sold to the plaintiff bank, and, not being paid at maturity, was renewed by the makers by their executing a new note to Shapek & Hakel, who, in turn, indorsed the same to the bank and thereby took up the original note. Afterwards Mr. Shapek removed to Oklahoma, and, while he was in Oklahoma, said note again became due, and was again renewed. Mr. Hakel of the firm then in charge of their Nebraska business, without consulting his partner, Shapek, indorsed and negotiated this renewal in the same manner as had theretofore been done.

No question is raised with reference to the liability of Shapek & Hakel upon the note renewed and extended by the execution of the note in question, or that, by reason of the execution and delivery of the present note, the former note upon which they were

admittedly liable was canceled and delivered up. The sole question presented by this record being a question of the liability of Shapek & Hakel as indorsers and guarantors of the renewal note sued on, such indorsement having been made by Hakel without the knowledge and consent of his partner Shapek. The amount of the judgment is not questioned, nor the fact of the execution and delivery of the instrument; the only question being the right of Hakel as a partner to so execute and deliver the same as a firm obligation. The statute of Oklahoma (section 3379, Wilson's Rev. & Ann. St. 1903) provides: "Every general partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary manner, and for this purpose may bind his co-partners by an agreement in writing." As the partnership is admitted, with Shapek & Hakel as general partners, the liability of the firm and each member thereof is governed by the above-quoted statute, which provides that each partner has authority to do whatever is necessary to carry on the business, and for such purpose may bind his copartners by an agreement in writing. The commercial world deals with a partnership in the light of its rights and liabilities as fixed and governed by the law, and under the law, as above stated, each partner has full power to act with reference to partnership affairs. No private agreement between the partners can affect third persons acting without knowledge of it, and, when Hakel indorsed the firm name to the instrument sued on in this case, the firm was thereafter liable by force of such indorsement if it was so done in the reasonable conduct of the firm's business.

Now, what were the facts? The record makes it clear that at the time Hakel indorsed the note in question with the firm name the firm was already indebted as indorsers upon another note which was then due and unpaid for the same indebtedness. By the indorsement and delivery of this note, the former note was canceled without other payment. The act was therefore the transaction of partnership business clearly within the provisions of the above statute, which governs in this case, in the absence of proof of a different law governing in the state of Nebraska. It would be clearly inequitable and unjust to hold that the partnership or that either of the partners might escape this liability after having, by the execution and delivery of it, canceled an obligation upon which they were admittedly liable, and we think that no rule of law or any statute can be invoked to excuse them from such liability. The plaintiff in error complains of the rule of the court in excluding the testimony of Shapek touching an agreement between him and Hakel to the effect that Hakel had no authority to sign the firm name. Such an agreement could in no wise

bind third persons in dealing with the partnership business, where neither fraud nor collusion is alleged or attempted to be shown, and, as neither fraud nor collusion was shown or proposed to be shown, any private understanding between the partners was wholly immaterial. Exceptions were taken upon the trial of the case by the plaintiff in error to the instructions of the court. We have already seen that the plaintiff in error was liable upon the instrument sued on, and, in the absence of complaint as to the amount of the judgment, an erroneous instruction would not be sufficient to justify a reversal.

We have examined the instructions, however, as well as those asked for by the plaintiff in error and refused, and are of the opinion that the rule of the court under the facts in the case was correct.

The judgment of the court below will be affirmed. All the Justices concurring, except GARBER, J., who tried the case while probate judge of Garfield county, and IRWIN, J., absent.

GARRISON v. KRESS et al.

(Supreme Court of Oklahoma. Sept. 20, 1907.
Rehearing Denied Oct. 12, 1907.)

1. EVIDENCE—PAROL EVIDENCE CONTRADICTING WRITTEN CONTRACT—FRAUD OR MISTAKE.

A contract in writing, if its terms are free from doubt and ambiguity, must be permitted to speak for itself, and cannot, by the courts at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1756.]

2. SAME—MERGER OF ORAL NEGOTIATIONS.

The execution of a contract in writing supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1756.]

(Syllabus by the Court.)

Error from Probate Court, Oklahoma County; Wm. P. Harper, Judge.

Action by Samuel H. Kress and another against G. W. Garrison for rent. Judgment for plaintiffs, and defendant brings error. Affirmed.

On or about the 23d day of July, 1904, Samuel H. Kress and Claude W. Kress leased to G. W. Garrison two upper stories of a certain brick building on lot 9, in block 35, in the city of Oklahoma City, Okl., to be used in connection with the Illinois Hotel, which the said G. W. Garrison at that time occupied. Prior to the completion of the said building, which was to be used in connection with the said hotel, the said G. W. Garrison sold out his interests in the Illinois Hotel and assigned his lease on the proposed annex to said hotel to the purchaser, one Mrs. M. J. Wade. The lease provided that the lessee could as-

sign same without the consent of the lessors. The lessee, G. W. Garrison, claims that prior to the signing of said lease and the delivery thereof he had entered into a separate and collateral agreement with the lessors, whereby it was agreed, stipulated, and understood that, in case said lessee assigned said lease, and was not in arrears with the rent at the time of assignment, he should be relieved, personally, from all liability under and by virtue of the terms of said lease contract; that this agreement was a condition precedent to the signing of said lease contract; and that the same would not have been signed and accepted by him but for the oral stipulations above referred to. The plaintiff in the court below brought an action against Garrison for the rent in arrears on said contract. The trial court refused to permit the defendant Garrison to testify as to the terms of said oral agreement, or to testify as to whether there was an oral agreement between the parties. The trial court also refused to permit defendant to show that the plaintiffs had assumed control of the premises by attempting to lease them to other parties, to which ruling of the court the defendant excepted. At the conclusion of the testimony, the court directed the jury to find a verdict for the plaintiff, which was done, to which defendant excepted. Motion for new trial was filed, overruled, and exceptions allowed, and the case is brought here for review.

Grant & McAdams, for plaintiff in error.
J. H. Everest and C. F. Smith, for defendants in error.

IRWIN, J. (after stating the facts as above). The sole and only question raised in this case by the brief and argument of plaintiff in error, and the only ground assigned as error for a reversal of this case, is the action of the court in refusing the evidence as to the oral agreement. We take the proposition to be elementary that all prior and contemporaneous oral agreements as to matters involved in a written contract are merged in the written contract, and that the written contract cannot be changed or varied by such prior and contemporaneous oral agreements. Our statute, in our judgment, conclusively settles this proposition. Section 781, Wilson's Rev. & Ann. St. Okl. 1903, is as follows: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." The Supreme Court of this territory, in the case of Deming Investment Company v. Shawnee Fire Insurance Co., 16 Okl. 1, 83 Pac. 918, 4 L. R. A. (N. S.) 607, says: "A contract in writing, if its terms are free from doubt and ambiguity, must be permitted to speak for itself, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless

in case of fraud or mutual mistake of facts." The same doctrine is laid down by this court in the case of Liverpool & London & Globe Insurance Company v. Richardson Lumber Co., 11 Okl. 585, 60 Pac. 938.

On the strength of this statute and these cases, the decision of the probate court is affirmed, at the costs of the plaintiff in error. All the Justices concurring, except PAN-COAST and GARBNER, JJ., absent.

MEMORANDUM DECISIONS.

CASE v. FRAHM. (Supreme Court of Kansas. July 5, 1907. Rehearing Denied Oct. 5, 1907.) Error from District Court, Rawlins County; A. C. T. Geiger, Judge. Action by Thomas Frahm against J. B. Case. Judgment for plaintiff. Defendant brings error. Affirmed. Fred Robertson, for plaintiff in error. W. E. Saum, for defendant in error.

PER CURIAM. We are unable to distinguish this case from the cases of Ordway v. Cowles, 45 Kan. 447, 25 Pac. 862, and Robidoux v. Munson (decided by this court February, 1907) 88 Pac. 1085, and are satisfied with the conclusions reached in those cases. The judgment of the trial court is therefore affirmed.

CHICAGO, R. I. & P. RY. CO. v. MORRILL. (Supreme Court of Kansas. July 5, 1907.) Error from District Court, Smith County; R. M. Pickler, Judge. Action by Jesse Morrill against the Chicago, Rock Island & Pacific Railway Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed. M. A. Low and Paul E. Walker, for plaintiff in error. J. T. Reed, for defendant in error.

PER CURIAM. The defendant in error was a section hand in the employment of the plaintiff in error at the station of Kensington, in Smith county. The company had a pumphouse and well there in charge of H. L. Worley. December 31, 1902, Worley had occasion to be absent, and requested Joseph Giroux, who was the section boss, to look after the pumphouse, build a fire, sweep out, and see that everything was all right. Morrill was directed by Giroux to do this. Worley had also requested him to do so whenever he was away. Morrill went to the pumphouse as directed, and before leaving lifted a trap-door and looked down in the well to see if everything was right. He heard a noise, which he thought might be escaping steam. The well was 60 feet deep, and about 20 feet across. It was provided with ladders so constructed that the pumper could descend into the well to examine the pipes, which he did every day. The plaintiff went down to ascertain the cause of the noise, and the ladder gave way, and he fell on a cross-timber and was injured. August 3, 1903, the plaintiff commenced this action in Smith county district court, where he recovered a judgment for \$2,000 on September 12, 1903. The railway company brings the case here. It is claimed that the plaintiff, when injured, was not engaged at work which he was employed by the company to do, and therefore he has no cause of action against it. It is also claimed that no negligence on the part of the company was shown. Numerous other questions have been presented, but they are all involved in these two. The only evidence on the subject

shows that the plaintiff was sent to the pump-house to look after things, and see that they were all right, by the pumper, Worley, and the section boss, Giroux, who were authorized by the company to do so. It is also amply shown that the structure by which descent was made in the well had been erected some 15 years before, and was thoroughly decayed and rotten. It did not appear that it had ever been inspected. The decayed condition was not apparent from the upper surface of the timbers, but was easily seen by a casual look at the under side. The jury, by its general verdict, found that the company was negligent. We are unable to find error, and the judgment is affirmed.

CITY OF TOPEKA v. PERT. (Supreme Court of Kansas. July 5, 1907.) Error from District Court, Shawnee County; A. W. Dana, Judge. Action by Rebecca A. Pert against the city of Topeka. From a judgment in favor of plaintiff, defendant brings error. Affirmed. F. G. Drenning and W. C. Ralston, for plaintiff in error. Hazen & Gaw, for defendant in error.

PER CURIAM. No substantial error was committed in requiring the city to go to trial at the term the trial was had. Both parties mistakenly proceeded on the theory that the defendant was in default; but the demurrer of the city, which was filed by consent of the plaintiff, was adjudged to be frivolous, and hence the case then stood as if no demurrer had been filed. Neither the ruling on the demurrer, nor in denying the motion for continuance, furnish ground for complaint. The time subsequently given for answer and preparation for trial was brief; but an examination of the record satisfies us that no injustice was done to the city in requiring a trial at that term. The affidavit for continuance, setting forth the absent testimony, was treated as a deposition, which the city was privileged to introduce, but did not. No error was committed in the admission of testimony, nor in the rulings on instructions. Judgment affirmed.

FURBECK v. HOLMAN. (Supreme Court of Kansas. July 5, 1907.) Error from District Court, Trego County; J. H. Reeder, Judge. Action by B. E. Furbeck against S. J. Holman. Judgment for defendant, and plaintiff brings error. Affirmed. W. E. Saum, for plaintiff in error. A. D. Gilkeson, for defendant in error.

PER CURIAM. The contract introduced in evidence over the plaintiff's objection corroborated the defendant's testimony. All other matters discussed depend upon what the facts were. The facts were found generally by the trial court adversely to the plaintiff upon conflicting oral testimony, and under the well-known rule this court cannot interfere. The judgment of the district court is affirmed.

HASTINGS v. FOX et al. (Supreme Court of Kansas. July 5, 1907.) Error from District Court, Rawlins County; A. C. T. Geiger, Judge. Action by N. N. Hastings against Roswell Fox and others. From a judgment in favor of defendants, plaintiff brings error. Affirmed. J. P. Noble, for plaintiff in error. J. H. Briney and Langmade & Caster, for defendants in error.

PER CURIAM. N. N. Hastings brought an action to quiet title against several defendants, and, failing to recover, prosecutes error. Various questions are argued in the briefs, which cannot be considered, as it is impossible to ascertain from the record whether they were passed upon by the trial court. The petition alleged that plaintiff was in the possession of the property in controversy. This allegation was a material one, inasmuch as the action was brought under the statute (Gen. St. 1901, §

5081); the pleading being too general to be sufficient upon any other theory. No special findings were made or asked. The judgment may have been based upon a decision against the plaintiff on the issue as to possession; the evidence thereon being conflicting. Under such circumstances we can only affirm it.

MILLS v. HARKIN et al. (Supreme Court of Kansas. July 5, 1907.) Error from District Court, Miami County; W. H. Sheldon, Judge. Action by Blanche Hogan Harkin and another against W. M. Mills. From a judgment in favor of plaintiffs, defendant brings error. Affirmed. L. S. Harvey and Frank M. Sheridan, for plaintiff in error. Shendon & Simpson, for defendants in error.

PER CURIAM. The action was brought by Blanche Hogan Harkin to set aside and cancel an oil and gas lease executed by Thomas Hogan, her father, to W. M. Mills. The title to the land was in the daughter, to whom the parents had conveyed it when she was an infant 18 months old. The conveyance was recorded when it was executed, and the lessee had constructive notice that the grantor of the lease had no title to the land. Believing, however, that Thomas Hogan was the owner, Mills expended \$500 in developing oil and gas, and thereby increased the value of the land to double what it was. The daughter may have known all about the lease. There were some circumstances in proof tending to show that she did; but the court made special findings of fact covering every disputed point in the case, setting aside the finding of the jury, to which certain issues of fact had been submitted merely to aid the court. The court's findings are that the conveyance to the daughter was in good faith, for value; that the deed was placed on record, and afterwards delivered to the daughter; that the daughter had possession of the land at the time the lease was executed, and had no knowledge or notice of the lease. These findings cannot be disturbed on the ground that in the opinion of plaintiff in error they are against the weight of evidence, or that the evidence is not sufficient to support each and all of them. There were two jury trials, and the court set aside the special findings at the first, and granted a new trial. It was, therefore, wholly unnecessary and uncalled for to incumber the record in this case with the proceedings of the first trial, and to assign as error rulings of the court thereon, or, in commenting upon the evidence, to quote from the evidence at the first trial, because the first trial was set aside. This practice is condemned, as well as the practice indulged in here of making unnecessary and useless assignments of error. There are 29 separate errors assigned. Two relate to errors occurring at the first trial; 13 relate to the giving or refusal to give instructions, and are argued at length in the brief, although the court set aside all the findings of the jury; and 10 of the others relate to rulings upon the admission of evidence, and none are well taken. The questions asked were not proper cross-examination. Many of them were afterwards asked of and answered by the same witness, when placed upon the stand by the defendant. The other errors are predicated upon the refusal to set aside the findings made by the court, and denying the motion for a new trial. No errors being found in the record, the judgment is affirmed.

STATE ex rel. COLEMAN, Atty. Gen., v. CITY OF PITTSBURG. (Supreme Court of Kansas. July 5, 1907.) Quo warranto by the state, on the relation of C. C. Coleman, Attorney General, against the city of Pittsburg. Judgment for the state. F. S. Jackson, Atty.

Gen. C. D. Shukers, Sp. Asst. Atty. Gen., for the State. J. L. Kirkpatrick, J. J. Campbell, and B. S. Gaitskill, for defendant.

PER CURIAM. Action of quo warranto, brought by the state on the relation of the Attorney General, to oust the city of Pittsburg from the exercise of certain assumed and unwarranted corporate powers, namely, the imposition and collection of a license tax upon the business of selling and keeping for sale intoxicating liquors in a manner forbidden by law, and also authorizing and licensing bawdy houses and houses of ill fame and the collection of money from the keepers and inmates of these places for the privileges of carrying on the illicit business. It was alleged that the city officers exercised these unwarranted powers and collected license taxes for these prescribed privileges as fines and forfeitures in simulated prosecutions, brought at stated times under certain invalid city ordinances. The report of the commissioner appointed to take the testimony has been made, and the case finally submitted on the evidence and a brief in behalf of the state. Although the charges in the petition are not directly admitted, the testimony sustaining them is abundant and convincing. No one appears here in behalf of the city to contest the sufficiency of the evidence, or to defend or excuse the unlawful actions of the city officers. Judgment will be rendered in favor of the state against the city as prayed for in the plaintiff's petition.

TOWNS v. MILLER. (Supreme Court of Kansas. July 5, 1907.) Error from District Court, Lane County; Chas. E. Lobdell, Judge. Action between H. E. Towns and G. F. Miller. From the judgment, Towns brings error. Affirmed. J. D. Lafferty, for plaintiff in error. W. H. Russell, for defendant in error.

PER CURIAM. Under the decision in the case of *Bushey v. Hardin* (Kan.) 86 Pac. 146, the proceedings for the sale of the land in controversy were invalid from the beginning, because a lawful sale could not be consummated during the term of the existing lease. It would open the door to juggling in the disposition of school lands if proceedings to sell could be commenced in the lifetime of one lease on the theory that a second lease might be made to effectuate them. The proceedings to sell and the sale being invalid, the second lease was valid, and the judgment of the district court is affirmed.

UNION PAC. R. CO. v. McCULLOUGH et ux. (Supreme Court of Kansas. July 5, 1907. Rehearing Denied Oct. 5, 1907.) Error from District Court, Dickinson County; O. L. Moore, Judge. Action by Samuel H. McCullough and wife against the Union Pacific Railroad Company. There was a judgment for plaintiffs, and defendant brings error. Affirmed. N. H. Loomis, R. W. Blair, and H. A. Scandrett, for plaintiff in error. C. E. Pugh and Geo. E. Overmeyer, for defendants in error.

PER CURIAM. In this case the defendants in error recovered judgment for \$3,375 for the negligence of the railroad company's trainmen, which resulted in the killing of their son at a crossing in Solomon. The defense was a general denial and contributory negligence. The evidence has been examined and found sufficient to sustain the finding of negligence on the part of the trainmen. It appears from the evidence and findings that the heads of the team the boy was driving were over or across the first rail of the track, upon which the train which killed him was approaching, when it was first possible for him to see the approaching train; that he immediately whipped up and attempted to cross ahead of the train, but his wagon was struck by the engine, and he was killed. The circumstances were such that it is peculiarly a ques-

tion of fact for the jury whether the boy exercised reasonable care to discover the approach of the train, and whether he did what a reasonably prudent person would do under all the circumstances to avoid the danger after he discovered the approaching train. We cannot say that their findings were not supported by evidence, nor under undisputed facts that the boy was guilty of contributory negligence. The trial errors assigned have been examined, and we find nothing to justify a reversal of the case. The judgment is therefore affirmed.

BARNES. Respondent, v. **GRANITE BI-METALLIC CON. M. CO.** Appellant. (No. 2,315.) (Supreme Court of Montana. Nov. 3, 1906.) Appeal from District Court, Granite County; Geo. B. Winston, Judge. W. E. Moore, for appellant. W. L. Brown, for respondent.

PER CURIAM. The appeal herein is hereby dismissed.

BROWN, Respondent, v. **DUNLAP et al.** Appellants. (No. 2,300.) (Supreme Court of Montana. Oct. 10, 1906.) Appeal from District Court, Carbon County; Frank Henry, Judge. C. L. Merrill, for appellants.

PER CURIAM. Upon motion of appellants, the appeal herein is hereby dismissed.

CITY OF LIVINGSTON, Respondent, v. **LEE et al.** Appellants. (No. 2,323.) (Supreme Court of Montana. Oct. 8, 1906.) Appeal from District Court, Park County; Frank Henry, Judge. O'Conner & O'Connell, for appellants. J. T. Smith and O. M. Harvey, for respondent.

PER CURIAM. Upon motion of respondent, the appeal herein is hereby dismissed.

FLYNN et al. Appellants, v. **POINDEXTER & ORR LIVE STOCK CO.,** Respondent. (No. 2,356.) (Supreme Court of Montana. Oct. 6, 1906.) Appeal from District Court, Beaverhead County; Lew L. Callaway, Judge. Edwin Norris and T. B. Poinexter, for respondent.

PER CURIAM. Upon motion of respondent, the appeal herein is hereby dismissed; the transcript not having been filed in time.

LYNG, Respondent, v. **ARMSTRONG,** Appellant. (No. 2,376.) (Supreme Court of Montana. Nov. 26, 1906.) Appeal from District Court, Cascade County; J. B. Leslie, Judge. F. E. Stranahan, for respondent.

PER CURIAM. Respondent's motion to dismiss the appeal herein is hereby sustained, and the appeal dismissed.

McCLURE, Appellant, v. **MANUEL et al.** Respondents. (No. 2,187.) (Supreme Court of Montana. Dec. 13, 1906.) Appeal from District Court, Lewis and Clark County; Henry C. Smith, Judge. F. P. Sterling and E. W. Toole, for appellant. Word & Word, for respondents.

PER CURIAM. This appeal is hereby dismissed, as per stipulation of counsel.

PIPPINGER et al., Respondents, v. **ROCKY FORK COAL CO.,** Appellant. (No. 2,160.) (Supreme Court of Montana. April 6, 1906.) Appeal from District Court, Carbon County; Frank Henry, Judge. Wallace & Donnelly, for appellant. T. J. Walsh, for respondents.

PER CURIAM. Upon motion of appellant, the appeal herein is dismissed, as settled.

POINDEXTER & ORR LIVE STOCK CO., Respondent, v. **FLYNN et al.**, Appellants. (No. 2,355.) (Supreme Court of Montana. Oct. 6, 1906.) Appeal from District Court, Beaverhead County; Lew L. Callaway, Judge. Edwin Norris and T. B. Poindexter, for respondent.

PER CURIAM. Respondent's motion to dismiss the appeal herein, for the reason that the transcript had not been filed in time, is hereby sustained, and the appeal dismissed.

STATE, Respondent, v. **ANDERSON**, Appellant. (No. 2,327.) (Supreme Court of Montana. Oct. 2, 1906.) Appeal from District Court, Deer Lodge County; Geo. B. Winston, Judge. Mackel & Meyer, for appellant. Albert J. Galen, Atty. Gen., for the State.

PER CURIAM. Upon motion of appellant, the appeal herein is hereby dismissed.

STATE, Respondent, v. **WATSON**, Appellant. (No. 2,285.) (Supreme Court of Montana. May 4, 1906.) Appeal from District Court, Silver Bow County; Michael Donlan, Judge. Maury & Hogevoil and John G. Brown, for appellant. Albert J. Galen, Atty. Gen., for the State.

PER CURIAM. For failure of appellant to file brief herein, the appeal is, on motion of respondent, hereby dismissed.

STATE, Respondent, v. **YOUNG**, Appellant. (No. 2,299.) (Supreme Court of Montana. May 28, 1906.) Appeal from District Court, Sweet Grass County; Frank Henry, Judge. Sydney Fox and Fred H. Hathhorn, for appellant. Albert J. Galen, Atty. Gen., for the State.

PER CURIAM. Brief of appellant not having been filed within the time prescribed by the rules of this court, the appeal is, on respondent's motion, dismissed.

STATE ex rel. COTTER et al., Relators, v. **DISTRICT COURT OF SECOND JUDICIAL DIST.** et al., Respondents. (No. 2,330.) (Supreme Court of Montana. July 2, 1906.) Original application for writ of supervisory control. C. M. Parr and J. M. Lewis, for relators.

PER CURIAM. The relators' application for writ of supervisory control herein is hereby denied.

STATE ex rel. DONOVAN, Relator, v. **BROWN et al.**, Respondents. (No. 1,737.) (Supreme Court of Montana. Oct. 2, 1906.) Original application for writ of mandate. H. J. Haskell and T. C. Holmes, for respondents.

PER CURIAM. Upon motion of Albert J. Galen, Attorney General, this cause is hereby dismissed.

STATE ex rel. ENRIGHT et al., Appellants, v. **DORAN**, Respondent. (No. 2,323.) (Supreme Court of Montana. June 22, 1906.) Appeal from District Court, Silver Bow County; Michael Donlan, Judge. Jesse B. Roote, Peter Breen, and A. C. McDaniel, for appellants.

PER CURIAM. Appellants' application for writ of supersedeas, or other appropriate writ, is hereby denied.

STATE ex rel. STRINGFELLOW et al., Relators, v. **DEVLIN et al.**, Respondents. (No. 2,307.) (Supreme Court of Montana. May 4,

1906.) Original application for writ of quo warranto. R. E. Hammond, for relators.

PER CURIAM. Nothing appearing in the application herein why this court should take original jurisdiction of this cause, the same is hereby dismissed.

STATE ex rel. WILLIAMS, Respondent, v. **CALKINS**, Appellant. (No. 2,269.) (Supreme Court of Montana. April 3, 1906.) Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge. On motion to dismiss appeal. James E. Healy, for appellant. Mackel & Meyer, for respondent.

PER CURIAM. Upon motion of the respondent herein, this appeal is hereby dismissed.

STORY, Appellant, v. **PITMAN**, Respondent. (No. 2,265.) (Supreme Court of Montana. May 14, 1906.) Appeal from District Court, Carbon County; Frank Henry, Judge. H. C. Crippen, for appellant.

PER CURIAM. The appeal herein is hereby dismissed, as settled.

SULLIVAN, Respondent, v. **BANK et al.**, Appellants. (No. 2,325.) (Supreme Court of Montana. June 27, 1906.) Appeal from District Court, Silver Bow County; John B. McClernan, Judge. Maury & Hogevoil, for appellants. R. B. Smith, for respondent.

PER CURIAM. Respondent's motion to dismiss the appeal herein is sustained, and the appeal dismissed.

VUKSINICH, Respondent, v. **GRAND LODGE A. O. U. W. OF MONTANA**, Appellant. (No. 2,346.) (Supreme Court of Montana. Dec. 20, 1906.) Appeal from District Court, Silver Bow County; John B. McClernan, Judge. Massena Bullard, for appellant.

PER CURIAM. It is ordered that the appeal herein be, and the same is, hereby dismissed, in accordance with precept on file.

TERRITORY ex rel. SIMONS, Atty. Gen., v. **DIVERS**, Mayor. (Supreme Court of Oklahoma. Sept. 20, 1907.) Mandamus by the territory, on relation of P. C. Simons, Attorney General, against William H. Divers, mayor of Anadarko. Dismissed. P. C. Simons, El. E. Grinstead, L. E. McKnight, and A. T. Boys, for relator. Carl Glitsch and Rush & Steen, for respondent.

PER CURIAM. The petition in this case was filed in this court April 1, 1904. No briefs by either party having been filed, in accordance with the rules of this court the case is dismissed, at the costs of the plaintiff.

WHITE v. WHITE. (Supreme Court of Oregon. Aug. 6, 1907.) Appeal from Circuit Court, Washington County; T. A. McBride, Judge. Suit by Emma G. White against Eugene D. White. From the decree for plaintiff, defendant appeals. Affirmed. H. K. Sargent, for appellant. S. B. Huston, for respondent.

PER CURIAM. This is a suit by the wife for a divorce on the ground of desertion. The answer denies the abandonment, and alleges that the defendant was obliged to leave his home by reason of the plaintiff's cruel and inhuman treatment, the facts of which are stated by way of cross-bill, and the prayer is that her suit may be dismissed, that he may have the divorce, and also be allotted an undivided one-third of her real property, a description of which is given.

The allegations of new matter in the answer and cross-complaint were denied in the reply, on which issues the cause was tried and a decree rendered as prayed for in the complaint, from which the defendant appeals. No good purpose can be promoted by setting out any part of the testimony, a perusal of which persuades us that no error was committed in granting the plaintiff the divorce, which decree is affirmed.

AMES v. KINNEAR et al. (Supreme Court of Washington. Sept. 6, 1907.) Appeal from Superior Court, King County; Arthur E. Griffin, Judge. Action by Edgar Ames against George Kinnear and others. Judgment for defendants, and plaintiff appeals. Affirmed. Bausman & Kelleher and Sachs & Hale, for appellant. Jas. M. Epler and Chas. A. Kinnear, for respondents.

PER CURIAM. This is the second appeal in this case. For the former opinion, see 42 Wash. 80, 84 Pac. 629. Reference is here made to that opinion for a full statement of the nature of the controversy. By that decision the trial court was directed to overrule the demurrer to the answer, and upon the return of the cause to that court the demurrer was overruled, and the plaintiff replied to the answer. With the issues thus formed the cause was tried before the court without a jury, and resulted in a judgment dismissing the cause, from which the plaintiff has appealed. The findings of the court are substantially in accordance with the facts averred in the affirmative defense, the scope of which may be seen by reference to the former opinion. The only matter urged upon this appeal is the insufficiency of the evidence to sustain the findings. We have carefully read the testimony, and we find evidence fully supporting the court's findings. We are satisfied that under the record we would not be justified in disturbing the findings as made. It is true there is conflict in the testimony upon some material points; but we shall not undertake to say from the record before us that the trial court erred in finding the greater weight of the evidence to be with the respondents. The findings do not necessarily reflect upon the integrity of any witness. Years had elapsed between the happening of the events and the time of the

trial. Under such circumstances it is a common experience with the best of men to remember particular facts somewhat imperfectly. The conflict in this case we believe is due to such fact, rather than to any intentional misstatement on the part of any of the witnesses. Upon the whole evidence we are satisfied with the findings of the trial court. The conclusions of law follow therefrom, and the judgment is affirmed.

COLBY v. MONTANA STABLES. (Supreme Court of Washington. July 26, 1907.) Appeal from Superior Court, King County; Geo. E. Morris, Judge. Action by G. E. Colby against the Montana Stables. From a judgment for plaintiff, defendant appeals. Affirmed. Brown, Leihy & Kane, for appellant. McBurney & Cummings, for respondent.

PER CURIAM. The facts and issues in this case are the same as in the case of *Weaver v. Montana Stables* (decided March 23, 1907), 89 Pac. 154. No new questions are presented. For the reasons there stated, the judgment in this case must be affirmed. It is so ordered.

ILLINOIS REFRIGERATOR CO. v. RICE. (Supreme Court of Washington. Sept. 5, 1907.) Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge. Action by the Illinois Refrigerator Company against E. L. Rice. From a judgment for plaintiff, defendant appeals. Affirmed. A. E. Barnes, H. M. Brooks, and E. L. Rice, for appellant. Belden & Losey, for respondent.

PER CURIAM. This action was brought by the respondent to recover from appellant the value of certain goods alleged to have been wrongfully appropriated by the appellant, who was acting as agent for respondent in the sale of the goods. Upon issues joined the cause was tried to the court without a jury. Findings and a judgment were entered in favor of the respondent. The questions presented on this appeal are wholly questions of fact. We have carefully examined the evidence, and are satisfied that the trial court arrived at a correct judgment in the case. It is needless to discuss the evidence. The judgment is affirmed.

END OF CASES IN VOL. 91.

